

STAFF REPORT

DATE: November 27, 2012

TO: City Council

FROM: Ken Hiatt, Director of Community Development and Sustainability
Katherine Hess, Community Development Administrator

SUBJECT: Nishi Pre-Development Cost Funding And Negotiation Agreement

Recommendation

Staff recommends that the City Council take the following actions

1. Adopt the attached resolution approving a Pre-Development Cost Funding and Negotiation Agreement with Nishi Gateway, LLC establishing parameters for predevelopment review of a mixed of university-related research park development complemented by high density urban housing.
2. Continue to coordinate with the university on infrastructure and circulation alternatives for the property.
3. Continue to pursue grant financing for predevelopment and/or infrastructure costs.
4. Approved the attached budget adjustment allocating \$700,000 to the effort, with costs to be split equally between the City and the property owner.

Council Goals

Economic Development

Actively partner with UC Davis, Yolo County and other regional partners on land use planning and economic development to define opportunities and remove constraints to future innovation business growth.

- Entitle the Downtown / University Mixed-Use Innovation District.

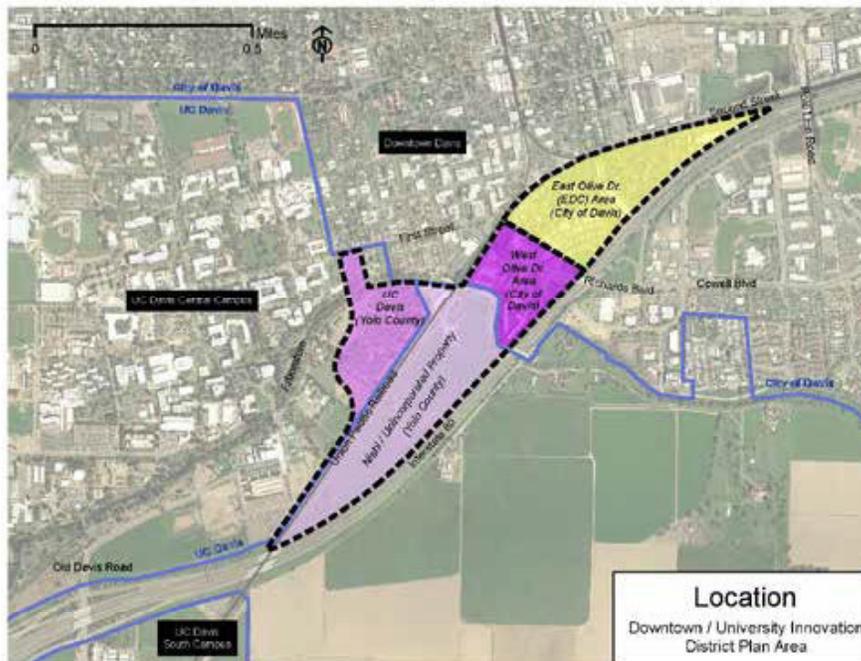
Fiscal Impact

The recommended Pre-Development Cost Funding and Negotiation Agreement for the Nishi Mixed-Use Innovation District anticipates City expenditure of up to \$350,000 for environmental, planning, and public outreach processes. Funds for the City's share are anticipated to come from currently-budgeted monies from the Downtown Area Revitalization Fund. The current budget includes an allocation for core area parking improvements that will not be expended this year. Staff anticipates that the City Council will evaluate options for core area parking with the 2013-14 budget, upon completion of the downtown parking task force effort, or as other opportunities arise.

Background and Analysis

In October 2010, as part of the Business Park Land Strategy, the City Council approved actions to maintain a steady supply of developable business park / industrial land. Immediate actions included initiating planning of the Nishi property as a mix of university-related research park development complemented by high density urban housing. Longer-term actions including moving forward to explore peripheral locations for an innovation park. Part of the Council's direction on Nishi was to work with UC Davis to identify and explore options, viability and costs for circulation and access options that involve university property.

In February, the City and the campus jointly submitted an application for grant funds for the Sustainable Communities Planning Grant and Incentives Program. The goal of the applications was to secure funds for a process to develop alignment of goals and closely-coordinated planning between the City and the University for the Nishi property, adjacent UC Davis land, and both East and West Olive Drive. Although the grant application scored highly, it was not selected for funding.



