

SOUTH DAKOTA BOARD OF REGENTS

Planning and Resource Development

**REVISED
AGENDA ITEM: 5 – M
DATE: October 3-5, 2017**

SUBJECT

USD Discovery District Covenants, Conditions and Restrictions

PERTINENT HISTORY

N/A

CONTROLLING STATUTE, RULE, OR POLICY

N/A for covenants, conditions and restrictions. SDCL [chapter 5-29](#) governs the operation of research parks on state lands in general.

BACKGROUND/DISCUSSION

The Board of Regents (the “Board”) entered into a Master Ground Lease with the USD Research Park, Inc. (“USD Discovery District”) dated June 20, 2013 for the operation of a research park on 80 acres of state land in Sioux Falls, which was approved at its [June 2013 meeting](#). The Board subsequently approved amending the Master Ground Lease at its [December 2015 meeting](#), and the Amended and Restated Master Ground Lease Agreement was executed on April 15, 2016. Pursuant to Section 1.4.1 of the Amended and Restated Master Ground Lease Agreement, the USD Discovery District will prepare CC&R’s for approval and review by the Board, and upon approval, will adopt the CC&R’s on the Research Park.

The CC&R’s were prepared by the USD Discovery District and its legal counsel, in consultation with individuals with extensive research park development experience to ensure the foregoing are not only compatible with the direction of the USD Discovery District, but also the needs of prospective tenants. At the time this item was initially sent the CC&R’s were in next to final form, but still under final review. This item and Attachment I were updated on 9/28/17 to reflect the final version of the CC&R’s approved by the USD Discovery District. The substantive changes between the version initial sent and the 9/28/17 update include:

1. Providing additional detail in Section 7.1 with respect to the feedback to be provided by the Advisory Board, which additions include feedback on the amount of Maintenance and Operation Assessments and other matters as may be requested by the USD Discovery District.
2. Increasing the maximum administrative fee to be charged on costs incurred by the USD Discovery District in Section 8.3 from 10% to 15%.

(Continued)

DRAFT MOTION 20171003__5-M:

I move to approve the USD Discovery District CC&R’s set forth in Attachment I.

3. Addition of Section 8.5 to account for the temporary use of undeveloped lots for such things as agricultural purposes, which pursuant to the Master Lease cannot be inconsistent with the research park environment.
4. Adjusting cross-references and timelines to ensure consistency throughout the document.

When adopted, the CC&R's will run with the land and will be applicable to, and will govern the use of the premises by all lessees, tenants and owners of Research Park buildings.

IMPACT AND RECOMMENDATION

The USD Research Park, Inc. (dba the USD Discovery District) requests that the Board of Regents approve the USD Discovery District Covenants, Conditions and Restrictions (CC&R's) set forth in Attachment I. The foregoing reflect current best practice in research park development and are an integral aspect of the development of the USD Discovery District.

Staff recommends approval.

ATTACHMENTS

Attachment I – USD Discovery District Covenants, Conditions and Restrictions

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UNIVERSITY OF SOUTH DAKOTA RESEARCH PARK
DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

THIS DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS (hereinafter “Declaration”) is made and entered into this ____ day of _____, 2017 by UNIVERSITY OF SOUTH DAKOTA RESEARCH PARK, INC. (“USDRP”), A South Dakota non-profit Research Park corporation, as agent for the SOUTH DAKOTA BOARD OF REGENTS (“Declarant”).

RECITALS:

WHEREAS, the Declarant is the owner of a certain parcel of real property situated in Sioux Falls, Minnehaha County, South Dakota as more particularly described in Exhibit A, attached hereto, consisting of approximately 80 acres, (the “Property”) on which Declarant desires to develop a research park as provided and defined in SDCL 5-29-2(3); and

WHEREAS, the Declarant entered into that certain Master Ground Lease, dated June 20, 2013, as later amended and restated by that certain Amended and Restated Master Lease Agreement dated the 15th day of April, 2016 (“Master Lease”) and related agreements, to lease the Property to USDRP and engaged USDRP to serve as its exclusive agent to develop, construct, sublease, and operate a research park in accordance with the requirements of in SDCL Ch. 5-29 (the “Research Park”); and

WHEREAS, the Master Lease contemplates that USDRP will enter into agreements to further sublease the Property (or portions thereof) to third-party developers or subtenants (“Sublessees”) for the purposes of effectuating the development of the Research Park; and

WHEREAS, Declarant desires to subject the Property to the within covenants, conditions and restrictions in furtherance of the desired development of the Property as a Research Park and for protecting and enhancing the value, desirability and attractiveness of the Property to potential Sublessees;

NOW, THEREFORE, the Declarant hereby declares that all of the Property described in Exhibit A attached hereto shall be held, sold, subleased, conveyed, occupied, developed, and

redeveloped subject to the following easements, restrictions, covenants and conditions, for the purpose of protecting the value and desirability of, and which shall run with, the Property and shall be binding upon on all parties having any right, title or interest in the Property or any part thereof, their heirs, successors and assigns, and shall inure to the benefit of each Sublessee and Occupant thereof.

ARTICLE I DEFINITIONS

Section 1.1 Definitions. For the purposes hereof, the following terms shall have the following meanings unless the context in which the same is used clearly indicates otherwise:

(a) “Advisory Board” shall mean the advisory board established as provided in Article VII.

(b) “Available Lots” shall mean any Lot that is subleased or deemed to be available to be subleased. Lots will be deemed available to be subleased when (i) direct access to such Lots is provided by roads with all required curb and gutter constructed, and (ii) all public utilities have been stubbed to such Lot, including without limitation water and sewer.

(c) “Common Areas” shall include all Common Land and Common Improvements as hereinafter defined.

