

**RECORDING FEES EXEMPT  
PURSUANT TO  
GOVERNMENT CODE §27383**

**RECORDING REQUESTED BY:  
CITY OF VACAVILLE**

Recorded in Official Records,  
Solano County  
Doc#: 200400155421  
10/29/2004 8:21 AM

**WHEN RECORDED MAIL TO:**

**MICHELLE A. THORNBRUGH  
CITY CLERK  
CITY OF VACAVILLE  
650 MERCHANT STREET  
VACAVILLE, CA 95688**

**DEVELOPMENT AGREEMENT  
BY AND AMONG THE CITY OF VACAVILLE, VACAVILLE  
REDEVELOPMENT AGENCY,  
AND NUT TREE ASSOCIATES, LLC,  
RELATIVE TO THE NUT TREE DEVELOPMENT PROJECT**

**OCTOBER 29, 2004**

**DEVELOPMENT AGREEMENT  
BY AND AMONG THE CITY OF VACAVILLE, VACAVILLE  
REDEVELOPMENT AGENCY,  
AND NUT TREE ASSOCIATES, LLC,  
RELATIVE TO THE NUT TREE DEVELOPMENT PROJECT**

**THIS DEVELOPMENT AGREEMENT** (hereinafter "Agreement") is entered into as of October 29, 2004, by and among **NUT TREE ASSOCIATES, LLC**, a Delaware limited liability Corporation ("Developer"), the **CITY OF VACAVILLE**, a municipal corporation ("City") and **THE VACAVILLE REDEVELOPMENT AGENCY**, a public body, corporate and politic ("Agency") (collectively the "Parties"), pursuant to the authority of Sections 65864 through 65869.5 of the California Government Code, and Division 14.17 of the Vacaville Municipal Code ("Municipal Code"). City, Agency and Developer are also referred to hereinafter individually as a "Party" and collectively as the "Parties."

**RECITALS**

This Agreement is made with reference to the following facts:

A. In order to strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic costs of development, the Legislature of the State of California enacted Section 65864 et. seq. of the California Government Code (the "Development Agreement Legislation"). The Development Agreement Legislation authorizes City to enter into a development agreement for the development of property with any person having a legal or equitable interest in real property. City has authorized the undertaking of Development Agreements within the City of Vacaville and established procedures for entering into Development Agreements through the adoption of Division 14.17 of the Vacaville Municipal Code.

B. The Agency owns the property within the Project Area described in Exhibit A-1 (the "Agency Property") of the Disposition and Development Agreement between the Agency, City and Developer ("DDA") and the City owns the property within the Project Area described in Exhibit A-2 (the "City Property") of the DDA. The DDA is attached hereto as Exhibit 1. The City will transfer ownership of the City Property to Agency prior to the closing of escrow with the Developer for the Agency Property and the City Property (collectively the "Property"). The Agency intends to sell the Property, or portions of the Property, to Developer for a development project pursuant to the Agency's Redevelopment Plan. The Agency Property generally consists of the historic Nut Tree lands along East Monte Vista Avenue, including the Shell Gas Station property located at 1611 East Monte Vista Avenue. The Shell Gas Station property is subject to acquisition by Agency in August 2004. The City Property generally consists of excess rights-of-way for City streets. Developer has entered into the DDA with the Agency to obtain a legal and/or equitable interest in the Property consisting of approximately 76 acres located adjacent to I-80, Nut Tree Road, and E. Monte Vista Avenue, all of which is commonly known as the "Nut Tree," as generally diagrammed in Exhibit A of the DDA and more particularly described in Exhibits A-1 and A-2 of the DDA.

C. Developer intends to develop the Property as a master planned development, including mixed-use commercial, recreation, office and residential development, all as more specially described in the Planned Development (defined below) and in the Subsequent Approvals (defined below) as and when they are adopted, approved or issued, and certain off-site improvements to be constructed in connection therewith (collectively the "Project").

D. The Parties now desire to set forth their understandings concerning the vesting of certain Project Approvals (defined below) and the Nut Tree Ranch Policy Plan, dated September 2004, for the Property. In executing this Agreement, Developer recognizes that the use and development of the Property are subject to the grant of certain Subsequent Approvals, which are hereinafter defined and identified. Developer recognizes that the Subsequent Approvals, are subject to review by City's planning staff, public hearings and discretionary approval by the appropriate decision-making body in accordance with the terms and conditions of this Development Agreement, and are subject to the requirements of the California Environmental Quality Act, Public Resources Code §§21000, et. seq., the "CEQA Guidelines", 15 California Code of Regulations §§15000 et. seq., and City's local policies and guidelines (hereinafter collectively referred to as "CEQA") to the degree not already environmentally reviewed in existing documents such as the environmental review developed for this Agreement and the Environmental Impact Report ("EIR") certified by the City and Agency for the Nut Tree Ranch Development Project on July 9, 2002 (SCH#2001062100).

E. City acknowledges that Developer's agreement to make the commitments herein furthers the City's efforts for development of the Property, and acknowledges that such commitments constitute a material factor in City's willingness to enter into this Agreement. City also acknowledges that it is willing to provide Developer with the undertakings contained in this Agreement and within the terms of the DDA because City has determined that development of the Property will provide public benefits that could not be obtained without vested approval of large-scale development including, without limitation, needed community open space, increased tax revenues, coordinated planning of development, installation of both on and off-site public infrastructure, creation of additional needed local employment opportunities, creation of additional housing opportunities and recapturing elements of the historic Nut Tree use.

F. In exchange for the special benefits to City described in this Agreement, together with other public benefits that will result from the development of the Property, the Parties now desire to set forth their understandings concerning the vesting of Developer's right to develop the Property in accordance with the Project Approvals. Developer will receive by this Agreement certain assurances concerning the conditions under which it may proceed with the Project in accordance with applicable law and, therefore, desires to enter into this Agreement.

G. Developer has secured various environmental and land use approvals, entitlements, and permits relating to the development of the Project (the "Project Approvals"). These Project Approvals include, without limitation, the following:

(1) EIR. The potential environmental impacts of the Project contemplated and addressed by the EIR, have properly been reviewed and assessed by City pursuant to CEQA. Concurrently with the adoption of this Agreement, pursuant to CEQA and in accordance with the recommendation of the City Planning Commission, the City Council reaffirmed the EIR, adopted certain Findings of Fact and Statements of Overriding

Considerations, and adopted a mitigation monitoring program (the "Mitigation Monitoring Program"). [Note: CEQA document will depend on specific application.]

(2) **Planned Development.** Concurrent with the introduction of the ordinance approving this Agreement, following review and recommendation by the City Planning Commission, and after duly-noticed public hearing and reaffirmation of the certified EIR, the City Council, by Resolution 2004-90, approved the Planned Development Master Plan providing City land use regulations and development criteria relating to the development of the Project on the Property.

(3) **Development Agreement.** On September 7, 2004, following a duly noticed public hearing, the City Planning Commission, by Resolution No. 03-071, made the appropriate findings required by Division 14.17 of Vacaville Land Use and Development Code, and recommended that the City Council approve this Agreement. On September 28, 2004, the City Council adopted Ordinance No. 1725, approving and authorizing the execution of this Agreement.

H. Immediately prior to the adoption of this Agreement, the City Council took the following actions:

(1) determined that the EIR adequately addressed this Agreement and made the findings required by CEQA; and

(2) after a duly noticed public hearing, made appropriate findings required by Division 14.17 of the Municipal Code, that the provisions of this Agreement are consistent with the General Plan and the Nut Tree Ranch Policy Plan.

I. Applications for land use approvals, entitlements, and permits other than the Planned Development, that are necessary to or desirable for the development of the Property and which are consistent with the Planned Development (collectively, the "Subsequent Approvals"), have been or will be made by Developer. The Subsequent Approvals may include, without limitation, the following: amendments of the Planned Development, design review approvals (including site plan, architectural and landscaping plan approvals), deferred improvement agreements and other agreements relating to the Project, use permits, grading permits, building permits, lot line adjustments, sewer and water connections, certificates of occupancy, subdivision maps (including tentative, parcel, and final subdivision maps), preliminary and final development plans, re-zonings, encroachment permits, re-subdivisions, and any amendments to, or repealing of, any of the foregoing. The Subsequent Approvals shall be subject to City and Agency review and approval consistent with applicable law in effect at the time of such Subsequent Approvals.

**NOW, THEREFORE,** in consideration of the promises, covenants and provisions set forth herein, the Parties agree as follows:

## AGREEMENT

### **SECTION 1. EFFECTIVE DATE AND TERM**

#### **A. Effective Date.**

This Agreement will be effective on the thirty-first (31st) day following final adoption of an ordinance of City approving this Agreement; provided, that if within the time permitted by law there is a voter referendum concerning this Agreement, this Agreement shall not become effective until and unless the results of such referendum, certified as provided by law, favor the adoption of this Agreement (the "Effective Date").

#### **B. Term.**

This Agreement shall commence upon the Effective Date and shall remain in effect for the duration that the DDA is in effect, subject to the earlier termination provisions set forth below in paragraph C, or as otherwise provided or permitted in this Agreement.

