CITY OF WHEATLAND

CITY COUNCIL MEETING
STAFF REPORT

July 23, 2024

SUBJECT: Introduce and Waive First Reading of an Ordinance Approving the City of Wheatland Development Agreement Concerning Avoca Orchards 1 and 2

PREPARED BY: Tim Raney, Community Development Director

Recommendation

Staff recommends that the Wheatland City Council conduct a public hearing on the proposed Development Agreement, and upon close of the public hearing, introduce and waive the first reading of the attached ordinance approving the City of Wheatland Development Agreement Concerning Avoca Orchards 1 and 2.

Background

As part of the city's effort to establish funding for the General Plan Update and address the regional drainage issues in the western area of the city, staff has been in discussion with the land owner Avoca Wheatland, LLC. City staff and the representative of Avoca Wheatland, LLC, Peter Meier, have agreed on terms for a proposed Development Agreement for the city's consideration.

The Avoca Wheatland, LLC currently controls approximately 385 acres of land outside the current Wheatland city limits, which currently include active agricultural operations. These properties have been identified as Avoca Orchard 1, Avoca Orchard 2, and Avoca Orchard 3 (see Attachment 1). Avoca Orchard 3 is located to the northwest of the existing city limits and totals approximately 86 acres. Avoca Orchard 3 has been recently approved for prezoning and annexation by the City of Wheatland and is currently under consideration by the Yuba County Local Agency Formation Commission (LAFCo). As a result, Avoca Orchard 3 is not included in this proposed Development Agreement.

Avoca Orchard 1 is located to the southwest of the existing city limits adjacent the Bear River and totals approximately 123 acres. Avoca Orchard 2 is located to the west of the existing city limits and totals approximately 176 acres.

Per state law, the proposed Development Agreement went to the Planning Commission for review prior to City Council consideration. On March 19, 2024 the Planning Commission adopted a Resolution recommending the Wheatland City Council approve the City of Wheatland Development Agreement Concerning Avoca Orchards 1 and 2.

Discussion

City staff has been coordinating with the local Reclamation Districts for several years to address the drainage issue in the western area of the City. As new development occurs in this area, the concerns increase. City staff has been considering possible solutions and the development of a new Storm Water Detention and Pumping facility near the Bear River. City staff identified Avoca Orchard 1 as the preferred location.

City staff has conducted negotiations with Avoca Wheatland, LLC to prepare the proposed Development Agreement that benefits both the City of Wheatland and the land owner. The proposed Development Agreement includes the following deal points:

- Avoca Wheatland, LLC will provide $50,000 to the city towards the cost of preparing the new City of Wheatland Storm Water Drainage Master Plan.
- Avoca Wheatland, LLC will dedicate up to 20 acres of Avoca Orchard 1 for regional storm water detention and pumping.
- Avoca Wheatland, LLC would receive credits and reimbursements equivalent to the market value of the land designated for storm water detention and pumping to be used to offset development impact fees for storm water drainage, public park fees and other city development fees.
- The City of Wheatland will consider Avoca Orchard 2 as part of the City's future development potential in the upcoming General Plan Update and retain the existing land use designations.

The proposed Development Agreement states the $50,000 towards the City of Wheatland Storm Water Drainage Master Plan shall be provided to the city within 30 days of the recordation of this proposed Development Agreement. The exact location of the proposed 20 acres for the development of a Storm Water Detention and Pumping facility in Avoca Orchard 1 shall be determined by the City of Wheatland and Avoca Wheatland, LLC. This proposed storm water master plan will identify the needed facilities to address the city's and the local Reclamation District's drainage concerns. A storm water master plan is a necessary component of the General Plan Update.

It should be noted that minor edits and refinements have occurred since the March 19, 2024 Planning Commission meeting; however, deal points remain the same.