(i) “Common Land” shall include all real property within the boundaries of the Property that has not been leased to a Sublessee.

(ii) “Common Improvements” shall include all facilities, utilities and other improvements found or located on Common Land, including, but not limited to, park landscape, entry features, directional graphic system, drainage systems, landscape medians, fences, security-related improvements, safety, bicycle paths, parking lots, parking garages and structures, parking stalls, jogging paths, exercise stations, sidewalks, roads, project lighting other similar improvements for the common benefit of a Sublessee and/or Occupant.

(d) “Common Expenses” shall be those expenses incurred or to be incurred by the USDRP in the performance of its duties or powers as required and authorized by this Declaration together with any administrative and management fees authorized to be charged by the USDRP in accordance with this Declaration. The USDRP has the power to assess Sublessees for their pro rata share of Common Expenses pursuant to Article VIII herein.

(e) “CPI” shall mean the numerical index of the “Consumer Price Index for All Urban Consumers” (1982-84 = 100) published by the Bureau of Labor Statistics of the United

States Department of Labor, or a comparable successor index employed by the United States government to track changes in the costs of consumer goods and services.

(f) “Declaration” shall mean and refer to this Declaration of Covenants, Conditions and Restrictions.

(g) “Declarant” shall mean and refer to the South Dakota Board of Regents, by and through its authorized agent, USDRP.

(h) “Development and Operating Guidelines” shall mean and refer to various USDRP policies, procedures or standards related to design, construction, use, maintenance, and operation of facilities, improvements, or Common Areas within the Research Park, as prepared by USDRP and variously adopted, dated and/or implemented in practice. The Development and Operating Guidelines may be modified or amended from time to time in the future by USDRP in its sole discretion (subject to any necessary approval and/or changes by any governmental authorities of the having jurisdiction over the Research Park and Property) and shall be binding upon all Occupants, provided that any such modification or amendment shall not prohibit or restrict any use of the Lot Improvements that (i) had previously been approved by the USDRP in accordance with this Declaration, but only to the extents such activity had been conducted in accordance with the Declaration and the Development and Operating Guidelines then in effect, and (ii) is being engaged in by an Occupant at the time of such amendment or modification. The Development and Operating Guidelines includes without limitation the Design Guidelines, Permitted Use Criteria, and the Rules and Regulations.

(i) “Design Review Committee” shall mean a committee composed of no less than three (3) individuals designated from time to time by USDRP and shall have the powers and duties set forth herein.

(j) “Design Guidelines” shall refer to any rules and regulations which shall be prepared and issued from time to time (and which may be amended from time to time) by the Design Review Committee for the purpose of assisting Sublessees in preparing plans and specifications for Improvements and other plans, specifications and other materials (including designs for signs and the like) which are subject to review by the Design Review Committee subject to this Declaration.

(k) “Lot” shall mean and refer to any legally platted parcel of land within the Research Park.

(l) “Lot Improvements” shall mean any building, wall, or other structure, or any improvement located on any Lot.

(m) “Maintenance and Operation Assessment” shall mean a charge for the maintenance and operation of the open space, detention pond, orchards, pedestrian amenities, and other Common Areas located on the Property.

(n) “Master Lease” shall have the meaning defined in the Recitals hereto.

(o) “Occupant” shall mean a Sublessee or any party entitled to occupy any space within any building through, or by virtue of, the rights of any Sublessee.

(p) “Permitted Use Criteria” shall mean shall refer to any rules and regulations which shall be prepared and issued from time to time by USDRP for the purposes of imposing limitations on the permitted uses of Lots within the Property. The Permitted Use Criteria may be amended or modified from time to time, provided that any such modification or amendment shall not prohibit or restrict any use of Lot Improvements that (i) had previously been approved by the USDRP in accordance with this Declaration, but only to the extents such activity had been conducted in accordance with the Declaration and the Development and Operating Guidelines then in effect, and (ii) is being engaged in by an Occupant at the time of such amendment or modification.

(q) “Property” shall mean and refer to that certain real property described in Article II and such additions thereto as may hereafter be brought within the jurisdiction of the USDRP.

(r) “Sublessee” shall mean and refer to any persons or entities that have rights as a lessee under any sub-ground lease between USDRP and such persons or entities with respect to the development of any Lot for Research Park purposes.

(s) “Rules and Regulations” shall mean the Rules and Regulations adopted by the USDRP.

Other terms defined in this Declaration will have the meanings so given them.

Section 1.2 Interpretation. References to “Recitals”, “Articles”, “Sections” and “Exhibits” shall be to Recitals, Articles, Sections, and Exhibits of this Declaration unless otherwise specifically provided. Any of the terms defined in this Article I may be used in singular or plural form. As used herein, the singular includes the plural, and the masculine gender includes the feminine and neuter genders, and vice versa, unless the context otherwise requires.

ARTICLE II PROPERTY

Section 2.1 General Declaration. Declarant hereby declares the Property entirely situated in Sioux Falls, Minnehaha County, State of South Dakota is, and shall be, conveyed, hypothecated, encumbered, leased, occupied, built upon or otherwise used, improved or transferred in whole or in part, subject to this Declaration. All of the covenants, conditions and restrictions set forth herein are declared and agreed to be in furtherance of a general plan for the subdivision, improvement, and leasing of the Property and are established for the purpose of enhancing and protecting the value, desirability, and attractiveness of the Property and every part thereof. All of said covenants, conditions and restrictions shall run with the Property for all purposes and shall be binding upon and inure to the benefit of Declarant, and all Sublessees and Occupants and their successors in interest as set forth in this Declaration.

