

CITY OF MERCED
Planning & Permitting Division

STAFF REPORT: #19-11 - Addendum

AGENDA ITEM: 4.2

FROM: Kim Espinosa,
Planning Manager

PLANNING COMMISSION
MEETING DATE: April 3, 2019
(continued from March 20, 2019)

PREPARED BY: Julie Nelson,
Associate Planner

SUBJECT: **Extension of Vesting Tentative Subdivision Map (VTSM) #1291**, initiated by Bright Development. This application involves a request for a one-year extension of time for filing a final map for VTSM #1291. VTSM #1291 would allow the subdivision of 39.8 acres of land into 161 single-family lots generally located on the east side of G Street at Merrill Place (extended) within an R-1-5 zone with a General Plan designation of Low Density Residential (LD). This extension request was referred to the Planning Commission for final action by the City's Site Plan Review Committee on February 14, 2019. *PUBLIC HEARING*

ACTION: Approve/Disapprove/Modify

- 1) Extension of Vesting Tentative Subdivision Map (VTSM) #1291

SUMMARY

Vesting Tentative Subdivision Map #1291 was approved on January 16, 2007, to subdivide 39.8 acres of land generally located on the east side of G Street at Merrill Place (extended) (Attachments A and B). This map would have expired after two years per the Subdivision Map Act. However, as a result of the automatic extensions granted by the State of California and the extension granted by the Planning Commission on June 6, 2018, the map's expiration date was extended to January 16, 2019.

On October 3, 2018, the Planning Commission considered the proposed modifications to VTSM #1291 as required by the approval of the extension and voted to approve the modifications which placed all the lots on property owned by CEB Holdings, LLC and reduced the total number of lots from 168 to 161 (the approved modified map is provided at Attachment B and the modified Planning Commission Resolution is provided at Attachment P). The life of the map was unchanged by this action. Therefore, the expiration date remained January 16, 2019.

Prior to the expiration of the map, the property owner, CEB Holdings, LLC (an entity of Bright Development) requested the map be granted a one year extension, thus extending the map to January 16, 2020 (see extension request at Attachment C). Upon request for an extension of a tentative map, the life of the map is automatically extended by 60 days per the Subdivision Map Act, which extended the expiration date to March 16, 2019. The Site Plan Review Committee heard the request for an extension on February 14, 2019. At that time, the Site Plan Review Committee voted to refer the request to the Planning Commission for action. The map is automatically extended while the Planning Commission review process takes place.

Prior to the Planning Commission meeting on March 20, 2019, staff received additional information from Rick Telegan, adjacent property owner, regarding the requested extension and the CEQA review process. In order to allow time for staff and the applicant to review the information submitted, the applicant requested the extension request be continued to the April 3, 2019, Planning Commission meeting.

Planning Staff is recommending approval of the one-year extension.

RECOMMENDATION

Planning staff recommends that the Planning Commission approve the Extension of Vesting Tentative Subdivision Map #1291 to January 16, 2020.

PROJECT DESCRIPTION

This project is a request to extend Vesting Tentative Subdivision Map #1291 for a period of one year from the date of expiration (January 16, 2019). This map, as modified by the Planning Commission on October 3, 2018, would allow the subdivision of 39.8 acres of land into 161 single-family lots (Attachment B). The subdivision is generally located on the east side of G Street at Merrill Place (extended). The lots range in size from approximately 5,000 square feet to approximately 10,000 square feet.

BACKGROUND

This property was annexed as part of the Absolute-Bright annexation approved in 2006. As part of the annexation, each party signed a Pre-Annexation Development Agreement that stipulated certain requirements for development within the annexation area. This agreement is provided at Attachment D.

Vesting Tentative Subdivision Map #1291 was originally approved on January 16, 2007 (see the originally approved map at Attachment E). This map as well as the Tentative Map for the Palisades subdivision to the north of this site (Attachment F) were submitted at the same time. Both the developers of the Palisades subdivision (Rick Telegan and Lee Jay Kolligian for Leeco LLC) and Bright Development were using the same engineering firm (Golden Valley Engineering). In order to maximize the number of lots within each subdivision, the engineer designed the subdivisions with lots on each other's property (Attachment G). At the time the maps were approved, the property owners planned to do a Lot Line Adjustment to rectify this situation. However, this never occurred, and 16 lots from the Bright Development Subdivision Map were on property owned by Leeco LLC. The Palisades Tentative Map expired as of January 2, 2018. Therefore, none of the lots originally approved with the Palisades subdivision are on the Bright property any longer.