#### **C. Termination of Agreement.**

This Agreement may be terminated by the City as to any Phase (defined below) if (1) Developer loses its right to develop such Phase pursuant to the terms of the DDA on account of Developer's failure to meet the conditions for development of such Phase contained in Sections 2.2 and 2.3 of the DDA and the Schedule of Performance (defined below); or (2) the DDA is terminated with respect to such Phase after Developer (or a permitted successor in interest under the DDA) acquires such Phase from the Agency. City may exercise its right in this paragraph C to terminate by notifying Developer of such termination, which shall not be subject to the cure provisions of Section 10 of this Agreement relating to default. No termination of this Agreement as to a particular Phase shall affect the effectiveness of this Agreement with respect to any other Phase for which the DDA remains in effect.

### **SECTION 2. DEFINITIONS**

**A. "City/Agency Development Agreement"** means the Development Agreement, between the City and the Agency, approved by the City Council and Agency Board on April 22, 2003, and adopted by Ordinance No.1692 on May 13, 2003, including any amendments thereto. The City/Agency Development Agreement is attached hereto as Exhibit 2.

**B. "DDA"** means the Disposition and Development Agreement, executed on February 6, 2003 between the Agency, the City and Developer for the sale and development of the Nut Tree property and authorized by the City Council/Redevelopment Agency Board on January 28, 2003, including any amendments thereto. The DDA is attached as Exhibit 1 to this Agreement.

**C. "EIR"** means the Nut Tree Ranch Development Final Environmental Impact Report, certified by the Vacaville City Council on July 9, 2002.

**D. “Master Planned Development” or “Planned Development”** means the master planned development application approved by City at the time of approval of this Agreement as required by the Nut Tree Ranch Policy Plan.

**E. “Phase”** means a Phase of the Project as described in Section 2.2 of the DDA.

**F. “Preliminary Development Plan”** means the Preliminary Development Plan included as Exhibit B in the DDA.

**G. “Project”** means the Project as that term is defined in Section 1.1(mm.) of the DDA.

**H. “Property”** means the City Property and the Agency Property as described in the DDA and more particularly shown in Exhibits A-1 and A-2 of the DDA.

**I. “Schedule of Performance”** means the Schedule of Performance attached as Exhibit C to the DDA, as it may be amended from time to time as permitted in the DDA.

**J. “Vested Elements”** means, 1) the Project Approvals secured by Developer prior to or concurrently with this Agreement and, 2) the Nut Tree Ranch Policy Plan.

### **SECTION 3. EXHIBITS**

The following exhibits are attached to and incorporated into this Agreement by reference:

**Exhibit 1:** Disposition and Development Agreement (DDA)

**Exhibit 2:** City/Agency Development Agreement

### **SECTION 4. OBLIGATIONS OF CITY AND AGENCY**

#### **A. Transfer of Development Agreement Provisions to Developer.**

The Agency may assign certain infrastructure capacity rights to Developer as permitted by the City/Agency Development Agreement, as may be required by City as part of subsequent development applications for those lands within the Nut Tree Ranch Policy Plan area that are conveyed to Developer under the terms of the DDA. The manner and amount of the capacity rights to be assigned to Developer shall be determined solely by Agency in order to ensure that sufficient capacity is available for all phases of development of the property covered by the City/Agency Development Agreement.

The foregoing notwithstanding, Agency agrees to assign its traffic/roadway and infrastructure capacity rights, as described in the City/Agency Development Agreement as follows:

(1) Traffic/roadway infrastructure capacity rights as described in Section 3 of such Development Agreement shall be assigned to Developer for a maximum period of five (5) years from the date that the first building permit is issued for Phase I of the Project as such Phase is described in Section 2.2 of the DDA, and;

(2) Its sewer and water capacity rights that Agency has paid or has rights to, for the term of this Agreement, pursuant to Subsections 1.B. and 1.C. of this Agreement.

**B. Responsibility for Road Improvements.**

Public road improvements related to the Project are anticipated to be constructed as follows:

(1) City and Developer agree to form an Assessment District for the construction of public improvements as described in Exhibit F of the DDA.

(2) City will be responsible for construction of the following road improvements (a) the widening of the Nut Tree Overcrossing to four (4) travel lanes; (b) construction of the two (2) freeway ramp improvements on East Monte Vista Avenue, adjacent to the Shell Gas Station property and Airport Road; and (c) related improvements subject to Caltrans approval.

**C. Planned Growth Ordinance.**

City recognizes that development of residential units on the Property is expected to provide a unique housing type/location for City residents. For this reason, building permits issued by the City for City approved residential units on the Property shall not be subject to the provisions of City's Planned Growth Ordinance.

**D. Vesting of Vested Elements.**

The Vested Elements shall vest upon the Effective Date of this Agreement as provided in Subsection 1.A, above.

**E. Timely Processing.**

City shall use its best efforts in the timely processing of Developer's applications for the Planned Development and design review in accordance with Section 4.1 of the DDA.

**SECTION 5. OTHER CITY OBLIGATIONS OR CONSIDERATIONS**

**A. No Conflicting Enactments; Protection From Moratoria; Exemption From Planned Growth Ordinance; Exception For Development Limitation Due to lack of Infrastructure of Inability of City to Provide Public Services; Timing of Project Construction and Completion.**

Neither City nor any agency of City shall enact any ordinance, resolution, rule, procedure or other measure that relates to the rate, timing or sequencing of development of the Property, except as provided in the DDA. Additionally, except as specifically provided to the contrary herein or in the DDA and in accordance with the purpose of the Development Agreement Legislation, the Development Agreement provisions of the Vacaville Municipal Code, and in

consideration of the benefits derived by City as recited herein, no future modification of City's codes or ordinances, or adoption of any code, ordinance, regulation or other action that purports to limit the rate of development over time or alter the sequencing of development phases (whether adopted or imposed by the City Council or through the initiative or referendum process) shall apply to the Property. However, this Section shall not limit City's or Agency's rights under the DDA including, but not limited to, Developer's obligations to timely construct and provide all necessary infrastructure to serve the proposed development as a condition of approval of any permit, map approval or other land use entitlement sought by Developer for the Property.

In particular, and not in limitation of any of the foregoing, since the California Supreme Court held in *Pardee Construction Co. v. City of Camarillo*, 37 Cal.3d 465 (1984), that the failure of the parties therein to consider and expressly provide for the timing of development resulted in a later-adopted initiative restricting the timing of development to prevail over such parties' agreement, it is the Parties' desire to avoid that result by acknowledging that Developer shall have the right to develop the Project in such order and at such rate and at such times as Developer has agreed in the DDA, including, but not limited to, the time limits established by the Schedule of Performance. Developer shall provide City and Agency with annual updates of Project development projections to ensure that City and Agency will have information necessary to comply with their obligations set forth in this Agreement. However, this Subsection A shall not limit City's or Agency's right to impose requirements concerning the timing or commencement of construction when related to the need for infrastructure or utilities as a condition of approval of permits or other approvals sought by Developer, provided that such conditions of approval do not conflict with the terms and conditions of the DDA.

**B. Subdivision and Parcel Maps.**

Developer shall have the right from time to time to file applications for subdivision maps, parcel map waivers and/or parcel maps with respect to some or all of the Property to reconfigure the parcels comprising the Property as may be necessary or desirable in order to develop a particular phase of the Project or to lease, mortgage or sell a portion of the Property. Nothing herein contained shall be deemed to authorize Developer to subdivide or use any of the Property for purposes of sale, assignment, lease or financing in any manner that conflicts with the provisions of the Subdivision Map Act or with the Municipal Code of the City or the DDA; nor shall this Agreement prevent City from enacting or adopting changes in the methods and procedures for processing subdivision and parcel maps so long as such changes do not preclude or materially burden or delay Developer's realization of the rights conferred under the terms of the DDA, as may be amended from time to time.

**C. Applicable Subdivision and Safety Regulations; No Conflicting Enactments.**

Except as expressly provided in the conditions of approval of a permit or other approval, applications by Developer for a parcel map waiver, tentative parcel map, tentative subdivision map, design review or use permit shall be processed in accordance with the laws, ordinances, rules and regulations in effect on the date that City staff deems the application to be complete. Further, nothing herein contained shall be deemed to prevent the adoption or amendment of such laws, ordinances, rules and regulations applicable to development and improvements throughout the City in general, including the Property, prior to the time building permits for construction of



improvements are issued, which pertain or relate to health and safety, fire protection, mechanical, electrical, grading and/or building integrity requirements or other requirements that would be defined as "ministerial" under CEQA.