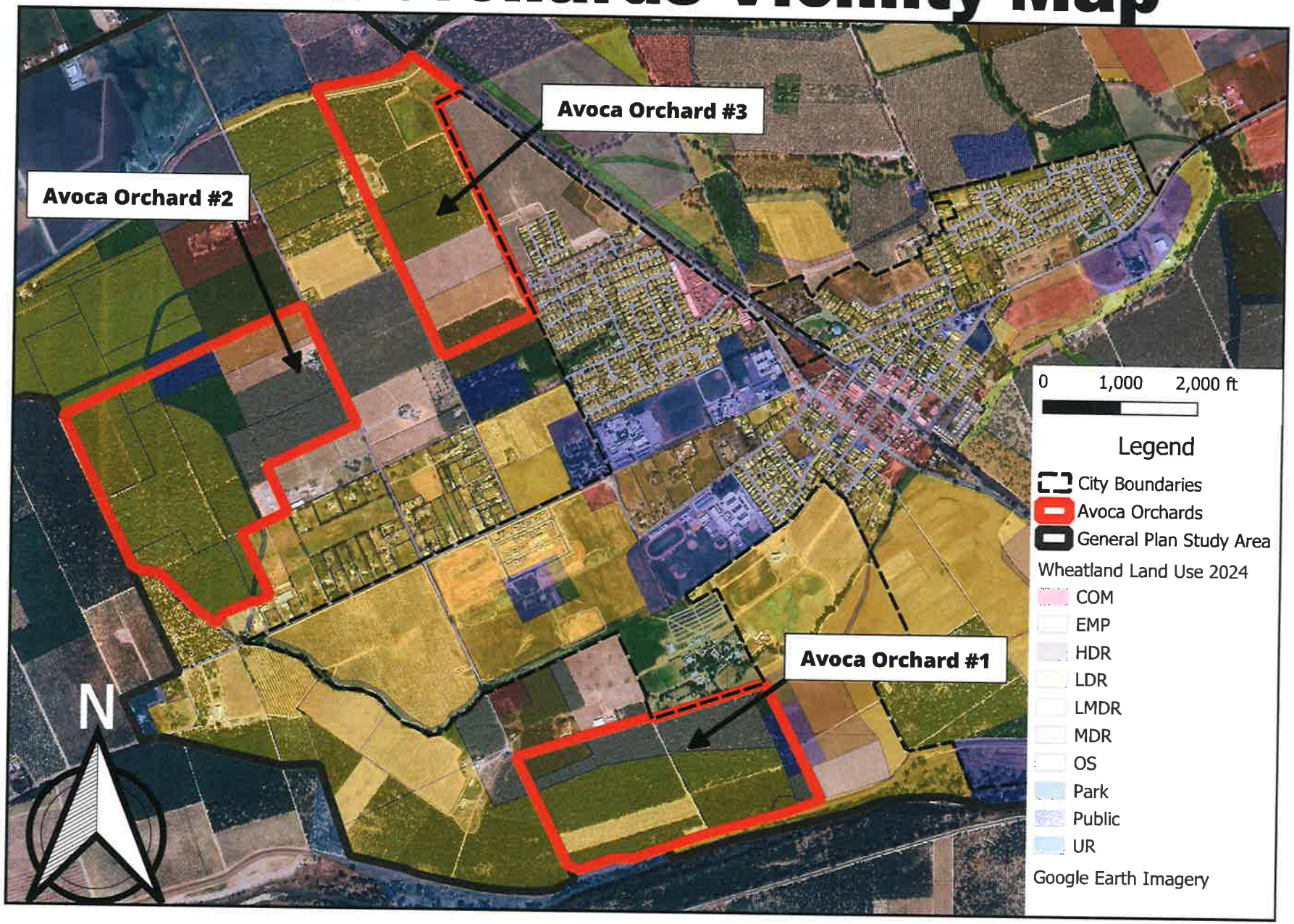
CEQA Review

Staff has determined that the actions considered and agreed to in this draft Development Agreement are exempt from review under the California Environmental Quality Act (CEQA). The proposed Development Agreement is preliminary in nature and does not advance any development actions that may result in an environmental impact prior to further compliance with CEQA, does not bind the City to any definite course of action regarding any party's use of the property prior to compliance with CEQA, and does not restrict the City or any other CEQA lead agency from considering any feasible mitigation measures and alternatives. Any subsequent development action on the property will require the necessary review under CEQA, and shall comply with any additional state or federal requirements

Attachments

1. Vicinity Map
2. Ordinance
3. City of Wheatland Development Agreement Concerning Avoca Orchards 1 and 2

Avoca Orchards Vicinity Map



RANEY PLANNING & MANAGEMENT, INC. 25 years

ORDINANCE NO. 499

AN ORDINANCE OF THE CITY OF WHEATLAND THE CITY OF WHEATLAND DEVELOPMENT AGREEMENT CONCERNING AVOCA ORCHARDS 1 AND 2

The City Council of the City of Wheatland does ordain as follows:

Section 1. Purpose and Authority. The purpose of this Ordinance is to approve City of Wheatland Development Agreement Concerning Avoca Orchards 1 and 2. This ordinance is adopted pursuant to Government Code sections 65864 through 65869.5 and other applicable law.

Section 2. Findings. The City Council hereby finds and declares:

A. For reasons listed in the recitals of the Agreement, the City of Wheatland and Avoca Wheatland, LLC desire to enter into a Development Agreement.

B. The Planning Commission conducted a duly noticed public hearing concerning the proposed Development Agreement on March 19, 2024, and recommended City Council approval of City of Wheatland Development Agreement, a copy of which is attached as Exhibit 1.

C. The City Council has conducted a duly noticed public hearing in accordance with law, and now desires to approve City of Wheatland Development Agreement.

D. The City Council has evaluated the Agreement and the City General Plan and has determined that the Agreement is consistent with the General Plan.

E. The City Council has determined that the actions considered and agreed to in this Agreement are exempt from review under the California Environmental Quality Act ("CEQA"). This Agreement is preliminary in nature and does not advance any development actions that may result in an environmental impact prior to further compliance with CEQA, does not bind the City to any definite course of action regarding any party's use of the Property prior to compliance with CEQA, and does not restrict the City or any other CEQA lead agency from considering any feasible mitigation measures and alternatives. Any subsequent development action on the Property will require the necessary review under CEQA, and shall comply with any additional state or federal requirements.

F. The Agreement is consistent with and conforms to the requirements of Government Code Sections 65864-65869.5.

G. The Agreement is consistent with the provisions of the City Council Establishing Procedures for Consideration of Development Agreements.

Section 3. Approval of Development Agreement. The City Council hereby approves City of Wheatland Development Agreement attached hereto as Exhibit 1 and incorporated herein by reference. The City Manager is authorized and directed to execute the Agreement on behalf of the City of Wheatland.

The City Clerk shall cause the Development Agreement to be recorded in the Official Records of Yuba County upon execution, but in no event prior to the effective date of this ordinance.

Section 4. Effective Date and Notice. This ordinance shall take effect thirty (30) days after its adoption. Within fifteen (15) days from the passage of this ordinance, the City Clerk shall post a copy of it in at least three public places in the City of Wheatland.

