

## DECLARATION OF RECREATIONAL USE RESTRICTION

This DECLARATION OF RECREATIONAL USE RESTRICTION (this “Restriction”) is made as of this \_\_\_ day of \_\_\_\_\_, 2016, by and between THE DISCOVERY MUSEUMS, INC., a Massachusetts non-profit corporation with a principal place of business at 177 Main Street, Acton, Massachusetts 01720 (“TDM”), and THE TOWN OF ACTON, a municipality of the Commonwealth of Massachusetts acting by and through its Board of Selectmen, with an address of 472 Main Street, Acton, Massachusetts 01720 (the “Town”).

### BACKGROUND

WHEREAS, TDM owns the property presently known and numbered 177 and 183 Main Street, Acton, Massachusetts (“TDM Property”) as described on Exhibit A attached hereto.

WHEREAS, TDM has sought and been granted project funding (the “Grant”) from the Town’s Community Preservation Committee in connection with the construction and installation by TDM of an outside educational play area to be called the Discovery Woods and Creative Playscape (the “Project”).

WHEREAS, the Acton Town Meeting on April 6, 2015 approved the Town’s acceptance of this Restriction.

WHEREAS, one of the conditions of the Grant and such Town Meeting Vote is to establish a recreational use restriction at the TDM Property in connection with the use of the Project.

NOW, THEREFORE for good and valuable consideration, the receipt and sufficiency of which is hereby mutually acknowledged, TDM and the Town hereby agree as follows:

### RECREATIONAL USE RESTRICTION

1. **Project Area.** The Project is in the approximate location (the “Project Area”) shown on a plan entitled “Site Plan-Discovery Woods” and attached hereto as Exhibit B (the “Plan”).
2. **Purpose.**
  - (a) The purpose of this Restriction is to assure that the Project Area will for the term of this Restriction be retained and maintained for only recreational use, and to prevent any use or change that would materially impair or interfere with its conservation and recreation values. Specifically, the Project Area shall be used only for natural play areas, play structures and a tree house class room.
  - (b) TDM and the Town hereby agree and acknowledge that the description of the use of the Project as described in Section 2(a) shall constitute “Recreational Use” for the purposes of this Restriction.

- (c) TDM hereby agrees that the Project Area shall be restricted from being used for any purpose other than the Recreational Use and shall be open and accessible to the public during the regular business hours of operation of the other facilities owned and operated by TDM at the TDM Property. TDM may not make any material alterations, modifications, or changes (collectively, "Alterations") to the Project Area after the completion of the construction of the Project without the Town's prior written consent, which shall not be unreasonably withheld, provided that any such Alterations are consistent with the Recreational Use. TDM shall maintain the Project in a safe condition and in good working order for the purpose of the Recreational Use throughout the term of this Restriction and TDM shall build, maintain and operate the Project, and provide access to the Project Area, in compliance with all applicable federal and state laws, including but not limited to the Americans with Disabilities Act of 1990.
3. **Benefited Land.** The parties hereby agree that in accordance with M.G.L. c. 184 § 27, the Great Hill Conservation and Recreation Land ("Great Hill") located adjacent to the TDM Property owned by the Town is directly benefited by the Project and Project Area and this Restriction and the certain Easement between TDM and the Town dated on or about the date hereof and recorded herewith. The Great Hill property is more particularly described in a deed from Donald B. Prouty and Charles F. Putnam as Trustees of the Jenks Charitable Foundation dated July 18, 1972 and recorded in the Middlesex South Registry of Deeds in Book 12249, Page 047
4. **Prohibited Acts and Uses.** Except as provided in the reserved rights set forth in Section 5 below, TDM will neither perform nor allow others to perform the following acts and uses, which are expressly prohibited on, above and under the Project Area:
- (i) Buildings and Improvements. Constructing, placing or allowing to remain any temporary or permanent shed, building, tennis court, mobile home, swimming pool, asphalt or concrete pavement, sign, fence, billboard or other advertising display, antenna, utility pole, tower, conduit, line or other temporary or permanent structure or facility on, above or under the Project Area, except for (A) those improvements and structures shown on the Plan, (B) any non-material modifications, alterations or changes to the Project Area consistent with the Recreational Use of the Project Area or (C) otherwise approved by the Town in accordance with this Restriction;
  - (ii) Soil and Water. Mining, excavating, dredging or removing from the Project Area of soil, loam, peat, gravel, sand, rock or other mineral resource or natural deposit (except as necessary for property drainage or soil conservation and then only in a manner that does not impair the purpose of this Restriction); and alteration of the existing natural topography of the Project Area;
  - (iii) Trash. Placing, filling, storing or dumping on the Project Area of soil, refuse, trash, automobiles, boats, trailers, vehicle bodies or parts, rubbish, debris, junk, waste or other substance or material whatsoever or the installation of underground storage tanks;