While the university will undertake planning studies for this side of campus to inform an update of their long range development plan and will look for opportunities to coordinate with City on similar studies of adjacent, non-university properties, staff continues to meet with the property owner to explore ways to advance planning on the Nishi property with limited local resources. We are proposing a collaborative cost/benefit sharing approach with the property owner for predevelopment of the Nishi site. The recommended agreement calls for a 50:50 share of out-of-pocket predevelopment costs between the property owner and the city. If a mixed-use innovation district project is approved by the City Council and the voters, the city's costs will be

reimbursed by the property owner. In addition, a development agreement will be negotiated during as part of this process. The following is a list of preliminary anticipated deal points that will be negotiated, among others, as part of the development agreement:

- *Developer to grant city the approximately 22 acres shown as research/business park land.*
- *City clerk Developer and City agree to identify backbone infrastructure to the property including access to Olive Drive in addition to possible access points to UCD, I-80, or both. Backbone infrastructure will include utilities and primary roadways.*
- *Costs for infrastructure will be shared equally*
- *City and Developer will work together to explore financing alternatives, including alternatives for construction and maintenance of infrastructure.*
- *City and Developer will work together with UCD in all planning efforts including negotiating access to UCD sewer, water, fiber optic, fire, and, if applicable, drainage services*
- *If residential density is greater than 30 units per acres gross, no affordable housing obligation or fees*
- *Agricultural land conservation to be determined and could include in-lieu of fees. Costs of Ag conservation, and any other fees, assessments, etc. for agricultural preservation will be split 50/50*
- *It is intended that phasing of the development will be flexible so that either property, City's or Developer's, can be developed as utilities and access are completed in phases. Once the Business Park parcel is granted to City it is the intent that each parcel can develop independent from the other*

We anticipate approximately \$700,000 in shared predevelopment expenses, including \$300,000 for the Environmental Impact Report and \$100,000 in planning staff costs. Other shared costs would include the Measure R ballot process (approx.. \$125,000) and legal expenses of drafting the Development Agreement (initially anticipated at \$50,000).

As outlined in the agreement, if a project is approved by the City Council and the voters, the property owner would be required to repay the City for its share of predevelopment expenses. The funds would be repaid over eighteen months. Staff anticipates that this would provide the City with revenue to cover for its own efforts as property owner and developer, including engineering and marketing.

The recommended agreement is not without risk to the City. We could be unable to reach agreement with the developer on land uses or terms of the development agreement. Infrastructure costs could be higher than justified by the projected development. Even if the land-use applications are approved by the City Council, voters might reject the proposal. However, the agreement allows either party to terminate the agreement without cause at any point during the process. This provision significantly limits the City's risk and the ability to limit its cost exposure prior to significant expenditure milestones, such as prior to commencing CEQA contracting. Staff believes the tremendous opportunity to provide additional urban housing and innovation park opportunities adjacent to downtown and the campus justifies the risk of initiating the process.

If the Pre-Application Agreement is approved, staff would anticipate the following next steps:

By June 2012 EIR Contract executed
Draft Tax-sharing Agreement with Yolo County
Preliminary understanding with UC Davis on circulation and utility
alternatives

By December 2012 Issuance of Draft EIR

By June 2013 Issuance of Final EIR
City Council action on land-use applications and Development
Agreement

November 2012 Measure J/R ballot

Throughout the planning and public processes, staff would collaborate with UC Davis representatives with the goal of identifying land use, circulation, and utility options that complement uses and vision for the campus.

Attachments

1. Resolution approving Pre-Application Agreement
2. Budget Adjustment

RESOLUTION NO. 12-XXX, SERIES 2012

**RESOLUTION APPROVING PRE-DEVELOPMENT COST FUNDING AND
NEGOTIATION AGREEMENT FOR THE NISHI PROPERTY**

WHEREAS, City Council two-year Economic Development (Draft) goals include goals to: promote economic development consistent with our community values and niche as home of a world class university; and to actively partner with UC Davis, Yolo County and other regional partners on land use planning to define opportunities and remove constraints to future innovation business growth; and

WHEREAS guiding principles for City economic development goals are to: cultivate a diversified economy, workforce and tax base; capitalize on the resources of a university town, including human capital, and promote appropriate partnerships with the private sector and university community; and

WHEREAS, to maintain a steady supply of developable business park/industrial land, City Council actions on the 2010 Business Park Land Strategy created an Innovation Park Task Force to consider whether and how the City should continue to pursue creation of a new innovation center; and identified this effort as a priority action of the Working Draft Comprehensive Economic Development Strategy approved in July of 2011; and

WHEREAS, on November 13,2012, the City Council approved the Innovation Park Task Force's recommendation to pursue a dispersed innovation strategy including "Downtown Research and University Innovation District" as the City's top innovation center priority; and

WHEREAS, the Nishi property is in unincorporated Yolo County adjacent to the territorial boundaries of the City and located within the 10-year Sphere of Influence (SOI) for the City as adopted by the Yolo County Local Agency Formation Commission; and