Except as provided above, City shall not impose upon the Project (whether by Subsequent Approval or other action by City or by initiative, referendum or other means) any City ordinance, resolution, rule, regulation, standard, directive, condition or other measure (each, individually, a "City Law") that reduces the development rights provided by the DDA, as the DDA may be amended from time to time. Without limiting the generality of the foregoing, any City Law shall be deemed to conflict with this Agreement or reduce the development rights provided by the DDA if it would result in any of the following:

(1) limit or reduce the density or intensity of the Project, or any part thereof, or otherwise require any reduction in the square footage or number of proposed buildings or other improvements. However, this provision shall not require City to increase the density of the Property lands resulting from state or federal limitations on development of the Property or portion thereof including, but not limited to, laws relating to airport safety and preservation or restoration of wetlands, and wildlife habitat. This provision is not intended to limit Developer's legal rights against state or federal authorities, but is intended to protect City from suit by Developer due to the impact of such laws upon the Property and to not obligate City to compensate for such reduction in density by increasing density on other areas of the Property. City, however, will cooperate with Developer to attempt to mitigate or minimize the impacts from such reductions on the over-all density of the Property as deemed appropriate by City;

(2) change any permitted land uses of the Property;

(3) limit or control the rate, timing, phasing or sequencing of the approval, development or construction of all or any part of the Project in any manner so long as all necessary infrastructure to serve such development is constructed by Developer or as otherwise provided for in this Agreement or the DDA;

(4) apply to the Project any City Law otherwise allowed by this Agreement that is not uniformly applied on a City-wide basis to all substantially similar types of development projects and properties with similar land use designations; however, this provision shall not prohibit City from establishing zones of benefit, rate zones, benefit districts, assessment districts or similar financing mechanisms, which may apply to the Property, so long as costs associated with such zones or districts are (i) uniformly applied to all similar uses within the zone or district and (ii) not limited in applicability to the Project;

(5) require the issuance of additional permits or approvals by City other than those required by applicable law or which City is required to impose by the authority of the state or federal government or of special districts or agencies that are not subject to the authority of City or Agency; or

(6) impose any ordinance or regulation, which controls commercial rents charged to commercial tenants within the Property.

**D. Undergrounding of Public Utilities.**

The City will, to the extent possible, and at no cost to the City, exercise its authority with P.G. & E., Comcast Cable, and PACTEL in undergrounding power and telephone lines in an effort to minimize Developer's undergrounding cost.

**E. Coordination of Construction of Offsite Improvements.**

Developer acknowledges that certain offsite improvements may be necessary to support development of the Property or may be required as part of environmental or other mitigation measures, including those improvements identified in Sections 3.5-3.7 and Exhibit F of the DDA, the adopted Mitigation Monitoring Plan for the Nut Tree Ranch Development Project EIR and as may be identified through subsequent approvals for the Planned Development. Examples of such off-site improvements may include, but shall not be limited to, joint-trench design and improvements, sewer laterals/mains extensions, storm drain lines to Pine Tree Creek, Nut Tree Road extension transition and water line main loops. Developer acknowledges and agrees that Developer shall be required to pay its fair-share of the cost of such off-site improvements attributable to the Project.

Further, Mitigation Measures in the Nut Tree Ranch Development Project EIR for traffic (4.3.3-7), air quality (4.4.2), noise (4.5.4), biological resources (4.8.1-14) and utilities (4.11.3-12) may necessitate the need for off-site improvements in order to reduce the environmental impacts that may be subsequently identified in Project specific studies required for each phase of the Project.

**F. Environmental Mitigation.**

To the maximum extent allowed by law, City shall not impose on the Project any mitigation measures other than those specifically imposed by the Project Approvals, the Mitigation Monitoring Program adopted concurrently with the Project Approvals, as authorized by City's Municipal Code or in the Nut Tree Ranch Policy Plan. To the maximum extent allowed by law, City shall not impose such additional mitigation measures; the basis for this commitment is that the EIR for the Nut Tree Ranch Development Project analyzes in full the environmental impacts of the Project, thereby alleviating the need for additional environmental review except in the circumstances described in Section 21166 of CEQA. To the maximum extent allowed by law, City shall, in connection with any Subsequent Approval, adopt Statements of Overriding Consideration recognizing the specific economic, social and other benefits of the Project that outweigh and make infeasible any such additional mitigation measures.

**SECTION 6. PROPERTY SUBJECT TO THIS DEVELOPMENT AGREEMENT**

**A. Property Subject to This Development Agreement.**

All of the property described in Exhibit A of the DDA is subject to this Agreement.

**B. Term of Subdivision Maps and Other Discretionary Reviews.**

The term of any parcel map waiver, tentative parcel map, tentative subdivision map, vesting tentative parcel map or vesting tentative subdivision map relating to the Property, or any part thereof, and the term of any subdivision improvement agreement related to development of the Property, or any portion thereof, shall be the period specified in the approval of said parcel map waiver, tentative parcel map, tentative subdivision map, vesting tentative parcel map or vesting tentative subdivision map. Developer may seek extensions of such maps in accordance with the provisions of the Subdivision Map Act. Notwithstanding the foregoing, however, any final map or final parcel map waiver shall not expire in less than the remaining term specified in the approval for such map.

The term of any use permit, design review approval or other zoning entitlement or discretionary review for development of any portion of the Property shall be as provided in Title 14 of the Vacaville Municipal Code.

**SECTION 7. OBLIGATIONS OF DEVELOPER FOR WHICH CITY OR AGENCY MAY TERMINATE DEVELOPMENT AGREEMENT FOR FAILURE OF DEVELOPER TO ACCOMPLISH OBJECTIVES**

Notwithstanding anything to the contrary herein contained, this Agreement shall be subject to termination by City or Agency (but not by Developer) pursuant to Subsection 1.C, above, for failure on the part of Developer to achieve the objectives stated below, subject to the provisions of this Agreement relating to permitted delays and delaying causes. Developer's performance in achieving these objectives shall be considered and evaluated as part of the process of annual review of this Agreement. The objectives to be achieved by Developer are:

**A. Conformance with the DDA and Consistency with Planned Development Approval.**

Developer shall develop the Property in conformance with the DDA (as it may be subsequently amended by the Parties). Site development shall be consistent with the approved Planned Development, as may be amended from time to time. Subsequent Project-specific construction phases shall conform with the master site plan and design concepts as shown in the adopted Planned Development, as reasonably determined by Agency staff and City's Community Development Department or, if necessary, by the Agency Board and City Council.

**B. Agreement Effective Only for Property Conveyed to Developer.**

This Agreement shall apply only to that portion of the Property conveyed to Developer or Qualified Transferees as provided in the DDA. Conveyance of the Property, or any portion thereof, shall be conditioned upon City's and Agency's approval of a site specific plan of development and design for the portion conveyed, meeting timeframes, requirements and other obligations as required by the DDA. Such plan of development shall also conform to the Nut Tree Ranch Policy Plan and other ordinances and regulations applicable thereto.

**C. Payment of Fees for Non-Residential and Residential Development.**

**Non-Residential Development:** In accordance with Section 4.3, "Payment of Development Impact Fees", of the DDA, Developer shall be responsible for payment of all customary City fees, not paid by Agency, and all charges and fees of all other government agencies including, but not limited to, full school mitigation fees and county facility development impact fees for non-residential development. Such fees and charges shall be payable at the time and as a condition of issuance of a City building permit for such non-residential development.

**Residential Development:** Developer shall pay all development impact fees then in effect for residential portions of each Phase of development plus any and all other fees and charges of the City and other governmental agencies (including, but not limited to, full school mitigation fees for residential development to the Vacaville Joint Unified School District, which may be higher than the statutorily-prescribed school mitigation fees). Developer understands that the amount of this fee may change from time to time. Such fees and charges shall be payable at the time and as a condition of issuance of a City building permit for such residential development.

**D. Environmental Mitigation Measures.**

Developer shall complete all mitigation measures as specified in the Mitigation Monitoring Plan, adopted by the City for the certification of the EIR as required by City in connection with any discretionary approval for the Project.

**E. Participation in Financing Mechanisms.**

Developer shall cooperate and participate in all financing mechanisms established in the DDA including, but not limited to Section 5.6, 5.7 and 8.10 of the DDA.

**F. Dedication of Rights-of-Way.**

Developer shall dedicate to City, at no cost, all necessary land for all new, expanded or realigned City streets and rights of way, including, but not limited to, East Monte Vista Avenue and Nut Tree Road as established by City during the development review process for the Property, including utility and other easements required for development as further described in Subsection 8.B, below.

**G. Formation and Participation In Area Assessment District; Limitation on Ability to Develop Prior to Formation of Assessment District.**

Subject to City's obligation to diligently process and act upon formation of the Assessment District, Developer shall cooperate with and assist City in the formation of, and shall join in and shall take all other actions necessary to include all or any portion of the Property in the Assessment District, presently contemplated to consist of the Property and adjoining property. Public improvements that will be financed by the Assessment District include, but are not limited to, those described in the DDA. The foregoing requirement shall not negate or affect Developer's right to challenge the assessment spread of the costs of public improvements to be constructed by such Assessment District. Until the Assessment District is formed, Developer may not seek, nor shall City issue, any building permit for the Project unless the City Council expressly authorizes such issuance in writing or this Agreement is administratively amended to eliminate the need for the Assessment District due to other funding mechanisms available to construct the public improvements contemplated hereunder.

**SECTION 8. DEVELOPER'S OBLIGATIONS AND SITE DEVELOPMENT**

**A. General Obligations.**

Developer shall comply with all Project Approvals and Subsequent Approvals in conformance with this Agreement. The Parties acknowledge that the execution of this Agreement by City and Agency is a material consideration for both Developer's acceptance of, and agreement to comply with, the terms and conditions of the Project Approvals and the Subsequent Approvals in conformance with this Agreement.