(iv) Drainage. Activities detrimental to drainage, flood control, water conservation, water quality, erosion control, soil conservation, or archaeological conservation that could adversely impact the Recreational Use;

(v) Vehicles. The use, temporary or permanent parking, or storage of motorcycles, motorized trail bikes, snowmobiles, automobiles, trailers, campers, and all other motor vehicles, except as necessary for the police, firefighters or other governmental agents to carry out their lawful duties and except as reasonably necessary in exercising any of the reserved rights in Section 5. The restriction regarding parking set forth in this Section 4(v) shall not be applicable to the parking areas surrounding the Project and shown on Exhibit B; and

(vi) Other Uses. Any other use of the Project Area or activity thereon that is inconsistent with the purpose of this Restriction or that would materially impair significant conservation or recreation interests, unless the use or activity is necessary for the preservation of the Project Area or in an emergency and is temporary in duration.

5. **Reserved Rights.** TDM shall be permitted to use the Project Area for the Recreational Use and other uses and activities that are directly accessory to the Recreational Use and are permitted by applicable law provided that such uses and activities do not impair the purpose of this Restriction and the use of the Project Area for Recreational Use.

The exercise of any right by TDM under this Section 5 shall be in compliance with the applicable provisions of the then-current Zoning Bylaws of the Town of Acton, the Wetlands Protection Act (Massachusetts General Laws Chapter 131, Section 40) and all other applicable federal, state and local law. The inclusion of any reserved right in this Section 5 requiring a permit from a public agency does not imply that the Town takes any position as to whether such permit should be issued.

6. **Notice and Approval.** Whenever notice to or approval by the Town is required under the provisions of this Restriction, TDM shall notify the Town in writing, in accordance with this Section 6, not less than sixty (60) days prior to TDM's commencement of the activity in question. The notice shall describe the nature, scope, design, location, timetable and any other material aspect of the proposed activity in sufficient detail to permit the Town to make an informed judgment as to its consistency with the purposes of this Restriction.

Any notice, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and either served personally or sent by certified mail, return receipt requested, or sent by a reputable overnight courier to:

To TDM:

The Discovery Museum  
177 Main Street  
Acton, MA 01720

with a copy to:

Michael E. Katin, Esq.  
Scheier, Katin & Epstein, P.C.  
103 Great Road  
Acton, MA 01720

To Town:

Town Manager  
Town of Acton  
472 Main Street  
Acton, MA 01720

with a copy to:

Stephen D. Anderson, Esq.  
Anderson & Kreiger LLP  
One Canal Park, Suite 200  
Cambridge, MA 02141

