



Resolution

NO. 975

OFFICE OF THE
MAYOR
CITY OF SAN LUIS

A RESOLUTION OF THE MAYOR AND COUNCIL OF THE CITY OF SAN LUIS, ARIZONA APPROVING PROTECTED DEVELOPMENT RIGHTS AGREEMENT WITH CLEAN WIND ENERGY, INC.

Whereas Clean Wind Energy, Inc., a corporation authorized to do business in Arizona has received permission to seek rezoning of certain Federal lands located in the City of San Luis;

Whereas for a portion of the land in question a major plan amendment to the general plan is needed before rezoning can be considered;

Whereas the City of San Luis has determined the proposed project of Clean Wind Energy, Inc. is in the best interests of the City of San Luis;

Whereas both parties desire to commit to a schedule for consideration of the proposed major plan amendment and rezoning and further see a commitment to a schedule for development of the proposed project;

Whereas both parties desire to commit to the above mentioned schedules in a protected development rights agreement;

NOW THEREFORE BE IT RESOLVED, by the Mayor and Council of the City of San Luis, State of Arizona, as follows:

Section 1: That the Protected Development Rights Agreement, as attached hereto as Exhibit "A", is hereby ratified and approved.

Section 2: That the appropriate City officials are hereby authorized and directed to enter into said agreement on behalf of the City and take any all actions as may be necessary to effectuate said agreement.

PASSED AND ADOPTED by the Mayor and Common Council of the City of San Luis, Arizona, this 23rd day of May, 2011.



Gerardo Sanchez, Mayor

ATTEST:



Sonia Cuello, City Clerk

APPROVED AS TO FORM:



Glenn Gimbut, City Attorney

AGREEMENT FOR PROTECTED DEVELOPMENT RIGHTS

THIS AGREEMENT (the “**Agreement**”) for protected development rights is entered into this 23rd day of May, 2012, by and between Clean Wind Energy Inc., a corporation authorized to do business in the State of Arizona, (the “**Developer**”) and the City of San Luis, an Arizona municipal corporation (the “**City**”). This Agreement is entered into pursuant to City Resolution Number 975.

RECITALS

- A. WHEREAS, A.R.S. § 9-1201 authorizes the City to approve a protected development rights plan; and
- B. WHEREAS, Developer is seeking to lease and has authority to rezone the property described on Exhibit A hereto (the “**Property**”) from the United States Bureau of Reclamation, the owner; and
- C. WHEREAS, Developer seeks to have the Property rezoned to Heavy Industrial Use for the development of wind tunnel electric generating facility with related infrastructure, improvements and facilities (the “**Facility**”);
- D. WHEREAS, Prior to rezoning the portion of the Property on the Eastern boundary of Avenue C a major plan amendment pursuant to the provisions of A.R.S. §9-461.06.H is necessary;
- E. WHEREAS, Developer and City desire to see the ultimate development of the Property for the Facility proposed by Developer;
- F. WHEREAS, the development of the Property for the Facility will require and be contingent upon numerous state and federal approvals over a period of time;
- G. WHEREAS, the City’s governing body supports the rezoning of the Property for the development of the Facility and has authorized execution of this Agreement by Resolution No. _____, a draft of which is attached to this Agreement.

NOW, THEREFORE, the parties agree as follows:

AGREEMENT

ARTICLE 1. DEFINITIONS

The following terms shall have the meanings set forth below whenever used in this Agreement, except where the context clearly indicates otherwise:

- 1.1. City shall mean and refer to the City of San Luis, an Arizona municipal corporation, and any successor public body or entity.

1.2. Developer shall mean and refer to Clean Wind Energy, Inc., a corporation authorized to do business in the State of Arizona, or any successor in interest or assignee.

1.3. Protective Development Right Plan and Schedule of Performance shall mean and refer to the plan of development of the Property as described on Exhibit B as attached hereto which sets forth the specific uses of the site for the generation of electric power, the boundaries of the Property; significant topographical and other natural features affecting development of the Property, and the location of proposed infrastructure on the Property, and other development matters with respect to the Property.

1.4. Improvements shall mean and refer to all public and private improvements which may be constructed from time to time on the Property, including, without limitation, all structures, buildings, utility and transmission lines, roads, driveways, parking areas, walls, landscaping and other improvements of any type or kind, or any other alteration of the natural terrain to be built by the Developer for the Facility pursuant to the terms of this Agreement.

1.5. Property as used in this Agreement shall mean and refer to all of the real property which is legally described in Exhibit A.

