

WHEN RECORDED, RETURN TO:

Elizabeth Burke, City Clerk

City of Flagstaff

211 West Aspen Avenue

Flagstaff, Arizona 86001

**FOURTH AMENDMENT TO
DEVELOPMENT AGREEMENT**

The City of Flagstaff, a political subdivision of the state of Arizona (“City”) and Nestle Purina Petcare Company, a Missouri corporation (“Purina”) enter into this Fourth Amendment to Development Agreement effective this ____ day of _____, 2016 (the “Fourth Amendment”).

RECITALS:

- A. This Fourth Amendment is intended to further purposes of the Development Agreement (as hereinafter defined) and achieve a 50% reduction in modeled ground level odor concentrations along the Purina facility’s property line in Flagstaff, Arizona and identified in Exhibit 1 (which includes Exhibits A, B, C, and D), with such reduction determination to be based on the Testing and Modeling Procedures (defined in Section 5 below).
- B. In 2003 the City and Purina entered into a Development Agreement recorded on June 25, 2003 as Instrument No. 3207666, Official Records of Coconino County, Arizona (“Development Agreement”) in connection with Purina’s expansion of its pet food manufacturing and warehousing facility located in the City of Flagstaff.
- C. Pursuant to the Development Agreement, title to the Original Property (Exhibit A) and Purina’s manufacturing facility located thereon (the “Facility”) were conveyed to the City and leased back by the City to Purina under the terms and conditions of a Government Property Lease entered into pursuant the provisions of A.R.S. § 42-6201, *et seq.* (as previously amended, the “Lease”). The form of Lease was recorded along with the original Development Agreement in Instrument No. 3207666, Official Records of the Coconino County, Arizona (“Lease”).
- D. In 2008 as approved in Ordinance No. 2008-16 the City and Purina entered into a First Amendment to Development Agreement recorded on June 26, 2008 as Instrument No. 3491226, Official Records of the Coconino County, Arizona (“First Amendment”) in connection with approximately 34.28 net acres of additional real property legally described in Exhibit B (“Additional Property”) for the purpose constructing a 94,000 square foot warehouse space addition, and parking facilities for employees and trailers, all as part of a further expansion of the Facility.

- E. Pursuant to the First Amendment, title to the Additional Property and the expanded Facility (“Expanded Facility”) were conveyed to the City and leased back by the City to Purina under the terms and conditions of the Lease (which was also amended). The Special Warranty deed conveying the Additional Property to the City was recorded on January 16, 2009, Instrument No. 3510883, Official Records of the Coconino County, Arizona. The First Amendment to the Lease was recorded on January 16, 2009, Instrument No. 3510882, Official Records of the Coconino County, Arizona (“First Amendment to Lease”).
- F. In 2008 pursuant to the First Amendment, the City purchased approximately two (2) acres of the Additional Property from Purina as legally described in Exhibit C (“Fire Station Parcel”), and as conveyed by Special Warranty Deed recorded on June 27, 2008 as Instrument No. 3491528 in the Official Records of the Coconino County, Arizona.
- G. In 2015 pursuant to the Development Agreement, Purina conveyed real property to the City for Industrial Drive by Quit Claim deed as recorded on January 1, 2015 as Instrument No. 3711317, Official Records of the Coconino County, Arizona, and as legally described in Exhibit D (“Industrial Drive Parcel”).
- H. The original purposes of the Development Agreement as amended by the First Amendment were to help fund expansions of the Purina facilities (“Expansions”) so as to provide new stable, good-paying employment opportunities for Flagstaff residents; provide for purchase of the Fire Station Parcel, and conveyance of the Industrial Drive Parcel; and provide certain other benefits (collectively “Benefits”) via Purina’s projected total tax savings of \$3,928,964.00. This total represents the actual tax savings under the original Development Agreement of \$481,964.00, plus the projected tax savings under the First Amendment of \$3,447,000.00.
- I. The parties have been performing the terms and conditions of the Development Agreement (as amended) and underlying Lease (as amended), and these agreements were initially scheduled to expire on or about October 14, 2015.
- J. Purina’s actual tax savings under the First Amendment are \$2,522,770.00, or approximately \$924,230.00 less than projected.
- K. The Purina Expansions have enabled a substantial increase in production of pet food at the Facility, and there are associated emissions to the atmosphere.
- L. Purina has an Air Quality Control Permit from the Arizona Department of Environmental Quality (“ADEQ”) and this Fourth Amendment is not being required by ADEQ or the parties for compliance with applicable laws, rules and regulations regarding its emissions to the atmosphere.