Section 2.2 Addition of Other Property. Declarant reserves all rights to at any time during the pendency of this Declaration, add all or a portion of any real property now or hereinafter owned by Declarant to the subject property, and upon recording of a notice of addition of real property containing at least the provisions of Section 2.3, the provisions of this Declaration specified in such notice shall apply to such added real property in the same manner as if it were originally covered by this Declaration. Thereafter, to the extent that this Declaration is made applicable thereto, the rights, powers and responsibilities of the Declarant and the Sublessees of Lots within such added real property shall be the same as in the case of the Property described in Exhibit A.

Section 2.3 Notice of Addition to Land. The notice of addition of real property referred to in Section shall contain at least the following provisions:

- (a) a reference to this Declaration stating the date of recording and the book or books of the records of Minnehaha County, South Dakota, and the page numbers where this Declaration is recorded;
- (b) a statement that the provisions of this Declaration, or some specified part thereof, shall apply to such added real property;
- (c) a legal description of such added real property; and
- (d) such other or different covenants, conditions, and restrictions as Declarant shall, in its discretion, specify to regulate and control the use, occupancy and improvements of such added real property.

ARTICLE III CONFORMANCE OF CONSTRUCTION AND IMPROVEMENTS WITH DESIGN GUIDELINES

Section 3.1 Approval of Submissions to Design Committee Required. No improvements shall be erected, placed, altered, maintained or permitted to remain on any Lot by any Sublessee until the Design Review Committee (a) has completed the process of reviewing all Sublessee plans and specifications submitted pursuant to the review process established in the Design Guidelines and (b) provided the written approvals of such plans and specifications required by the Design Guidelines. Such plans and specifications shall be submitted under the authorized signature of the Sublessee of the Lot or the authorized agent thereof. Such plans and specifications shall be in a form and shall contain such information as may be required by the Design Review Committee and the Design Guidelines. All submissions to the Design Review Committee shall contain such information as required by, or otherwise shall conform to, all requirements of the Development and Operating Guidelines, the Master Lease, and all requirements of SDCL Ch. 5-29 applicable to research park developments.

Section 3.2 Basis for Approval. Approval shall be based, among other items, upon compliance with the Development and Operating Guidelines, including specifically, the Design Guidelines and all regionally acceptable standards of construction of like facilities located within research parks. The Design Review Committee shall not arbitrarily or unreasonably withhold its

approval of any plans or specifications that are in compliance with the Development and Operating Guidelines.

Section 3.3 Result of Inaction. If the Design Review Committee fails either to approve or disapprove any submissions made to it for approval within the time frames specified within the Design Guidelines for such submission, it shall be presumed that the Design Review Committee has approved said submission; provided, however, that if within the time specified within the Design Guidelines, the Design Review Committee gives written notice of the fact that more time is required for the review of any submission of plans and specifications, there shall be no presumption that the same are approved until the expiration of such period of time as is set forth in the notice.

Section 3.4 Approvals. The Design Review Committee may approve plans and specifications as submitted, or as altered or amended, or it may grant its approval to the same subject to the specific conditions, or may grant its approval of only a portion of the submitted plans and approvals. Upon approval or conditional approval by the Design Review Committee of any plans and specifications submitted, a copy of such plans and specifications, together with any conditions shall be deposited for permanent record with the Design Review Committee, and a copy of such plans and specifications, bearing such approval together with any conditions, shall be returned to the applicant Sublessee submitting the same. For purposes of clarification, USDRP and Declarant contemplate a process comprised of multiple submissions of plans and specifications prior to any applicant Sublessee receiving approval(s) sufficient to proceed with the construction on the Lot.

Section 3.5 Proceeding with Work. Upon receipt of approval from the Design Review Committee pursuant to Section 3.4, the Sublessee to whom the same is given, shall, as soon as practicable, satisfy any and all conditions of such approval and shall diligently proceed with the commencement and completion of all approved excavation, construction, refinishing, and alterations. In all cases, work shall commence within one (1) year from the date of approval, and if work is not so commenced, approval shall be deemed revoked unless the Design Review Committee, pursuant to written request made and received prior to the expiration of said one (1) year period, extends the period of time within which work must be commenced.

Section 3.6 Waiver of Liability. Neither the Design Review Committee nor the Declarant shall be liable for any damage, loss, or prejudice suffered or claimed by any person on account of:

- (a) The approval or disapproval of any plans, drawings, and specifications, whether or not in any way defective;
- (b) The construction of any improvement, or performance of any work, whether or not pursuant to approved plans, drawings, and specifications; or
- (c) The development of any Lot within the Research Park.

Section 3.7 Construction without Approval. If any Lot Improvements shall be erected,

placed, or maintained upon any Lot, or any new use commenced upon any Lot, other than in accordance with the approval by the Design Review Committee pursuant to the provisions of this Article III, such alteration, erection, placement, maintenance, or use shall be deemed to have been undertaken in violation of this Declaration, and upon written notice from USDRP or the Design Review Committee, any such Lot Improvement so altered, erected, placed, maintained, or used upon any Lot in violation of this Declaration shall be removed or altered so as to conform to this Declaration, and any such use shall cease or be amended so as to conform to this Declaration and any conditions or other requirements that may be imposed by the Design Review Committee. Should such removal or alteration or cessation or amendment or use not be accomplished within thirty (30) days after receipt of such notice, then the party in breach of this Declaration shall be subject to the enforcement procedures set forth in Article XIII.