7. **Disclaimer of Liability.** By its reservation of this Restriction, the Town does not undertake any liability or obligation relating to the condition of the Project Area, including with respect to compliance with hazardous materials or other environmental laws and regulations. Any election by the Town as to the nature and timing of its actions pursuant to its right to enforce this Restriction or otherwise exercise its rights hereunder shall not be deemed or construed to be a waiver of such rights.
8. **Acts Beyond TDM's Control.** Nothing contained in this Restriction shall be construed to entitle the Town to bring any action against the TDM for any injury to or change in the Project Area resulting from causes beyond the TDM's control, including, but not limited to, fire, flood, storm and earth movement, or from any prudent action taken by the TDM under emergency conditions to prevent, abate, or mitigate significant injury to the Project Area resulting from such causes. In the event of damage to the Project Area from acts beyond TDM's control, TDM shall promptly notify the Town in writing (but in no event later than seven (7) days after such casualty), such notification including what, if any, emergency work has been completed. Within thirty (30) days of the date of damage or destruction, TDM at TDM's expense shall submit to the Town a written report, which report shall include the following:
  - (i) An assessment of the nature and extent of the damage to the Project;
  - (ii) A determination of the feasibility of the repair and restoration of the Project given the useful life of the play structures, tree house classroom and other equipment located within the Project Area and as may have been damaged or destroyed; and
  - (iii) In the event that the tree house sustains damages, a separate report prepared by a qualified architect shall be required.
9. **Review After Casualty Damage or Destruction.** If, after reviewing the report required in Section 7, the Town and TDM, in their respective good faith and reasonable judgment, mutually agree that it is economically feasible for TDM to repair or restore the Project to the condition that it is in on the completion date of the Project (or if the project has not yet been complete, then to the condition that the Project is in as of the date of this Restriction), TDM shall do so in accordance with the terms of this Restriction. TDM shall submit to the Town, within thirty (30) days of TDM's receipt of

the Town's determination that the Project should be repaired or restored, for the Town's written approval, plans and specifications for the repair or restoration of the Project, along with a construction schedule for such repair and restoration work. The Town shall have sixty (60) days to review such plans, specifications and schedule, and the parties shall proceed under the terms of this Restriction. If the Town and TDM in their respective good faith and reasonably judgment mutually determine that it is not economically feasible to repair or reconstruct the Project or that the purpose of this Restriction would not be served by such repair or restoration, TDM may alter, demolish, remove or raze the Project or construct new improvements on the Project Area all in accordance with all applicable laws and regulations. In such event, TDM and the Town may agree to extinguish this Restriction in accordance with applicable laws, and upon such extinguishment, TDM shall repay to the Town the amount specified in Section 12 below.

10. **Insurance.** TDM shall keep the Project insured by an insurance company rated "A" or better by A.M. Best for the full replacement value against loss from the perils commonly insured under standard fire and extended coverage policies and TDM shall maintain comprehensive general liability insurance against claims for personal injury, death and property damage. Property damage insurance shall include change in condition and building ordinance coverage, in form and amount sufficient to fully replace the damaged Project Area without cost or expense to TDM or contribution or coinsurance from TDM except for a standard deductible. TDM shall deliver to the Town upon the execution and recording hereof, certificates of such insurance coverage naming the Town as loss payee and additional insured and requiring not less than thirty (30) days prior written notice to the Town before expiration or termination of any such policy. TDM shall provide to the Town replacement certificates of insurance satisfying the terms and conditions of this Section 10 at least fifteen (15) days prior to the expiration or termination of any such policy or as otherwise required by the Town. From time to time during the term of this Restriction, the Town may request from TDM, and TDM shall promptly provide, a certificate of insurance evidencing its compliance with this Section 10. Notwithstanding the foregoing, whenever the Project Area is encumbered with a mortgage nothing contained in this paragraph shall jeopardize the prior claim, if any, of the mortgagee to such insurance proceeds, less any amounts owed to the Town pursuant to Section 9 above in the case of a casualty in which the Project is not repaired or restored, which such amounts shall be senior to any such mortgage.
11. **Condemnation.** If all or any part of the Project Area is taken under the power of eminent domain by a public authority or is otherwise acquired by such authority through a purchase in lieu of a taking, TDM may commence appropriate proceedings at the time of such taking to recover the full value of TDM's interest in the Project Area, subject to such taking and all incidental and direct damages resulting therefrom. The Town may, but shall not be required to, join in any proceedings relating to a taking of all or any part of the Project Area, and the Town shall be entitled to receive as part of any takings award or damages equal to the amount specified in Section 12 below.
12. **Duration and Assignability.** The burdens of this Restriction shall run with the TDM Property and shall be enforceable against TDM and its successors and assigns for (i) a