**B. Infrastructure Construction; Dedication of Land, Rights of Way and Easements.**

Developer shall construct and pay the full costs of all on-site infrastructure for each Phase of the Property outside of the limits of City's East Monte Vista Avenue roadway realignment and Nut Tree Road extension project, which is further shown on the draft Nut Tree Assessment District Engineer's Report, dated May 2, 2003. Furthermore, Developer shall contribute its proportionate share of the costs of the infrastructure improvements identified in the draft Nut Tree Assessment District Engineer's Report, dated May 2, 2003, and further described in Sections 3.5 – 3.7 of the DDA. Developer shall construct and pay the full costs of any other improvements or mitigation measures which are necessary to serve each Phase of the Project, as specified in the provisions of the adopted Mitigation Monitoring Plan for the Nut Tree Development Project EIR, the requirements of the Nut Tree Ranch Policy Plan, and the DDA, at such time as Subsequent Approvals have been obtained which permit development by Developer of a Phase of the Property and such Phase has been conveyed by Agency to Developer pursuant to the DDA.

Developer shall also construct and pay the full costs of any on-site improvements required for each Phase of the Property, including those improvements that are needed to serve such Phase that extend onto, through or across the Property not yet conveyed to Developer pursuant to the DDA (e.g. looped water lines). City may impose upon Developer over-sizing requirements in accordance with applicable laws. Reimbursement for any over-sizing shall be in

accordance with the provisions of City's Benefit District Ordinance (Municipal Code, Division 14.15); however the term for any such reimbursement agreement shall be ten (10) years. Developer may utilize those financing mechanisms to fund such on-site, backbone infrastructure City deems appropriate to protect City's general fund for the cost of such improvements.

As required under Subsection 7.F. above, Developer shall dedicate to City, without compensation, all rights-of-way, utility and other easements required for development of the Property in accordance with the Planned Development. City shall cooperate with Developer and use its best efforts to bring about construction of the infrastructure required for the development contemplated in the Planned Development that is not within Developer's control, including county, state, or federal assistance and, where appropriate, through exercise of the power of eminent domain so long as the funds required therefore are available from non-City or non-Agency fund sources, such as bond sales proceeds.

**C. Developer's Option to Fund Infrastructure Shortfalls.**

If any public agency lacks sufficient funds to complete necessary area-wide infrastructure improvements required by the Planned Development, Developer shall have the option of providing the shortfall in funding to the applicable public agency, provided the source of such funding is reasonably acceptable to City.

**D. No Mineral Exploitation; Water Rights; Closure and Transfer of Existing Water Wells and Water System.**

No portion of the surface and no portion of the Property lying within five hundred (500) feet of the surface of the land may be utilized for extraction of oil, gas, hydrocarbon or any other mineral, metal, rock or gravel or any activities associated with or ancillary to any such activities. Nothing herein contained shall be deemed to prevent or restrict exploitation and/or extraction of such minerals and other substances below a plane lying five hundred (500) feet below the surface of the land so long as all such activities conducted within the boundaries of the Property are confined to a level below said elevation; and nothing in this Subsection shall be deemed to prevent movement or export of rock, gravel or earth as part of grading activity undertaken in connection with development allowed under the Vested Elements. No portion of the Property may be utilized for the placement of water wells or for extraction of water by Developer or any successor in interest. City shall have the sole and exclusive right to all water, rights in water, or the placement of wells and use of water underlying the Property, whether above or below five hundred (500) feet of the surface and this provision shall constitute a transfer of all such water rights to City effective upon the effective date of the Agreement.

Prior to issuance of the first building permit to construct a residential structure on the Property, Developer shall de-annex all of the Property to be developed for residential uses from the Solano Irrigation District ("S.I.D.") and pay to S.I.D. the detachment fee applicable thereto. The portions of the Property that are not to be developed for residential uses shall remain within S.I.D.'s boundaries. City provides water for residential use.

**E. Impact Mitigation; No Cost to City.**

All public improvements (including, without limitation, landscaping) necessary for provision of public services in support of development of the Property or to be constructed or installed as conditions of development as generally described in the Nut Tree Ranch Policy Plan, shall be constructed or installed without cost or expense to City (except as otherwise specified in the DDA or herein).

**F. Developer Procures Financing for Major Infrastructure.**

Developer shall obtain funding for construction of the infrastructure for which Developer is responsible (e.g. major on-site circulation streets and other public improvements) without cost to City, and shall provide assurance thereof as a condition of any City-supported financing for construction of such improvement work on some or all of the Property, either in the form of a bonded contract for construction of such improvement work or a contract for acquisition of such work in a form acceptable to City.

**G. Assurances Concerning In-Tract Improvements.**

Developer shall be responsible for the work required to be performed as a condition to the approval of any subdivisions within the Property contemplated by the DDA, in accordance with applicable laws, and assurance thereof shall be required as a condition to filing a final subdivision map or parcel map for any portion of the Property to be subdivided, such assurance to be in the form of an improvement agreement acceptable to City requiring construction of such improvements, entered into in accordance with procedures established pursuant to City's Subdivision Ordinance (with bond or other surety provided as therein required), unless a community facilities district has been formed with provision for construction, of the improvements, in which case no assurance shall be required. All standards for construction of the surface streets, storm drains, sanitary sewers, curbs, gutters, sidewalks and utilities, the terms of contracts for provision thereof and other terms and conditions applicable to the work of construction as well as for dedication of property interests required to be dedicated shall be those conditions established by City through the Public Works Department and Community Development Department, as may be adopted and generally applicable to development in the City when Developer seeks to develop a portion or portions of the Property.

**H. Dedications of Open Space, Greenbelt, Parks, Trails and Landscaped Areas Lying Within Tracts.**

Upon formation of the Assessment District and prior to recordation of subdivision or parcel maps for Phase I, Developer shall propose and implement mechanisms acceptable to City to maintain public and private landscaped areas, parks, greenbelts or other open space areas. These mechanisms could include Lighting and Landscape Maintenance District and/or Property Owners Associations. Developer shall prepare an exhibit(s) to show which areas would be privately maintained.

**I. Dedicated Property Shall be Unencumbered.**

All parcels or interests in land dedicated by Developer to City shall be free and clear of all liens and encumbrances other than easements or restrictions of record that do not, in City's reasonable judgment, interfere with or preclude use of the dedicated land for its intended purpose.

**J. Developer to Provide Projections for Development of the Project.**

In order to facilitate cooperation among the Parties in connection with the timely development of the Project, Developer or its successor in interest shall provide City with annual reports of its projected timetable for the design and construction of the Project ("Development Projections") as required by and in accordance with the DDA.

**SECTION 9. PROVISIONS RELATING TO ASSESSMENT PROCEEDINGS**

**A. Participation in Area Assessment District.**

As provided in Section 7 above, Developer shall join, and take all those actions necessary to participate in the Assessment District required under the DDA.

**B. Construction and Acquisition Proceedings.**

Developer may propose to initiate assessment and/or community facilities district proceedings to finance payment of all or portions of the design, acquisition and construction costs for the off-site improvements, which are required to be designed and constructed by Developer in connection with development of the Property (or portions thereof) pursuant to the Planned Development. City shall diligently process such application so long as: (i) the application complies with law, (ii) is otherwise regular in form, (iii) is consistent with City's standards, (iv) provides for a lien-to-value ratio and other financial terms that are reasonably acceptable to City, (v) the person, firm or entity initiating the proceedings advances such amounts as City requires to provide for City staff and outside experts and Developer's consultants to undertake such processing, and (vi) City has reviewed and approved proposed experts and consultants who will be involved in the process including, but not limited to, bond counsel and financial advisory underwriter, which approval shall not be unreasonably withheld. City shall diligently seek to sell any bonds to be issued and secured by such assessments upon the best terms reasonably available in the marketplace; provided, however, that City's duty to sell such bonds shall be suspended during any period when marketing conditions render the issuance or sale economically infeasible. Developer may initiate improvement and assessment proceedings utilizing assessment mechanisms authorized under the laws of the State of California where the property subject to assessment serves as the primary security for payment of the assessments. Developer and its successors in interest as to any portion of the Property as to such portion may initiate such assessment proceedings with respect to such portion in order to finance the design or construction of improvements for such portion. In the event Developer or its successor in interest initiates such proceedings, City shall allocate shortfalls or cost overruns in the same manner that special taxes or assessments for construction of improvements (as opposed to assessments for maintenance) are normally allocated for such community facilities district or other financing mechanism so that each lot and/or parcel within the benefited area



(including the Property ) shall bear its proportionate share of the burden thereof so that construction or acquisition of such improvements is not prevented or delayed.

**C. Maintenance District Proceedings.**

City is authorized to, and presently contemplates, the creation of maintenance districts to fund maintenance and operating costs for wetlands mitigation areas, storm water drainage and detention areas, landscape medians, parks, landscaping areas, open space areas, street lighting and other improvements as they relate to the Project. If City creates a maintenance district, City shall allow Developer (or its successors in interest) to perform some or all of the maintenance district work so long as the work is performed to City standards. As to maintenance work related to storm water drainage and detention improvements and street lighting, City may, at its option, permit Developer (or its successor in interest) to perform such work so long as the work is performed to City standards. City's Director of Public Works is empowered to determine whether the work is performed to City standards. During such period that such work is performed by Developer or its successors in interest, the maintenance districts shall remain dormant. If, at any time, City's Director of Public Works, within his/her sole discretion, determines that the work is not being performed to City standards, then the Director will so notify Developer, and if not cured within thirty (30) days after such notice, activate or create the maintenance district and, thereafter, maintain the areas in question.

