

RESOLUTION NO. R2016-027

**EXHIBIT A
DEVELOPMENT AGREEMENT
SMOKETREE DESERT LAND COMPANY, L.L.C.**

This Development Agreement ("Agreement") is entered into pursuant to Arizona Revised Statutes (A.R.S.) § 9-500.05, by and between the City of Yuma ("City"), an Arizona municipal corporation, and Smoketree Desert Land Company, L.L.C. ("Owner"), an Arizona limited liability company.

RECITALS

WHEREAS, Owner is the owner and developer of the proposed Smoketree Subdivision, consisting of approximately 48 acres located at the northwest corner of Avenue 7 ½ E and 40th Street in the City of Yuma (the "Property"); and,

WHEREAS, the Yuma City Council approved a rezone of the Property on January 15, 2013 consisting of 46.3 acres of conditional Medium Density Residential/Planned Unit Development Overlay (R-2/PUD) District and 2.01 acres of conditional Low Density Residential/Planned Unit Development Overlay (R-1-6/PUD) District; and,

WHEREAS, in order to vest zoning and permit the development of the Property through the recording of a subdivision plat prior to the completion of all conditions associated with the development, particularly, construction of certain amenities required through the PUD, it is necessary to remove certain conditions from the zoning ordinance O2014-02 and place the construction of amenities in a development agreement as covenants that run with the land; and,

WHEREAS, a companion amending ordinance authorizes removal of the PUD amenities as a condition of Ordinance No. O2014-02 and substitutes a condition requiring the recording of this Development Agreement concerning the construction of the amenities,

NOW THEREFORE, in consideration of the above recitals, the parties agree as follows:

The Owner/Developer shall install the following amenities according to the listed timeframes:

- a. Grass lawn and landscaping in the retention basin shall be installed prior to final inspection for any unit.
- b. Within one (1) year of recording the final plat the following amenities will be installed:
 - (1) Crushed stone walking path around the retention basin with permanent distance signs every ¼ mile.
 - (2) Lighting along the perimeter of the retention basin, specifically double street lights located on the east, west and south side of the retention basin (total of three) and one interior light located in approximate center on north side of retention basin.

(3) Two picnic tables and three barbeque grills in the retention basin.

- c. Combination playground (similar to Saguaro or Las Casitas) or additional basin amenities not to exceed a cost of \$20,000 shall be installed within three years after recording the final plat or after 33% of the units (110 units) have been constructed, whichever occurs first. The developer will supply available information on the types of households and number of children in the subdivision and the Department of Community Development shall in good faith determine if there is a need for playground equipment or if some other amenity would be more beneficial to the occupants and direct developer as to which should be constructed.
- d. Landscape within the 10' middle easements (neither trees nor barbeque grills are required) shall be installed along each street after 50% of the units (12 units) on that street are constructed or within one year after final inspection of the first unit on that street, whichever occurs first.
- e. The walking path and landscaping along the 50' west strip shall be completed in two phases. The existing canal shall be buried at the first available "water out date" (when there is no water in the canal) after 50% (166 units) of the units have been constructed or three (3) years from the date of recording the final plat, whichever occurs first, and the landscaping completed before four (4) years from the date of recording the final plat or 75% (249 units) units have been constructed, whichever occurs first. The developer may revisit this issue with the Department of Community Development after fully investigating alternative designs, cost and feasibility to include incorporation of the canal in the landscaping (use of grating above canal), minimizing the cost of burying the canal and possible relocation of the canal.
- f. The developer shall install appropriate barricades and fencing on the west wall openings to block access to the canal from the subdivision pending the burial of the canal.
- g. Front yard irrigation, grass, and a 15-gallon tree for each unit shall be installed prior to the final inspection for each unit and prior to each new owner taking control of the property.