On March 15, 2018, the Site Plan Review Committee heard the request to extend Vesting Tentative Subdivision Map #1291. After hearing testimony regarding the extension request, the Site Plan Committee voted to refer the matter to the Planning Commission. An excerpt from the minutes for this meeting are provided at Attachment H.

The Planning Commission considered the extension request at their meeting of June 6, 2018. After considering all the testimony, the Planning Commission unanimously voted to extend the map, subject to the condition that the map be modified to have all the lots on property owned by Bright Development (or CEB Holdings, LLC). This action extended the map through January 16, 2019. An excerpt from the minutes for this meeting are provided at Attachment I.

On October 3, 2018, the Planning Commission approved the modification of Vesting Tentative Map #1291 which moved all the lots onto property owned by CEB Holdings, LLC and allowed a Temporary Emergency Vehicle Access (EVA) onto G Street. The approved modified map is provided at Attachment B). A Minute Excerpt is provided at Attachment J.

On January 31, 2019, the Site Plan Review Committee was scheduled to hear a new request from Bright Development to extend the map to January 16, 2020. However, the day of the meeting, staff received a letter of opposition from Rick Telegan (Attachment K). Because staff needed time to review Mr. Telegan's letter and basis for opposition, the Site Plan Committee voted to continue the extension request to the meeting of February 14, 2019 (an excerpt of the Minutes are provided at Attachment L).

The Site Plan Committee considered the new extension request at their meeting of February 14, 2019. At the Site Plan Committee meeting, Rick Telegan spoke in opposition to the extension citing the reasons in his letter of opposition previously submitted, the CEQA review done for the modification, and that the proposed storm drainage facilities underneath the PG&E power lines would not be feasible given PG&E regulations. Mr. Telegan provided an email he received from PG&E regarding the storm drainage facilities (Attachment M). Dave Butz with Bright Development spoke in favor of the extension. After hearing the testimony, the Site Plan Committee unanimously voted to refer the matter to the Planning Commission for consideration and action. An excerpt of the Minutes for this meeting are provided at Attachment N.

At their meeting on March 20, 2019, at the applicant's request, the Planning Commission voted to continue this item to the April 3, 2019, Planning Commission meeting to allow the applicant and staff sufficient time to review the new information submitted by Mr. Telegan.

FINDINGS/CONSIDERATIONS:

General Plan Compliance and Policies Related to This Application

- A) Vesting Tentative Subdivision #1291 complies with the General Plan designation of Low Density Residential (LD) and the Zoning designation of R-1-5.

Subdivision Map Act and Municipal Code

- B) The Subdivision Map Act Section 66452.6 (e) allows a city to approve discretionary extensions for a period or periods not exceeding a total of 6 years. These extensions are in addition to the automatic extensions granted by the State beginning in 2013.

Section 66498.1 of the Subdivision Map Act provides that additional conditions may only be added to a Vesting Tentative Subdivision Map (VTSM) or an extension request for a VTSM may only be denied if the Legislative Body determines any of the following:

1. A failure to do so would place the residents of the subdivision or the immediate community, or both, in a condition dangerous to their health or safety, or both.
2. The condition or denial is required in order to comply with state or federal law.

Merced Municipal Code (MCC) Section 18.04.020 states that this section is to supplement and implement the Subdivision Map Act. It further states that all provisions of the Subdivision Map Act which are mandatory in nature are incorporated by reference in this

title. MCC Section 18.04.060 states that the provisions of Chapter 18 of the Municipal Code shall be in addition to and shall be considered as supplementing the provisions of the Subdivision Map Act of the state.

Concerns Raised by Mr. Telegan

- C) As described in the background section of this report, a letter of opposition was submitted by Mr. Rick Telegan on January 31, 2019. This letter asserts that the approval of the modified map on October 3, 2018, violated the General Plan and the Pre-Annexation Development Agreement for the Absolute/Bright Annexation. The City Attorney reviewed Mr. Telegan's letter and concluded that the issues raised are issues that should have been raised during the appeal period after the approval of the modified map. Since that time has expired, the issues raised have no standing in reference to the requested extension.