WHEREAS, on October 26, 2010, the City Council determined to pursue (re)development of Downtown and Nishi/Gateway as a dynamic mixed-use innovation district, including initiating planning of the Nishi property as a mix of university-related research park development complemented by high density urban housing; and

WHEREAS, the owner of the Nishi property has proposed to the City that in furtherance of the overall development of the Property, as a term of the proposed Development Agreement, Developer would convey approximately twenty-two acres of the Property to the City for development of the research/business park component of the Proposed Development.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Davis hereby approve the attached Pre-Development Cost Funding and Negotiation Agreement for the Nishi Property, in substantially the form attached as Exhibit A, subject to any minor and conforming changes as may be determined necessary by the City Manager and City Attorney.

PASSED AND ADOPTED by the City Council of the City of Davis on this 27th day of November, 2012 by the following vote:

AYES:

NOES:

Joseph F. Krovoza
Mayor

ATTEST:

Zoe S. Mirabile, CMC
City Clerk

PRE-DEVELOPMENT COST FUNDING AND NEGOTIATION AGREEMENT

THIS PRE-DEVELOPMENT COST FUNDING AND NEGOTIATION AGREEMENT TO NEGOTIATE EXCLUSIVELY (the “Agreement”) is entered into this ___ day of _____, 2012 (the “Effective Date”), by and between the City of Davis (the “City”), a municipal corporation, and _____, a _____ (the “Developer”) (each a “party”), on the basis of the following facts, understandings and intentions of the parties:

RECITALS

A. The property that is the subject of this Agreement (the “Property”) is described in Exhibit A attached hereto and incorporated herein. The property is owned by the Developer. The Property is in unincorporated Yolo County adjacent to the territorial boundaries of the City and located within the 10-year Sphere of Influence (SOI) for the City as adopted by the Yolo County Local Agency Formation Commission.

B. The Developer and City desire to develop the Property as a mixed-use development with a residential component and a research/business park component (the “Proposed Development”), thus City has encouraged Developer to submit an application to the City for a general plan amendment, annexation of the Property into the City, and such other land use approvals or entitlements as are deemed necessary or appropriate for the development of the Property (the “Development Application”). The Developer has proposed to the City that in furtherance of the overall development of the Property, as a term of the proposed Development Agreement, Developer would convey approximately twenty-two acres of the Property to the City for development of the research/business park component of the Proposed Development as generally shown on preliminary land plan attached as Exhibit B.

C. The Property is located in a prominent site adjacent to Downtown Davis, the University of California Davis campus and Interstate 80. The City Council has expressed its interest in exploring the development of the Property as a dynamic mixed-use innovation district.

D. In light of the City Council’s desire to explore the development of the Property, and Developer’s preliminary proposal to convey a portion of the Property to the City for future development consistent with the City Council’s contemplated vision for the Property, the City Council desires to participate in the development of a project description for the Property, and contribute to certain costs associated with the processing of the Development Application, the Development Agreement and associated environmental review, subject to reimbursement by the Developer in the event the Development Application and Development Agreement are ultimately approved by Developer, the City Council, and the citizens of the City of Davis pursuant to the procedures set forth in Chapter 41 of the Davis Municipal Code.

THEREFORE, the City and the Developer agree as follows:

Section 1. Negotiation of Development Agreement. City and Developer agree to negotiate in good faith for a period of time not to exceed twenty-four (24) months from the Effective Date of this Agreement (the “Negotiation Period”) regarding terms of the proposed Development Agreement to be submitted to the City Council for consideration. As a key term of the Development Agreement, both parties anticipate that Developer would convey twenty-two acres of the Property to City for development of a research/business park, as depicted in Exhibit B to this Agreement. If the City staff and Developer have not produced a development agreement for the Proposed Development in a form that may be submitted to the City Council by the end of the Negotiation Period, this Agreement shall automatically terminate and the parties shall have no further obligations under the terms of this Agreement, except for those obligations that survive termination as specifically provided in this Agreement. If the City Council approves a development agreement for the Proposed Development prior to the expiration of the Negotiation Period, this Agreement shall remain in effect until a vote of the citizens is conducted pursuant to Chapter 41 of the Davis Municipal Code. Following the vote of the citizens, this Agreement shall automatically terminate, except for those obligations that survive termination as specifically provided in this Agreement.