INTRODUCED by the City Council on the ___ day of _____ 2024.

PASSED AND ADOPTED by the City Council of the City of Wheatland this ___ day of _____, 2024 by the following vote:

AYES:
NOES:
ABSENT:
ABSTAIN:

_____
MAYOR

Attest:

_____
Lisa J. Thomason, City Clerk

Recording requested by, and
when recorded return to:

City of Wheatland
111 C Street
Wheatland, CA 95692

Exempt from recording fees
(Government Code sections 6103 & 27383)

APNs: _____

CITY OF WHEATLAND
DEVELOPMENT AGREEMENT
CONCERNING AVOCA ORCHARDS 1 AND 2

This Development Agreement (the "Agreement") is made and entered into this _____, 2024, by and between the City of Wheatland, a general law city ("City"), and Avoca Wheatland, LLC, a California limited liability company ("Developer"), (collectively the "Parties"), who agree as follows:

1. RECITALS. This Agreement is made with reference to the following background recitals:

1.1. Authorization. To strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic risk of development, the California Legislature adopted Government Code section 65864 et seq. (the "Development Agreement Law"), which authorizes the City and a property owner to enter into a development agreement, establishing certain development rights in the real property that is the subject of a development project application. This Agreement is entered into pursuant to the authority of the Development Agreement Law.

1.2. Property. The subject of this Agreement is the development of those certain two parcels of land located outside the City limits, consisting of approximately 123± acres ("Orchard 1") and 176.6± acres ("Orchard 2"), respectively (collectively, the "Property") as described in Exhibit A, attached hereto and incorporated herein by this reference. Developer owns the Property in fee.

1.3. California Environmental Quality Act. The City Council has determined that the actions considered and agreed to in this Agreement are exempt from review under the California Environmental Quality Act ("CEQA"). This Agreement is preliminary in nature and does not advance any development actions that may result in an environmental impact prior to further compliance with CEQA, does not bind the City to any definite course of action regarding any party's use of the Property prior to compliance with CEQA, and does not restrict the City or any other CEQA lead agency from considering any feasible mitigation measures and alternatives. Any subsequent development action on the Property will require the necessary review under CEQA, and shall comply with any additional state or federal requirements.

1.4. Developer's Faithful Performance. The Parties acknowledge and agree that Developer's performance in contributing funds and dedicating land for the creation of certain public improvements will fulfill substantial public needs. The City acknowledges and agrees that there is good and valuable consideration to the City resulting from Developer's assurances and faithful performance of this Agreement, and that the same is in balance with the benefits conferred by the City on the Project. The Parties further acknowledge and agree that the exchanged consideration is fair, just and reasonable.

1.5. Developer's Future Initiatives. Subject to the terms of this Agreement, Developer reserves the right to develop the Property in a manner and at a rate it deems appropriate within the exercise of its subjective business judgment. Any such development shall be in accordance with the City's General Plan terms and development standards in effect at the commencement of this Agreement.

2. GENERAL PROVISIONS.

2.1. Property Description and Binding Covenants. The Property is that real property described and shown in Exhibit A. It is intended and determined the provisions of this Agreement shall constitute covenants that shall run with the Property for the term of the Agreement and the benefits and burdens of this Agreement shall bind and inure to all successors in interest to the Parties.

2.2. Term.

2.2.1. Commencement; Expiration. The term of this Agreement shall commence upon the approval of the City's 2024 General Plan update and continue for a period of 10 years thereafter, unless the term is terminated, modified or extended as provided by this Agreement. If a federal or state agency with jurisdiction issues an order that prohibits development of the Project, then the term of this Agreement shall be extended for the period of time that the order and prohibition are in effect. If there is uncertainty regarding the date of final conclusion of any litigation or the time period that a federal or state agency order and prohibition are in effect, then that uncertainty shall be decided by the City Attorney.

2.2.2. Sale of Lots; Termination. Notwithstanding the contents of section 2.2.1, if a final map is approved for the Property during the term of this Agreement, the terms of the Agreement shall apply to each subdivided lot, as designated in the final map, until the last lot is sold. Upon the sale of the last lot, the terms shall terminate automatically, without any further action by any party or need to record any additional document.

2.2.3. Challenge to Agreement; Termination. If litigation is filed against City and/or Developer challenging the approval of this Agreement and/or the Entitlements, Developer may terminate this Agreement by providing 60-day written notice to City. If Developer does not terminate the Agreement under such circumstances, the term of this Agreement shall be extended for the period of time from the date of the filing of the complaint until the date that the litigation is dismissed or otherwise finally concluded.

2.2.4. City Termination; Failure to Dedicate. If Developer fails to fulfill its obligations under this Agreement, including failing to dedicate any property or facilities required to be dedicated to City use as a condition of development, City shall may terminate this Agreement by providing 60-day written notice to Developer.

2.2.5. Amendment of Agreement. This Agreement may be amended from time to time by mutual written consent of the Parties in accordance with the Development Agreement Law. Amendment by City requires approval by the City Council of City. If the proposed amendment affects less than the entire Property, then such amendment need only be approved by the owner(s) in fee of the portion(s) of the Property that is(are) subject to or affected by such amendment.

2.2.6. Recordation. Except when this Agreement is automatically terminated due to the expiration of its term or terminated by the Developer under section 2.2.3, the City shall cause any amendment to it or any other termination of it to be recorded, at Developer's expense, with the County Recorder within 10 days of the date of the amendment or termination becoming effective. Any amendment or termination of the Agreement to be recorded that affects less than all the Property shall describe with specificity the portion that is the subject of such amendment or termination.

