

When recorded, mail to:

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

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT is made as of this [REDACTED] day of [REDACTED], 2016, between the City of Flagstaff (the "City"), a municipal corporation organized and existing under the laws of the State of Arizona, and FMH Enterprises, LLC (the "Developer"), an Arizona limited liability company.

RECITALS

- A. Developer is the escrow owner of approximately 1.4 acres of real property located at 100 N. Humphreys St. and 175 W. Aspen Ave., parcel numbers 100-21-007A, 100-19-011A, 100-19-012, 100-19-013A, and 100-19-019, within the City's corporate limits, more specifically described in **Exhibit A** (the "Property").
- B. Developer proposes to develop an extended-stay hotel on the Property as more specifically described in the approved site plan containing City Staff conditions dated December 8, 2015 (the "Project" or the "Site Plan").
- C. The City is interested in obtaining a portion of the Property for possible future right-of-way purposes because the Arizona Department of Transportation indicates a possible widening of Humphreys Street to relieve traffic congestion in this area in its Urban Mobility Study.
- D. The Property is currently zoned Central Business (CB) and Downtown Overlay (DO) Zone and no zone change is needed for development of the property.
- E. The City believes that development of the Property pursuant to this Agreement will result in planning and economic benefits to the City and its residents, and will not be detrimental to the public health, safety or welfare, or materially injurious to the properties in the vicinity.
- F. The City has an interest in ensuring that the development of the Property complies with the City's standards for development and engineering improvements and all other City standards, and Developer desires assurances from the City that this long-term Project will be developed within a stable regulatory environment.

- G. Developer acknowledges that this development will be beneficial and advantageous to Developer. Developer agrees it will not be compensated for any lost revenue caused by the sale of a portion of the Property to the City (see paragraph 4.1.1) and that the compensation provided herein by the City for said portion is sufficient and appropriate.
- H. The City and Developer are entering into this Agreement pursuant to Arizona Revised Statutes § 9-500.05.

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:

1. **Definitions.** The following terms, whenever capitalized in this Agreement, shall have the meanings set forth below, except where the context clearly indicates otherwise:
 - 1.1. “**Agreement**” shall mean this Development Agreement between the City and Developer.
 - 1.2. “**A.R.S.**” shall mean Arizona Revised Statutes.
 - 1.3. “**City**” shall mean and refer to the City of Flagstaff, an Arizona municipal corporation, and any successor public body or entity.
 - 1.4. “**Construction Permits**” shall mean any permit issued by the City or other jurisdiction that is required in order to begin construction on any On-Site or Off-Site phase or stage of the Project, including but not limited to public improvements, grading, electrical, gas, plumbing, or mechanical.
 - 1.5. “**Developer**” shall mean and refer to FMH Enterprises, LLC, an Arizona limited liability company, and any successor and/or assignee of FMH Enterprises, LLC pursuant to Section 6.21 of this Agreement.
 - 1.6. “**Effective Date**” shall mean the date this Agreement becomes effective as set forth in Section 6.9 of this Agreement.
 - 1.7. “**Parties**” shall mean a collective reference to the City and Developer, and its successors and/or assigns.
 - 1.8. “**Roadway Improvements**” shall mean improvements to public roadway segments and intersections.
 - 1.9. “**Site**” shall have the same meaning as the term Property.

1.10. “**Zoning Code**” shall mean the City’s Zoning Code.

2. Applicable Regulations & Development Standards.

2.1. Screen Walls. The City will not require a screen wall along the Humphreys Street surface parking. Developer must construct a screen wall along the south side of Aspen Avenue along the surface parking. The screen wall may be constructed immediately adjacent to the public right-of-way. If it is necessary to meet parking requirements, the screen wall may encroach partially into the City’s right-of-way. City staff will determine the appropriate amount of encroachment that may be permitted. So long as the City owns the right-of-way, the City shall provide an encroachment permit in its standard form for the screen wall. The City shall not revoke the permit without six-month’s notice and adequate consideration, which will include the cost to remove and relocate the screen wall if removal and relocation is necessary as a result of the revocation.

2.2. Regulation Timeframe. All aspects of the Project, including public improvements, shall be governed by the City’s codes in existence as of the Agreement’s Effective Date, including the Zoning Code, ordinances, regulations, rules, guidelines and policies; provided, however, that Developer obtains grading permits for one or more components of the Project within two (2) years following City’s approval of this Agreement. If Developer fails to obtain any grading or Construction Permits at the expiration of this two (2) year period, the Project shall be subject to the City’s codes, ordinances, regulations, rules, guidelines, and policies in effect at the time Developer applies for such Construction Permits.