In regards to the e-mail from PG&E Mr. Telegan submitted to the Site Plan Review Committee concerning the location of the storm drainage facilities, staff has determined that the approval of the exact location of the drainage basin could be done by the City Engineer at a later date and does not impact the requested extension. However, it should be noted that Bright Development has worked with their engineer and would locate a drainage basin on the remaining portion of their property (Lot A, as shown on VTSM #1291 - Attachment B) if they are unable to obtain permission from PG&E to have it underneath the power lines. This issue will be resolved at the Final Map stage under the direction of the City Engineer, therefore, it is not relevant to the extension of the Tentative Map.

On March 14, 2019, Mr. Telegan submitted additional information supporting his objection to the extension of the map. This information is provided at Attachment O.

On March 19, 2019, additional information was submitted by Mr. Telegan (Attachment P). Planning Staff, along with the City Attorney, has reviewed the information submitted by Mr. Telegan and determined that the issues raised are not relevant to the requested extension of the subdivision map.

Environmental Clearance

- D) The act of extending a tentative map does not require an additional environmental review. This previous environmental review (Environmental Review #06-26 - CEQA Section 15162 Findings) remains sufficient for this project. Although Planning Staff usually provides these Findings to the Planning Commission and asks the Commission to adopt them, the Planning Commission's adoption of the 15162 Findings is not required by CEQA. Mr. Telegan submitted an appeal request regarding the City's CEQA determination on February 28, 2019. That appeal request was subsequently rejected as it had not been submitted within the appeal period on the tentative map in October 2018.

Attachments:

- A) Location Map
- B) VTSM #1291 (modified)
- C) Letter Requesting Extension

- D) Pre-Annexation Development Agreement
- E) Original VTSM #1291
- F) Palisades Subdivision
- G) Map of Palisades and Bright Development Subdivisions showing lots on each other's property
- H) Site Plan Committee Minutes Excerpt 3-15-18
- I) Planning Commission Minutes Excerpt 6-6-2018
- J) Planning Commission Minutes Excerpt 10-3-2018
- K) Objection Letter
- L) Site Plan Committee Minutes Excerpt 1-31-19
- M) Email from Mr. Telegan
- N) Site Plan Committee Minutes Excerpt 2-14-19
- O) Information provided by Mr. Telegan 3-14-19
- P) Information provided by Mr. Telegan 3-19-19
- Q) Planning Commission Resolution #2904

Ref: N:\SHARED\PLANNING\STAFFREP\SR2019\SR 19-11 - Addendum Extension of VTSM .docx



EXTENSION OF VTSM #1291 (MODIFIED) CEB HOLDINGS, LLC (BRIGHT DEVELOPMENT)

Disclaimer: This document was prepared for general inquiries only. The City of Merced is not liable for errors or omissions that might occur. Official information concerning specific parcels should be obtained from recorded or adopted City documents.

ATTACHMENT A



Subject Site

Modified Map Approved by
the Planning Commission
October 3, 2018.

GOLDEN VALLEY
ENGINEERING & SURVEYING
105 West Live Street, Suite 100
Merced, CA 95341
Phone: (209) 723-8264
Fax: (209) 723-8264

PROJECT NO.: 18-031
SHEET NO.: 3

CALIFORNIA

**MODIFIED VESTING TENTATIVE SUBDIVISION MAP FOR
BRIGHT DEVELOPMENT
PORTION SECTION 5 & 8, T.7 S., R.14 E., M.D.B. & M.**

MERCED

DATE: 10/15/18
BY: [Signature]

PROJECT NO.: 18-031
SHEET NO.: 3

BRIGHT DEVELOPMENT
1850 N. Carpenter Rd., Bldg. B
Merced, CA 95341
Phone: (209) 624-0242

DATE: April 2018
SCALE: AS SHOWN
DRAWN BY: RICK R.
JOB NO.: 18-031
SHEET NUMBER:

3



[illegible]

Modified Map Approved by
the Planning Commission
October 3, 2018.