ARTICLE 2. DEVELOPMENT PLAN

2.1. Duration of Protected Development Rights Agreement. The term of this Agreement shall continue and exist from the effective date of this Agreement for a period of three years pursuant to the provisions of A.R.S. §9-1203.A. It is acknowledged that the commencement of construction the Facility during the term of this Agreement shall entitle Developer to a two year extension of this Agreement pursuant to A.R.S. §9-1203.B.

2.2. Schedule of Performance. The City and the Developer intend that the planning and development of the Property shall be achieved pursuant to the Schedule of Performance contained in Exhibit B.

2.3. Failure of Timely Performance. In the event that either party hereto fails to perform any of its obligations which are set forth in or contemplated by this Agreement or in the Schedule of Performance in a timely manner after no less than ninety (90) days written notice from the other party, and should such failure not otherwise be excused by agreement of the parties or by the terms of this Agreement, such failure shall be considered to be a breach of this Agreement and the nonbreaching party shall have their respective remedies set forth in Sections 3 and/or 4 of this Agreement.

2.4. Approval and Processing of Plans. The City hereby acknowledges and agrees that development of the Property may occur over a span of a number of years and will require the City's ongoing participation in the review and approval of a major amendment to the General Plan, a rezoning to Heavy Industrial Use, modifications and amendments to any site plans, infrastructure plans, drainage plans, design plans, building plans, grading permits, building permits, and other plans, permit applications and inspections which are a part of the City's current building and development requirements (hereinafter collectively called "**Approval**

Requests”). City approves the Development Rights Plan attached hereto as Exhibit B for the development of the Property and agrees that said Plan can be built by Developer consistent with new zoning to be obtained by Developer in accordance with City’s rules regulations and ordinances after the obtaining of an amendment to the General Plan of the City. City staff agrees to support and recommend approval of a major plan amendment to the General Plan and agrees to recommend approval of rezoning to Heavy Industrial Use. Developer will be entitled to build the heights, densities, and intensity of uses as shown on Exhibit B, provided that all development and zoning processes are complied with by Developer, and that development is in accordance with such Federal, State, and local laws then in effect. City agrees that in connection with all approvals required by the zoning processes relating to the development of the Property, no extraordinary review requirements will be imposed on the Developer by City.

2.5. Review Process. The City acknowledges the necessity for expeditious review by the City of all plans and other materials (“**Submitted Materials**”) submitted by the Developer to the City hereunder or pursuant to any zoning procedure, permit procedure, or other governmental procedure pertaining to the development of the Property and agrees to use its reasonable efforts accomplish such an expeditious review of the Submitted Materials whenever possible. In making this commitment it is understood that development of this project is an extraordinary undertaking, and is unique in its scale and scope. As a result, it is understood that City will be engaging outside consultants and no particular or specific time frame for review and/or approval can presently be promised.

ARTICLE 3. MEDIATION AND DEFAULT

3.1. Representatives. To further the cooperation of the parties in implementing this Agreement, the City and Developer each shall designate and appoint a representative to act as a liaison between the City and its various departments and the Developer. The initial representative for the City (the “**City Representative**”) shall be the City Manager and the initial representative for the Developer shall be its project manager, as identified by the Developer from time to time (the “**Developer Representative**”). The representatives shall be available at all reasonable times to discuss and review the performance of the parties to this Agreement and the development of the Property.

3.2 Mediation. If a dispute arises out of or relates to this Agreement, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try to settle the dispute through mediation before resorting to arbitration, litigation or some other dispute resolution procedure. In the event that the parties cannot agree upon the selection of a mediator within seven (7) days, either party may request the presiding judge of the Superior Court of Yuma County to assign a mediator from a list of mediators maintained by the Arizona Municipal Risk Retention Pool.

3.2. Default. Failure or unreasonable delay by any party to perform any term or provision of this Agreement for a period of ninety (90) days after written notice thereof from another party shall constitute a default under this Agreement. If the default is of a nature which is not capable of being cured within ninety (90) days, the cure shall be commenced within such period, and diligently pursued to completion. The notice shall specify the nature of the alleged default and the manner in which the default may be satisfactorily cured. In the event of a default hereunder by any party, the non-defaulting party shall be entitled to all remedies at both law and

in equity, including, without limitation, specific performance and the right to perform the obligation(s) of which the defaulting party is in default and to immediately seek reimbursement from the defaulting party of all sums expended in order to cure such default, together with interest on all such sums from the date said sums are expended by the non-defaulting party for the purpose of curing the default to the date such sums are paid in full. In the event of failure of the Developer to timely develop in accordance with the Schedule of Performance, City shall have the right to rescind and terminate this agreement, terminating any protected development right pursuant to Chapter 11 of Title 9 of the Arizona Revised Statutes created hereunder.