City shall entertain Developer-initiated requests to create a maintenance district and City shall diligently process such applications that comply with law and are otherwise regular in form. Developer and/or City shall have the right to form or create such maintenance districts under any mechanism authorized by law where the benefited property may be assessed or charged for the cost of such maintenance and operating cost. Developer and/or City may initiate proceedings for formation of such maintenance districts with respect to a portion of the Property to provide for maintenance of improvements thereon without the consent of the owners of any other portion of the Property so long as the proceedings are conducted and assessments are levied without cost or expense to such other owners and so long as the formation of such district will not interfere with the formation of other maintenance districts.

Developer (or its successors in interest) will pay City its costs of inspecting the area or improvements maintained by Developer or its successor as permitted under this Subsection.

**D. City's Good Faith in Processing.**

City shall accept, process and review, in good faith and in a timely manner (subject to payment of such application fees as may be charged hereunder in connection therewith), all applications required by law to develop or use the Property, in accordance with the terms of this Agreement.

**E. Right of Reimbursement From Others Benefited.**

In any case where City requires or permits Developer to provide improvements in excess of those required for development of the Property, or to dedicate, provide mitigation or incur costs in connection with public improvements in excess of those needed to serve the Property, City shall require others benefited by the improvements or measures and who utilize the same

within twenty (20) years after Developer constructs or provides the same, to either add their property to the financing district by which such improvements or measures were made or require such property owners to reimburse Developer for their proportionate share of the costs thereof in accordance with the adopted method of spreading assessments for such improvement or measure, such reimbursement to be made together with interest thereon at the rate of interest being charged on the principal amount of the assessments from which said reimbursement is made or at such other rate as City determines will fairly compensate Developer for the cost of the funds to be reimbursed and in accordance with the particular reimbursement financing mechanism utilized by City.

## **SECTION 10. DEFAULT, REMEDIES, TERMINATION OF AGREEMENT**

### **A. Notice of Default and Liability.**

Subject to extensions of time by mutual written consent of the Parties, or as otherwise provided herein, failure or delay by any Party to perform any material term or provision of this Agreement constitutes a default hereunder. Upon such default, the Party alleging the default shall give the other Parties written notice thereof, specifically stating that it is a notice of default under this Agreement, specifying in detail the nature of the alleged default and, when appropriate, the manner in which said default may be satisfactorily cured, and giving a reasonable time that shall be not less than thirty (30) days measured from the date of personal service or delivery by certified mail of the written notice of default. During any such cure period or during any period prior to notice of default, the Party charged shall not be considered to be in default for purposes of termination or institution of legal proceedings.

If a dispute arises regarding a default of any other provision of this Agreement, the Parties shall continue to perform their respective obligations hereunder, to the maximum extent practicable in light of the disputed matter. Notwithstanding anything to the contrary herein contained, no default hereunder in performance of a covenant or obligation with respect to a particular lot or parcel on the Property shall constitute a default applicable to other portions of the Property where no default has occurred, and any remedy arising by reason of such default shall be applicable solely to the lot or parcel where the default has occurred. Any liability arising by reason of such default shall be the liability and obligation solely of the owner or owners of the lot or parcel where the default has occurred.

### **B. Remedies.**

After proper notice and expiration of the applicable cure period provided herein without cure, or if such cure cannot be reasonably accomplished within such cure period, without commencement of such cure within such period and diligent effort to effect such cure thereafter, the Party that has given notice of default may, at its option, give notice of intent to terminate this Agreement, or pursue such other remedies as may be available to such Party. All remedies shall be cumulative. Notice of intent to terminate shall be in writing and delivered by certified mail, return receipt requested. If the notice of intent to terminate is given by City, the matter shall be scheduled for consideration and review by the City Council within sixty (60) days in accordance with Vacaville Municipal Code §14.17.218.030. Upon consideration of the evidence presented during such review and a determination by the City Council based thereon, City may give written

notice of termination of this Agreement to the defaulting Party, which notice shall effectively terminate this Agreement as to the lot or parcel on the Property where the default has occurred. Evidence of default also may arise and be considered during the regular annual review of this Agreement as described below. Any determination of default (or any determination of failure to demonstrate good faith compliance as a part of the annual review) made by City against Developer, or any person who succeeds to Developer with respect to any portion of the Property, shall be based upon written findings supported by substantial evidence in the record as provided in Vacaville Municipal Code §14.17.218.010 and 030. Notwithstanding any other provision of this Agreement to the contrary, remedies for a default by Developer or its successor in interest of any of its obligations hereunder shall not be limited, and City shall have the right to institute legal proceedings to enforce the obligations of Developer or its successor in interest as set forth herein, including the obligation of Developer to indemnify, defend, and save and hold harmless City pursuant to the provisions of this Agreement, with respect to that portion of the Property owned by Developer or its successor in interest and the failure of Developer or its successor in interest to pay fees, taxes, monetary exactions or assessments levied against the Property to pay for the cost of improvements whether levied pursuant to this Agreement or the obligations otherwise stated in a separate agreement or undertaking under the Vested Elements or which is entered into in support of any community facilities or assessment district financing. City acknowledges that an unpaid tax, monetary exaction, or assessment upon the Property may be satisfied through a lien foreclosure, and thus, such unpaid tax, monetary exaction, or assessment shall not be a personal obligation of Developer or its successor in interest, as the case may be. City shall have the right to exercise such remedies as may be available at law or in equity to enforce the conditions stated in any use permit, design review approval, zoning approval, entitlements for use or entitlements for construction of improvements on a specific lot or parcel, or as are provided in the Subdivision Map Act (Gov't Code §§ 66400 et. seq.) or the Vacaville Municipal Code. In addition to having the right to give notice of default and intent to terminate this Agreement, Developer shall have the right to institute legal proceedings to enforce this Agreement in the event of a material default by City and to contest any action taken by City to declare a default hereunder or to enforce a remedy following an alleged default by Developer.

**C. No Waiver.**

Failure or delay in giving notice of default shall not constitute a waiver of default, nor shall it change the time of default. Except as otherwise expressly provided in this Agreement, any failure or delay by a Party in asserting any of its rights or remedies as to any default shall not operate as a waiver of any default or of any such rights or remedies; nor shall it deprive any such Party of its right to institute and maintain any actions or proceedings that it may deem necessary to protect, assert or enforce any such rights or remedies.

**D. Judicial Review.**

Any purported termination of this Agreement for alleged default shall be subject to review in the Superior Court of the County of Solano pursuant to Code Of Civil Procedure § 1094.5(c).

**E. Defaults By City.**

If City does not accept, review, approve or deny Developer's applications for development permits, entitlements or other land use or building approvals in a timely fashion as provided in this Agreement or otherwise defaults in the performance of its obligations under this Agreement, Developer (or the owner of the lot or parcel on the Property to which such default applies) shall have the rights and remedies provided herein or available in law or in equity, including, but without limitation, the right to seek specific performance under the appropriate circumstances.

**F. Obligation and Default Limited to Affected Parcel.**

Notwithstanding anything to the contrary herein contained, where an obligation or duty hereunder to be performed, or a default has occurred only with respect to a particular lot, Phase or parcel, such obligation or duty and any remedy or right of termination arising hereunder as a result of a failure to perform the same shall apply solely to or with respect to such lot, Phase or parcel and affect only the owner thereof and the holders of the interest therein. No obligation, duty or liability will be imposed against or apply to any lot, parcel or Phase with respect to which no default has occurred nor shall any obligation or duty be imposed against or applied to the owner thereof, and any termination of this Agreement shall be only with respect to such lot, parcel or Phase found to be in default.

**G. Copies of Default Notices.**

The owner of any portion of the Property shall have the right to request copies of a notice of default given to the owner of any other portion of the Property. City and any owners of other portions of the Property to whom such request has been made shall honor the same and provide such notice in the manner and to the address specified in the request.

**SECTION 11. ANNUAL REVIEW**

In addition to the terms and conditions of the DDA, good faith compliance by Developer with the provisions of this Agreement shall be subject to annual review pursuant to Government Code § 65865.1 and Title 14 of the Vacaville Municipal Code, utilizing the following procedures:

**A. Submission by Developer; Result of Failure to Submit.**

Review shall be conducted by City's Director of Community Development upon a submission made by Developer of a draft report, accompanied by the fee therefore, pursuant to Vacaville Municipal Code § 14.17.218 not less than forty-five (45) days nor more than sixty (60) days prior to the anniversary date of this Agreement. The Director may refer the review to the Planning Commission pursuant to Vacaville Municipal Code §14.17.218.010 E. Should there be a failure by Developer to submit a draft report and the City has not notified Developer within ninety (90) days following the anniversary date of this Agreement to submit such report, then

this Agreement shall be deemed to have satisfactorily completed the annual review for, and only for, that year.

**B. Showing Required.**

During the review, Developer shall be required to demonstrate good faith compliance with the terms of this Agreement and provide such documents evidencing such compliance as the Director may reasonably request.

**C. Notice of Staff Reports, Opportunity to Respond.**

At least ten (10) days prior to the conduct of such review, the Director shall deliver to Developer a copy of any public staff reports and documents to be used or relied upon in conducting the review. Developer shall be permitted an opportunity to respond to the Director's evaluation of its performance by written and oral testimony at a public hearing to be held before the Director or the Planning Commission, as provided above.