3. DEVELOPER'S OBLIGATIONS.

3.1. Storm Water Drainage Plan Payment. Within 30 days of the recordation of this Agreement by City against the Property, Developer shall pay $50,000 to City for City's use in preparing a drainage study for the City of Wheatland Storm Water Drainage Plan ("Drainage Plan").

3.2. Storm Water Detention Facility Dedication. Developer shall dedicate up to 20 acres on Orchard 1 for the development of a Storm Water Detention and Pumping facility ("Detention Facility"). The Parties shall utilize their reasonable best efforts to design the Detention Facility in a manner that maximizes the development capacity of Orchard 1 and, thus, maximizes the size of the parcel remaining for the future development. In consultation with Developer, City shall determine the location of the Detention Facility within one year of the commencement of this Agreement. Developer shall maintain approval authority over the location of the Detention Facility, but shall not unreasonably withhold, condition, or delay such approval. Upon the completion of the Detention Facility, City may utilize the facility to serve the Property or any other property desired by City.

3.3. Storm Water Detention Facility Dedication Submittals. Developer shall complete and submit the necessary documentation for the Orchard 1 Tentative Parcel Map and Annexation Application of Orchard 1 to the City by April 30, 2025. Once the City

approves the Tentative Parcel Map and Yuba Local Agency Formation Commission approves the Annexation Application, Developer shall record the necessary documents with the County Recorder. Upon the recordation of the necessary documents and the execution of a separate Fee Credit Agreement between the Parties, Developer shall dedicate to City the property rights necessary to complete the Detention Facility in an instrument as agreed upon in writing by the Parties.

3.4. Liens, Encumbrances, Covenants, Conditions and Restrictions. Except as otherwise approved by City or provided for by this Agreement, all property to be dedicated or conveyed in fee to City pursuant to this Agreement shall be free of any liens, encumbrances, special taxes, special assessments, deed covenants, conditions and restrictions, or hazardous materials. For each such conveyance, Developer shall provide to City, at Developer's expense, a current preliminary title report and Phase 1 preliminary site assessment for hazardous materials in a form approved by the City Attorney. Any policy of title insurance required by City shall be at City's expense.

3.5. Developer's Payment Obligations. Developer's obligations, including any and all processing fees in pursuit of the terms of this Agreement or the future development contemplated within this Agreement, shall be at Developer's sole cost and expense, unless expressly provided otherwise.

4. CITY OBLIGATIONS.

4.1. General Plan Update. Upon the execution of this Agreement, City agrees to utilize its reasonable best efforts to complete the 2024 General Plan update.

4.2. Credit Reimbursement. Upon City's receipt of a dedication of the Detention Facility as contemplated by section 3.2, City agrees to provide Developer non-refundable future developer credits equivalent to the fair market value of the land dedicated by Developer for the Detention Facility. The credits, as designated in this Agreement, shall run with the land and inure to the benefit of Developer and any subsequent successor in interest to the Developer. The City shall apply the credits to offset and reduce the development impact fees for storm water drainage, public park fees, and other City development fees that would be paid by Developer upon development of the Property. The valuation shall be determined as of the date of land dedication by agreement of City and Developer as to value, or, if there is no agreement as to value, by an independent appraisal obtained by City. If the value of the Detention Facility is less than the amount of development impact fees Developer would otherwise owe upon development of the Property, Developer shall pay the amount of development impact fees remaining after they are reduced by the amount of the credit given for the dedication of the Detention Facility.

4.3. Improvements. All improvements to any property that is dedicated by the Developer to the City shall be funded by the City.

4.4. Right-of-Way and Public Utility Easements. If the construction, operation, or maintenance of the Detention Facility requires a right-of-way or public utility easement, Developer shall grant and City shall accept a non-exclusive public utility easement for access to the facility in a form acceptable to the City. Easement widths shall be granted in accordance with the City Engineer's requirements.

4.5. Reservation of Drainage Basin Reserve Capacity. Once the Yuba Local Agency Formation Commission approves the Annexation of the Property to the City, City shall reserve adequate capacity in the City's Drainage Basin for the future development of Orchard 1 and identify such reservation in the Drainage Plan. City shall record the reservation in a separate writing that shall survive the termination of this Agreement.

4.6. Environmental Review. City shall act as the lead agency for all environmental review for any subsequent development on the Property. City shall maintain review and approval authority over all environmental documents, including the drafting of an Environmental Impact Report, prior to the documents' circulation. City agrees to utilize its reasonable best efforts to provide the necessary information or approvals for Developer to complete any environmental review.

5. ANNUAL REVIEW

5.1. Annual Review.

5.1.1. At least every 12 months during the term of this Agreement, City shall review the extent of good faith substantial compliance by Developer with the terms of this Agreement. Such periodic review shall be limited in scope to compliance with the terms of this Agreement pursuant to Government Code § 65865.1. Developer shall be responsible for the cost reasonably and directly incurred by the City to conduct such annual review, the payment of which shall be due within 30 days after conclusion of the review and receipt from City of the bill for such costs.

5.1.2. Upon written request by the City Planning Director, Developer shall provide such information as may be necessary or appropriate in order to ascertain compliance with this Agreement.

5.1.3. Failure by City in any given calendar year to undertake and complete its annual review of the Agreement shall constitute a finding by City that Developer is in compliance with all of the terms and conditions of this Agreement for that calendar year, provided that:

5.1.3.1. Developer gives notice to the City Manager of its intent to proceed in accordance with this section 5.1.3.

5.1.3.2. Developer submits information regarding its good faith compliance with this Agreement, and

5.1.3.3. City fails to respond to Developer's submittal within 30 days of Developer's provision of notice and information as provided herein.