ARTICLE 4. TERMINATION

4.1. Development Rights in the Event of Termination. Upon the termination of this Agreement as provided herein, the Developer shall have no further rights to develop the Property pursuant to this Agreement.

ARTICLE 5. CONFLICT OF INTEREST; REPRESENTATIVES NOT INDIVIDUALLY LIABLE

5.1. Conflict of Interest. Pursuant to Arizona law, rules and regulations, no member, official or employee of the City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his or her personal interest or the interest of any corporation, partnership or association in which he or she is, directly or indirectly, interested.

5.2. No Personal Liability. No member, official or employee of the City shall be personally liable to Developer, or any successor or assignee, (a) in the event of any default or breach by the City, (b) for any amount which may become due to the Developer or its successor or assign, or (c) pursuant to any obligation of the City under the terms of this Agreement.

ARTICLE 6. MISCELLANEOUS PROVISIONS

6.1. Notices. All notices and communications provided for herein, or given in connection herewith, shall be validly made if in writing and delivered personally or sent by registered or certified United States Postal Service mail, return receipt requested, postage prepaid to:

If to the City: City of San Luis
 Attn. City Manager
 P.O. Box 1170
 San Luis, Az 85349

If to the Developer: Clean Wind Energy, Inc.
 Attn: Ron Pickett
 1977 Annapolis Exchange Parkway, Suite 300
 Annapolis, MD 21401

or to such other addresses as either party may from time to time designate in writing and deliver in a like manner. Any such change of address notice shall be given at least ten (10) days before the date on which the change is to become effective. Notices given by mail shall be deemed

delivered 72 hours following deposit in the United States Postal Service in the manner set forth above.

6.2. Waiver. No delay in exercising any right or remedy shall constitute a waiver thereof, and no waiver by the parties of the breach of any provision of this Agreement shall be construed as a waiver of any preceding or succeeding breach of the same or of any other provision of this Agreement.

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

6.4. Authority. The undersigned represent to each other that they have full power and authority to enter into this Agreement, and that all necessary actions have been taken to give full force and effect to this Agreement. The Developer represents and warrants that it is duly formed and validly existing under the laws of the State of Arizona and that it is duly qualified to do business in the State of Arizona and is in good standing under applicable state laws. The Developer and the City warrant to each other that the individuals executing this Agreement on behalf of their respective parties are authorized and empowered to bind the party on whose behalf each individual is signing. The Developer represents to the City that by entering into this Agreement, the Developer has bound the Property and all persons and entities having any legal or equitable interest therein to the terms of the Agreement.

6.5. Entire Agreement. This Agreement, including the following exhibits, constitutes the entire agreement between the parties. This provision applies only to the entirety of this Agreement only; additional and separate zoning stipulations and agreements with the City may apply to the Property, and this provision has no effect on them.

- | | |
|-----------|--|
| Exhibit A | Legal Description of Property |
| Exhibit B | Protected Development Right Plan and Schedule of Performance |

6.6. Amendment of the Agreement. This Agreement may be amended, in whole or in part and with respect to all or any portion of the Property, only with the mutual written consent of the parties to this Agreement or by their successors in interest or assigns. The City shall record the amendment or cancellation in the official records of the Yuma County Recorder.

6.7. Severability. If any other provision of the Agreement is declared void or unenforceable, such provision shall be severed from this Agreement, which shall otherwise remain in full force and effect.

6.8. Governing Law. The laws of the State of Arizona shall govern the interpretation and enforcement of this Agreement. The parties agree that venue for any action commenced in connection with this Agreement shall be proper only in a court of competent jurisdiction located in Yuma County, Arizona, and the parties hereby waive any right to object to such venue.

6.9. Recordation of Agreement and Subsequent Amendment; Cancellation. This Agreement, and any amendment or cancellation of it shall be recorded in the official records of

the Yuma County Recorder no later than ten (10) days after the City and the Developer execute such agreement, amendment, or cancellation.

6.10. Attorneys' Fees and Costs. If either party brings a legal action either because of a breach of this Agreement or to enforce a provision of this Agreement, the prevailing party will be entitled to reasonable attorneys' fees and court costs.

6.11. Notice of Conveyance or Assignment. The Developer shall give notice to the City of any sale of the entire Property at least ten (10) days prior to the effective date of the sale.

6.12. No Third-Party Beneficiaries. There are no third-party beneficiaries to this Agreement, and no person or entity not a party hereto shall have any right or cause of action hereunder.