Golden Valley Engineering & Surveying
100 West 1st Street, Suite 100
Merced, CA 95341
Phone: (209) 722-3254
Fax: (209) 722-3254

PROJECT:
BRIGHT DEVELOPMENT
PORTION SECTION 5 & 8, T.7S, R.14E, M.D.B. & M.

DATE: 04/18/2018
BY: [Signature]
CHECKED: [Signature]
APPROVED: [Signature]

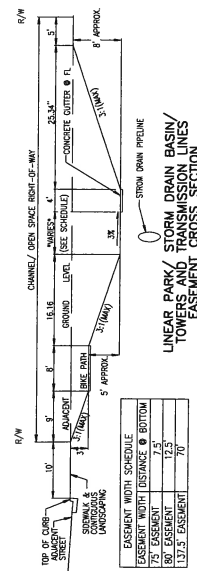
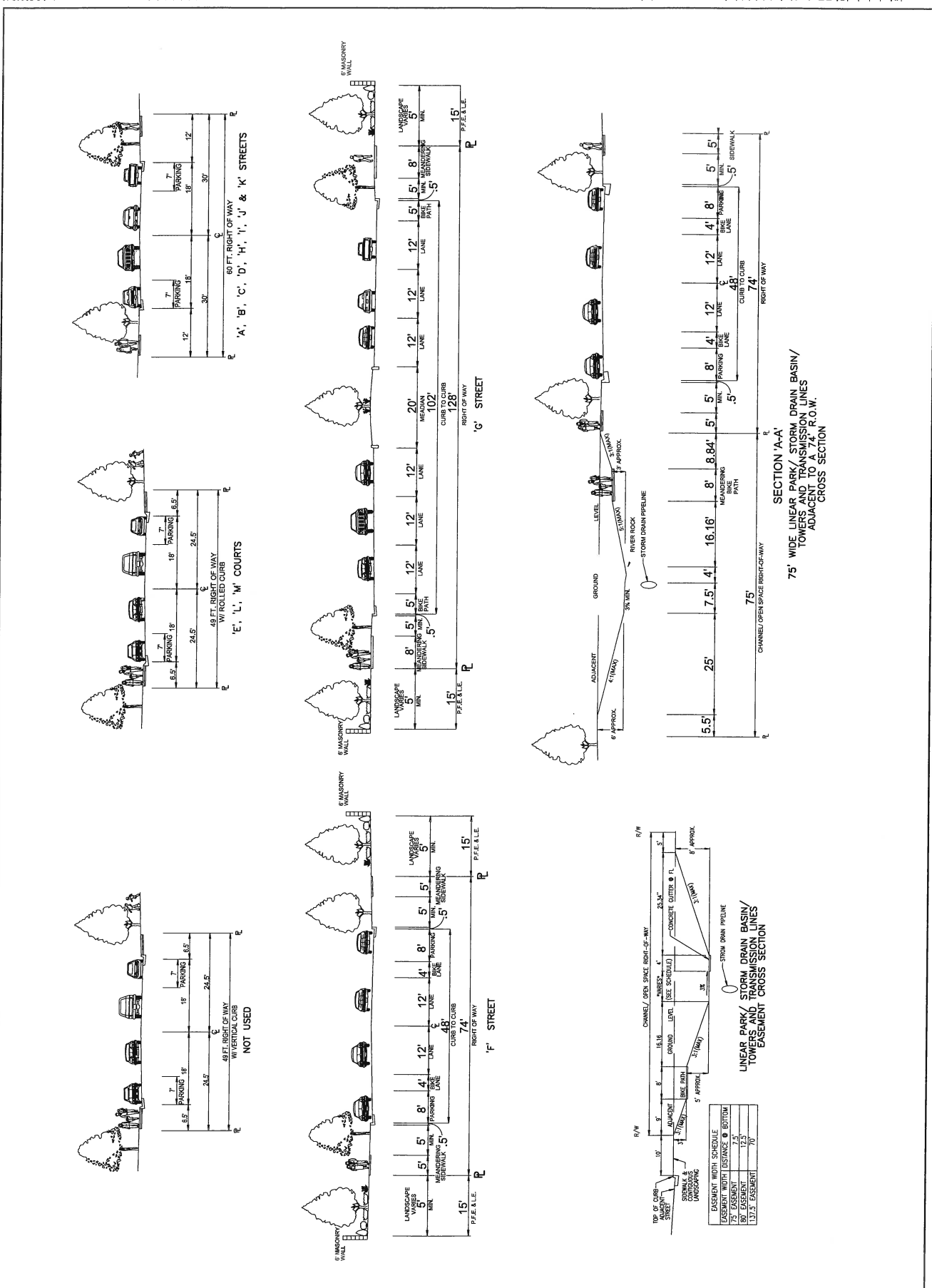
MODIFIED VESTING TENTATIVE SUBDIVISION MAP FOR
BRIGHT DEVELOPMENT
PORTION SECTION 5 & 8, T.7S, R.14E, M.D.B. & M.