2.3. Permits & Building Fees. Developer agrees and understands that all building permits, development fees, and other fees normally applicable to construction within the City at the time of application shall apply to the Project. Denial of a Developer’s permit application for failure to meet the City’s criteria for such permit shall not be deemed a breach by the City of this Agreement.

2.3.1. Out-Sourcing. City agrees to out-source review of permits if it cannot meet the City’s established timeframes.

2.3.2. No Breach. Failure to meet established timeframes is not a material breach of this agreement, but may be cured pursuant to Section 6.8.

3. Utility Requirements. The City agrees to permit Developer to relocate the overhead utilities in the adjacent alleys to the Property so that such utilities do not interfere with the site plan so long as the relocation of the overhead utilities continues to conform with governmental requirements and code and does not negatively impact existing businesses in the area. The water meter for the Project must be sized according to AWWA Manual M22 and in accordance with City Code.

4. **Road Improvement Requirements.** The City and Developer understand that the Arizona Department of Transportation may eventually widen Humphreys Street to relieve traffic congestion. So long as Developer closes escrow on the Property and becomes the owner of the Property, the Developer agrees, as described below, to sell a portion of its Property to the City in anticipation of that project.
- 4.1. **General Roadway Improvements.** The Developer is not required to provide a Traffic Impact Analysis (“TIA”) to determine the necessary traffic mitigation for the Project. Instead, the Parties agree that Developer’s traffic mitigation will be accomplished as described in this Section.
- 4.1.1. **Sale of a Portion of the Property.** Developer agrees to sell to the City and the City agrees to purchase the portion of the Property described in **Exhibits B1 and B2** (the “Humphreys Right-of-Way”) for a full purchase price of one hundred and fifty-five thousand six-hundred dollars (\$155,600.00). The City may deduct from the full-purchase price the value of the property that the City may abandon as discussed in Section 5.2 below. The value of the abandoned property is five thousand six hundred dollars (\$5,600.00). Sale of the Humphreys Right-of-Way will occur when Developer makes written demand upon the City after all permits have been received by Developer to begin construction and construction begins. Developer agrees this is adequate consideration for the Humphrey’s Right-of-Way and will not require additional funds from the City or any other government entity that undertakes the widening of Humphreys Street for any reason, so long as no additional real property is needed from Developer on the site covered by this Agreement for the widening project. If, however, the widening project commences, the City will pay for the installation of an appropriate screen wall along Humphreys and the paving needed for the south parking lot to match-up with the current paving. Such installation and match-up of paving shall permit Developer to maintain the parking layout attached hereto as Exhibit C.
- 4.1.2. **Use of the Property Prior to Widening of Humphrey Street.** The City shall provide an encroachment permit in its standard form to Developer to use the portion of the Humphreys Right-of-Way that is located south of Aspen Avenue for parking until the Humphreys widening project commences. The City shall not revoke the permit without six-month’s notice and adequate consideration, which will include the City’s acknowledgement that the remaining amount of parking, after any revocation is allowed as a legal nonconforming use and no further parking is required.
- 4.1.3. **Conformance with City Parking Requirements.** In the event that Humphreys Street is widened, the City will not require Developer to construct additional parking spaces to conform to regular City parking

requirements due to spaces lost as a result of the Humphreys widening project.

- 4.1.4. Location of ADA Ramp. The ADA ramp which is located on the site plan alongside Humphreys Street will be relocated to City right-of-way on Aspen Avenue promptly after the Developer obtains a building permit. The City shall provide an encroachment permit for City right-of-way in its standard form to Developer for placement of the ADA ramp in City right-of-way and agrees to not revoke the permit without six-month's notice and adequate consideration, which will include all costs associated with removing and relocating the ADA ramp to a different location that is mutually agreeable to the Parties. The Developer will be responsible for maintenance of the ADA ramp.
- 4.1.5. Payment for Relocation of City Infrastructure and Facilities. The City shall pay for the design, construction, and permitting, to relocate the City infrastructure and facilities that impede the placement of the ADA ramp on Aspen Avenue, including the signal-light electrical box and fire hydrant located on the northeast corner of Humphreys Street and Aspen Avenue. The City will also pay for the conversion of one on-street parking space to sidewalk and match it to the brick-paved sidewalk area. All work will be performed by the Developer or its designee. All bids for design, construction or any other work covered by this Section shall be approved by the City Engineer. The City will pay within thirty (30) days of invoice. The Developer is responsible for the costs to construct the ADA ramp.
- 4.1.6. Limitation on Transfer of Humphreys Right-of-Way. The City agrees that, after purchase from Developer, it will not transfer ownership of any portion of the Humphreys Right-of-Way until the Humphreys widening project becomes imminent.