Section 2. Pre-Development Schedule. Developer shall proceed with submitting the Development Application to the City and the City will commence with the processing of the Development Application for consideration by the City Council. The City and Developer agree to use their best efforts to adhere to the following schedule in proceeding with completing the proposed entitlements for consideration by the City Council. Notwithstanding the schedule set forth below, both parties acknowledge and agree that many aspects of the entitlement process are beyond the control of either party, and failure to meet the deadlines set forth below shall not constitute a default of either party under this Agreement.

a. Project Description and Architectural Concept for Residential Portion of Property. Within six (6) months of the Effective Date of this Agreement, the Developer shall complete a project description for the residential component of the Proposed Development that is sufficient to conduct the environmental analysis required pursuant to the California Environmental Quality Act (“CEQA”) (Public Resources Code §§21000 *et seq.*), The project description for the residential portion of the property shall include a description of the anticipated roadway connections and utility service connections necessary to provide access and utility service to the residential portion of the Property.

b. Project Description and Architectural Concept for Research/Business Park Portion of Property. Within six (6) months of the Effective Date of this Agreement, the City shall complete a project description for the research/business park component of the Proposed Development that is sufficient to conduct the environmental analysis required pursuant to the California Environmental Quality Act (“CEQA”) (Public Resources Code §§21000 *et seq.*). The project description for the research/business park portion of the property shall include a description of the anticipated roadway connections and utility service connections necessary to provide access and utility service to the research/business park portion of the Property.

c. Contract for Environmental Impact Report. Within six (6) months after the Effective Date of this Agreement, the City shall select and enter into a contract with an

environmental consultant for the preparation of an Environmental Impact Report (“EIR”) in accordance with CEQA and the CEQA Guidelines.

d. Preliminary Tax-Sharing Agreement. Within six (6) months after the Effective Date of this Agreement, the City shall prepare a preliminary Tax-Sharing Agreement between the City and the County of Yolo (the “County”) that would reflect the annexation of the Property into the City. The preliminary Tax-Sharing Agreement would be submitted to the County for its consideration following preparation by the City.

e. Issuance of Draft EIR. Within ten (12) months after the Effective Date of this Agreement, the City shall complete a draft EIR for the Proposed Development and make the draft EIR available for public comment in accordance with the requirements of CEQA and the CEQA Guidelines.

f. Issuance of Final EIR. Within twenty-four (18) months after the Effective Date of this Agreement, the City shall complete a final EIR for the Proposed Development and present the final EIR to the City Council for certification in accordance with the requirements of CEQA and the CEQA Guidelines.

g. Consideration of Development Agreement and Other Land Use Entitlements. Within twenty-four (18) months after the Effective Date of this Agreement, the City Council shall hold a public hearing to consider the Development Application and the Development Agreement.

h. Ballot Measure. Within (24) months after the Effective Date of this Agreement, if the Development Application and the Development Agreement are approved by the City Council, the City shall have the project scheduled for a vote pursuant to Chapter 41 of the Davis Municipal Code.

Section 3. Pre-Development Cost Funding.

a. Sharing of Pre-Development Costs. The City and Developer agree to each pay fifty percent (50%) of certain costs associated with processing the Development Application, conducting environmental review of the Proposed Development and conducting an election for the Proposed Development pursuant to Chapter 41 of the Davis Municipal Code, up to a maximum total cost of Seven Hundred Thousand Dollars (\$700,000.00), or Three Hundred Fifty Thousand Dollars (\$350,000.00) each for City and Developer. The costs to be shared between City and Developer are limited to costs incurred for: (1) Consultants and subconsultants retained by the City to conduct the environmental review required under CEQA; (2) costs of City staff time incurred in processing the Development Application and negotiating agreements and approvals necessary or appropriate for the development of the Property; (3) other consultants retained by the City in connection with the processing of the Development Application and negotiating the Development Agreement, including but not limited to engineers, surveyors, and financial consultants; (4) City legal costs related to the Proposed Development; (5) any direct or indirect costs to the City of Davis caused by the elections mandated by Chapter 41 of the Davis Municipal Code; (6) costs incurred by the City in connection with negotiations with third parties in furtherance of the Development Application and Development Agreement, including but not

limited to, negotiations with the University of California regarding access and utility service to the Property and negotiations with Yolo County regarding the tax sharing agreement between the City and Yolo County regarding the Property; and (7) such other direct or indirect costs incurred by the City in the processing of the Development Application that are the responsibility of Developer pursuant to that certain Agreement to Pay the City of Davis the Total Costs Incurred in Connection with the Processing of an Application for a Land Use Entitlement (the "Entitlement Cost Agreement") (collectively, the "Pre-Development Costs").