- M. On September 15, 2015 pursuant to A.R.S. § 42-6203.A.4 the City and Purina entered into a Second Amendment to Development Agreement in order to temporarily extend the Agreement and underlying Lease for a period commencing on October 14, 2015 and continuing for up to six (6) months (April 15, 2016) to further the original purposes of the Development Agreement and to explore the feasibility of voluntary installation of equipment at the Purina Facility to measurably reduce odor. This document was recorded on __, 2016 as Instrument No. _____ in the Official Records of the Coconino County, Arizona.
- N. On March 1, 2016 pursuant to A.R.S. § 42-6203.A.4 the City and Purina entered into a Third Amendment to Development Agreement in order to temporarily extend the Agreement and underlying Lease for a period commencing on April 15, 2016 and continuing for up to six (6) months to further the original purposes of the Development Agreement and to explore the feasibility of voluntary installation of equipment at the Purina Facility to measurably reduce odor. This document was recorded on __, 2016 as Instrument No. _____ in the Official Records of the Coconino County, Arizona.
- O. This Fourth Amendment will extend the Development Agreement until October 15, 2017 for the purposes stated herein.
- P. The Second, Third, and Fourth Amendments, resulting in extensions of the Development Agreement from October 14, 2015 through October 15, 2017 may result in a tax savings of approximately \$800,000.

AGREEMENT

NOW THEREFORE, IN CONSIDERATION FOR THE MUTUAL PROMISES CONTAINED HEREIN, THE PARTIES AGREE AS FOLLOWS:

In General

1. Purpose. The purpose of this Fourth Amendment is to further the purposes of the original Development Agreement and achieve a 50% reduction in modeled ground-level odor concentrations (based on the Testing and Modeling Procedures) from the Facility.
2. Phases. There are two (2) proposed phases of odor minimization as described herein. The first two phases will be funded in part by property tax savings.
3. Extension Period. The Development Agreement is hereby extended until October 15, 2017. The estimated tax savings for Purina over the two tax years covered by the extension from October 15, 2015 to October 15, 2017 is approximately \$800,000.00.

4. Fourth Amendment to Lease. The term of the Lease (as amended) shall be extended to October 15, 2017. To accomplish this, the parties shall execute a Fourth Amendment to Lease in the form attached hereto as Exhibit 2.
5. How Odor is Measured (D/T). A dilution threshold measures how many unit volumes of odor free air are needed to dilute one (1) unit volume of odorous air to the point where odor is no longer detectible by the average person. A liter is typically used as the unit volume.
6. Testing and Modeling Procedures. Testing and Modeling Procedures are intended to provide a reasonably accurate measure of odors at the designated receptor point(s) at the property line, measured in terms of dilutions per threshold (D/T). Testing and Modeling Procedures are more fully described in Brown & Caldwell technical memorandum dated May 23, 2016 attached hereto as Exhibit 3 ("Testing and Modeling Procedures"). Testing and Modeling Procedures used before and after each Phase will be based on the same operational assumptions, conditions, and factors so as to achieve an accurate comparison of before and after results.
7. Baseline Test. Purina in consultation with Brown & Caldwell has conducted baseline testing and modeling of odors at the designated testing points at the property line ("Baseline Test") using the Testing and Modeling Procedures, at its own costs. The Baseline Test measures odor in terms of a dilutions per threshold (D/T) (D/T's are further described in Exhibit 3). Based on current operations at the Facility, the Baseline Test shows the following: Maximum odor at property line 55 D/T (*European method*). A copy of the Brown & Caldwell technical memorandum dated May 23, 2016 describing baseline testing and modeling and possible odor solutions is attached hereto as Exhibit 3.
8. Permits and Approvals. Purina at its own expense will obtain all necessary governmental permits and approvals for the odor reduction equipment and measures described herein. Purina will obtain any necessary approvals from ADEQ for modification of its Air Quality Permit No. 58866, as amended by No. 60197, and as may be amended or superseded.

Phase 1

9. Dispersion Stack for Extruder Air Take Aways.
 - a. Equipment. Purina will combine all five (5) extruder air take aways into one new tall stack supported by the mill building to disperse exhaust higher into the atmosphere ("ATA Stack") A conceptual rendering and description of the ATA Stack is attached hereto as Exhibit 4.
 - b. Cost. Purina will pay for all costs of the ATA Stack, estimated at a cost of \$430,000, according to Purina.