5.1.4. Estoppel Certificate. Either party may from time to time deliver written notice to the other party requesting such party to certify in writing that, to the knowledge of the certifying party, (a) this Agreement is in full force and effect and a binding obligation of the parties, (b) this Agreement has not been amended or modified either orally or in writing, or if so amended, identifying the amendments, and (c) the requesting party is not in default in the performance of its obligations under this Agreement, or if in default, to

describe the nature of such default. The party receiving a request under this Agreement shall execute and return such certificate within 30 days following the receipt thereof. City acknowledges that transferees and mortgagees of Developer may rely upon a certificate under this Agreement.

6. DEFAULT, REMEDIES, TERMINATION.

6.1. Defaults. Any failure by either party to perform any term or provision of this Agreement, which failure continues uncured for a period of thirty (30) days following written notice of such failure from the other party (unless such period is extended by mutual written consent), shall constitute a default under this Agreement. Any notice given pursuant to the preceding sentence ("Default Notice") shall specify the nature of the alleged failure and, where appropriate, the manner in which said failure satisfactorily may be cured. If the nature of the alleged failure is such that it cannot reasonably be cured within such 30-day period, then the substantial commencement of the cure within such time period, and the diligent prosecution to completion of the cure within one year thereafter, shall be deemed to be a cure within such 30-day period. Upon the occurrence of a default under this Agreement, the non-defaulting party may institute legal proceedings to enforce the terms of this Agreement or, in the event of a material default, terminate this Agreement. If the default is cured, as provided herein, then no default shall exist and the noticing party shall take no further action.

6.2. Remedies. In addition to any other rights or remedies, any party may institute legal action to cure, correct or remedy any default, to enforce any provision herein, or to enjoin any threatened or attempted violation, including but not limited to actions for declaratory relief, specific performance, injunctive relief, and relief in the nature of mandamus. All of the remedies described herein shall be cumulative and not exclusive of one another, and the exercise of any one or more of the remedies shall not constitute a waiver or election with respect to any other available remedy.

6.2.1. Specific Performance Remedy. Due to the size, nature and scope of the Project, it will not be practical or possible to restore the Property to its natural condition once implementation of this Agreement has begun. After such implementation, Developer may be foreclosed from other choices it may have had to utilize the Property and provide for other benefits. Developer has invested significant time and resources and performed extensive planning and processing of the Project in agreeing to the terms of this Agreement and will be investing even more substantial time and resources in implementing the Project in reliance upon the terms of this Agreement, and it is not possible to determine the sum of money which would adequately compensate Developer for such efforts. By the same token, in the event that City issues any permit or other approval for a structure, and the public facilities, improvements, and infrastructure reasonably necessary to provide an adequate level of public services to that structure are not timely completed, then it would not be possible to determine a sum of money that would adequately compensate City for the resulting hardship. For the above reasons, City and Developer agree that damages would not be an adequate remedy if City or Developer fails to carry out its obligations under this Agreement. Therefore, specific performance of this Agreement is the only remedy which would compensate Developer if City fails to carry out its obligations under this Agreement, and City hereby agrees that Developer shall be entitled to specific performance in the event of a default by City hereunder. Developer may seek money damages against City only if

specific performance is not granted by the court. Further, specific performance of this Agreement is the only remedy which would compensate City if Developer fails to carry out its obligations under this Agreement. The City's right to specific performance shall be limited to those circumstances set forth above, and City shall have no right to seek specific performance to cause Developer to otherwise proceed with the development of the Project in any manner, except as specified in this section 6.2.1.

6.2.2. Withholding of Permits and Approvals. City and Developer acknowledge that if Developer substantially fails to carry out its obligations under this Agreement, and Developer fails to cure said default as specified in Section 6.1, then City shall have the right to refuse to issue any permits or other approvals to which Developer would otherwise have been entitled to pursuant to this Agreement or applicable law, subject to the process set forth in Section 6.4 of this Agreement.

6.2.3. Termination. If City elects to consider terminating this Agreement due to a material default of Developer, the City shall give notice of intent to terminate this Agreement and the matter shall be scheduled for consideration and review by the City Council at a duly noticed and conducted public hearing. Developer shall have the right to offer written and oral evidence prior to or at the time of said public hearings. If the City Council determines that a material default has occurred and is continuing, and elects to terminate this Agreement, City shall give written notice of termination of this Agreement to Developer by certified mail and this Agreement shall thereby be terminated sixty (60) days thereafter.