The Pre-Development Costs that are funded by City and Developer on a 50/50 basis are all costs that will be incurred directly by City and are required to be reimbursed by Developer in accordance with the terms agreed to by Developer in the Entitlement Cost Agreement. This Agreement sets forth City's agreement to partially fund Developer's obligations under the Entitlement Cost Agreement, but this Agreement shall not otherwise modify, supersede or amend Developer's obligations under the Entitlement Cost Agreement in any way. Further, Developer shall be required to make an initial deposit to the City in accordance with the requirements of the Development Application, the Entitlement Cost Agreement and the City's Master Fee Schedule. Thereafter, Developer shall replenish the deposit as requested by the City, but at a minimum, on a bi-monthly basis. Each City request for replenishment shall include a summary of costs incurred to date, and shall require a deposit sufficient to pay anticipated costs for the next 60 days. The Developer shall replenish the deposit in the amount required by the City within 15 days of written request by the City. Failure to replenish the deposit in accordance with each City request in the time provided in this Section shall constitute a default under this Agreement and the City may, in addition to all other remedies provided in this Agreement, cease all work in connection with the Development Application and the Development Agreement. At such time that costs are incurred by City for any of the purposes described above, the City shall charge 50% of such cost to the Developer, and shall pay 50% of the cost from City funds, until such time that the total costs incurred for the purposes described in this Section 3.a are equal to \$700,000.00. At such time that the Pre-Development Costs equal \$700,000.00, this Agreement shall automatically terminate and the City may, at its option, cease all work in connection with the Development Application and the Development Agreement, until such time that the parties agree upon a mechanism for paying the remaining costs associated with the Development Application and the Development Agreement.

b. Statement of Pre-Development Cost Charges. Any statement or invoices submitted by City to Developer setting forth costs incurred for Pre-Development Costs will set forth the total Pre-Development Costs incurred, and will state both the 50% share of those costs paid by the City pursuant the terms of this Agreement, and the portion of those costs that are charged to and/or owing by Developer. City staff billing invoices will include detailed information identifying staff member, time spent, and a brief narrative describing the subject matter of the work conducted by City staff.

c. Reimbursement of City Costs. In the event that the Development Application and the Development Agreement are approved by the City Council and are approved by the citizens of the City in accordance with Chapter 41 of the Davis Municipal Code, the Developer shall reimburse to the City all Pre-Development Costs incurred by City as set forth in this Agreement, including but not limited to costs of City staff time incurred in connection with the

Proposed Development. The reimbursement required under this Section 3.c shall be paid as follows:

i. Within five days following certification of the results of the election required for the Development Application pursuant to Chapter 41 of the Davis Municipal Code, the City shall notify Developer of the reimbursement amount owed pursuant to this Section (the “Total Reimbursement”);

ii. Within thirty days following the date of certification of the results of the election, the Developer shall make an initial payment equal to 25% of the Total Reimbursement;

iii. Within six months following the date of certification of the election, the Developer shall make a second payment of equal to 25% of the Total Reimbursement;

iv. Within twelve months following the date of certification of the election, the Developer shall make a third payment equal to 25% of the Total Reimbursement; and

v. Within eighteen months following the date of certification of the election, the Developer shall make a final payment equal to 25% of the Total Reimbursement.

Failure to make the required reimbursement payments in accordance with this Section is a default under this Agreement, and in addition to any and all remedies available pursuant to this Agreement, the City shall not issue or process any further development or building permits of any kind for Developer to conduct any work on the Property unless and until the reimbursement payments required under this Section 3.c are paid in the timeframes required under this Agreement.

Section 4. Public Process and Participation. Developer agrees and acknowledges that the City cannot and does not intend to commit in advance to the outcome of the Proposed Development, the Development Application or the Development Agreement, and is entering into this Agreement solely to establish terms pursuant to which the City will participate in and provide assistance for the preliminary planning of the Proposed Development and processing of the Development Application. Notwithstanding the City’s participation, the Development Application and the proposed Development Agreement are subject to legally required environmental review and the same public hearing process as any other application for such land use entitlements in or adjacent to the City, including but not limited to approval by the citizens of the City pursuant to Chapter 41 of the Davis Municipal Code. Nothing herein shall constitute or be construed as a pre-commitment by the City to approve the Development Application or the Development Agreement, and Developer shall have no additional rights to or expectation of approval of the Development Application or the Development Agreement arising from this Agreement.