4. Notice. Except as otherwise required by law, any notice, demand or other communication given hereunder, shall be in writing and shall be given by personal delivery or be sent by certified or registered U.S. Mail, return receipt requested, addressed to the Parties at their respective addresses set forth below, or at such other address as a Party may designate in writing pursuant to the terms of this paragraph, or by electronic mail, facsimile machine or by any nationally recognized express or overnight delivery service (e.g., Federal Express or UPS), with all postage and other delivery charges prepaid:

To City:

To Owner:

City Administrator

Brian Hall, Manager

One City Plaza
P.O. Box 13014
Yuma, Arizona 85366-3014

Smoketree Desert Land Company, L.L.C.
3064 S. Avenue B
Yuma, Arizona 85364

All such notices, demands or other communications will: (i) if delivered personally or delivered through a same day delivery/courier service be deemed effective upon delivery or refusal to accept delivery by the addressee; (ii) if delivered by U.S. mail in the manner described above be deemed effective upon the earlier of receipt or three (3) business days after deposit in the United States mail; (iii) any notice sent by a recognized national overnight delivery service shall be deemed effective one (1) business day after deposit with such service; and (iv) any notice sent by email or facsimile machine shall be deemed effective upon confirmation of the successful transmission by the sender's electronic mail system or facsimile machine. Notwithstanding the foregoing, no payment shall be deemed to be made until actually received in good and available funds by the intended payee.

5. Default. If either party defaults (the "Defaulting Party") with respect to any of such party's obligations, then the other party (the "Non-Defaulting Party") shall give written notice in the manner described in Section 4 above to the Defaulting Party. The notice shall state the nature of the default claimed and make demand that such default be corrected. The Defaulting Party shall then have:

- (i) twenty (20) days from the date of receipt of such notice within which to correct such default if it can be reasonably corrected by the payment of money, or
- (ii) sixty (60) days from the date of receipt of notice to cure such default if action other than payment of money is reasonably required, or
- (iii) if any such non-monetary default cannot reasonably be cured within sixty (60) days for reasons beyond the Defaulting Party's control (financial inability, construction delays and market conditions excepted), then such longer period as may be reasonably required, provided and so long as such cure is promptly commenced within such period and diligently prosecuted to completion.

5.1 Remedies. If the default is not corrected within the time periods described in Section 5 above, the Non-defaulting Party shall have all remedies available to it at law or in equity, subject to the limitations set forth herein. Owner or City, or any successor-in-interest or assignee, may institute a legal action to cure, correct or remedy any default, to enforce any covenant or agreement herein, or to enjoin any threatened or attempted violation, including but not limited to suits for declaratory relief, specific performance, relief in the nature of mandamus and actions for damages, provided that claims for damages shall be limited to actual damages as of the time of entry of judgment. The Parties hereby waive any right to seek consequential, punitive, multiple, exemplary or any damages other than actual damages.

5.2 Delays; Waivers. Except as otherwise expressly provided in this Agreement, any delay by any Party in asserting any right or remedy under this Agreement shall not operate as a waiver of any such rights or limit such rights in any way; and any waiver in fact made by such Party with respect to any default by the other Party shall not be considered as a waiver of rights with respect to any other default or with respect to the particular default except to the extent specifically waived in writing. It is the intent of the Parties that this provision will enable each

Party to avoid the risk of being limited in the exercise of any right or remedy provided in this Agreement by waiver, laches or otherwise at a time when it may still hope to resolve the problems created by the default involved.

5.3 Rights and Remedies Cumulative. The rights and remedies of the Parties are cumulative, and the exercise by either Party of any one or more of such rights shall not preclude the exercise by it, at the same or different times, of any other right or remedy for any other default by the other Party.

