

# PROJECT REPORT

TO: **PLANNING COMMISSION**

AGENDA DATE August 11, 2010

FROM: **Planning & Development Services Dept.**

AGENDA TIME 9:00AM/ 11

PROJECT TYPE: Coyote Wells SP ( Development Agreement) SUPERVISOR DIST. 2

LOCATION: Ocotillo/Normirage area APN: 033-620-033 , 033-620-034 , 033-620-035 , 033-630-010 ,033-630-011,033-630-012, 033-640-026 , 033-640-027 , 033-650-020, 033-650-021, 033-650-022 , 033-650-023

Imperial County , CA PARCEL SIZE: 943.75 Acres

GENERAL PLAN (existing) Ocotillo/Nomirage Desert Residential GENERAL PLAN (proposed: Specific Plan

ZONE (existing) R-1 L40 ZONE (proposed) Coyote Wells SP zones

GENERAL PLAN FINDINGS  CONSISTENT  INCONSISTENT  MAY BE/FINDINGS

PLANNING COMMISSION DECISION: HEARING DATE: 08/11/2010

APPROVED  DENIED  OTHER

PLANNING DIRECTORS DECISION: HEARING DATE: \_\_\_\_\_

APPROVED  DENIED  OTHER

ENVIROMENTAL EVALUATION COMMITTEE DECISION: HEARING DATE: \_\_\_\_\_

NEGATIVE DECLARATION  MITIGATED NEG. DECLARATION  EIR

## DEPARTMENTAL REPORTS / APPROVALS:

PUBLIC WORKS	<input type="checkbox"/> NONE	<input checked="" type="checkbox"/> ATTACHED
AG / APCD	<input type="checkbox"/> NONE	<input checked="" type="checkbox"/> ATTACHED
E.H.S.	<input type="checkbox"/> NONE	<input checked="" type="checkbox"/> ATTACHED
FIRE / OES	<input type="checkbox"/> NONE	<input checked="" type="checkbox"/> ATTACHED
OTHER		

## REQUESTED ACTION:

IT IS RECOMMENDED THAT YOU CONDUCT A PUBLIC HEARING, THAT YOU HEAR ALL THE OPPONENTS AND PROPONENTS OF THE PROPOSED PROJECT. STAFF WOULD THEN RECOMMEND THAT YOU TAKE THE FOLLOWING ACTION:

1. Recommend to the Board of Supervisors this Development Agreement is consistent with the objectives, policies, general land uses and programs specified in the Imperial County General Plan and Coyote Wells Specific Plan.
2. Recommend to the Board of Supervisors that this Development Agreement is compatible with the uses authorized in, and the regulation prescribed for, the Coyote Wells Specific Plan and Tract Map 985.
3. Recommend to the Board of Supervisors that this Development Agreement is in conformity with and will promote public convenience, general welfare and good land use practice.
4. Will not be detrimental to the health, safety, and general welfare.
5. Will not adversely affect the orderly development of property or the preservation of property values.
6. Will provide significant public benefits.
7. RECOMMEND TO THE BOARD OF SUPERVISORS, THE APPROVAL OF THIS DEVELOPMENT AGREEMENT BY ORDINANCE.

## Findings for Development Agreement for Coyote Wells Specific Plan 08-0001 and Tract Map 985

- A. Is consistent with the objectives, policies, general land uses and programs specified in the general plan and any applicable specific plan;

The Development Agreement is a collection of Development requirements, Tract Map 985 conditions and mitigation measures approved in the Draft and Final Environmental Impact Report, Mitigation Monitoring and Reporting Program between the applicant and County of Imperial for this Coyote Wells Specific Plan.

- B. Is compatible with the uses authorized in, and the regulations prescribed for, the zoning district in which the real property is or will be located;

The Coyote Wells Specific Plan will have designated zoning for commercial development. The Specific Plan zones include allowable uses and allowable uses requiring additional discretionary approval for Coyote Wells.

- C. Is in conformity with and will promote public convenience, general welfare and good land use practice;

The development agreement will promote public convenience, general welfare and good land use practice the Specific Plan is a planned development and by enforcing and ensuring that the mitigation and development standards for this project are adhered too, will promote public convenience, general welfare and good land use practices.