5. Future Considerations.

- 5.1. Garage. The City and Developer presently believe that a parking structure on the portion of the Property located south of Aspen Avenue could be a benefit to the City and to Developer. Therefore, when said parking structure is being earnestly considered then Developer agrees to explore use of the parcel as a parking structure with terms and conditions acceptable to the Parties.
- 5.2. Abandonment. Staff will propose to the City Council that the City abandon right-of-way to the Developer for the southeast corner of the building to match the southwest corner of the building, as depicted on the Site Plan. The abandonment will be considered by Council at the same time as consideration of this Agreement. This Agreement is conditional on City Council approval and the

continuing validity of the ordinance to abandon right-of-way to the Developer for the southeast corner of the building to match the southwest corner of the building.

6. General Provisions.

- 6.1. **Agreement Recordation.** 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 by the City.
- 6.2. **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.
- 6.3. **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.
- 6.4. **Cancellation.** This Agreement is subject to the cancelation provisions of A.R.S. § 38-511.
- 6.5. **Captions.** The captions used herein are for convenience only, are not part of this Agreement, and do not in any way limit or amplify the terms and provisions hereof.
- 6.6. **Construction of Agreement.** This Agreement has been arrived at by negotiation and shall not be construed against either Party.
- 6.7. **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.
- 6.8. **Default & Remedies.** A party hereunder shall be deemed to be in default under this Agreement if such party breaches any obligation required to be performed by the respective party hereunder within any time period required for such performance and such breach or default continues for a period of forty-five (45) days after written notice thereof from the party not in default hereunder. For purposes of determining default and termination, the Developer's obligations set forth in the Agreement are severable, and each individual obligation shall terminate upon its completion.

- 6.8.1. **Developer's Remedies.** In the event that the City is in default under this Agreement and fails to cure any such default within the time period required therefore as set forth in Section 6.8 above, then, in that event, in addition to all other legal and equitable remedies which Developer may have, Developer may: a) terminate this Agreement by written notice delivered to the City; b) seek specific performance by the City; or c) seek recovery of money damages from the City.
- 6.8.2. **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 in Section 6.8 above, then, in that event, in addition to all other legal and equitable remedies which the City may have, the City may: a) terminate this Agreement by written notice delivered to Developer; b) seek specific performance by the Developer; or c) seek recovery of money damages from the Developer.
- 6.8.3. **Development Rights in the Event of Termination.** With the exception of a termination that occurs under Section 6.8.1 above, upon the termination of this Agreement as provided herein, Developer shall have no further rights to develop the Property pursuant to this Agreement.
- 6.8.4. **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.
- 6.9. **Effective Date of the Agreement.** This Agreement shall be effective upon the latter of the execution of the Parties hereto, recordation in accordance with Section 6.1, and upon expiration of thirty (30) days following the approval hereof by the City. However, in the event that the approval is delayed in its effect by judicial challenge, or by referendum or injunction, the effective date of this Agreement shall be delayed until resolution or termination of such judicial challenge, referendum or injunction. In the event of judicial challenge, referendum or injunction by any person or entity resulting in a delay in the effect of this Agreement that extends for a period of more than one hundred eighty (180) days following its approval by the City Council, this Agreement shall be terminable by Developer upon written notice to the City in accordance with this Agreement at any time within an additional sixty (60) days. Upon termination, this Agreement shall be of no further force or effect, and neither party shall have any further obligation hereunder. Any delay relative to the effective date of this Agreement by judicial challenge, referendum or injunction filed by parties acting independently of and not under the control of the City shall not be deemed a default hereunder by the City.

- 6.10. **Entire Agreement.** This Agreement, along with the site plan approval, right-of-way abandonment ordinance, and Humphreys Right-of-Way acquisition ordinance, constitutes the entire agreement between the Parties hereto pertaining to the subject matter hereof, and all prior and contemporaneous agreements, representations, negotiations, and understandings of the Parties hereto, oral or written, are hereby superseded and merged herein. The foregoing sentence shall in no way affect the validity of any instruments executed by the Parties in the form of the exhibits attached to this Agreement.
- 6.11. **Further Acts.** Each of the Parties hereto shall execute and deliver such documents and perform such acts as are reasonably necessary, from time to time, to carry out the matters contemplated by this Agreement. The City Manager or his designee is authorized to perform such acts on behalf of the City.
- 6.12. **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.
- 6.13. **Incorporation of Recitals and Exhibits.** The Recitals set forth above, and the Exhibits referenced within the Agreement and attached below, are incorporated into this Agreement.
- 6.14. **Modification.** No modification of this Agreement shall be deemed effective unless in writing, signed by the Parties hereto, and recorded as required by Section 6.1.
- 6.15. **Negotiation of Partnership.** The Parties specifically acknowledge that the Project will be developed as private property, that 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 partnership between or among the Parties, nor shall it cause them to be considered a joint venture or members of any joint enterprise.
- 6.16. **No Personal Liability.** No current or former member, official, or employee of the 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 the City or Developer, as applicable; (b) for any amount which may become due to the non-breaching party or its successor and/or assign; or (c) pursuant to any obligation of the City or Developer, as applicable, under the terms of this Agreement.
- 6.17. **No Third Party Beneficiaries.** The City and Developer acknowledge and agree that the terms, provisions, and conditions hereof are for the sole benefit of, and may be enforceable solely by, the City and Developer; and none of these terms,