ARTICLE IV PERMITTED USES

Section 4.1 Establishment of Permitted Use Criteria. USDRP shall develop, establish and approve Permitted Use Criteria in accordance with the Master Lease. Such Permitted Use Criteria may be revised and updated from time to time by USDRP, provided that any such modification or amendment shall not prohibit or restrict any use of Lot Improvements that (i) had previously been approved by the USDRP in accordance with this Declaration, but only to the extent such activity had been conducted in accordance with the Declaration and the Development and Operating Guidelines then in effect, and (ii) is being engaged in by an Occupant at the time of such amendment or modification.

Section 4.2 Review of Permitted Use. USDRP reserves the right to make a separate determination regarding whether a proposed use by a Sublessee, Occupant or potential Occupant conforms with all restrictions and requirements applicable to Lots located in the Research Park. Prior to commencing any use of a Lot or changing the use of any Lot, each Sublessee in possession of a Lot, Occupant or potential Occupant will make a submission to USDRP disclosing the information required in the Permitted Use Criteria that provides a description of the proposed use of any Lot (or portion thereof) with detail sufficient for USDRP to make a determination about whether to disapprove, approve, or approve with conditions any proposed use of a Lot. USDRP will review and have the right to disapprove any proposed use submitted hereunder that is not in compliance with the Permitted Use Criteria and this Declaration. USDRP will have the time specified in the Permitted Use Criteria to make its determination about whether proposed uses will conform to the requirements described herein; provided, however, that if the time specified within the Permitted Use Criteria is insufficient for USDRP to make its determination regarding any proposed use, USDRP may give written notice of the fact that more information is needed or more time is required for the review of the proposed use and USDRP shall have additional time. No Sublessee, Occupant or proposed Occupant may commence use of a Lot prior to receiving USDRP's express approval for such use and meeting all conditions contained in such approval, if any.

Section 4.3 Permitted Uses. Sublessees and Occupants may use Lots only in accordance with and subject to the applicable zoning ordinances of the City of Sioux Falls or other applicable laws and regulations, the Master Lease, and the provisions of SDCL Ch. 5-29. Permitted uses will

be further subject to Permitted Use Criteria as contained within the Development and Operating Guidelines.

ARTICLE V REGULATION OF OPERATIONS

Section 5.1 Restrictions on Use. Use of the Property and any Lot thereon remains subject to all covenants, restrictions, and easements of record and to the following restrictions:

(a) Approved uses identified in Article IV, shall be performed or carried out in the manner represented to USDRP entirely within a building that is so designed and constructed that the enclosed operations and uses do not cause or produce a nuisance to other Lots or property, such as, but not limited to, vibration, sound, electromechanical disturbances, electromagnetic disturbances, radiation, air or water pollution, dust, or emission of odorous, toxic, or nontoxic matter.

(b) There shall be no material obstruction of the Common Areas without the prior consent of the USDRP, as appropriate. The use by Sublessees or Occupants of any designated area that is part of the Common Areas shall be uniformly prescribed by the USDRP, as appropriate.

(c) In order to provide for an orderly procedure in the case of lease transfers and to assist in the maintenance of a current roster of Sublessees and Occupants, the Sublessee of a Lot shall give the USDRP timely notice of its intent to lease or assign its rights to the Lot or Lot Improvements and, prior to the commencement of the term of such lease, shall notify USDRP of the names, and addresses of the new Sublessee or Occupants. Notwithstanding the above, sublease of a Lot shall not require the permission of the USDRP, provided however, the nature of the use of any Lot remains subject to the approval or USDRP. Any lease, sublease, or assignment of any Lot or Lot Improvement remains subject to the Development and Operation Guidelines, Permitted Use Criteria, and all other documents governing development within the Research Park.

Section 5.2 Rules and Regulations. The USDRP shall have the power to make additional Rules and Regulations as may be necessary to carry out the intent of the above restrictions and shall have the right to bring suits both in law and in equity to enforce the Rules and Regulations.

ARTICLE VI LICENSES, RESERVATIONS, AND COMMON AREAS

Section 6.1 Reservation of License for Use of Common Areas. Subject to the limitations hereafter provided, Declarant reserves for the benefit of every Occupant a non-exclusive license and right of enjoyment in and to the Common Areas that shall be appurtenant to and shall pass with the lease or sublease of every Lot or Lot Improvement.

Section 6.2 Limitation of Rights. Declarant's reservation of rights to Occupants rights provided in this Article VI shall remain at all times subject to and limited by the following:

(a) The right of the Declarant to dedicate or transfer all or any part of the Common

Areas to any public agency, authority, or utility;

(b) Subject to each Sublessee's responsibility to pay all Common Expenses assessed (either annual or special) against that Sublessee's Lot or Lot Improvements pursuant to the further terms of this Declaration; and

(c) Subject to any Temporary Use defined in Section 8.5 below; and

(d) Subject to the requirements of the Master Lease; SDCL 5-2-10; 5-2-11; and all applicable South Dakota laws.

Section 6.3 Occupant's Licenses. Subject to the limits of Section 6.2 above, every Occupant, its respective successors and assigns, and its employees, agents and invitees shall have the following perpetual licenses with respect to the Property.

(a) A nonexclusive license for ingress and egress to its Lot over, across and through the Common Areas on the private roadways constructed for such use purposes;

(b) A perpetual nonexclusive license in common with the Sublessees of all other Lots to use all pipes, wires, cables, public utility lines, and other Common Areas serving its Lot; and

(c) A perpetual and nonexclusive license in, over, and through the Common Areas and to use the entrance ways, bike paths, walks and other Common Improvements within the Property subject of the right of the USDRP to promulgate Rules and Regulations for the use and enjoyment thereof.