6.3. Force Majeure. Performance by any party of its obligations under this Agreement (other than for payment of money) shall be excused during any period of "Permitted Delay" as hereinafter defined. For purposes hereof, Permitted Delay shall include delay beyond the reasonable control of the party claiming a Permitted Delay (and despite the good faith efforts of such party) including, but not limited to (i) acts of God, (ii) civil commotion, (iii) riots, (iv) strikes, picketing or other labor disputes, (v) shortages of materials or supplies, (vi) damage to work in progress by reason of fire, floods, earthquake or other casualties, (vii) failure, delay or inability of the other party to act, (viii) as to City only, with respect to completion of the Annual Review or processing applications for Approvals, the failure, delay or inability of Developer to provide adequate information or substantiation as reasonably required to complete the Annual Review or process applications for Approvals; (ix) delay caused by governmental restrictions imposed or mandated by other governmental entities, (x) enactment of conflicting state or federal laws or regulations, (xii) judicial decisions or similar basis for excused performance, and (xiii) litigation brought by a third party attacking the validity of this Development Agreement. Any party claiming a Permitted Delay shall notify the other party (or parties) in writing of such delay within thirty (30) days after the commencement of the delay, or within 30 days after receipt of a Default Notice, whichever is later which notice ("Permitted Delay Notice") shall include the estimated length of the Permitted Delay. A Permitted Delay shall be deemed to occur for the time period set forth in the Permitted Delay Notice unless a party receiving the Permitted Delay Notice objects in writing within ten (10) days after receiving the Permitted Delay Notice. In the event of such objection, the parties shall meet and confer within thirty (30) days after the date of the objection with the objective of attempting to arrive at a mutually acceptable solution to the disagreement regarding the Permitted Delay. If no mutually acceptable solution can be reached, either party may take such action as may be

permitted under this Agreement.

6.4. Emergency Working Group Meeting. Notwithstanding any other provision in this Agreement, neither Developer nor City shall commence any legal action, or willfully engage in any other act or omission inconsistent with the terms of this Agreement, including but not limited to withholding or delaying prompt issuance of any ministerial Subsequent Approval by City, (collectively, a "Self-Help Remedy"), without first initiating, and participating in good faith in, an "Emergency Working Group Meeting" pursuant to the terms of this Section. Upon receipt of any Default Notice, or upon the existence of any dispute or disagreement between the Parties arising out of or relating to this Agreement and/or the Project, any party may initiate an Emergency Working Group Meeting to address and seek to resolve the dispute or disagreement by giving written notice to the other Party setting forth the nature of the issue in dispute and the desire to hold an immediate Emergency Working Group Meeting. The Meeting shall be held within 10 days of the written notice, unless extended by mutual written agreement of the Parties. Failure to hold the required Meeting prior to commencing any legal action or engaging in any Self-Help Remedy will result in the award of all reasonable attorney's fees and costs to the party found by any Court to be responsible for the failure to timely hold the Meeting. To expedite the process of commencing and completing an Emergency Working Group Meeting, if and when the need for such a Meeting should arise, the Parties shall form the Emergency Working Group within 60 days of the Effective Date of this Agreement.

7. DEFENSE AND INDEMNITY/HOLD HARMLESS.

7.1. Defense and Indemnity. Developer shall defend, indemnify and hold harmless City, its elected and appointed commissions, officers, agents and employees, from and against any and all damages, claims, costs and liabilities arising out of the personal injury or death of any third party, or damage to the property of any third party, to the extent such damages, claims, costs or liabilities arise out of or in connection with the operations of the Project under this Agreement by Developer or by Developer's contractors, subcontractors, agents or employees. Nothing in this Section 7.1 shall be construed to mean that Developer shall defend or indemnify City from or against any damages, claims, costs or liabilities arising from, or alleged to arise from, activities associated with the maintenance or repair by City or any other public agency of improvements that have been offered for dedication and accepted by City or such other public agency. City and Developer may from time to time enter into subdivision improvement agreements, as authorized by the Subdivision Map Act, which agreements may include defense and indemnity provisions different from those contained in this Section 7.1. In the event of any conflict between such provisions in any such subdivision improvement agreement and the provisions set forth above, the provisions of such subdivision improvement agreement shall prevail. No provision of this Agreement shall be construed to require any party to enter into a subdivision improvement agreement that contains defense and indemnity provisions different from those contained in this Section 7.1. Subject to extensions of time by mutual consent in writing, failure or unreasonable delay by either party to perform any term or provision of this Agreement shall constitute a default. In the event of alleged default or breach of any term or condition of this Agreement, the party alleging such default or breach shall give the other party not less than 30 days' notice in writing specifying the nature of the alleged default and the manner in which the default may be satisfactorily cured. During any such 30-day period, the party charged shall not be considered in default for purposes of termination or

institution of legal proceedings.

8. COOPERATION IN THE EVENT OF LEGAL CHALLENGE.

8.1. Cooperation.

8.1.1. 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 provision of any of the Entitlements, or the approval of any final map, Implementing Approval, or ministerial permit, granted to Developer pursuant to the Entitlements, or the creation of any financing or improvement district or entity, pursuant to the Entitlements, or the imposition, enforcement, levy, or collection of any special assessment or special tax imposed pursuant to the Entitlements, the parties shall cooperate in defending such action to settlement or final judgment. In addition, Developer agrees to defend the City and, at the City's request, to appear and represent the City at Developer's sole cost and expense, in connection with any action challenging the City's approval of the Entitlements or certification of the EIR or other CEQA document prepared for the Project. Counsel shall be selected by Developer and reasonably approved by the City. Developer's obligation to provide such defense includes the obligation to indemnify and hold harmless the City from any and all claims arising from such litigation or administrative challenge, including, but not limited to, damages, claims, judgments, litigation costs and attorneys' fees. Developer shall not settle any such proceeding on terms which include the granting of any form of relief to any person not a party to this Agreement, excepting only monetary relief to be paid solely by Developer, without the consent of City, which consent shall not be unreasonably withheld, conditioned or delayed. Nothing contained herein shall limit the right of the City to appear and defend itself in any administrative or legal proceeding, at the City's expense. The City shall promptly give notice to Developer, within five (5) business days, of any action filed against the City in relation to the Development and shall promptly and fully cooperate with Developer in its defense of any such action filed against the City.