6. Representations

6.1 Owner Representations. Owner represents and warrants that:

a. Owner has the full right, power and authorization to enter into and perform this Agreement and the obligations and undertakings of Owner under this Agreement, and the execution, delivery and performance of this Agreement by Owner has been duly authorized, agreed to, and is in compliance with the organizational documents of Owner.

b. All consents and approvals necessary to the execution, delivery and performance of this Agreement have been obtained, and no further action needs to be taken in connection with such execution, delivery and performance.

c. Owner will execute and acknowledge when appropriate all documents and instruments and take all actions necessary to implement, evidence and enforce this Agreement.

d. As of the date of this Agreement, Owner knows of no litigation, proceeding or investigation pending or threatened against or affecting Owner, which could have a material adverse effect on Owner's performance under this Agreement that has not been disclosed in writing to City.

e. This Agreement (and each undertaking of Owner contained herein) constitutes a valid, binding and enforceable obligation of Owner according to its terms, except to the extent limited by bankruptcy, insolvency and other laws of general application affecting creditors' rights and by equitable principles, whether considered at law or in equity.

f. The execution, delivery and performance of this Agreement by Owner is not prohibited by, and does not conflict with, any other agreements, instruments, judgments or decrees to which Owner is a party or to which owner is otherwise subject.

g. Owner has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this Agreement other than normal costs of conducting business and costs of professional services such as the services of architects, attorneys, and engineers.

h. Owner has had opportunity for independent legal review of this Agreement by counsel of its choosing in the preparation and execution hereof.

6.2 City representations. City represents and warrants to Owner that:

a. City has the right, power and authorization to enter into and perform this Agreement and each of City's obligations and undertakings under this Agreement, and City's execution, delivery and performance of this Agreement have been duly authorized and agreed to in compliance with the requirements of the Yuma City Charter and the Yuma City Code.

b. All consents and approvals necessary to the execution, delivery and performance of this Agreement have been obtained, and no further action needs to be taken in connection with such execution, delivery and performance.

c. City will execute and acknowledge when appropriate all documents and instruments and take all actions necessary to implement, evidence and enforce this Agreement.

d. City knows of no litigation, proceeding, initiative, referendum, investigation or threat of any of the same contesting the powers of City or its officials with respect to this Agreement that has not been disclosed in writing to Owner.

e. This Agreement (and each undertaking of City contained herein), constitutes a valid, binding and enforceable obligation of City, enforceable according to its terms, except to the extent limited by bankruptcy, insolvency and other laws of general application affecting creditor's rights and by equitable principles, whether considered at law or in equity.

f. The execution, delivery and performance of this Agreement by City is not prohibited by, and does not conflict with, any other agreements, instruments or judgments or decrees to which City is a party or is otherwise subject.

g. City has been assisted by counsel of its own choosing in connection with the preparation and execution of this Agreement.

7. Miscellaneous.

7.1 Governing Law; Choice of Forum. This Agreement shall be deemed to be made under, shall be construed in accordance with, and shall be governed by the internal, substantive laws of the State of Arizona (without reference to conflict of law principles). Any action brought to interpret, enforce or construe any provision of this Agreement shall be commenced and maintained in the Superior Court of the State of Arizona in and for the County of Yuma (or, as may be appropriate, in the Justice Courts of Yuma County, Arizona, or in the United States District Court for the District of Arizona, if, but only if, the Superior Court lacks or declines jurisdiction over such action). The Parties irrevocably consent to jurisdiction and venue in such courts for such purposes and agree not to seek transfer or removal of any action commenced in accordance with the terms of this Section 7.1.

7.2 A.R.S. § 38-511. Notice is hereby given of the applicability of A.R.S. § 38-511.

7.3 Integration. This Agreement contains the entire agreement between the Parties, and no oral or written statements, promises, or inducements made by either party or its agents not contained or specifically referred to in this Agreement is valid or binding.

7.4 Recordation. City shall record a copy of this Agreement no later than ten (10) days from date of entering into this Agreement pursuant to A.R.S. § 9-500.05.