Section 5. Default.

a. **Events of Default—Developer.** Developer will be in default under this Agreement upon the occurrence of any one or more of the following events (each, a “Developer Event of Default”):

- i. Developer fails to negotiate in good faith regarding the terms of the proposed development agreement during the Negotiation Period;
- ii. Developer fails to pay any costs or expenses due to City pursuant to this Agreement or the Developer Application within seven (7) days after such payment is due;
- iii. Developer becomes insolvent or the subject of any bankruptcy or other voluntary or involuntary proceeding, in or out of court, for the adjustment of debtor-creditor relationships and such proceeding is not dismissed within ninety (90) days;
- iv. Developer dissolves, terminates or liquidates;
- v. Any representation or warranty made or given by Developer in this Agreement proves to be false or misleading in any material respect; and
- vi. Developer fails to comply with any other material covenant or provision contained in this Agreement and does not cure that failure within thirty (30) days after written notice from City of such failure.

b. Events of Default—City. City will be in default under this Agreement upon the occurrence of any one or more of the following events (each, a “City Event of Default”):

- i. City fails to negotiate in good faith regarding the terms of the proposed development agreement during the Negotiation Period;
- ii. City fails to contribute the City’s share toward Pre-Development Costs in accordance with the terms of this Agreement;
- iii. Any representation or warranty made or given by City in this Agreement proves to be false or misleading in any material respect; and
- iv. City fails to comply with any other material covenant or provision contained in this Agreement and does not cure that failure within thirty (30) days after written notice from City of such failure.

Section 6. Remedies

a. City Remedies. If a Developer Event of Default occurs under this Agreement, City may exercise any right or remedy City has under this Agreement or any remedy otherwise available to City at law or in equity, and all of City’s rights and remedies shall be cumulative. If any Developer Event of Default occurs, City’s obligation to pay the City’s share of Pre-Development Costs under this Agreement shall automatically terminate and City, in City’s sole and absolute discretion, may withhold any amount of the City’s share of Pre-Development Costs due to be paid under this Agreement or may terminate this Agreement.

b. Developer Remedies—Right to Specific Performance and Limitation on Recovery of Damages. If a City Event of Default occurs under this Agreement, Developer shall be limited to either of the following remedies: (1) an action against the City for specific performance of this Agreement; or (2) termination of this Agreement. Such specific performance shall be limited to directing the City to pay its share of the Pre-Development Costs pursuant to this Agreement through the date on which Developer delivers to City notice of a City Event of Default or the date of termination of this Agreement, whichever is earlier. The Pre-Development Costs are paid directly by City to third parties, and therefore no amounts shall be paid or owing by City to Developer under this Agreement under any circumstances. Further, under no circumstances shall the City be liable to Developer under this Agreement for any speculative, consequential, collateral, special, punitive or indirect damages or for any loss of profits suffered or claimed to have been suffered by Developer.

c. Developer Waiver of Rights. City and Developer each acknowledge and agree that City would not have entered into this Agreement if it were to be liable to Developer for any monetary damages, monetary recovery or any remedy during the continuance of an Event of Default under this Agreement by City. Accordingly, City and Developer agree that the remedies specifically provided for this Section 5 are reasonable under the circumstances and shall be Developer's sole and exclusive rights and remedies during the continuance of an Event of Default under this Agreement by City. Developer waives any right to pursue any remedy or damages other than those specifically provided in Section 5.b.

d. Civil Code Section 1542 Waiver. Developer acknowledges the protections of Civil Code Section 1542 relative to the waivers and releases contained in this Section 6, which Civil Code Section reads as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

e.. Acknowledgment. By initialing below, Developer knowingly and voluntarily waives the provisions of Section 1542 and all other statutes and judicial decisions (whether State or Federal) of similar effect solely in connection with the waivers and releases contained in this Section 6.

Initials of Authorized
Developer Representative

Section 7. Termination. The parties each reserve the absolute right to terminate this Agreement without cause, upon 72-hours' written notice to the other party. In the event of termination without cause, the terminating party shall be responsible to pay its share of the Pre-Development Costs actually incurred through the date of termination of the Agreement. The non-terminating party shall not be entitled to any claim or lien against the terminating Party for any additional compensation or damages in the event of such termination. Notwithstanding the

foregoing, if the City terminates this Agreement pursuant to this Section 7, the City shall not be entitled to reimbursement of the City Share pursuant to Section 3.c of this Agreement even if the City and the citizens of the City approve the Development Application and the Development Agreement. If Developer terminates this Agreement pursuant to this Section 7, or if this Agreement terminates automatically upon expiration of the Negotiation Period, and the City and the citizens of the City both approve the Development Application and the Development Agreement, the Developer shall be required to reimburse the City Share to the City in accordance with Section 3.c of this Agreement. The Developer’s obligation to pay such reimbursement shall survive termination of this Agreement.