8.1.2. The parties agree that this Section 8.1 shall constitute a separate agreement entered into concurrently, and that this Section 8.1 shall survive termination of this Agreement. Without limiting the generality of the foregoing, if any other provision of this Agreement, or the Agreement as a whole, is invalidated, rendered null, or set aside by a court of competent jurisdiction, the parties agree to be bound by the terms of this Section, which shall survive such invalidation, nullification or setting aside.

8.2. Cure; Reapproval.

8.2.1. If, as a result of any administrative, legal or equitable action or other proceeding as described in Section 8.1, all or any portion of the Entitlements (including, but not limited to, this Agreement) are set aside or otherwise made ineffective by any judgment (a "Judgment") in such action or proceeding (based on procedural, substantive or other deficiencies, hereinafter "Deficiencies"), the parties agree to use their respective best efforts to sustain and reenact or readopt the Entitlements or any portion(s) thereof that the Deficiencies related to, as follows, unless the Parties mutually agree in writing to act otherwise:

8.2.1.1. If any Judgment requires reconsideration or consideration by City of the Entitlements or any portion(s) thereof, then the City shall consider or reconsider that matter in a manner consistent with the intent of this Agreement. If any such Judgment invalidates or otherwise makes ineffective all or any portion(s) of the Entitlements, then the Parties shall cooperate and shall cure any Deficiencies identified in the Judgment or upon which the Judgment is based in a manner consistent with the intent of this Agreement. To the maximum extent permitted under the Judgment and applicable law, City shall then readopt or reenact the Entitlements, or any portion(s) thereof, to which the Deficiencies related.

8.2.1.2. Acting in a manner consistent with the intent of this Agreement includes, but is not limited to, recognizing that the Parties intend that Developer may develop the Project consistent with the requirements and provisions of the Entitlements, and to the extent permitted by Applicable Law, adopting such ordinances, resolutions, and other enactments, including but not limited to zoning ordinances, a specific plan and general plan amendments, as are necessary to readopt or reenact all or any portion of the Entitlements without contravening the Judgment.

8.2.2. Nothing in this Section 8.2 shall obligate the City to expend any funds under the City's control, other than funds provided to the City under this Agreement, to construct or contribute to the construction of any public facility, improvement, or infrastructure, or to otherwise mitigate any impact caused by the Project.

8.2.3. The parties agree that this Section 8.2 shall constitute a separate agreement entered into concurrently, and that this Section 8.2 shall survive termination of this Agreement. Without limiting the generality of the foregoing, if any other provision of this Agreement, or the Agreement as a whole, is invalidated, rendered null, or set aside by a court of competent jurisdiction, the parties agree to be bound by the terms of this section, which shall survive such invalidation, nullification or setting aside.

9. MORTGAGEE PROTECTION.

9.1. In General. The provisions of this Development Agreement shall not prevent or limit Developer's right to encumber the Property or any portion thereof, or any improvement thereon by any mortgage, deed of trust or other security device securing financing with respect to such portion. City acknowledges that lenders providing such financing and other "Mortgagees" (defined below) may require certain modifications or amendments to this Development Agreement and agrees upon request, from time to time, to meet with Developer and representatives of such lenders to negotiate in good faith any such request for modification or amendment. Any modification or amendment requested by a Mortgagee will be processed in accordance with Section 1.7 of this Agreement. Any person holding a mortgage, deed of trust or other security instrument on all or any portion of the Property made in good faith and for value (each, a "Mortgagee"), shall be entitled to the rights and privileges set forth in this Section 9.

9.2. Impairment of Mortgage or Deed of Trust. This Agreement shall be superior and senior to any lien placed upon the Property, or any portion thereof, including the lien of any mortgage. Notwithstanding the foregoing and except as otherwise specifically stated in the terms of any security instrument held by a Mortgagee, no default under this

Development Agreement shall defeat, render invalid, diminish, or impair the lien of any mortgage or deed of trust on the Project Site made, or their interest in the Property acquired by, any Mortgagee in good faith and for value.

9.3. Notice of Default to Mortgagee. If a Mortgagee has submitted a request in writing to City in the manner specified herein for giving notices, City shall exercise its best efforts to provide such Mortgagee written notification from City of any failure or default by Developer in the performance of Developer's obligations under this Development Agreement, which notification shall be provided to such Mortgagee at such time as such notification is delivered to Developer.

9.4. Right of Mortgagee to Cure. Any Mortgagee shall have the right, but not the obligation, to cure any failure or default by Developer during the cure period allowed Developer under this Development Agreement, plus an additional 60 days if, in order to cure such failure or default, it is necessary for the Mortgagee to obtain possession of the property such as by seeking the appointment of a receiver or other legal process. Any Mortgagee that undertakes to cure or attempt to cure any such failure or default shall provide written notice to City that it is undertaking efforts of such a nature; provided that no initiation of any such efforts by a Mortgagee shall obligate such Mortgagee to complete or succeed in any such curative efforts.

9.5. Liability for Past Defaults or Obligations. Subject to the foregoing, any Mortgagee, including the successful bidder at a foreclosure sale, who comes into possession of the Project or the Property or any part thereof pursuant to foreclosure, eviction or otherwise, shall take such property subject to the rights and obligations of this Development Agreement, and in no event shall any such property be released from any obligations associated with its use and development under the provisions of this Development Agreement. Nothing in this Section 9 shall prevent City from exercising any remedy it may have for a default under this Development Agreement provided, however, that in no event shall such Mortgagee personally be liable for any defaults or monetary obligations of Developer arising prior to acquisition or possession of such property by such Mortgagee.