MERCED

PROJECT:
BRIGHT DEVELOPMENT
PORTION SECTION 5 & 8, T.7S, R.14E, M.D.B. & M.

PROJECT:
BRIGHT DEVELOPMENT
PORTION SECTION 5 & 8, T.7S, R.14E, M.D.B. & M.

DATE: 04/18/2018
BY: [Signature]
CHECKED: [Signature]
APPROVED: [Signature]



Modified Map Approved by
the Planning Commission
October 3, 2018.

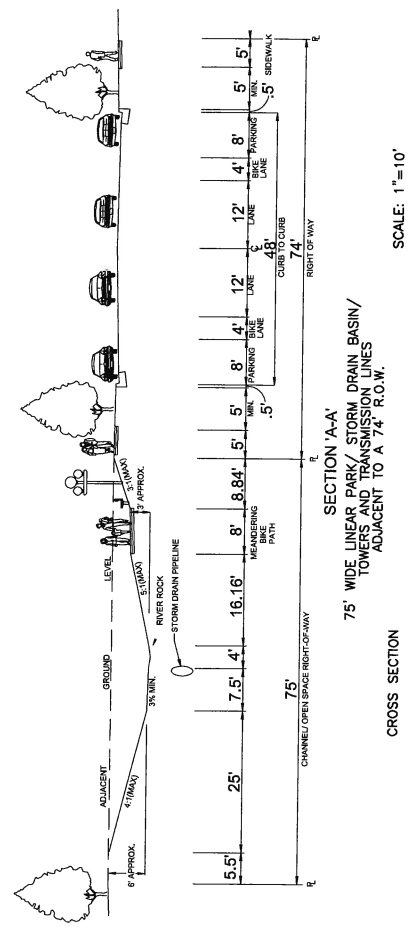
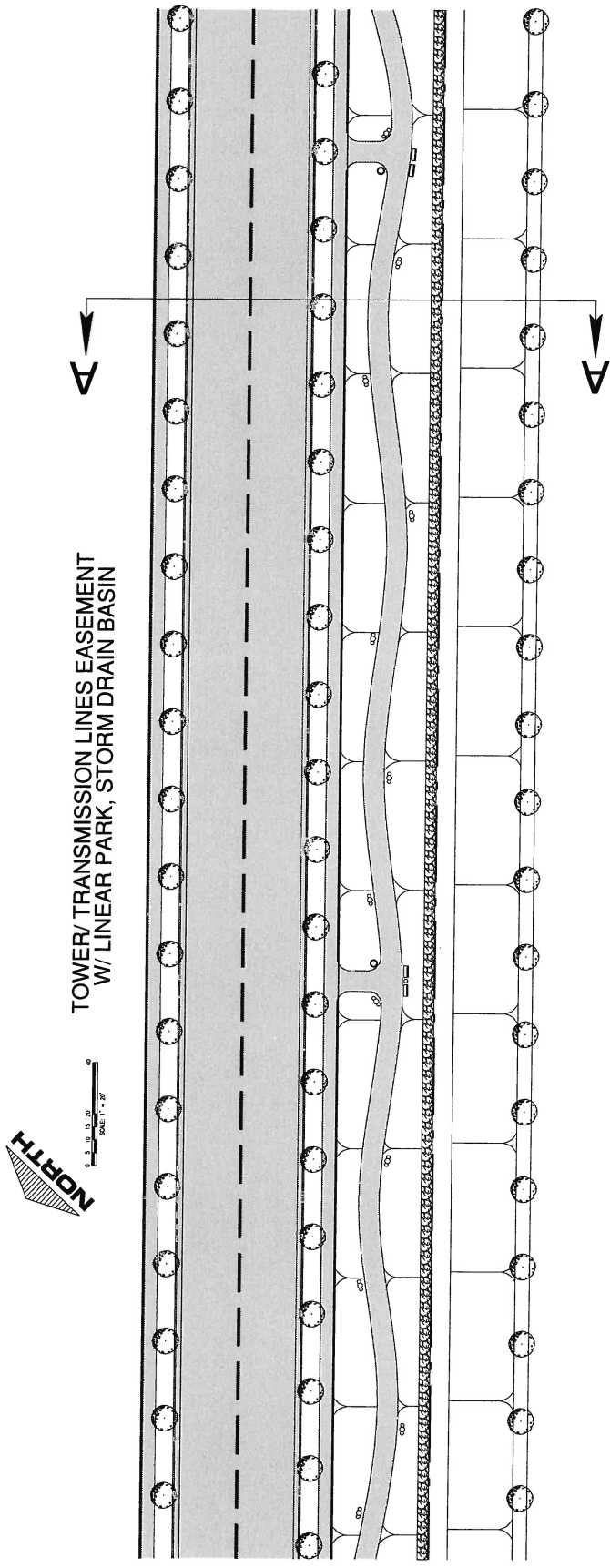