- D. Will not be detrimental to the health, safety and general welfare;

This development agreement is consistent with the policies and goals of the Coyote Wells Specific Plan and will help in the development of this project. This Development Agreement will address public benefits, and impacts to the environment.

- E. Will not adversely affect the orderly development of property or the preservation of property values;

The agreement will help in the orderly development of this project by ensuring that that developer will provide all the services for commercial and business development and with the substantial investments into this development will preserve and upgrade property values around this development.

- F. Will provide significant public benefits.

Numerous improvements are included in this development agreement to address the orderly development of this Specific Plan.

Recording requested by, and  
when recorded return to:

County of Imperial  
480 W. Main Street  
El Centro, CA 92243

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## **Imperial County Development Agreement Concerning Coyote Wells Specific Plan**

THIS DEVELOPMENT AGREEMENT ("Agreement") is entered into by and between the County of Imperial, a political subdivision of the state of California, ("County") and Property Owners set forth in Section 3 ("Developer") (collectively referred to as "Parties") with respect to the development of real property in the County.

**1. Authorization.** California Government Code Sections 65864 through 65869.5 and Title 9, Division 23 of the County of Imperial Codified Ordinances authorize County to enter into binding development agreements with persons having legal or equitable interests in real property for the development of the property in order to establish certainty in the development process.

**2. Property Description.** The real property which is the subject of this Agreement consists of Coyote Wells Specific Plan Project and is more particularly described as follows set forth in **Exhibit A**, attached hereto and incorporated by this reference ("Property").

**3. Property Ownership.** Each individual set forth in **Exhibit B**, attached hereto and incorporated by this reference, is the legal owner in fee of the Property.

### **4. Approvals.**

**4.1** County and Developer agree that this Development Agreement and project have been given all required approvals as follows:

Planning Commission:

Board of Supervisors:

**4.2** This Development Agreement as approved by Ordinance No. [ordinance agreement number], adopted on [date DA ordinance passed] 2010 and shall be effective on [date DA ordinance is effective], 2010 ("Effective Date").

**4.3** County and Developer agree that all environmental impacts associated with the development of the Project as provided under this Agreement have been adequately addressed in the EIR, and that the adoption of this Agreement will not result in any new or different environmental impacts than those considered in the certified EIR; therefore, the County determines that no further environmental review relating to the adoption of this Agreement is required under CEQA.

**5. Assurances.** In entering into this Agreement, County and Developer acknowledge the following:

**5.1** This Agreement assures adequate public facilities at the time of development consistent with the Imperial County General Plan.

**5.2** This Agreement assures development in accordance with the General Plan.

**5.3** This Agreement constitutes a current exercise of the County's police powers to provide certainty to Developer in the development approval process by vesting the permitted uses, density, intensity of use, and the timing and phasing of development in exchange for Developer's commitment to provide significant public benefits to the County.

**5.4** This Agreement will allow the County and public to realize significant economic, recreational, circulation, streets, parks, open space, and public facilities benefits.

**5.5** The Parties acknowledge and agree that Developer's performance in developing the Project on the Property and in constructing and installing certain public improvements and complying with the Entitlements and the terms of this Agreement will fulfill substantial public needs. The County acknowledges and agrees that there is good and valuable consideration to the County resulting from Developer's assurances and faithful performance of this Agreement, and that the same is in balance with the benefits conferred by the County on the Project. The Parties further acknowledge and agree that the exchanged consideration is fair, just and reasonable.

**6. Entitlements.** The County Board of Supervisors has approved the following land use entitlements for the Property, which entitlements are the subject of this Agreement:

**6.1** A Rezone in order to change the zoning on the site from R-1 L40 Light Residential to be consistent with the Coyote Wells Specific Plan as shown on the attached **Exhibit C**;

**6.2** A Major Subdivision (Tentative Tract Map #985) to subdivide the property.

**7. Duration of Agreement and Tentative Subdivision Maps.**

**7.1** The effective date of this Agreement shall be the effective date of Ordinance No. [Insert Development Agreement Ordinance Number].