Section 6.4 Easements and Licenses in Favor of USDRP. Declarant reserves for USDRP, or the appropriate utility, their successors, and assigns, shall have the following perpetual easements and licenses with respect to the Property:

(a) A perpetual license and easement for the maintenance of any Common Areas, which may presently or hereafter encroach upon a Lot;

(b) The USDRP shall have a perpetual and nonexclusive license, easement, and right of access to each Lot (i) to inspect same for the purpose of verifying conformance with this Declaration, the Development and Operating Guidelines or any Rules and Regulations promulgated by the USDRP, (ii) to remedy any violation set forth in this Declaration or in any Rule or Regulation of the USDRP, and (iii) to perform any operations required in connection with the maintenance, repairs or replacements of or to the Common Areas, or any equipment, facilities, or fixtures affecting or serving other Lot(s) or the Common Areas; provided that requests for entry are made in advance and that any such entry is at a time reasonably convenient to the Sublessee or Occupant, and provided further, in case of emergency, such right of entry shall be immediate, whether the Sublessee or Occupant is present at the time or not;

(c) A perpetual, blanket, and nonexclusive license and easement in, upon, over, under, across, and through the Common Areas for surface water runoff and drainage caused by

natural forces and elements, grading, and/or improvements located upon the Property, provided however, no individual Sublessee or Occupant shall directly or indirectly interfere with or alter in any material respect the drainage and runoff patterns and systems within the Property; and

(d) A perpetual, blanket and nonexclusive license and easement in, upon, over, across, and through the Common Areas for the purpose of the installation, maintenance, repair, service, and replacement of all sewer, water, power, and telephone pipes, lines, mains, conduits, waters, poles, transformers, meters, and any and all other equipment or machinery necessary or incidental to the proper functioning of any utility systems serving the Property and the Lots, which easement shall be for the benefit of any governmental agency or utility company or other entity that requires same for the purpose of furnishing one or more of the foregoing services.

Section 6.5 Other Easements. Declarant hereby reserves to USDRP the sole right to grant consents for the construction and operation of public utilities, including, but not limited to, rapid transit, freight railways, poles or lines for electricity, telephone, or telegraph, below ground conduits, and gas pipes in any and all streets now existing or hereafter established upon which any portion of the Property may now or hereafter front or abut. Declarant reserves for USDRP the exclusive right to grant consents and to petition the proper authorities for any and all street improvements, such as grading, seeding, tree planting, sidewalks, paving, and sewer and water installation, whether it be on the surface or subsurface, which in the opinion of the USDRP are necessary on or to the Property. Notwithstanding contrary provisions contained herein, the Declarant reserves for USDRP the exclusive right to approve above-ground utility lines across the subject property or any portion thereof on a temporary basis for the purpose of construction, and such lines shall be permitted when required by a government agency. Notwithstanding contrary provisions of this Section, the construction and operation of public utilities in rights-of-way dedicated to the public must be approved by the appropriate governmental authority, and if required by the Master Lease, the Declarant.

Section 6.6 Mineral Rights. As required by SDCL 5-2-12, all uses of the Property remain subject to the Declarant's reservation to the State of South Dakota all deposits of coal, ores, metals, and other minerals, asphaltum, oil, gas, and other like substances in such lands, together with the right to prospect for, mine, and remove the same upon rendering compensation to the owner of lessee for all damages that may be caused by such prospecting or removal. The reserved deposits shall be disposed of only in the manner expressly provided by law. Notwithstanding the foregoing, under SDCL 5-29-7, such portions of the mineral interests reserved to the State of South Dakota in the lands occupied by the USDRP as may be necessary to permit USDRP, Sublessees, or Occupants to use geothermal resources for heating or cooling on-site facilities has been leased to USDRP pursuant to the Master Lease, and may be further subleased to Sublessees or Occupants by USDRP.

ARTICLE VII ADVISORY BOARD

Section 7.1 Advisory Board. An Advisory Board is to be established, comprised of a designee of each Sublessee and a designee representing USDRP. USDRP shall provide Advisory Board with detailed information regarding budgeted Common Expenses, any proposed material capital expenditures, and the anticipated amount of upcoming Maintenance and Operation

Assessments. Advisory Board shall consult with USDRP as requested by USDRP to provide feedback regarding (i) the maintenance of Common Areas, (ii) the amount of Maintenance and Operation Assessments, (iii) proposed improvements and additions to Common Areas and (iv) such other matters as may be requested by USDRP. The Advisory Board shall have no authority to bind USDRP with respect to any manner and no participation on such Advisory Board by a designee of a Sublessee shall constitute a waiver of any rights of such Sublessee, whether arising under this Declaration or otherwise at law or in equity.

Section 7.2 Meetings. The Advisory Board will meet at least annually. Members of the Advisory Board may participate in a meeting of the Advisory Board by any means of communications equipment by means of which all persons participating in the meeting can hear and effectively communicate with each other.

ARTICLE VIII MAINTENANCE AND OPERATION ASSESSMENT

Section 8.1 Administration of Common Areas. The administration and management of the Common Areas and any other common facilities shall be by the USDRP in accordance with the provisions of this Declaration and of any other agreements, documents, amendments, or supplements to the foregoing that may be duly adopted.

Section 8.2 Condition of Property. The Sublessee and Occupant of any Lot shall at all times be jointly responsible for keeping the Lot and any Lot Improvements thereon in a safe and clean condition and comply, at its own expense, in all respects with the requirements of the Development and Operating Guidelines, and all applicable governmental, health, fire and safety ordinances, regulations, requirements, and directives.

Section 8.3 Maintenance and Operation of Property. Declarant reserves to USDRP all rights to maintain the Common Areas.