**D. Director's Findings: Appeal.**

At the conclusion of the review, the Director or the Planning Commission, as the case might be, shall make written findings and determinations on the basis of substantial evidence, whether Developer or its successors have complied in good faith with the terms and conditions hereof. Any determination of failure of compliance shall be subject to the notice requirements and cure periods stated in Section 10, above. Any interested person may appeal the decision of the Director or Planning Commission directly to the City Council, such appeal to be filed within ten (10) days after the Director or Planning Commission has rendered its decision in writing or issued a certificate of compliance. The appeal shall otherwise be governed by the provisions of Chapter 14.17.218 of the Vacaville Municipal Code, as may be amended from time to time.

**E. Notice of Termination.**

If the Director determines that Developer (or any person, firm or entity owning a portion of the Property) has not complied with the terms and conditions hereof, and after expiration of any cure period, the Director may recommend to the City Council that a notice of termination be given or modification of this Agreement be made as provided in Government Code §§ 65867 and 65868 and Vacaville Municipal Code § 14.17.218. If notice of termination is given, such notice shall apply solely to that portion of the Property (if less than all) involving the failure of good faith compliance, subject to the cure provisions of Section 10 hereof. If modification of this Agreement is made, the modification shall pertain solely to the provisions hereof as applicable to that portion of the Property (if less than all) involving the failure of good faith compliance.

**F. Notice of Compliance.**

Upon Developer's request, City shall provide Developer with a written notice of compliance, in recordable form, duly executed and acknowledged by City's Director of Community Development, or his/her designee, with respect to any year for which the annual review was conducted or waived and Developer was found or deemed to be in compliance. Any person owning a portion of the Property will have the right to record such notice.

## **SECTION 12. MITIGATION MONITORING**

Compliance with the various mitigation measures specified in the Nut Tree Ranch Policy Plan and determined to be feasible in the EIR certified in connection with such Policy Plan shall be determined as follows:

### **A. Permits and Approvals.**

Compliance with mitigation measures related to a particular development proposal shall be determined when the proposal is considered by City. This provision does not require a comprehensive review of all mitigation measures upon the consideration of such proposal; but only those directly related to the proposal under consideration.

### **B. Annual Review.**

Compliance with mitigation measures shall be considered no less often than annually in connection with the annual review of this Agreement as provided in Section 11, above.

## **SECTION 13. APPLICABLE LAWS; PERMITTED DELAYS; EFFECT OF SUBSEQUENT LAWS**

### **A. Applicable Law.**

This Agreement shall be construed and enforced in accordance with the laws of the State of California.

### **B. Permitted Delays.**

Performance by any Party of its obligations hereunder (other than for payment of money) shall be excused during any period of Excusable Delay as hereinafter defined. For purposes hereof, "Excusable Delay" shall include delay beyond the reasonable control of the Party claiming the delay (and despite the good faith efforts of such Party) including, but not limited to: (i) acts of God, (ii) riots, (iii) strikes, picketing or other labor disputes, (iv) shortages of materials or supplies, (v) damage to work in progress by reason of fire, floods, earthquake or other natural catastrophes, (vi) failure, delay or inability of the other Party to act, (vii) as to Developer only, the failure, delay or inability of City to provide adequate levels of public services, facilities or infrastructure to the Property including, by way of example only, the lack of water to serve the Property, or any part thereof due to drought, (viii) delay caused by restrictions imposed or mandated by other governmental entities, (ix) enactment of conflicting state or federal laws or regulations, (x) judicial decisions or similar basis for excused performance, (xi) litigation brought by a third party attacking the validity of this Agreement, any of the approvals, or any permit, ordinance, entitlement or other action necessary for development of the Property or any portion thereof, shall constitute an Excusable Delay as to the property or owner affected; provided, however, that any Party claiming delay shall promptly notify the other Party (or Parties) of any delay hereunder as soon as possible after the same has become known or should have become known to the Party claiming delay. However, any Excusable Delays agreed to in

accordance with this Agreement are separate and apart from obligations regarding timelines and deadlines stated in the DDA.

**C. Effect of Subsequent Laws.**

If any governmental or quasi-governmental agency other than City adopts any law or regulation ("Law") after the date of this Agreement, that prevents or precludes compliance with one or more provisions of this Agreement and the provisions hereof are not entitled to the status of a vested right as against such Law, then the provisions of this Agreement shall, to the extent feasible, be modified or suspended to the extent necessary to comply with such new Law. Immediately after enactment of any such Law, the Parties shall meet and confer in good faith to determine the feasibility of any such modification or suspension based on the effect such modification or suspension would have on the purposes and intent of this Agreement. Developer shall have the right to contest such Law at Developer's expense and seek a declaration that it does not affect or diminish the provisions hereof. If any such challenge is successful, this Agreement shall remain unmodified and in full force and effect.

**SECTION 14. COOPERATION OF CITY; PROCESSING OF PERMITS**

**A. Other Governmental Permits.**

City shall cooperate with Developer in its endeavors to obtain any other permits and approvals as may be reasonably required from other governmental or quasi-governmental agencies having jurisdiction over the Property or portions thereof (such as, for example, but not by way of limitation, public utilities or utility districts and agencies having jurisdiction over wetlands and air quality issues) and shall, from time to time, at the request of Developer join with Developer in the execution of such applications as may be required by such other agency, provided such participation does not expose City to un-reimbursable costs, liabilities or expenses. In the event such permits and approvals necessitate amendments to this Agreement and/or one or more of the approvals granted by City, City shall not unreasonably withhold approval of such amendment.

**B. Procedure for Review of Applications by Director of Community Development.**

The Nut Tree Ranch Policy Plan, as may be amended from time to time, delegates various implementing decisions for consideration by City's Director of Community Development or his or her designee.

**SECTION 15. MORTGAGEE PROTECTION**

The Parties hereto agree that this Agreement shall not prevent or limit Developer's right to encumber the Property when conveyed to Developer or any portion thereof or any improvement thereon by any mortgage, deed of trust or other security device given to secure financing to develop the Property or any portion thereof and that such mortgage, deed of trust or any other financial security device recorded subsequent to the recording of this Agreement or the DDA is subordinate to this Agreement and the DDA. Any person holding a mortgage, deed of trust or other security device on all or any portion of the Property made in good faith and for value (a "Mortgagee") shall be entitled to the following rights and privileges:

**A. Impairment of Mortgage or Deed of Trust.**

Neither entering into this Agreement nor a breach of this Agreement shall defeat, render invalid, diminish, or impair the lien of any mortgage, deed of trust or other security device on the Property or portion thereof made in good faith and for value.

**B. Notice of Default to Mortgagee.**

The Mortgagee may submit a request in writing to City in the manner specified herein for giving notices, to receive written notification from City of any default by Developer in the performance of Developer's obligations under this Agreement.

**C. Right of Mortgagee to Cure.**

If City timely receives a request from a Mortgagee requesting notice of default by Developer, City shall notify Mortgagee within fifteen (15) days of sending the notice of default to Developer. Mortgagee shall have the right, but not the obligation, to cure the default during the remaining cure period allowed such Party under this Agreement, plus an additional ninety (90) days if, in order to cure such default, it is necessary for Mortgagee to obtain possession of the Property through appointment of a receiver or other legal process.

**D. Liability for Past Defaults or Obligations.**

Any Mortgagee, including the successful bidder at a foreclosure sale, who purchases the Property, or any part thereof, pursuant to foreclosure, shall take the Property, or any part thereof, subject to the terms of this Agreement; provided, however, in no event shall such Mortgagee be liable for any defaults or monetary obligations of Developer arising prior to acquisition of title to the Property by such Mortgagee; and provided further, in no event shall any such Mortgagee or its successors or assigns be entitled to a building permit or occupancy certificate until all fees and other monetary obligations due under this Agreement have been paid to City.

**SECTION 16. TRANSFERS AND ASSIGNMENTS**

**A. Right to Assign.**

Developer shall have the right to sell, assign or transfer its rights to any portion of the Property subject to the terms and conditions of this Agreement and the DDA, including, but not limited to, Article 9 of the DDA. If there is a conflict, the terms and conditions of the DDA shall prevail. All of Developer's rights, duties and obligations under this Agreement with respect to the portion of the Property so sold, transferred or assigned shall pass to the person acquiring such fee simple title. As used in this Agreement, "Developer" shall include the entities so identified herein and its successors in interest.

**B. Release Upon Transfer.**

Upon sale, transfer or assignment, in whole or in part of the Property or portion thereof, Developer shall be released from its obligations with respect to the property conveyed arising



subsequent to the effective date of such conveyance provided: (i) Developer (or the transferring owner) was not in default of this Agreement at the time of conveyance, (ii) Developer has provided to City notice of such conveyance, and (iii) with respect to sale or transfer of any portion of the Property that has not been fully improved, the transferee executes and delivers to City a written agreement in which: (A) the name and address of the transferee is set forth, and (B) the transferee expressly assumes the obligations of Developer under this Agreement with respect to the portion conveyed; provided, however, that Developer shall not be relieved of any obligation for dedication or conveyance of land required to be conveyed or dedicated pursuant to the Planned Development. Failure to deliver a written assumption agreement hereunder shall not nullify, or negate, the liability of any transferee pursuant to the provisions of this Development Agreement. Nothing herein contained shall be deemed to grant to City discretion to approve or deny any such transfer provided such transfer conforms to the requirements of this Agreement and the DDA.