**7.2** The term of this Agreement shall commence on the Effective Date and shall extend for a period of ten (10) years following the Effective Date, unless terminated sooner, pursuant to this agreement. This agreement may be extended for an additional period of time as necessary to effect the development of the project, and upon mutual agreement of the parties.

**7.3** Pursuant to California Government Code section 66452.6, any Tentative Subdivision Map shall be valid for a period of time equal to the term of this Agreement, and as allowed by law.

**8. Rules, Regulations and Policies.**

**8.1** County acknowledges that Developer would not enter into this Agreement or agree to provide the public benefits and improvements described in this Agreement if it were not for the commitment of the County that the Property can be developed, to the extent possible, in accordance with County's ordinances, rules, regulations, and policies existing as of the Effective Date of this Agreement.

**8.2** The Property shall not be subject to any subsequently enacted amendment, modification of, or substitution for, the General Plan, zoning, or subdivision ordinances.

**8.3** Developer shall have the right, to the fullest extent allowed under California Government Code sections 65864 et seq., to (1) develop the Property in accordance with this Agreement, rules, regulations, ordinances, policies, conditions, environmental regulations, exactions, entitlements, assessments, and fees applicable to and governing development of the Property in effect as of the Effective Date of this Agreement and (2) develop the Property with respect to the permitted use(s) of land, density, and intensity of use(s), and timing and phasing of development as generally

described [in the specific plan - if applicable, or other authorization based on the project] and all other Entitlements set forth in this Agreement in effect as of the Effective Date of this Agreement, provided that:

**8.3.1** Developer acknowledges that the Project must comply with all future amendments, modifications, or alterations of County's building, plumbing, mechanical, electrical, housing, signage and fire codes.

**8.3.2** If a conflict between federal or state laws or regulations and this Agreement arises, County and Developer shall meet and confer in good faith in a reasonable attempt to preserve the terms of this Agreement to the extent feasible.

**8.3.3** Nothing in this Agreement shall be construed to be in derogation of County's police power to protect the public health and safety in the event of a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services involving the Property or the community.

**8.3.4** Developer acknowledges that the Project must comply with any new or amended ordinance, resolution, rule, regulation or policy that does not conflict with the Entitlements or those ordinances, resolutions, rules, regulations, and policies in effect at the Effective Date, and that is generally applied equally to all real property in the County with similar zoning designations and/or land uses.

**8.3.5** This Agreement shall not be construed to limit the authority or obligation of County to hold necessary public hearings, or to limit discretion of County or any of its officers or officials with regard to rules, regulations, ordinances, laws and entitlements of use that require the exercise of discretion by County or any of its officers or officials, provided that subsequent discretionary actions (a) shall not prevent or delay development of the Property for the uses and to the density and intensity of development as provided by this Agreement and the other Entitlements in effect as of the Effective Date of this Agreement, and (b) shall not be inconsistent with the Entitlements.

## **9. Infrastructure Capacity.**

**9.1** Subject to the on-site and off-site improvements as required by the land use approvals, and subject to Permittee, providing an assurance to County, hereby agrees that it will provide sufficient capacity in its infrastructure, services, and utility systems, including, without limitation, traffic circulation, flood control, water supply, treatment, distribution, and service, to accommodate the Project.

**9.2** Permittee agrees to all Coyote Wells Specific Plan Tract Map 985 conditions.

**9.3** Permittee agrees to all Coyote Wells Specific Plan Conditional Use Permits 08-0030 & 08-0031 conditions.

## **10. Fees.**

**10.1** Except as otherwise provided in this Agreement, and specifically excluding fees set by entities not controlled by County that are collected by County, County shall only impose those fees, charges, and costs, including, without limitation, dedications and any other fee or tax (including excise, construction or any other tax) relating to development or the privilege of developing, which are in effect on a Countywide basis as of the Effective Date, including generally applicable increases in such fees that may be adopted from time to time and are generally applicable on a Countywide basis.

**10.2** Nothing in this section shall be construed to limit the authority of County to charge customary application, processing, and permit fees for land use approvals, building permits and other similar permits, which fees are designed to reimburse County's expenses attributable to such application, processing and permitting and are in force and effect on a County-wide basis at such time as said approvals and permits are granted by County.