- c. Schedule. Purina shall use its reasonable efforts to obtain approval from its ultimate parent company to spend capital to install the ATA Stack and startup use of the ATA Stack on or before April 30, 2017. In the event Purina is unable to obtain approval for such capital expenditure, Purina will continue to use its reasonable efforts to obtain such approval as soon as possible thereafter and complete installation and startup as soon as reasonably feasible upon receipt of approval to spend the capital.
- d. Post Installation Testing. Within 60 days after installation of the ATA Stack, Purina at its own cost will conduct post installation testing and modeling at the property line using the Testing and Modeling Procedures. The estimated cost is \$50,000.00, according to Purina. Purina will provide a summary of such testing results to City.
- e. Measurable Reduction in Odor. Based on current operations, it is anticipated the ATA Stack will reduce modeled ground-level odor at the Facility's property line by approximately 35% when measured using the Testing and Modeling Procedures and compared to the Baseline Test: Maximum odor at property line 35.75 D/T (*European method*)
- f. Maintenance and Operations. Purina will keep and operate the ATA Stack in good repair for at least 10 years after the technology is installed and operational. Purina will pay all ongoing repair and operational costs for the ATA Stack, including an estimated \$67,000 in annual energy usage costs (FY 16 dollars). In the event Purina desires to remove or decommission the ATA Stack during such 10 year period, it will implement similar (or improved) odor mitigation technology at the Facility and keep and operate in good repair such replacement odor mitigation technology for the balance of the 10 year period, not counting any time when odor mitigation equipment was not in service. Example: ATA Stack is taken out of service on January 1 of year 8, replacement odor mitigation technology is installed in and becomes operational on January 1 of year 10 (equipment is out of service for 3 years): Purina will operate the replacement odor mitigation technology in good repair for at least three (3) more years. The obligations set forth herein will survive expire upon expiration of the 10 year period as described above, except in the event Purina, its successor and/or assigns ceases to operate a pet manufacturing food operation in Flagstaff altogether within the promised minimum operation period(s), this obligation shall automatically expire.

Phase 2

10. Dispersion Stacks for Dryers.

- a. Equipment. Purina will connect all dryer exhausts in a bundle and extend the exhaust piping into four or five new tall stacks supported by the mill building ("Dryer Stacks"). A conceptual rendering and description of the dryer stacks is attached hereto as part of Exhibit 5

- b. Cost. Purina will pay for all costs of the Dryer Stacks, estimated at a cost of \$670,000, according to Purina.
- c. Schedule. Purina shall use its reasonable efforts to obtain approval from its ultimate parent company to spend capital to install the Dryer Stacks and startup use of the Dryer Stacks on or before June 30, 2018. In the event Purina is unable to obtain approval for such capital expenditure, Purina will continue to use its reasonable efforts to obtain such approval as soon as possible thereafter and complete installation and startup as soon as reasonable feasible upon receipt of approval to spend the capital.
- d. Post Installation Testing. Within 60 days after installation of the Dryer Stacks, Purina at its own cost will conduct post installation testing and modeling at the property line testing point(s) using the Testing Procedures. The estimated cost is \$50,000.00, according to Purina. Purina will provide a summary of testing results to City.
- e. Measurable Reduction in Odor. Based on current operations, it is anticipated the Dryer Stacks (in conjunction with the ATA Stack) will reduce modeled ground-level odor at the Facility's property line by at least 50% when measured using the Testing and Modeling Procedures and compared to the Baseline Test: Maximum odor at property line 27.5 D/T (European Method).
- f. Maintenance and Operations. Purina will keep and operate the Dryer Stacks in good repair for at least 10 years after the technology is installed and operational. Purina will pay all ongoing repair and operational costs, including an estimated \$205,000 in annual energy usage costs (FY 16 dollars). In the event Purina desires to remove or decommission the Dryer Stacks during such 10 year period, it will implement similar (or improved) odor mitigation technology at the Facility and keep and operate in good repair such replacement odor mitigation technology for the balance of the 10 year period, not counting any time when odor mitigation equipment was not in service. Example: Dryer Stacks are taken out of service on January 1 of year 8, replacement odor mitigation technology is installed in and becomes operational on January 1 of year 10 (equipment is out of service for 3 years): Purina will operate the replacement odor mitigation technology in good repair for at least three (3) more years. The obligations set forth herein will survive upon expiration of the 10 year period as described above, except in the event Purina, its successor and/or assigns ceases to operate a pet manufacturing food operation in Flagstaff altogether within the promised minimum operation period(s), this obligation shall automatically expire.