**C. Approval; Right of Amendment; Supplements Establishing Specific Rights and Restrictions; Review.**

The grant of various approvals and consents provided for herein shall not constitute an amendment hereof, nor shall ministerial acts of City staff implementing the provisions hereof, including granting minor modifications to approved plans, the Planned Development or any approval granted hereunder, including approval of minor modifications to approved plans, shall constitute such an amendment.

No owner of less than all of the Property shall have the right to seek or consent to amendment of the terms hereof, to make an election hereunder, to terminate this Agreement or enter into an agreement to rescind any provisions hereof in a manner that is binding upon, increases the burdens upon or reduces the rights appurtenant to any of the Property other than that owned in fee simple by said owner.

The purchaser of any portion of the Property may request, and City shall have the right in its sole discretion to grant or conditionally grant an amendment hereto by its City Council that is consistent with the Planned Development, which may establish special restrictions or conditions with respect to such portion of the Property based upon the proposed use thereof, so long as such action does not increase the burdens upon or reduce the rights for other portions of the Property.

City's consideration of such amendment shall be limited to that portion of the Property to which the amendment applies and the owner thereof. No such amendment shall extend the benefits of this Agreement to any other portion of the Property on terms more favorable than those provided to Developer hereunder, including, but without limitation, provisions requiring dedication of open space or payment of in-lieu fees as an equivalent thereto.

Should this Agreement be amended to include any property that is currently not subject to this Agreement, such property shall be subject to participating in any community facilities or assessment district(s) created to fund the design, construction and maintenance of the infrastructure, landscaping and other improvements as if such property had been part of this Agreement when first executed. In becoming a part of such district(s), said property shall be assessed an additional assessment to compensate for the costs previously borne by the other assessed properties in order to put the newly-annexed property in an equal position with the

other properties had it been part of said district(s) (including planning and formation costs) from its inception.

**D. No Third Parties Benefited.**

No third party who is not a successor or assign of a Party hereto or who has not become a Party by duly adopted amendment hereof may claim the benefits of any provision hereof.

**E. Covenants Run with the Land.**

All of the provisions, agreements, rights, powers, standards, terms, covenants and obligations of this Agreement shall be binding upon the Parties and their respective heirs, successors (by merger, consolidation, or otherwise) and assigns, devisees, administrators, representatives, lessees, and all other persons or entities acquiring the Property, or any portion thereof, or any interest therein, whether by sale, operation of law or in any manner whatsoever, and shall inure to the benefit of the Parties and their respective heirs, successors (by merger, consolidation or otherwise) and assigns. All other provisions of this Agreement shall be enforceable during the term hereof as equitable servitudes and constitute covenants running with the land pursuant to applicable law, including, but not limited to Section 1468 of the Civil Code of the State of California.

**SECTION 17. GENERAL PROVISIONS**

**A. Incorporation of Recitals.**

The recitals set forth above, and all defined terms set forth in such recitals and in the introductory paragraph preceding the recitals, are incorporated herein as though set forth in full.

**B. Limitation on Effect of Agreement.**

Except as expressly provided for in this Agreement to the contrary, Developer and the Property are subject to all rules, regulations, ordinances, procedures, standards, uniform codes, requirements, costs, exactions and processes of City applicable to development of property within City as the same are in effect at the time Developer seeks any land development approval including, but not limited to, subdivision of the Property, design review, zoning changes, building permits, or construction of on or off-site infrastructure.

**C. Covenants.**

The provisions of this Agreement shall constitute covenants or servitudes which shall run with the land comprising the Property, and the burdens and benefits of this Agreement shall bind and inure to all estates and interests in the Property and all successors in interest to Developer. This provision shall not, however, nullify or affect any separate covenants, conditions and restrictions which otherwise affect such parcel or any land use regulations affecting such parcel as provided in this Agreement.

**D. Amendment of Agreement.**

This Agreement may be amended from time to time by mutual consent of the Parties or their successors in interest, in accordance with the provisions of Government Code Section 65867 and 65688 and Division 14.17 of the Municipal Code, provided that:

(i) Procedural Exemptions. Any amendment not affecting the term of this Agreement, permitted uses of the Property, provisions for the reservation or dedication of land, the conditions, terms, restrictions and requirements relating to subsequent discretionary approvals of City, or monetary exactions of Developer, shall be considered an "Administrative Amendment" that may be executed on behalf of City by City's Director of Community Development and shall not require notice or public hearing before the Parties may execute an amendment hereto. However, when in the judgment of any member of the City Council or the Director of Community Development that notice and public hearing on any proposed Administrative Amendment would be appropriate, then there shall be a noticed public hearing on said Administrative Amendment.

(ii) Exemption for Amendments of City Land Use Regulations. Any amendment of the City land use regulations including, but not limited to, the General Plan, the Nut Tree Ranch Policy Plan and City's Zoning Ordinances, shall not require an amendment to this Agreement. Instead, any such amendment shall be deemed to be incorporated into this Agreement at the time that such amendment is approved so long as such amendment is consistent with this Agreement.

(iii) The Planned Development may not be amended except by amendment of this Agreement; and, in the case of amendments affecting only portions of the Property, only the consent of the owner of such portions shall be required for such amendment so long as the amendment does not diminish the rights appurtenant to or increase the burdens upon any other portion of the Property.

**E. Project is a Private Undertaking.**

The development proposed to be undertaken by Developer on the Property is a private development. Except for that portion thereof to be devoted to public improvements to be constructed by Developer in accordance with the Planned Development, City has no interest in, responsibility for or duty to any persons concerning any of said improvements, and Developer shall exercise full dominion and control over the Property, subject to the limitations and obligations of Developer under this Agreement.

**F. Hold Harmless; Indemnification of City and Agency.**

Developer shall hold and save City and Agency and their officers and employees, harmless and shall indemnify and defend them of and from any and all claim, loss, cost, damage, injury or expense, arising out of or in any way related to injury to or death of persons or damage to property that may arise by reason of the physical development of the Property by Developer pursuant to this Agreement or by any activity of City and/or Agency, whether caused by joint negligence of the City and/or Agency, their officers or employees; provided, however, that the foregoing obligation of Developer shall not include (i) suits and actions brought by Developer by

reason of City's and/or Agency's default or alleged default hereunder, or (ii) suits and actions arising from the willful misconduct of City and/or Agency, their officers or employees.

**G. Cooperation in the Event of Legal Challenge.**

In the event of any administrative, legal or equitable action or other proceeding instituted by any person not a party to this Agreement challenging the validity of any Project Approval or Subsequent Approval, the Parties shall cooperate in defending such action or proceeding. City shall promptly notify Developer of any such action against City. If City fails promptly to notify Developer of any legal action against City or if City fails to cooperate in the defense, Developer shall not thereafter be responsible for City's defense. The Parties shall use their best efforts to select mutually agreeable legal defense to defend such action, and Developer shall pay the fees and expenses for such legal counsel; provided, however, that such fees and expenses shall not include those paid to City staff and shall exclude, without limitation, City Attorney and other City staff employed by City. Developer's obligation to pay for legal defense shall not extend to fees incurred on appeal unless otherwise authorized by Developer. In the event City and Developer are unable to select mutually agreeable legal counsel to defend such action or proceeding, each Party may select its own legal counsel at its own expense. City shall not reject any reasonable offer of settlement; if City rejects a settlement acceptable to Developer, City may continue to defend such action at its own cost.

**H. Notices.**

Any notice or communication required hereunder between City, Agency and Developer shall be in writing, and may be given either personally or by registered or certified mail (return receipt requested). If given by registered or certified mail, such notice or communication shall be deemed to have been given and received on the first to occur of: (i) actual receipt by the Party to whom notice is sent; or (ii) five (5) days after a registered or certified letter containing such notice, properly addressed, with postage prepaid, is deposited in the United States mail. If personally delivered, a notice shall be deemed to have been given when delivered to the Party to whom it is addressed. Any Party hereto, and any person who acquires a portion of the Property, may at any time, by giving ten (10) days written notice to the other Parties hereto, designate any other address in substitution of the address to which such notice or communication shall be given. Such notices or communications shall be given to the Parties at their addresses set forth below:

If to City, to:

Community Development Director  
City of Vacaville  
650 Merchant Street  
Vacaville, California 95688

If to Agency, to:

Housing and Redevelopment Director  
City of Vacaville  
650 Merchant Street  
Vacaville, California 95688

With copies to:

City Attorney/Agency Counsel  
City of Vacaville  
650 Merchant Street  
Vacaville, California 95688

If to Developer, to:

Nut Tree Associates, LLC  
101 Larkspur Landing Circle, Suite 327  
Larkspur, CA 94939  
Attention: Roger Snell

With a copy to:

Rockwood Capital Real Estate Fund IV, L.P.  
Two Embarcadero Center, 23<sup>rd</sup> Floor  
San Francisco, CA 94111  
Attention: Donald L. Clark

**I. No Joint Venture or Partnership.**

Nothing contained in this Agreement or in any document executed in connection with this Agreement shall be construed as creating a joint venture or partnership between City, Agency and Developer.

**J. Severability.**

If any term, provision, covenant, or condition of this Agreement is held in a final disposition by a court of competent jurisdiction to be invalid, void or unenforceable but the remainder of this Agreement can be enforced without failure of material consideration to any Party, then this Agreement shall remain in full force and effect, unless terminated by mutual consent of the Parties, or unless the rights and obligations of the Parties have been materially altered or abridged by such holding or determination.