**10.4** All development impact fees imposed by the County on the Project shall be due and payable to the County, on a pro rata basis, at the time of issuance of a Certificate of Occupancy of each residential unit, commercial structure, institutional structure, or industrial structure subject to the development impact fee for which the County has issued a building permit.

**10.5** To the extent permitted by law, Developer agrees not to oppose, protest or challenge the County Development Fees to be imposed and collected pursuant to this Agreement.

**10.6** Nothing in this section shall prevent or preclude the County from adopting assessments, fees and charges (other than fees imposed on new development) or special taxes on property within the County to fund ongoing maintenance and operations for the capital facilities, public improvements and/or services.

**11. Public Benefits Provided by Developer.** County acknowledges that Developer is providing through these Agreement significant public benefits to County, including, but not limited to:

**11.1 EIR Mitigation Measures and Conditions of Approval.** Notwithstanding any other provision in this Agreement to the contrary, as and when Developer elects to develop the Property, Developer shall be bound by, and shall perform, all mitigation measures contained in the certified final EIR related to such development that are adopted by the County and identified in the mitigation monitoring plan as being a responsibility of Developer, the Property rezoning conditions of approval and the Tentative Map conditions of approval.

**11.2 Development, Connection and Mitigation Fees.** Except as otherwise provided in this Agreement, Developer shall pay all County development fees established by the County.

**11.3 Housing Needs.**

**11.4**

**11.5 The Community.** This development will provide a planned development with open space lands and with commercial development that provide an atmosphere of a vibrant community enterprise.

**11.6** Permittee and operator of firing ranges and car racing tracts will give hiring priority to the local residents of Nomirage and Ocotillo.

**11.7 School Facilities Mitigation.** Developer shall pay school facilities impact fees that, prior to County approval of each building permit for the Project, as required by state law.

**11.8 Drainage and Special Grading Improvements.** Developer shall provide drainage and special grading improvements to the Project as required by the Tract Map #985.

**11.9 Storm Water Pollution and Prevention Plan.** Developer shall prepare a Storm Water Pollution and Prevention Plan as required by state law.

**11.10 Water System Improvements.** Developer shall provide improvements to the

**11.11 Street Improvements.** Developer shall provide improvements to the streets as set forth in Tract Map #985 and the Coyote Wells Specific Plan.

**11.12** Permittee shall provide free firing range training to the Imperial County Sheriffs Department and General Pubic for up to 3 weeks per year.

**11.13** Permittee shall allow free access to the airstrip for take off and landings for the general public year around.

11.14 Permittee shall donate monies and labor for the operation of the local museum.

**13. Periodic Review.**

13.1 County shall review the extent of good faith substantial compliance by Developer with the terms of this Agreement at least every twelve (12) months pursuant to California Government Code section 65865.1.

13.2 Upon written request from the County, Developer shall have the duty to demonstrate its good faith substantial compliance with the terms of this Agreement, within thirty (30) days after a written request.

13.3 County's failure to review at least annually Developer's compliance with the terms and conditions of this Agreement shall not constitute or be asserted by County or Developer to be a breach or default of the Agreement, and shall not be used as grounds to amend, modify, alter, or terminate the Agreement.

**14. Assignment and Delegation.**

14.1 The County shall approve all sales, transfers, or assigns of all of Developer's right in the Property within sixty (60) days of notice being provided to the County Executive Office, and such consent shall not be unreasonably withheld.

14.2 If Developer sells, transfers, or assigns all of Developer's right in the Property, such sale, transfer, or assignment shall include the assignment and assumption of all rights, duties, and obligations arising under or from this Agreement.

14.3 If there is a purchase, transfer, or assignment of the Property as a whole, the purchaser, transferee, or assignee must provide County with security equivalent to any security previously required of Developer to secure performance of its obligations. The sufficiency of the equivalent security shall be determined by the County in its sole discretion prior to sale, transfer, or assign.

14.4 Developer shall deliver written notification of sale, transfer, or assignment to County sixty (60) days prior to such sale, transfer, or assignment. Developer shall deliver a copy of the acknowledgment and the assignment duly executed by the purchaser or transferee and notarized by a notary public, whereby the purchaser or transferee expressly assumes the obligations of Developer under this Agreement with respect to the sold or transferred portion of the Property.