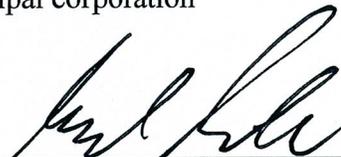
6.13. No Agency Created. Nothing contained in this Agreement shall create any partnership, joint venture, or agency relationship between the parties.

6.14. Non-Liability of City Officials and Employees. Except for mandamus and other special actions, no member, official or employee of the City shall be personally liable to Developer, or any successor in interest, in the event of any default or breach by the City or for any amount that may become due to the Developer or successor, or under any obligation under the terms of this Agreement.

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

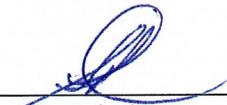
THE CITY OF San Luis, an Arizona municipal corporation

THE DEVELOPER, Clean Wind Energy, Inc., a corporation authorized to do business in Arizona

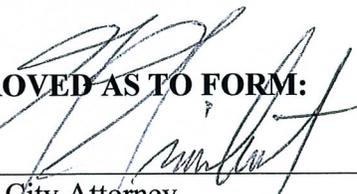
By: 

Mayor **ATTEST:**

By: _____
Its: _____

By: 

City Clerk

APPROVED AS TO FORM:
By: 

City Attorney

STATE OF ARIZONA)
) ss.
County of _____)

The foregoing instrument was acknowledged before me this ____ day of _____,
20__, by _____, Mayor of the City of _____, Arizona, a municipal
corporation.

Notary Public

My Commission Expires: _____

STATE OF ARIZONA)
) ss.
County of _____)

The foregoing instrument was acknowledged before me this ____ day of _____,
20__, by _____, on behalf of _____, an _____.

Notary Public

My Commission Expires: _____

Schedule for Performance
Clean Wind Energy, Inc. Project
San Luis, Arizona

DEVELOPMENT SCHEDULE OF DEVELOPER

PRECONSTRUCTION 12 to 36 months following approval of initial rezoning.

- . Perform on-site cultural assessment
- . Perform on-site environmental & habitat assessment
- . Complete National Environmental Policy Act (NEPA) Environmental Impact Statement
- . Conduct sub-surface geological testing
- . Complete final site plan
- . Prepare site: including onsite & offsite grading, utilities and paving
- . Commence construction

INITIAL CONSTRUCTION PHASE – 18 months following Preconstruction Phase

- . Complete site work and construct support facilities, including but not limited to roadways, parking areas, and utility lines needed for construction of Tower purposes
- . Complete Assembly Plant structure
- . Complete Tower foundation

TOWER CONSTRUCTION – 18 months following Initial Construction Phase

(This is for the development of at least one Tower)

- . Complete Tower base and wind tunnels
- . Complete Tower
- . Install Equipment
- . Complete grid connection

. Complete water pipeline

. Complete all roads, [including development of County 25th](#), driveways, parking areas, walls, landscaping, support buildings and other structures for the operation of the Facility

Formatted: Superscript

SCHEDULE OF GOVERNMENTAL APPROVALS

1) City acknowledges having received an application for rezoning of the property for the property located west of the Ave. C alignment. Developer and City agree that all public hearings have been held and the second reading of the rezoning ordinance rezoning the property to Heavy Industrial Use shall be on May 23, 2012 with an effective date of June 22, 2012. It is understood that rezoning is subject to referendum. Developer agrees to pay all application and advertising costs associated with this rezoning.

2) Developer to apply for a Major Plan Amendment of City General Plan for property east of the Ave. C alignment on or before [June 18](#)—, 2012.

3) City agrees, subject to timely application for Major Plan Amendment as provided hereinabove, that the Planning and Zoning Commission will hold its Public Hearings on October 9, 2012 and October 16, 2012, and City Council shall hold its Public Hearing on November 14, 2012 with an effective date for the amendment being on November 14, 2012. Developer agrees to pay all application and advertising costs associated with the Major Plan Amendment. It is understood that a Major Plan Amendment is subject to referendum.

4) Developer to apply for a rezoning for the Property located east of the Ave. C alignment on or before the 15th day of November, 2012.

5) City agrees, subject to timely application for rezoning of the property located east of the Ave. C alignment as provided hereinabove, to [conduct the Citizen Review hearing on or before January 1, 2013](#), hold the public hearing before the Planning and Zoning Commission on January 8, 2013 and the public hearing before City Council and first reading of the ordinance rezoning said property on February 13, 2013 with second reading of said rezoning ordinance on February 27, 2013 with a proposed effective date of March 29, 2013. Developer agrees to pay all application and advertising costs associated with the rezoning. It is understood that rezoning is subject to referendum.