Possible Additional Evaluation.

- 11. Possible Additional Work. In the event the post-installation Testing and Modeling Results of Phases 1 and 2 do not reduce modeled ground-level odor at the Facility's

property line by at least 50% when measured using the Testing and Modeling Procedures and compared to the Baseline Test, Purina will evaluate additional odor mitigation measures at its own expense. Possible additional mitigation techniques include those set forth in the Brown & Caldwell technical memorandum (Exhibit 3). Purina will be responsible for determining appropriate technology and operations management to be used and the schedule for implementation, if any.

12. Good Faith Review. On or before October 15, 2020 City and Purina, including any successor or assigns, will meet to review the progress on odor reduction at the Facility and to discuss intentions and long term solutions to achieving and maintaining the purposes of the Fourth Amendment.

FUTS Trail

13. Flagstaff Urban Trail System ("FUTS" trail). As additional consideration for this Fourth Amendment to Development Agreement, on or before April 1, 2017 Purina shall grant to the City an easement for the Flagstaff Urban Trail System across Coconino County Assessor Parcel No. 11337004B. The easement will be in a mutually agreed easement. The minimum width of the easement is thirty (30) feet. The approximate location of the easement is identified in the map included as part of Exhibit 1. A conceptual rendering is attached hereto as Exhibit 6. A copy of the easement to be executed is attached hereto as Exhibit 7. In addition, Purina, its successors and/or assigns will grant City a temporary construction permit across the Purina property adjoining the FUTS trail easement area as may be reasonably necessary for construction of such segment of the FUTS trail at time City is ready to proceed with construction. City understands and agrees that construction of, maintenance of and the trail itself must not interfere with Purina's storm water outflow or other factory operations. City shall not be required to pay any funds to Purina, its successors and/or assigns for the value of the FUTS trail easement and temporary construction permit. City will be responsible for obtaining and paying for the legal descriptions and maps for such grants, as well as costs of construction of the FUTS trail, performing (and paying for) maintenance of the FUTS trail (and surrounding property within the easement area). This paragraph shall survive expiration of the Development Agreement.

Harmonization

14. All other terms and conditions of the Development Agreement (as previously amended) as further amended by this Fourth Amendment shall remain in effect and are incorporated herein. The parties agree that Exhibit 1 as attached hereto is intended to reflect the current status of the Purina and City properties respectively.

Contingency

15. If Purina is unable to install the equipment called for under this agreement by October 15, 2020, Purina shall pay to City the sum of \$800,000, plus interest accruing at 3%

annually thereafter until paid as consideration for the tax losses to the community, less consideration for the FUTS easement and recognition of expenses incurred by Purina in good faith to install such equipment; provided, however, that if Purina is able to install such equipment called for in Phase 1 Section 9 of this Agreement (but not Phase 2 Section 10), then Purina shall only be obligated to pay to City the sum of \$400,000, plus interest accruing at 3% annually thereafter until paid as consideration for the tax losses to the community, less consideration for the FUTS easement and recognition of expenses incurred by Purina in good faith to achieve odor mitigation. City will be responsible for distributing the funds in proportionate shares to the governmental entities (City, County, FUSD) that normally would have received a share of property taxes in the 2015-2017 time period. This provision will survive expiration or termination of the Fourth Amendment to the Development Agreement and underlying Lease. This obligation shall be a lien against any real property owned by Purina, its successors and assigns until paid.

NESTLE PURINA PETCARE COMPANY

By: _____

Its: _____

CITY OF FLAGSTAFF

By: Mayor Nabours

Attest:

By: Elizabeth Burke, City Clerk

Approved as to form:

By: _____

City Attorney's Office

Attachments:

Exhibit 1 Purina Facility property (with Map, Exhibits A, B, C and D)

Exhibit 2 Fourth Amendment to Lease

Exhibit 3 Brown & Caldwell technical memorandum dated May 23, 2016

Exhibit 4 Dispersion Stack for Extruder Air Take Aways

Exhibit 5 Dispersion Stacks for Dryers *(to be provided)*

Exhibit 6 Conceptual map of FUTS trail easement

Exhibit 7 Form of FUTS trail easement

S:\Legal\Civil Matters\2014\2014-626 Purina Scrubbers Air Quality\Fourth Amendment 8-12-16.docx