14.5 Notwithstanding any sale, transfer, or assignment, a transferring Developer shall continue to be obligated under this Agreement unless such transferring Developer is given a release in writing by the County.

**15. Relationship of County and Developer.** The contractual relationship between County and Developer arising out of this Agreement is one of independent contractor and not agency. This Agreement does not create any third-party beneficiary rights.

**16. Indemnification and Hold Harmless.**

16.1 Developer agrees to and shall hold the County, its officers, agents, and employees harmless from liability:

(i) for damages, just compensation, restitution, judicial or equitable relief arising out of claims for personal injury, including health, and claims for property damage which may arise from the direct or indirect operations of the Developer or its contractors, subcontractors, agents, employees, or other persons acting on Developer's behalf that relate to the Project ; and

(ii) from any claims by third parties that damages, just compensation, restitution, judicial or equitable relief is due by reason of the terms of, or effects arising from, this Agreement.

(iii) from any claims for damages, just compensation, restitution, judicial or equitable relief arising out of claims for personal injury, including health, and claims for property damage which may arise from a challenge to this project based on the Environmental Quality Act.

**16.2** Developer further agrees to indemnify, hold harmless and pay all reasonable costs for the defense of the County, including reasonable fees and costs for legal counsel regarding any action by a third party challenging the validity of this Agreement or asserting that damages, just compensation, restitution, judicial or equitable relief is due to personal or property rights by reason of the terms of, or effects arising from, this Agreement.

**17. Amendment or Cancellation.** This Agreement may be amended or canceled by the mutual consent of County and Developer, in the manner set forth in California Government Code section 65868 and County Ordinances sections 92316.00 and 92316.01.

**18. Default.** A default under this Agreement shall be deemed to have occurred upon the happening of one or more of the following events or conditions:

**18.1** A warranty, representation, or statement made or furnished by Developer in this Agreement to County or by County to Developer is false or proves to have been false in any material respect when it was made.

**18.2** A finding by County, based on substantial evidence, that the Developer has not complied in good faith with one or more of the terms or conditions of this Agreement.

**18.3** Any other act or omission by Developer which materially interferes with the terms of this Agreement.

**19. Procedure upon Default.**

**19.1** Upon the occurrence of default by Developer or County, the non-defaulting party shall provide the other party thirty (30) days written notice specifying the alleged default.

**19.2** After proper notice and after the default remains uncured for thirty (30) days, this Agreement may be terminated.

**19.3** All other remedies at law or in equity which are not inconsistent with the provisions of this Agreement are available to County and Developer to pursue in the event there is a breach.

**20. Legal Action.** In addition to any other rights or remedies, either party may institute legal action to cure, correct or remedy any default, to enforce any covenant or agreement herein, to enjoin any threatened or attempted violation, or to compel specific performance. In no event shall County or its officers, employees or agents be liable in damages for any breach of this Agreement, it being expressly understood and agreed that the sole remedy available to Developer for a breach of this Agreement by County shall be a legal action in mandamus, specific performance, injunction or declaratory relief to enforce the Agreement.

**21. Attorney's Fees.** In the event any legal action is brought to enforce or construe this Agreement, the prevailing party shall be entitled to an award of reasonable attorney's fees, expert witness and consulting fees, and litigation costs.



**22. Discretion to Encumber.** This Agreement shall not prevent or limit Developer from encumbering the Property or any improvement on the Property by any mortgage, deed of trust or other security device.

**22.1** The lien of any existing or future deeds of trust recorded against all or any part of the Property shall be superior and senior to any lien created by this Agreement or the recordation thereof. At the request of any lender whose loan will be secured by a deed of trust on all or any part of the Property, County shall execute a subordination agreement subordinating its interest hereunder to the lien of such deed of trust, which subordination agreement shall be subject to the reasonable approval of County. Notwithstanding the foregoing, at the option of the mortgagee/beneficiary, any foreclosure of any such deed of trust shall not serve to extinguish or terminate this Agreement. Nothing in this Agreement shall be deemed to construe, permit or authorize any such mortgagee to devote the Property, or any part thereof, for any uses, or to construct any improvements thereon, other than those uses or improvements provided for or authorized by this Agreement.