GOLDEN VALLEY
ENGINEERING & SURVEYING
 405 West 10th Street, Suite 100
 Modesto, CA 95351
 Phone: (209) 524-2000
 Fax: (209) 524-2004
 www.gveng.com

I hereby certify that the above is a true and correct copy of the original map as filed in the office of the County Clerk of Merced County, California, on this 10th day of October, 2018.
 Surveyor's Seal: [Seal]
 Surveyor's Name: [Name]
 Surveyor's License No.: [License No.]
 Date of License: [Date]
 State of California: [State]
 Commission Expires: [Date]

MODIFIED VESTING TENTATIVE SUBDIVISION MAP FOR
BRIGHT DEVELOPMENT
 PORTION SECTION 5 & 8, T.7 S., R.14 E., M.D.B. & M.
 MERCED CALIFORNIA

| | |
|-------------------|---|
| SHEET CONTAINS: | Transmission Line Easement |
| | Park Basin |
| PROJECT: | |
| PROJECT NO.: | |
| PROJECT NAME: | BRIGHT DEVELOPMENT |
| PROJECT LOCATION: | 1620 N. Carpenter Rd., Bldg. 8 Modesto, CA 95351 P.O. Box 1000 Modesto, CA 95351 |
| PROJECT DATE: | June 2018 |
| PROJECT BY: | Golden Valley Engineering & Surveying, Inc. |
| PROJECT FOR: | Golden Valley Engineering & Surveying, Inc. |
| PROJECT NUMBER: | |





1620 N. CARPENTER ROAD
BUILDING B
MODESTO, CALIFORNIA 95351

PHONE: 209.526.8242
BRIGHT-HOMES.COM
BRE#0978136

January 4, 2019

City of Merced Planning Department
Attn: Julie Nelson
678 West 18th Street
Merced, CA 95340



Subject: Vesting Tentative Subdivision Map #1291 (Merzoian)

Dear Ms. Nelson,

We are writing to request a minimum one-year time extension for the above referenced Vesting Tentative Subdivision Map. Attached please find Check No. 269503 for the \$256 application fee. Our records indicate that the map has an expiration date of January 16, 2019. With the approval of this one-year extension the new expiration date would be January 16, 2020.

If you have any questions or need additional information please contact me.

Sincerely,

A handwritten signature in blue ink that reads "D. W. Butz". The signature is stylized, with a large, sweeping "A" at the end.