(a) Each Sublessee shall be assessed a “Maintenance and Operation Assessment” by USDRP consisting of a pro rata share of the maintenance costs attributable to Common Areas, a pro rata share of an amount attributable to the depreciation of Common Areas, a pro rata share of all utilities and other operating expenses attributable to Common Areas, a pro rata share of all expense associated with insuring all Common Areas as provided in Article XI hereof and a pro rata share of any real estate taxes and assessments that may be attributable to Common Areas. The Maintenance and Operation Assessment will be determined by taking into account only the actual costs incurred by the USDRP for the items described above plus an administration fee not to exceed 15% of the cost of such items. Each Sublessee’s pro rata share of the items comprising the Maintenance and Operation Assessment shall be determined by taking the square footage of the Available Lot(s) subleased by such Sublessee, divided by the total square footage of all Available Lots. The Maintenance and Operation Assessment shall be assessed on a periodic basis, no more frequently than quarterly, and a statement evidencing the costs incurred shall be provided to members of the Advisory Board at meetings of the Advisory Board.

(b) Each Sublessee shall be responsible for the maintenance and repair of all Lot Improvements on its Lot in a manner consistent with any Rules and Regulations promulgated by

the USDRP and contained within the Development and Operating Guidelines. In light of the unique physical landscape of the Property, which it is the policy of the Declarant to preserve, no Sublessee or Occupant shall make any significant alteration in the landscaping of its Lot, including removal or replacement of trees and shrubbery or construction of any fencing between Lots, without the prior approval of the Design Review Committee.

(c) Nothing contained herein shall preclude a Sublessee or Occupant from recovering from any personal liability therefor, damages to which such Sublessee or Occupant might be entitled for any act or omission to act requiring an expenditure by the Sublessee or Occupant for the maintenance and repair of the parking area, driveway, walkway, and/or landscaping on its Lot.

(d) Each Sublessee shall have the right, by written notice given within ninety (90) days after such Sublessee's receipt of any Maintenance and Operation Assessment, to require the USDRP to make available its books and records relating to the costs and expenses for the period covered by the Maintenance and Operation Assessment for inspection and audit. Should such inspection and audit disclose that the Sublessee has overpaid the amount due to the USDRP, such overpayment shall be, at Sublessee's option, refunded to Sublessee within thirty (30) days or retained by USDRP or credited against the next Maintenance and Operation Assessment payable by Sublessee. Notwithstanding any dispute or challenge, each Sublessee shall pay to USDRP, without benefit of right of set-off and regardless of challenge, all Maintenance and Operation Assessments levied by USDRP.

Section 8.4 Remedies for Failure to Maintain and Repair.

(a) *Remedies.* If any Sublessee or Occupant fails to pay the Maintenance and Operation Assessment or to perform the maintenance and repair required of them by this Declaration then the USDRP, after thirty (30) days prior written notice to such delinquent Sublessee or Occupant shall have the right, but not the obligation, to pay the Maintenance and Operation Assessment or to perform such maintenance and repair and to charge the delinquent Sublessee with costs of such assessment or such work, together with interest thereon at the lesser of the rate of eighteen percent (18%) per annum or the highest interest rate allowable under the then-applicable provisions of South Dakota law accruing from the date of the USDRP's advancement of funds for such payment or such work to the date of reimbursement of the USDRP by Sublessee. If the delinquent Sublessee fails to reimburse the USDRP for such costs within ten (10) days after demand therefore, the USDRP may, at any time within two (2) years after such advance, file for record in the Office of Register of Deeds of Minnehaha County, South Dakota, a claim of lien signed by Declarant or USDRP on behalf of Declarant for the amount of such charge together with interest thereon. The lien created by this section shall be effective to establish a lien against the interest of the delinquent Sublessee in its Lot together with interest at the lesser of eighteen percent (18%) per annum or the highest interest rate allowable under the then-applicable provisions of South Dakota law on the amount of such advance from the date thereof, in addition to recording fees, cost of title search obtained in connection with such lien or the foreclosure thereof, and obtained in connection with such lien or the foreclosure thereof, and court costs and reasonable attorney's fees that may be incurred in the enforcement of such a lien.

(b) *Foreclosure of Lien.* Subject to the provisions of Article XVIII, such a lien,

when so established against the Lot described in said claim, shall be prior or superior to any right, title, interest, lien, or claim that may be or may have been acquired in or attached to the real property interests subject to the lien subsequent to the time of filing such claim for record. Such lien shall be for the benefit of the USDRP and may be enforced and foreclosed in a like manner as a real estate mortgage is foreclosed in the State of South Dakota, but without redemption.

(c) *Cure*. If a default for which a notice of claim of lien was filed is cured, USDRP shall file or record a rescission of such notice, upon payment by the defaulting Sublessee of the costs of preparing and filing or recording such rescission, and other reasonable costs, interest, or fees that have been incurred.

(d) *Nonexclusive Remedy*. The foregoing lien and the rights to foreclose thereunder shall be in addition to, and not in substitution for, all other rights and remedies that any party may have hereunder and by law, including any suit to recover a money judgment for unpaid assessments.

Section 8.5 Temporary Use of Undeveloped Lots and Common Areas. Declarant intends for each Lot to be developed in accordance with the terms of this Declaration, provided however notwithstanding contrary provisions contained herein, the limitations and requirements imposed by this Declaration (including the requirements of Article IV and Article VIII) shall not be imposed upon temporary uses of undeveloped Lots and/or Common Areas which support the activities of the Research Park, USDRP, and/or Sublessee(s) (“Temporary Use”). The term Temporary Use specifically includes without limitation, farming and other agricultural uses.