7.5 Estoppel Certificate. The Parties agree that, upon not less than twenty one (21) business days prior written request from a Party to this Agreement, a requested Party shall execute, acknowledge and deliver to the Party making such request a written statement certifying to the current status of the Agreement, including whether or not, the requested Party has actual knowledge that any Party is in default of any obligation or duty set forth in this Agreement. Any such certificate may be relied on by a prospective purchaser of any lot within the Property, or any prospective Lender.

7.6 Headings. The descriptive headings of the Sections of this Agreement are inserted for convenience only and shall not control or affect the meaning of construction of any of the provisions hereof.

7.7 Recitals. The Recitals set forth at the beginning of this Agreement are hereby acknowledged and incorporated herein and the Parties hereby confirm the accuracy thereof.

7.8 Time is of the Essence. Time is of the essence in implementing the terms of this Agreement.

7.9 No Partnerships; Third Parties. It is not intended by this Agreement to, and nothing contained in this Agreement shall, create any partnership, joint venture or other arrangement between the Parties. No term or provision of this Agreement is intended to, or shall, be for the benefit of any person or entity not a Party hereto, and no such other person or entity shall have any right or cause of action hereunder, except for transferees or assignees to the extent that they assume or succeed to the rights and/or obligations of Owner under this Agreement.

7.10 Amendment. No change or addition is to be made to this Agreement except by written amendment executed by City and Owner. Within ten (10) days after any amendment to this Agreement, such amendment shall be recorded in the Official Records of Yuma County, Arizona.

7.11 Severability. If any provision of this Agreement is declared void or unenforceable, such provision shall be severed from this Agreement, which shall otherwise remain in full force and effect. If any applicable law or court of competent jurisdiction prohibits or excuses City or Owner from undertaking any contractual commitment to perform under any provision hereunder, the remaining portions of this Agreement shall remain in full force and effect, and the Parties will negotiate diligently in good faith for such amendments of this Agreement as may be necessary to achieve the original intent of this Agreement, notwithstanding such invalidity or unenforceability.

7.12 Individual Nonliability. No City Council member, official, representative, agent, attorney or employee shall be personally liable to any of the other Parties hereto, or to any successor in interest to such Parties, in the event of any default or breach by City or for any amount which may become due to a Party or its successor, or with respect to any obligation of City under the terms of this Agreement. Notwithstanding anything contained in this Agreement to the contrary, the liability of Owner under this Agreement shall be limited solely to the assets of Owner, and shall not extend to or be enforceable against: (i) the individual assets of any of the individuals or entities who are shareholders, members, managers constituent partners,

officers or directors of the general partners or members of Owner, (ii) the shareholders, members or managers or constituent partners of Owner, or (iii) officers of Owner.

7.13 Proposition 207 Waiver. Owner hereby waives and releases City from any and all claims under Arizona Revised Statutes § 12-1134, et seq., including any right to compensation for reduction to the fair market value of the Property or any portion thereof, as a result of City's approval of this Agreement, and all related zoning, land use, building and development matters arising from, relating to, or reasonably inferable from this Agreement, including the approval, rejection or imposition of conditions or stipulations upon the approval of the zoning designation. The terms of this waiver shall run with the land and shall be binding upon all subsequent landowners, assignees, lessees and other successors, and shall survive the expiration or earlier termination of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement through their authorized representatives this _____ day of _____, 201____.

APPROVED:

CITY OF YUMA

Smoketree Desert Land Company, L.L.C.

By _____
Gregory K. Wilkinson
City Administrator

By  _____
Brian L. Hall
Manager

ATTEST:

By _____
Lynda L. Bushong
City Clerk

APPROVED AS TO FORM:

By _____
Steven W. Moore
City Attorney

ACKNOWLEDGEMENTS

State of Arizona)
) ss

County of Yuma)

The foregoing instrument was acknowledged before me this 30th of June, 2016 by Brian L. Hall, Manager, Smoketree Desert Land Company, L.L.C., an Arizona limited liability company on behalf of the company.

My commission expires:

By Lynn Redondo
Notary Public