**K. Interpretation.**

To the maximum extent possible, this Agreement shall be construed to provide binding effect to the Vested Elements, to facilitate use of the Property as therein contemplated and to allow development to proceed upon all of the terms and conditions applicable thereto, including, without limitation, public improvements to be constructed and public areas to be dedicated.

**L. Completion or Revocation.**

Upon completion of performance by the Parties or termination of this Agreement, a written statement acknowledging such completion or termination, signed by the appropriate agents of City and Developer, shall be recorded in the Office of the Recorder of the County of Solano, California.

**M. Estoppel Certificate.**

Either Party may, at any time, and from time to time, deliver written notice to the other Party requesting such Party to certify in writing that, to the best knowledge of the certifying Party: (i) this Agreement is in full force and effect and a binding obligation of the Parties, (ii) this Agreement has not been amended or modified except by an amendment in writing, and if so amended, identifying all such amendments, and (iii) the requesting Party is not in default in the performance of its obligations under this Agreement or, if in default, a statement describing the nature of such default. A Party receiving a request hereunder shall execute and return such certificate or give a written detailed response explaining why it will not do so within thirty (30) days following the receipt thereof. Each Party acknowledges that such a certificate may be relied upon by third parties acting in good faith. A certificate provided by City establishing the status of this Agreement with respect to any lot or parcel shall be in recordable form and may be recorded with respect to the affected lot or parcel at the expense of the recording Party.

**N. Construction.**

All Parties have been represented by counsel in the preparation of this Agreement and no presumption or rule that ambiguity shall be construed against a drafting Party shall apply to interpretation or enforcement hereof. Captions on sections and subsections are provided for convenience only and shall not be deemed to limit, amend or affect the meaning of the provision to which they pertain.

**O. Counterpart Execution.**

This Agreement may be executed in any number of counterparts and shall be deemed duly executed when each of the Parties has executed such a counterpart.

**P. Time.**

Time is of the essence of each and every provision hereof.

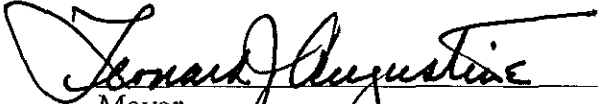
IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year first above written.

"CITY"/"AGENCY"

CITY OF VACAVILLE, a  
municipal corporation

Approved as to form:

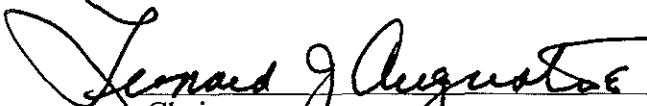
By:

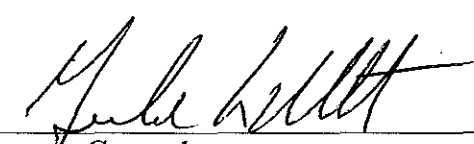
  
\_\_\_\_\_  
Mayor  
Leonard Augustine  
VACAVILLE REDEVELOPMENT  
AGENCY, a public body, corporate and  
politic

  
\_\_\_\_\_  
City Attorney

Approved as to form:

By:

  
\_\_\_\_\_  
Chairman  
Leonard Augustine

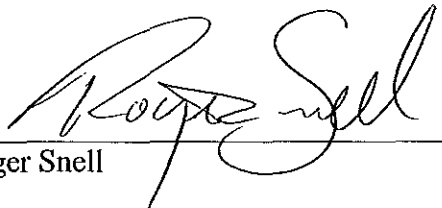
  
\_\_\_\_\_  
Agency Counsel

"DEVELOPER"

NUT TREE ASSOCIATES, LLC, a  
Delaware limited liability company  
By Snell & Co. LLC, a California limited  
liability company, its managing member

Approved as to form:  
Paul, Hastings, Janofsky & Walker LLP

By:

  
\_\_\_\_\_  
Roger Snell

By:

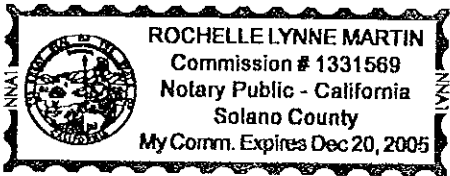
\_\_\_\_\_  
Charles V. Thornton,  
Nut Tree Associates, LLC Counsel

**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**

State of California }  
 County of Solano } ss.

On 10/12/04, before me, Rochelle Lynne Martin, Notary Public  
Date Name and Title of Officer (e.g., "Jane Doe, Notary Public")  
 personally appeared Leonard J. Augustine,  
Name(s) of Signer(s)

- personally known to me
- proved to me on the basis of satisfactory evidence



to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.  
Rochelle Lynne Martin  
Signature of Notary Public

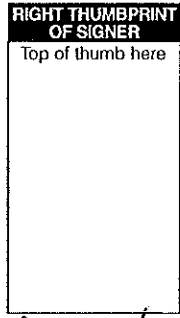
Place Notary Seal Above

**OPTIONAL**

*Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.*

**Description of Attached Document**  
 Title or Type of Document: Development Agreement - Nut Tree Development  
 Document Date: September 29, 2004 Number of Pages: \_\_\_\_\_  
 Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer**  
 Signer's Name: Leonard J. Augustine  
 Individual  
 Corporate Officer — Title(s): \_\_\_\_\_  
 Partner —  Limited  General  
 Attorney in Fact  
 Trustee  
 Guardian or Conservator  
 Other: \_\_\_\_\_



Signer Is Representing: City of Vacaville & City of Vacaville Redevelopment Agency



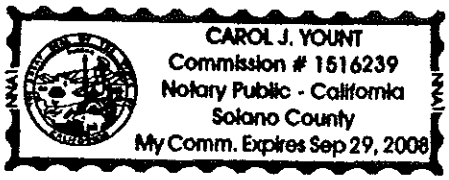
**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**

State of California }  
County of SOLANO } ss.

On OCT. 28, 2004 before me, CAROL J. YOUNT, NOTARY PUBLIC  
Date Name and Title of Officer (e.g., "Jane Doe, Notary Public")

personally appeared ROGER SWELL  
Name(s) of Signer(s)

- personally known to me
- proved to me on the basis of satisfactory evidence



to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.  
Carol J. Yount  
Signature of Notary Public

**OPTIONAL**

*Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.*

**Description of Attached Document**

Title or Type of Document: \_\_\_\_\_

Document Date: \_\_\_\_\_ Number of Pages: \_\_\_\_\_

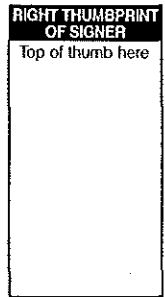
Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer**

Signer's Name: \_\_\_\_\_

- Individual
- Corporate Officer — Title(s): \_\_\_\_\_
- Partner —  Limited  General
- Attorney-in-Fact
- Trustee
- Guardian or Conservator
- Other: \_\_\_\_\_

Signer Is Representing: \_\_\_\_\_




IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year first above written.

"CITY"/"AGENCY"

CITY OF VACAVILLE, a  
municipal corporation

Approved as to form:

By:

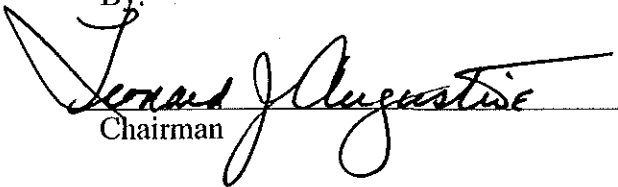
  
\_\_\_\_\_  
Mayor

\_\_\_\_\_  
City Attorney

VACAVILLE REDEVELOPMENT  
AGENCY, a public body, corporate and  
politic

Approved as to form:

By:

  
\_\_\_\_\_  
Chairman

\_\_\_\_\_  
Agency Counsel

"DEVELOPER"

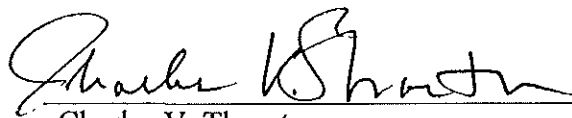
NUT TREE ASSOCIATES, LLC, a  
Delaware limited liability company  
By Snell & Co. LLC, a California limited  
liability company, its managing member

Approved as to form:  
Paul, Hastings, Janofsky & Walker LLP

By:

\_\_\_\_\_  
Roger Snell

By:

  
\_\_\_\_\_  
Charles V. Thornton,  
Nut Tree Associates, LLC Counsel

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year first above written.

**"CITY"/ "AGENCY"**

CITY OF VACAVILLE, a  
municipal corporation

Approved as to form:

By:

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
City Attorney

VACAVILLE REDEVELOPMENT  
AGENCY, a public body, corporate and  
politic

Approved as to form:

By:

\_\_\_\_\_  
Chairman

\_\_\_\_\_  
Agency Counsel

**"DEVELOPER"**

NUT TREE ASSOCIATES, LLC, a  
Delaware limited liability company  
By Snell & Co. LLC, a California limited  
liability company, its managing member

Approved as to form:  
Paul, Hastings, Janofsky & Walker LLP

By:

By:

\_\_\_\_\_  
Roger Snell


  
\_\_\_\_\_  
Charles V. Thornton,  
Nut Tree Associates, LLC Counsel

EXHIBIT 1

DISPOSITION AND DEVELOPMENT AGREEMENT  
(DDA)