period of thirty (30) years after the recording of this Restriction, or (ii) the end of the useful life of all of the play structures and tree house classroom and other equipment located in the Project Area, as determined in accordance with generally accepted accounting principles (GAAP), or (iii) the sale of the TDM Property by TDM, whichever occurs first, provided, however, in the event that TDM sells the TDM Property prior to the expiration of said 30-year period, then, in that event, the Town shall be entitled to payment of a sum equal to Five Thousand (\$5,000.00) Dollars times the number of years remaining in the 30 year term of this Restriction, which, for the purposes of this Agreement and to the extent permitted by law, the parties hereby agree is the fair market value of the Project over the term of this Restriction.

13. **Amendment.** This Restriction may not be amended without the mutual agreement of the parties, in a written instrument recorded in the Registry, provided that no amendment shall be made that will adversely affect the qualification of this Restriction or the status of the Town or a subsequent holder under any applicable law, including Section 170(h) of the Internal Revenue Code of 1986 as amended and as applicable. Any amendment shall be consistent with the recreational purpose of this Restriction and shall not permit any private inurement to any person or entity. Nothing in this paragraph shall require TDM or the Town to agree to any amendment or to consult or negotiate regarding any amendment, except for the parties obligations expressed and listed under Section 9 hereof.
14. **Inspection.** The Town shall be permitted at reasonable times and upon reasonable notice to TDM to enter on and inspect the Premises and the Building to determine whether TDM is in compliance with the terms of this Restriction.
15. **Town's Remedies.** The Town may, following prior written notice to TDM, institute suits to enjoin any violation of the terms of this Restriction by *ex parte*, temporary, preliminary or permanent injunction, including without limitation prohibitory and/or mandatory injunctive relief, and to require the restoration of the Project Area to the condition and appearance required under this Restriction. The Town shall also have available all legal and other equitable remedies to enforce TDM's obligations hereunder. In the event any civil action is commenced and TDM is found to have violated any of TDM's obligations or is otherwise liable under this Restriction, TDM shall reimburse the Town for any costs or expenses incurred in connection with the Town's enforcement of the term of this Restriction, including without limitation all reasonable court costs, and attorney, architectural, engineering and expert witness fees.
16. **Runs with the Land.**
  - (i) TDM shall fully cooperate with the Town in its efforts to obtain any government approvals necessary for the enforcement of this Restriction.
  - (ii) TDM intends, declares and covenants on behalf of itself and its successors and assigns (i) that this Restriction and the covenants, agreements and restrictions contained herein shall be and are covenants running with the land, encumbering the Premises for the term of this Restriction, and are binding upon TDM's

successors in title (subject to Section 12 above), (ii) are not merely personal covenants of TDM, and (iii) shall bind TDM, its successors and assigns and inure to the benefit of the Town and its successors and assigns for the term of the Restriction.

17. **Title; Authority.** TDM hereby represents, covenants and warrants as follows:

- (i) The execution and performance of this Restriction by TDM (i) will not violate any provision of law, rule or regulation or any order of any court or other agency or governmental body, and (ii) will not violate any provision of any indenture, agreement, mortgage, mortgage note, or other instrument to which TDM is a party or by which it or the Project Area is bound, and (iii) will not result in the creation or imposition of any prohibited encumbrance of any nature.
- (ii) TDM will, at the time of execution and delivery of this Restriction, have good and marketable title to the Project Area free and clear of any lien or encumbrance except those matters set forth on Exhibit D attached hereto. TDM represents and warrants that it has obtained the consent of all existing mortgagees of the Project Area to the execution and recording of this Restriction and to the terms and conditions hereof and the subordination of all existing mortgages to this Restriction.

18. **Recordation.** The Town shall record this instrument in the Middlesex South Registry of Deeds.

19. **Miscellaneous.**

**A. Controlling Law.** The interpretation and performance of this Restriction shall be governed by the laws of the Commonwealth of Massachusetts.