Upon termination of this Agreement pursuant to this Section or at the expiration of the Negotiation Period, neither party shall have any further rights against or liability to the other under this Agreement except as specifically provided herein.

Section 8. Miscellaneous

a. No Waiver; Consents. Each waiver by City of any term, condition, covenant, provision or agreement set forth in this Agreement must be in writing, and no waiver shall be construed as a continuing waiver. No waiver shall be implied from City’s delay in exercising or failure to exercise any right or remedy against Developer or any security. Consent by City to any act or omission by Developer shall not be construed as a consent to any other or subsequent act or omission or as a waiver of the requirement for City’s consent to be obtained in any future or other instance. All rights and remedies of City under or relating to this Agreement are cumulative.

b. No Assignment without Consent. Neither Developer nor City shall make or permit any sale, assignment or other transfer of this Agreement without the prior written consent of other party, which consent shall not be unreasonably withheld. Notwithstanding the foregoing, the City shall not under any circumstances consent to the assignment of this Agreement to a third party unless that third party also obtains an ownership interest in the Property, and assumes all of Developer’s duties and obligations under the Development Application and the Entitlement Cost Agreement.

c. No Third Parties Benefited. This Agreement is made and entered into for the sole protection and benefit of City and Developer and their permitted successors and assigns.

d. Notices.

i. *Addresses.* All notices, requests, demands or other communications to the respective parties to this Agreement shall be deemed to have been duly given or made if addressed as follows:

If to City, to:	City of Davis 23 Russell Boulevard Davis, CA 95616 Attention: City Manager
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With a copy to:	Best Best & Krieger LLP 500 Capitol Mall, 17th Floor Sacramento, CA 95814 Attn: Harriet A. Steiner, Esq.
If to Developer, to:	Tim Ruff, President Nishi Gateway LLC P.O. Box 4188 Davis, CA 95617

or to such other address or such other person as either party may from time to time hereafter specify to the other in a written notice delivered in the manner provided in this Agreement.

ii. Delivery. All notices and other communications provided for in this Agreement shall be in writing and be delivered by messenger, overnight air courier or registered or certified first class mail with return receipt requested (for U.S. mailings) to the appropriate party at its address. Delivery of a notice, demand, request or report shall be deemed to be effected (a) when personally delivered, (b) one (1) business day after the date when deposited with an overnight courier or (c) three (3) days after the date when deposited in the United States mail and sent postage prepaid by registered or certified mail, return receipt requested.

e. Applicable Law. This Agreement shall be governed by and construed in accordance with the substantive and procedural laws of the State of California, without application of conflicts or choice of laws statutes or principles.

f. Heirs, Successors and Assigns; Participations. The terms of this Agreement shall bind and benefit the heirs, legal representatives, successors and assigns of the parties.

g. Severability. The invalidity or unenforceability of any one or more provisions of this Agreement shall not affect any other provision of this Agreement.

h. Interpretation. Whenever the context requires, all words used in the singular will be construed to have been used in the plural, and vice versa, and each gender will include any other gender. The captions of the sections of this Agreement are for convenience only and do not define or limit any terms or provisions. The word “include(s)” means “include(s), without limitation,” and the word “including” means “including, but not limited to.” The word “or” shall include the word “and.” No listing of specific instances, items or matters in any way limits the scope or generality of any language of this Agreement. Time is of the essence in the performance of this Agreement by Developer.

i. Amendments; Corrections. This Agreement may not be modified or amended except by a written agreement signed by the parties.

j. Counterparts. This Agreement may be signed in counterparts, and all counterparts shall constitute but one and the same document.

k. Language of Agreement. This Agreement has been negotiated at arm’s length and between persons sophisticated and knowledgeable in the matters dealt with herein. In

addition, each party has been represented by experienced and knowledgeable legal counsel. Accordingly, any rule of law (including California Civil Code Section 1654) or legal decision that would require interpretation of any ambiguities in this Agreement against the party that has drafted this Agreement is not applicable and is waived. The provisions of this Agreement shall be interpreted in a reasonable manner to effect the purposes of the parties and this Agreement.

1. Entire Agreement. This Agreement (including the attachments) contains all of the representations of and the entire agreement between the parties with respect to the subject matter of this Agreement. Any prior correspondence, memoranda, agreements, warranties or representations relating to such subject matter are superseded in total by this Agreement. No prior drafts of this Agreement or changes from those drafts to the signed version of this Agreement shall be introduced as evidence in any litigation or other dispute resolution proceeding by either party or any other person and no court or other body shall consider those drafts in interpreting this Agreement.