LEGAL DESCRIPTION

Portions of Township 11 South, Range 23 West of the Gila and Salt River Base and Meridian, Yuma County, Arizona, more particularly described as follows:

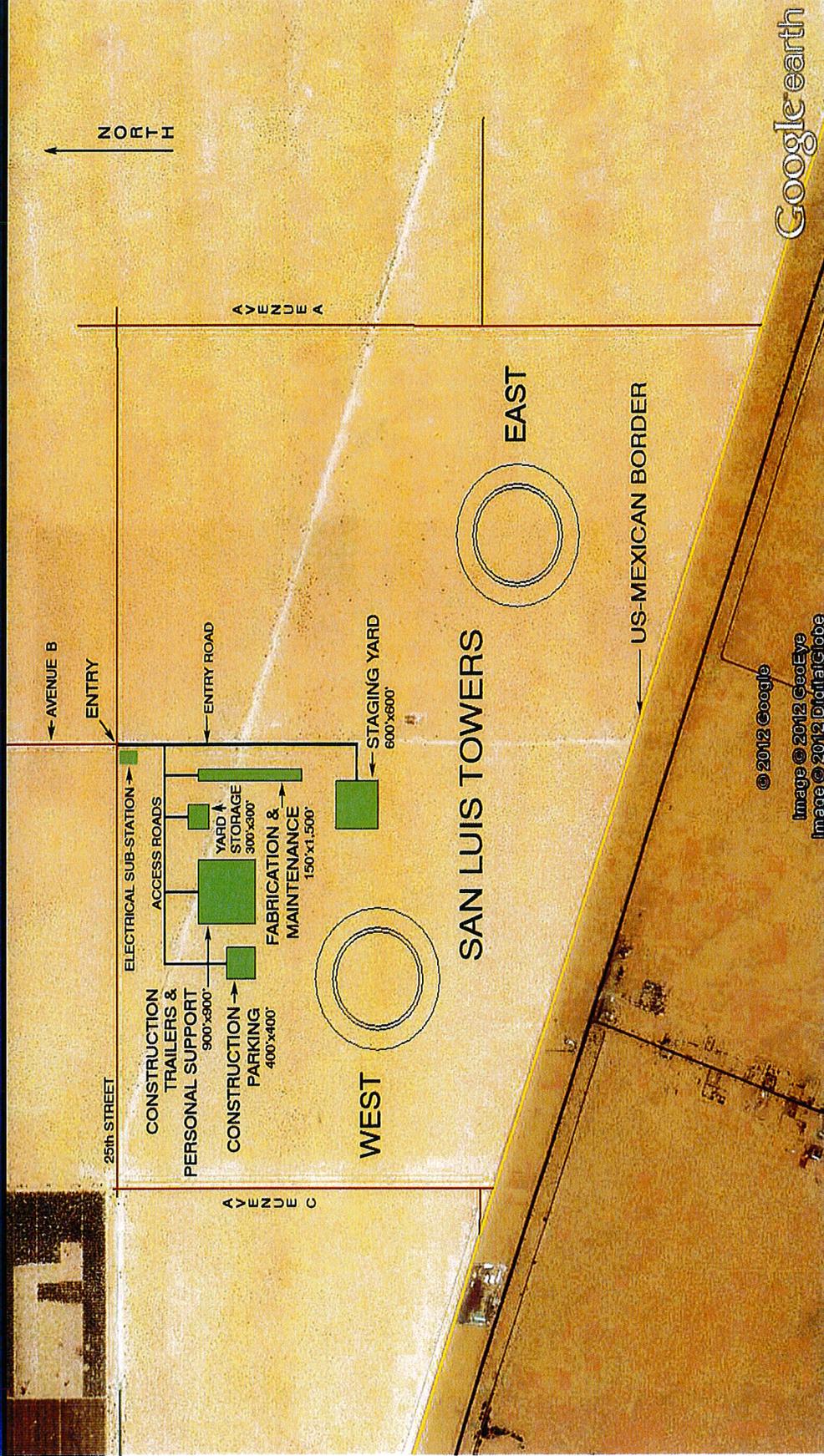
- A. Sections 19 and 20 in their entirety;
- B. Those portions of Sections 29 and 30 lying North of the United States of America/Republic of Mexico International Boundary;

EAST LEGAL DESCRIPTION

Portions of Township 11 South, Range 23 West of the Gila and Salt River Base and Meridian, Yuma County, Arizona, more particularly described as follows:

- A. Section 20 in its entirety;
- B. That portion of Section 29 lying North of the United States of America/Republic of Mexico International Boundary;

San Luis Tower Site Plan



Google earth

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 Image © 2012 GeoEye
 Image © 2012 DigitalGlobe



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