ARTICLE IX REAL ESTATE TAXES AND ASSESSMENTS

If any Sublessee fails to pay any real estate taxes or assessments on its Lot that becomes a lien on any portion of the Property then the Declarant or USDRP may pay such taxes or assessments, together with any interest, penalties, and costs arising out of or related thereto, except while the validity thereof is being contested by judicial or administrative proceedings, and in such event the defaulting Sublessee obligated to pay such taxes or assessments shall promptly reimburse USDRP or Declarant for all such taxes or assessments, interest, penalties, and costs paid or incurred by the Declarant or USDRP, and until such reimbursement has been made, the amount of the payment by Declarant or USDRP shall constitute a lien on and charge against the lot of the defaulting Sublessee subject and subordinate, however, to any mortgage then outstanding and affecting said Lot.

ARTICLE X OBLIGATIONS OF USDRP

Until USDRP subleases the first Available Lot to a Sublessee, USDRP shall be solely responsible for all Common Expenses. Following such first subleasing, the Sublessees of Lots shall be responsible for all Maintenance and Operation Assessments payable by them as provided in Article VIII of this Declaration.

ARTICLE XI INSURANCE

Section 11.1 Risk of Loss/Insurance.

(a) USDRP shall maintain, from a reputable insurance company, or companies, full-extended fire and casualty insurance coverage for structures located in the Common Areas in accordance with the requirements of the Master Lease. USDRP shall also maintain comprehensive liability insurance coverage in an amount not less than the greater of \$5,000,000.00 or such other greater amount as may be required by the Master Lease, and such policy will contain endorsements naming the South Dakota Board of Regent and the University of South Dakota as additional insureds. The minimum liability coverage is based upon the value of the United States dollar in 2015, and the minimum shall be adjusted at five year intervals throughout the term of these CCRs to reflect fluctuations in the CPI with the first of such adjustments to occur in 2021. The base liability insurance policy, together with any excess liability coverage provided under blanket umbrella coverage, shall be no less than the minimum level of insurance required of USDRP under the Master Lease. The Declarant shall be a named insured under such policy.

(b) USDRP and Sublessees will at all times maintain fire and extended coverage, vandalism, malicious mischief and special extended coverage insurance in such amounts as may be required under the Master Lease.

ARTICLE XII MODIFICATION AND REPEAL

Section 12.1 Procedure. This Declaration or any provision hereof, or any covenant, condition or restriction contained herein, may not be terminated, extended, modified or otherwise amended, as to the whole of the Property, except with the written consent of these parties comprised of the Sublessees which possess rights under sublease agreements to control development of no less than eighty percent (80%) of the then subleased Lots, based upon the number of square feet of the Lot leased in proportion to the total square footage of all then-subleased Lots (excluding dedicated streets and Common Areas) and USDRP; provided, however, that no such termination, modification or other amendment shall be effective without the written approval of the Declarant to allow Declarant to ensure such termination, extension, modification, or amendment does not constitute a deviation from the master plan approved for the Research Park. No such termination, extension, modification, or other amendment shall be effective (a) if it conflicts with a valid governmental enactment, ordinance, or regulation, including without limitation the requirements of SDCL Ch. 5-29 applicable to research parks, and (b) until a proper instrument in writing has been executed by the duly approving parties, acknowledged, and recorded with the Minnehaha County Register Of Deeds.

Section 12.2 Governmental Regulation. All valid governmental enactments, ordinances, and regulations are deemed to be a part of this Declaration, and to the extent they conflict with any provision, covenant, condition or restriction hereof, said conflicting governmental enactment, ordinance and regulation shall control and the provision, covenant, condition or restriction hereof in conflict therewith shall be deemed (i) amended to the extent necessary to bring it into conformity with said enactment, ordinance, or regulation while still preserving the intent and spirit of the

provisions, covenant, condition or restriction; or (ii) stricken herefrom should no amendment conforming to the governmental enactment, ordinance, or regulation be capable of preserving the intent and spirit of said provision, covenant, condition or restriction.

ARTICLE XIII ENFORCEMENT

Section 13.1 Abatement and Suit. The Sublessees of any Lot shall be primarily liable and any other Occupant secondarily liable for the violation or breach of any covenant, condition or restriction herein contained. Violation or breach of any covenant, condition or restriction herein contained shall give to the USDRP, following thirty (30) days written notice to the Sublessee and Occupant, if any, in question except in exigent circumstances, the right, privilege and license to enter upon the Lot where said violation or breach exists and to summarily abate and remove, or abate and remove, at the expense of the Sublessee or Occupant thereof, any improvement, structure, thing or condition that may be or exist thereon contrary to the intent and meaning of the provisions of these covenants, conditions or restrictions to enjoin or prevent them from doing so, to cause said violation to be remedied, or to recover damages for said violation. No such entry by the USDRP or its agents shall be deemed a trespass, and neither the USDRP nor its agents shall be subject to liability to the Sublessee or Occupant of said Lot for such entry and any action taken to remove a violation. The cost of any abatement, remedy or removal hereunder shall be a binding personal obligation of any Sublessee or Occupant in violation of any provision of this Declaration, as well as a lien (enforceable in the same manner as a mortgage) upon the Lot in question. The lien provided for in this section shall not be valid as against a bona fide purchaser or mortgagee for value of the Lot in question unless a suit to enforce said lien shall have been filed in the State Circuit Court situated in Minnehaha County, South Dakota, prior to the recordation of the deed or mortgage conveying or encumbering the Lot in question to such purchaser or mortgagee, respectively.

Section 13.2 Right of Entry. During reasonable hours and upon reasonable notice and subject to reasonable security requirements, the USDRP or its agents, shall have the right to enter upon and inspect any Lot and the Improvements thereon covered by this Declaration for the purpose of ascertaining whether or not the provisions of this Declaration have been or are being complied with, and neither the USDRP nor its agents shall be deemed to have committed a trespass or other wrongful act by reason of such entry or inspection.