**22.2** Neither entering into this Agreement nor a breach of this Agreement shall defeat, invalidate, diminish or impair the lien of any existing or future mortgage or deed of trust on the Property made in good faith and for value.

**23. Termination of Agreement With Respect to Individual Lots Upon Sale to Public.**

Notwithstanding any other provision herein, this Agreement, except for the provisions relating to nondiscrimination, shall terminate, without the execution or recordation of any further document, with respect to any lot which meets the following conditions:

**23.1** The lot has been finally subdivided; and

**23.2** The lot has been individually (and not in "bulk") sold or leased to a member of the public or other ultimate user.

**24. Entire Agreement. Waivers and Recorded Statement.**

This Agreement constitutes the entire understanding and agreement of County and Developer with respect to the matters set forth in this Agreement. This Agreement supersedes all negotiations or previous agreements between County and Developer respecting this Agreement. All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of County and Developer. Upon the completion of performance of this Agreement or its revocation or termination, a statement evidencing completion, revocation or termination signed by the appropriate agents of County shall be recorded in the Official Records of Imperial County, California.

**25. Notices.** All notices required or provided for by this Agreement shall be in writing and delivered in person or sent by certified mail, postage prepaid, return receipt requested, to the following:

To County:                      The County of Imperial  
  Attn: County Executive Officer  
  940 Main Street  
  El Centro, CA 92243  
  Facsimile: (760) 353-8338

To Developer:                 Wind Zero Corp

County or Developer may change its address by giving notice in writing to the other party.

**26. Captions.** The captions of this Agreement are for convenience and reference only and shall not define, explain, modify, construe, limit, amplify or aid in the interpretation, construction or meaning of any provision of this Agreement.

**27. Recording.** The Clerk of the Board shall cause a copy of this Agreement to be recorded with the Office of the County Recorder of Imperial County, California, within ten (10) days following the execution of this Agreement, pursuant to California Government Code section 65868.5.

**28. Interpretation and Governing Law.** This Agreement and any dispute arising hereunder shall be governed and interpreted in accordance with the laws of the State of California.

**29. Venue.** In the event of any legal or equitable proceeding arising out of or relating to this Agreement, the parties agree that venue shall lie only in the federal or state courts located nearest to the Property.

**30. Time of Essence.** Time is of the essence in the performance of the provisions of this Agreement as to which time is an element.

**31. Unenforceable Provisions.** The terms, conditions, and covenants of this Agreement shall be construed, whenever possible, as consistent with applicable laws and regulations. To the extent that any provision of this Agreement as so interpreted is held to violate any applicable law or regulation, the remaining provisions shall nevertheless be carried into full force and effect and remain enforceable.

**32. Representation of Capacity to Execute Contract.** Each party to this Agreement represents and warrants that the person or persons signing on behalf of that party has the authority to execute this Agreement on behalf of the entity represented by those individuals.

**33. No Waiver.** The failure of either party to enforce any term, covenant or condition of this Agreement on the date it is to be performed shall not be construed as a waiver of that party's right to enforce this or any other term, covenant or condition of this Agreement at any later date or as a waiver of any term, covenant or condition of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Development Agreement as of the Effective Date stated in this Agreement as authorized by Ordinance No. [Ordinance Number of This Development Agreement] of the Board of Supervisors of the County of Imperial.

**Exhibit A – Legal Property Description**

The zone classification of those certain parcel(s) of real property being legally identified as a portion of the Coyote Wells Quadrangle, Portions of Sections 4, 5, 32, and 33, Township 16 and 16 ½ South, Range 10 East, SBBM: Also identified by the following Assessor's Parcel Numbers:

033-620-033-000  
033-620-034-000  
033-620-035-000  
033-630-010-000

033-630-011-000  
033-630-012-000  
033-640-026-000  
033-640-027-000

033-650-020-000  
033-650-021-000  
033-650-022-000  
033-650-023-000

**Exhibit B – Property Ownership**

Wind Zero Company, LLC, 1220 Rosecrans, Street, PMB146, San, Diego, CA. 92105.