[remainder of page intentionally left blank]

**Signature Page To
Pre-Development Cost Funding and Negotiation Agreement**

IN WITNESS WHEREOF, the City and Developer have signed and entered into this Agreement by and through the signatures of their respective authorized representative(s) set forth below:

“DEVELOPER”

Nishi Gateway LLC,
a California Limited Liability Company

By: _____
Name: Timothy Ruff
Its: President

“City”

CITY OF DAVIS, a municipal corporation

By: _____
Steven J. Pinkerton
City Manager

Approved as to form:

By: _____
Harriet A. Steiner
City Attorney

EXHIBIT A

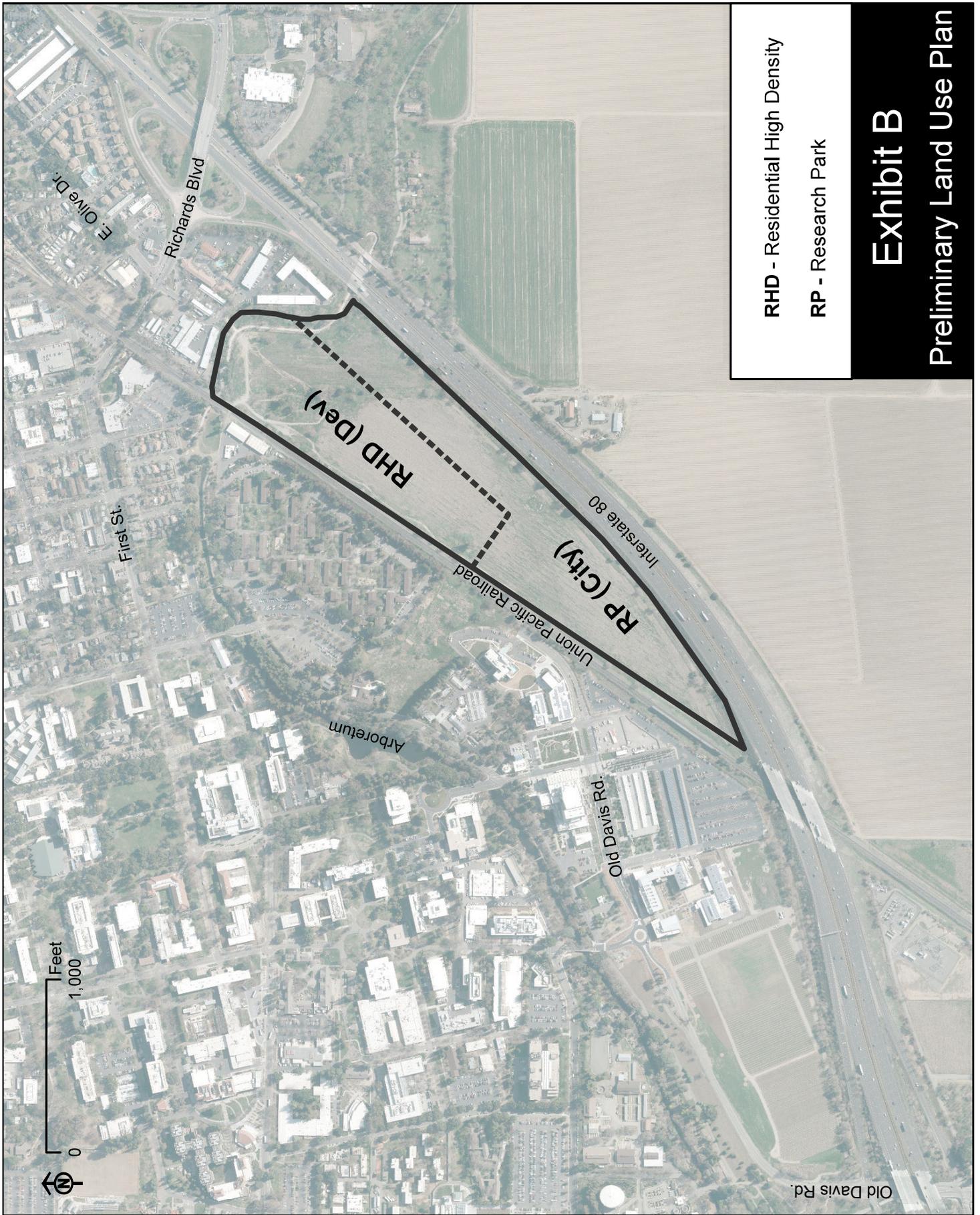
Legal Description of Property

[to be inserted]

EXHIBIT B
Preliminary Land Plan

[To be inserted]

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RHD - Residential High Density

RP - Research Park

Exhibit B

Preliminary Land Use Plan