**B. Liberal Construction.** Any general rule of construction to the contrary notwithstanding, this Restriction shall be liberally construed in favor of the grant to effect the purpose of this Restriction. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purpose of this Restriction that would render the provision valid shall be favored over any interpretation that would render it invalid.

**C. Severability.** If any provision of this Restriction shall to any extent be held invalid, the remainder shall not be affected.

**D. Entire Agreement.** This instrument sets forth the entire agreement with respect to the Restriction and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Restriction, all of which are merged herein.

**E. Captions.** The captions in this instrument have been inserted solely for convenience of reference. They are not a part of this instrument and shall have no effect upon construction or interpretation.

**F. Counterparts.** This Restriction may be executed in counterparts that shall constitute a single agreement whether or not all signatures appear on a single copy hereof.

**G. Title.** Subject to the limitations set forth herein, this Restriction shall run with the title of the TDM Property and be binding on the successors and assigns of TDM.

[Remainder of page intentionally left blank]

Executed as a sealed instrument as of the date first set forth above.

THE DISCOVERY MUSEUMS, INC.

By: \_\_\_\_\_

Name:

Title: President

By: \_\_\_\_\_

Name:

Title: Treasurer

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss:

On this        day of        , 2016, before me, the undersigned notary public, personally appeared        proved to me through satisfactory evidence of identification, which was (  ) driver's license (  ) passport (  ) employee ID Card (  ) other \_\_\_\_\_, to be the person(s) whose name(s) are signed on the preceding or attached document, and acknowledged to me that he/she/they signed it voluntarily for its stated purpose as President of The Discovery Museum, Inc.

\_\_\_\_\_  
Notary public:  
My commission expires:

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss:

On this        day of        , 2016, before me, the undersigned notary public, personally appeared        proved to me through satisfactory evidence of identification, which was (  ) driver's license (  ) passport (  ) employee ID Card (  ) other \_\_\_\_\_, to be the person(s) whose name(s) are signed on the preceding or attached document, and acknowledged to me that he/she/they signed it voluntarily for its stated purpose as Treasurer of The Discovery Museum, Inc.

\_\_\_\_\_  
Notary public:  
My commission expires:

*Approval of Selectmen*

We, the undersigned, being a majority of the Town of Acton Board of Selectmen, hereby certify that at a meeting duly held on \_\_\_\_\_ day of \_\_\_\_\_, 2016, the Board voted to accept the foregoing Restriction.

TOWN OF ACTON  
By its Board of Selectmen

\_\_\_\_\_  
Peter J. Berry, Chair

\_\_\_\_\_  
Janet K. Adachi, Vice-Chair

\_\_\_\_\_  
Frances J. Osman, Clerk

\_\_\_\_\_  
Katie Green

\_\_\_\_\_  
Chingsung Chang

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

On this \_\_\_\_\_ day of \_\_\_\_\_, 2016, before me, the undersigned Notary Public, personally appeared Katie Green, Janet K. Adachi, Peter Berry, Frances J. Osman and Chingsung Chang proved to me through satisfactory evidence of identification, which was personal knowledge, to be the persons whose names are signed on the preceding document, and acknowledged to me that he/she/they signed it voluntarily for its stated purpose, and that he/she/they has/have authority to sign as a/the Member(s) of the Board of Selectmen of the Town of Acton, before me.

\_\_\_\_\_  
Notary Public  
My Commission Expires:

Exhibit A

(TDM Property)

Exhibit B

(Plan)

## Exhibit C

### Permitted Encumbrances

1. Taking and Relocation of Main Street by the Town of Acton dated April 25, 1958 and recorded with the Middlesex South District Registry of Deeds (the "Registry") in Book 9138, Page 530, as certified by instrument recorded with the Registry in Book 9167, Page 115.
2. Order and Assessment for Sewer Construction by the Town of Acton dated January 25, 2001 and recorded with the Registry in Book 32363, Page 77 and Supplemental Orders dated September 13, 2004 and June 6, 2005 and recorded in the Registry in Book 44689, Page 164 and Book 45383, Page 378, respectively.
3. Reciprocal License Agreement dated May 27, 1993 and recorded in the Registry in Book 23452, Page 57.