David W. Butz
Bright Development

M. STEPHEN JONES

3:24 PM

County Recorder

RE04

P Public

P

RECORDING REQUESTED BY:

City of Merced, A California Charter
Municipal Corporation

WHEN RECORDED, MAIL TO:

City Clerk's Office
City of Merced
678 W. 18th Street
Merced, CA 95340

Exempt Recording per Gov't Code
Section 6103

Doc#: 2008-015282



Titles: 1 Pages: 76

| | |
|-------|--------|
| Fees | 0.00 |
| Taxes | 0.00 |
| Other | 0.00 |
| PAID | \$0.00 |

The following document (initially recorded as Document # 2006-045412
on 6/27/2006) is being re-recorded to include page F-4 of Exhibit F,
which was originally omitted.

PRE-ANNEXATION DEVELOPMENT AGREEMENT

PENDING ANNEXATION AND PREZONING NO. _04-01_

"ABSOLUTE-BRIGHT"

ABSOLUTE, LLC
LEECO, LLC
BP INVESTORS, LLC
BRIGHT DEVELOPMENT, A CALIFORNIA CORPORATION

Date: April 17, 2006**ATTACHMENT D**

M. STEPHEN JONES
County Recorder

2:58 PM
R06

RECORDED AT THE REQUEST OF
City Clerk
City of Merced
A California Charter Municipal Corporation

CM City of Merced

G

Doc#: 2006-045412



| | |
|-----------|-----------|
| Titles: 1 | Pages: 74 |
| Fees | 0.00 |
| Taxes | 0.00 |
| Other | 0.00 |
| PAID | \$0.00 |

WHEN RECORDED RETURN TO
City Clerk
City of Merced
678 West 18th Street
Merced, California 95340

(Space Above Line For Recorder's Use)

PRE-ANNEXATION DEVELOPMENT AGREEMENT

PENDING ANNEXATION AND PREZONING NO. 04-01

"ABSOLUTE-BRIGHT"

ABSOLUTE, LLC
LEECO, LLC
BP INVESTORS, LLC
BRIGHT DEVELOPMENT, A CALIFORNIA CORPORATION

Date: April 17, 2006

**PRE-ANNEXATION DEVELOPMENT AGREEMENT
BETWEEN
CITY OF MERCED
and
ABSOLUTE, LLC
LEECO, LLC
BP INVESTORS, LLC
BRIGHT DEVELOPMENT, A CALIFORNIA CORPORATION**

This Pre-Annexation Development Agreement ("Agreement") is entered into on the date it is recorded with the Merced County Clerk/County Recorder (the "Agreement Date") by and among the City of Merced, a California Charter Municipal Corporation ("City") and the persons and entities listed below ("Owner"):

ABSOLUTE, LLC
LEECO, LLC
BP INVESTORS, LLC
BRIGHT DEVELOPMENT, a CALIFORNIA
CORPORATION
C/O Rick Telegan
9 River Park Place East, Suite 101
Fresno, California 93720

RECITALS

A. To provide for orderly planning, City has the authority pursuant to California Government Code Sections 65300 and 65301 to include in its General Plan land outside its boundaries which is in the City's sphere of influence or in the City's judgment bears a relation to its planning and, pursuant to Section 65450, to adopt specific plans for any part of the area covered by the General Plan. City also has the authority pursuant to California Government Code Section 65859 to pre-zone property adjoining the City for the purpose of determining the zoning

designation that will apply to the property in the event of a subsequent annexation of the property to the City.

B. The Legislature of the State of California has adopted California Government Code Section 65864-65869.5 ("Development Agreement Legislation") which authorizes a city to enter into a binding development agreement with persons having legal or equitable interests in real property located within a city's municipal boundaries or in unincorporated territory within a city's sphere of influence for the development of such property in order to, among other things: encourage and provide for the development of public facilities; to support development projects; provide certainty in approval of development projects in order to avoid a waste of resources and escalation in project costs and encourage an investment in and commitment to comprehensive planning, which will make maximum efficient utilization of resources at the least economic cost to the public land; provide assurance to the applicants for development projects that they may proceed with their projects in accordance with existing policies, rules and regulations and subject to the conditions of approval of such projects as provided in such annexation and/or development agreements.

C. Pursuant and subject to the Development Agreement Legislation, the City's police powers, and City Council Resolution No. 95-6, City is authorized to enter into binding agreements with persons having legal or equitable interest in real property located within the City's municipal boundaries or sphere of influence thereby establishing the conditions under which such property may be developed in the City or may be annexed into the City and governing development of such property upon its annexation.