provisions, conditions, and obligations are for the benefit of or may be enforced by any third party.

- 6.18. **Notices.** Unless otherwise specifically provided herein, 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

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

To Developer: FMH Enterprises, LLC
Attn: Steven D. Shumway, President/CEO
P.O. Box 250
Show Low, AZ 85902

Copy To: FMH Enterprises, LLC
Attn: Shane J. Shumway, Executive V.P.
P.O. Box 250
Show Low, AZ 85902

Notice of address may be changed by either party by giving notice to the other party in writing of change of address.

- 6.19. **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, to the extent that the intent of the Parties to develop the Project is still viable.
- 6.20. **Successors and Assigns.** All of the covenants and conditions set forth herein shall be binding upon the successors in interest of each of the Parties hereto, except that transfer of any portions of right-of-way from the City to the State of Arizona will not result in a transfer of obligations in this Agreement to the State . Obligations accruing after a transfer of ownership will not be deemed to be an

obligation of the transferor, though no transfer will relieve a transferor of any obligation that accrued prior to the transfer.

6.20.1. **Assignment.** 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. Such assignment must be approved by the City before the assignment is valid, which approval shall not be unreasonably withheld.

6.20.2. **Lender Provisions.** Further, Developer or any persons or entities benefited by this Agreement may collectively assign all or a part of its rights and obligations under this Agreement to any lender from which such Developer or other benefited person or entity has borrowed funds for developing, constructing improvements, and/or operation of the improvements on the Property (the "Lender"). If the Lender requests a collateral assignment of this Agreement as part of its collateral for its loan to Developer, the City agrees that such collateral assignments are permissible without consent of the City. In the event of default by Developer, the City shall provide notice of such default at the same time notice is provided to Developer to any Lender previously identified in writing to the City. If a Lender is permitted under the terms of its agreement with Developer to cure the default or to assume Developer's position with respect to this Agreement, the City agrees to recognize the rights of Lender and to otherwise permit Lender to assume such rights and obligations of Developer under this Agreement. Nothing contained in this Agreement shall be deemed to prohibit, restrict or limit in any way the right of a Lender to take title to all or a portion of the Property, pursuant to a foreclosure proceeding, trustee's sale, or deed in lieu of foreclosure. The City shall, at any time upon request by Developer or Lender, provide to any Lender an estoppel certificate, acknowledgement of collateral assignment, or other document evidencing that this Agreement is in full force and effect, that it has not been amended or modified (or, if appropriate, specifying such amendment or modification) and that no default by Developer exists hereunder (or, if appropriate, specifying the nature and duration of any existing default) and certifying to such other matters reasonably requested by Developer or Lender. Upon request by a Lender, the City will enter into separate assumption or similar agreement with such Lender consistent with the provisions of this Section.

6.21. **Term.** The term of this Agreement shall commence on the effective date of this Agreement as defined in Section 6.9 and shall automatically terminate at complete build out of the Project unless previously terminated pursuant to the terms of this Agreement.

6.22. **Waiver.** No waiver by either party of a breach of any of the terms, covenants, and conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, covenant, or condition herein contained.

IN WITNESS WHEREOF, the City has caused this Agreement to be duly executed in its name and on its behalf by its Mayor and its seal to be hereunder duly affixed and attested by its City Clerk, and Developer has signed the same on or as of the day and year first above written.

City of Flagstaff, a municipal corporation

FMH Enterprises, LLC, an Arizona limited liability company

Gerald W. Nabours, Mayor

Attest:

City Clerk

Approved as to form and authority:

City Attorney

List of Exhibits

Exhibit A: Legal Description of the Property

Exhibit B1: Legal Description of the Humphreys Right-of-Way

Exhibit B2: Map Depicting Humphreys Right-of-Way

Exhibit C: Revised parking layout after potential widening of Humphreys.