Section 13.3 Deemed to Constitute a Nuisance. The result of every act or omission whereby any covenant, condition, or restriction herein contained is violated in whole or in part is hereby declared to be and to constitute a nuisance, and every remedy allowed by law or in equity against an Sublessee or Occupant either public or private shall be applicable against every such result and may be exercised by the USDRP.

Section 13.4 Attorney's Fees. In any legal or equitable proceeding for the enforcement of this Declaration or any provision hereof, whether it be an action for damages, declaratory relief or injunctive relief, or any other action, the losing party or parties shall pay the costs, expenses, and attorney's fees of the prevailing party or parties, in such reasonable amount as shall be fixed by the court in such proceedings, or in a separate action brought for such purpose. The prevailing party shall be entitled to said attorney's fees even though said proceeding is settled prior to judgment.

All remedies provided herein or at law shall be cumulative and not exclusive.

Section 13.5 Failure to Enforce Is No Waiver. The failure of the USDRP to enforce any requirement, restriction, or standard herein contained shall in no event be deemed to be a waiver of the right to do so thereafter or in other cases nor of the right to enforce any other restriction.

ARTICLE XIV NO PARTITION

Subject to the provisions of this Declaration, the Common Areas shall remain undivided and no Sublessee(s) shall bring any action for partition or division thereof.

ARTICLE XV ASSIGNMENT

Any and all of the rights, powers, and reservations of Declarant or USDRP herein contained, may be assigned to any person, partnership, corporation or association that will assume the duties pertaining to such particular rights, powers and reservations assigned, and upon any such person, partnership, corporation, or association evidencing its consent in writing to accept such assignment and assume such duties, he or it shall, to the extent of such assignment, have the same rights and powers and be subject to the same obligations and duties as are given to and assumed by Declarant or the USDRP herein.

ARTICLE XVI CONSTRUCTIVE NOTICE AND ACCEPTANCE

Every person or entity who now or hereafter owns, occupies, or acquires any right, title or interest in or to any portion of the subject Property is and shall be conclusively deemed to have consented and agreed to every covenant, conditions and restriction contained herein, whether or not any reference to this Declaration is contained in the instrument by which such person acquired an interest in the subject property.

ARTICLE XVII RUNS WITH THE LAND

All covenants, conditions, restrictions and agreements herein contained are made for the direct, mutual and reciprocal benefit of each and every Lot of the subject property; shall create mutual equitable servitudes upon each Lot in favor of every other Lot; shall create reciprocal rights and obligations between respective Sublessees and Occupants of all Lots and privity of contract and estate between all grantees, lessees and sublessees of said Lots, their heirs, successors, and assigns; and shall, as to the Sublessee and Occupant of each Lot, its successors and assigns, operate as covenants running with the land, for the benefit of all other Lots, except as provided herein. Notwithstanding, the covenants, conditions, restrictions, and agreements herein contain may be terminated following the expiration or termination of the Master Lease by Declarant upon the recording of a writing signed by Declarant with the Register of Deeds of Minnehaha County purporting to terminate this Declaration, including any renewals, amendments, and modifications.

**ARTICLE XVIII
RIGHTS OF MORTGAGEES**

No breach of any covenant, condition or restriction herein contained, or any enforcement thereof, shall defeat or render invalid the lien of any mortgage now or hereafter executed upon the subject Property or a portion thereof, provided, however, that if any portion of said Property is sold under a foreclosure of any mortgage, any purchaser at such sale and its successors and assigns shall hold any and all Property so purchased subject to all covenants, conditions and restrictions contained in this Declaration.

**ARTICLE XIX
GENDER**

The use of the masculine gender in this Declaration shall be deemed to refer to the feminine gender, and the use of the singular shall be deemed to refer to the plural, and vice versa, whenever the context so requires.

**ARTICLE XX
INVALIDITY**

The invalidity of any provisions of this Declaration shall not be deemed to impair or affect in any manner the validity or enforceability or affect the remainder of this Declaration, and in such event all of the other provisions of this Declaration shall continue in full force and as if such invalid provisions had never been included.

IN WITNESS WHEREOF, the Declarant has approved this Declaration and authorized its agent USDRP execute this Declaration on the day and year first above written.

DECLARANT:

SOUTH DAKOTA BOARD OF REGENTS

By: UNIVERSITY OF SOUTH DAKOTA RESEARCH PARK, INC.,
a South Dakota non-profit research park corporation, (d/b/a USD Discovery District)
as authorized agent of the Declarant in accordance with the Master Lease

By: _____
Its: President

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF _____)

On this, the ____ day of _____, 2017, before me, the undersigned officer, personally appeared _____, who acknowledged himself/herself to be the _____ of University of South Dakota Research Park, Inc., a South Dakota non-profit research park corporation, and that he/she, as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by himself/herself as such _____.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

(SEAL)

Notary Public, South Dakota
My Commission expires:_____

EXHIBIT A

The Property comprising the Research Park that will be subject to the requirements of this Declaration includes the following real property legally described as:

LOT A OF TRACT 1 OF SOUTH DAKOTA PUBLIC UNIVERSITIES & RESEARCH CENTER ADDITION TO THE CITY OF SIOUX FALLS, MINNEHAHA COUNTY, SOUTH DAKOTA, ACCORDING TO THE RECORDED PLAT THEREOF

And

LOT A OF TRACT 1 OF UNIVERSITY CENTER RESEARCH PARK ADDITION TO THE CITY OF SIOUX FALLS, MINNEHAHA COUNTY, SOUTH DAKOTA, ACCORDING TO THE RECORDED PLAT THEREOF

Such additional property may be added from time to time in the manner described in the foregoing Declaration.