10. MISCELLANEOUS – PROVISIONS.

10.1. Authority to Execute Agreement. The person or persons executing this Agreement on behalf of Developer and City warrant and represent that they have the authority to execute this Agreement and the authority to bind Developer and City to the performance of their respective obligations hereunder.

10.2. Cancellation or Modification. In addition to the rights provided the parties in Section 5.1 of this Agreement with respect to City's annual review and Sections 6.1 and 6.2 of this Agreement as to default and termination, any party may propose cancellation or modification of this Agreement pursuant to Government Code Section 65868, but such cancellation or modification shall require the consent of both the City and all other parties hereto retaining fee title to the Property or any portion thereof.

10.3. Consent. Where the consent or approval of a party is required in, or necessary under, this Agreement, such consent or approval shall not be unreasonably withheld,

conditioned or delayed.

10.4. Construction of Agreement. 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.

10.5. Governing Law and Venue.

10.5.1. This Agreement shall be construed and enforced in accordance with the laws of the State of California, without regard to conflicts of laws principles. Venue for any legal action brought by any party hereto for breach of this Agreement, or to interpret or enforce any provisions herein, shall be in the Federal Court or Superior Court of California in any County in which venue is otherwise appropriate.

10.5.2. The parties agree that this Section 10.5 shall constitute a separate agreement entered into concurrently, and that this Section 10.5 shall survive termination of this Agreement. Without limiting the generality of the foregoing, if any other provision of this Agreement, or the Agreement as a whole, is invalidated, rendered null, or set aside by a court of competent jurisdiction, the parties agree to be bound by the terms of this Section, which shall survive such invalidation, nullification or setting aside.

10.6. No Joint Venture or Partnership. City and Developer hereby renounce the existence of any form of joint venture, partnership or other association between City and Developer, and agree that nothing in this Agreement or in any document executed in connection with it shall be construed as creating any such relationship between City and Developer.

10.7. Covenant of Good Faith and Fair Dealing. No party shall do anything which shall have the effect of injuring the right of another party to receive the benefits of this Agreement or do anything which would render its performance under this Agreement impossible. Each party shall perform all acts contemplated by this Agreement to accomplish the objectives and purposes of this Agreement.

10.8. Partial Invalidity Due to Governmental Action. In the event state or federal laws or regulations enacted after the effective date of this Agreement, or formal action of any governmental entity other than City, prevent compliance with one or more provisions of this Agreement, or require changes in plans, maps or permits approved by City, the parties agree that the provisions of this Agreement shall be modified, extended or suspended only to the minimum extent necessary to comply with such laws or regulations.

10.9. Further Actions and Instruments. The parties agree to provide reasonable assistance to the other and cooperate to carry out the intent and fulfill the provisions of this Agreement. Each of the parties shall promptly execute and deliver all documents and perform all acts as necessary to carry out the matters contemplated by this Agreement.

10.10. Third Party Beneficiaries. This Agreement is made and entered into for the sole protection and benefit of the parties and their successors and assigns. No other person

shall have any right of action based upon any provision in this Agreement.

10.11. No Waiver. No delay or omission by a party in exercising any right or power accruing upon non-compliance or failure to perform by another party under the provisions of this Agreement shall impair, or be construed to be a waiver of, any such right or power. A waiver by a party of any of the covenants or conditions to be performed by another party shall not be construed as a waiver of any succeeding breach or non-performance of the same or other covenants and conditions hereof.

10.12. Severability. If any provision of this Agreement shall be adjudicated to be invalid, void or illegal, it shall in no way affect, impair or invalidate any other provision. Notwithstanding the foregoing or any other provisions of this Agreement, in the event that any material provision of this Agreement is found to be unenforceable, void or voidable, Developer or City may terminate this Agreement upon providing written notice to the other parties.

10.13. Recording. Pursuant to California Government Code Section 65868.5, no later than ten (10) days after City enters into this Agreement, the County Clerk shall record an executed copy of this Agreement in the Official Records of the County of Yuba.

10.14. Attorneys' Fees. Should any legal action be brought by either party for breach of this Agreement, or to enforce any provisions herein, the prevailing party shall be entitled to reasonable attorney's fees and costs incurred in addition to all other relief as may be allowed by law.

10.15. Time is of the Essence. Time is of the essence of each and every provision in this Agreement.

10.16. Notices. Any notice, demand, invoice or other communication required or permitted to be given under this Agreement, the Development Agreement Law or implementing ordinance shall be in writing and either served personally or sent by prepaid, first class U.S. mail and addressed as follows:

City:	Developer:
City Clerk City of Wheatland 111 C Street Wheatland, CA 95692	Avoca Wheatland, LLC Address City/Zip

Any party may change its address by notifying the other party in writing of the change of address.

(Signature Page Follows)

[Signatures to be Notarized]

CITY OF WHEATLAND

By: _____
Bill Zenoni
City Manager

AVOCA WHEATLAND, LLC

By: _____
Name

EXHIBIT A

Property Description

CERTIFICATE OF ACKNOWLEDGMENT BY NOTARY PUBLIC
[California Civil Code § 1189]

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
)
County of _____)

On _____, 20_____ before me, _____, a notary public, personally appeared _____, who 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.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____

[Notary Seal]

CERTIFICATE OF ACKNOWLEDGMENT BY NOTARY PUBLIC

[California Civil Code § 1189]

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
)
County of _____)

On _____, 20_____ before me, _____, a notary public, personally appeared _____, who 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.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____

[Notary Seal]