D. By electing to enter into this Agreement, City shall bind future Members of the City Council of City by the obligations specified herein and further limit the future exercise of certain governmental and proprietary powers by any Member of the City Council to the extent such limitation is provided in the Development Agreement Legislation.

E. The terms and conditions of this Agreement have undergone extensive review by the staff of the City, the City's Planning Commission, the City Council of City, and Owner, and have been found to be fair, just, and reasonable.

F. City finds and determines that it will be in the best interests of its citizens and the public health, safety and welfare will be served by entering into this Agreement.

G. All of the procedures of the California Environmental Quality Act have been met with respect to this Agreement.

H. City was incorporated on April 1, 1889, and the City Charter was approved on April 12, 1949, and last amended in March 2002.

I. Owner is the fee or equitable owner of a an approximately 100 acre parcel of undeveloped land located within the City's sphere of influence, hereinafter referred to as the "Property" as legally described in Exhibit "A" and depicted on the map thereto, both attached hereto and made a part herein by this reference.

J. Owner has requested City to apply to the Merced County Local Agency Formation Commission ("LAFCO") to annex the Property. City is not opposed to Owner's request and will consider said request upon Owner's execution of this Agreement.

K. City and Owner desire that the Property be developed pursuant to policies in effect as of the date of this Agreement, including City Council Ordinance No. 2239 and City Council Ordinance No. 2240, as a residential planned development and pursuant to the land uses and conditions of Annexation/Rezoning Application #04-01 and Residential Planned Development (RP-D) #61 and Expanded Initial Study No. 04-02 (Mitigated Negative Declaration and Mitigation Monitoring Program).

L. The City Council of City hereby finds and determines that:

(1) The environmental impacts of the Project have been reviewed and all measures deemed feasible to mitigate adverse impacts thereof have been incorporated into the City approvals for the Project.

(2) No other mitigation measures for environmental impacts created by the Project, as presently approved, shall be required for development of the Project unless mandated by law.

(3) City may, pursuant to and in accordance with its rules, regulations, and ordinances, conduct an environmental review of subsequent discretionary entitlements for the development of the Project or any changes, amendments, or modifications to the Project. The City, as a result of such review, may impose additional measures (or conditions) to mitigate as permitted by law the

adverse environmental impacts of such development entitlement which were not considered or mitigated at the time of approval of the Project.

M. As a Mitigated Negative Declaration was prepared for the Project vested by this Agreement, the following language is to be included:

(1) Within forty-eight (48) hours of the effective date of this Agreement, Owner shall deliver to the City's Planning Department a check payable to the County Clerk in the amount of One Thousand Two Hundred Seventy-Five Dollars (\$1,275.00), which includes the One Thousand Two Hundred Fifty Dollars (\$1,250.00) fee required by Fish and Game Code Section 711.4(d)(3) plus the Twenty-Five Dollar (\$25.00) County administrative fee to enable the City to file the Notice of Determination required under Public Resources Code Section 21152 and 14 Cal. Code of Regulations 15075. If within such forty-eight (48) hour period the Owner has not delivered to the City's Planning Department the check required above, this Agreement shall be void by reason of failure of a material condition, Fish and Game Code Section 711.4.

N. City Council of City has approved this Agreement by Ordinance No. 2241 adopted on 5/1, 2006, and effective on 5/31, 2006.

NOW, THEREFORE, in consideration of the above Recitals and of the mutual covenants hereinafter contained and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and agreed, the parties hereto do hereby agree as follows:

1. Incorporation of Recitals. The RECITALS above are true and correct and constitute an enforceable provision of this Agreement.

2. Definitions. In this Agreement, unless the context otherwise requires, the following words and phrases shall have the meaning set forth below:

2.1 "City" is the City of Merced.

2.2 "County" is the County of Merced.

2.3 "Development Exaction" means any requirement of City in connection with or pursuant to any Land Use Regulation or Existing Development Approval for the dedication of land, the construction of improvements or public facilities, or the payment of fees in order to lessen, offset, mitigate or compensate for the impacts of development on the environment or other public interests.

2.4 "Development Plan" means the Existing Development Approvals defined in Section 2.6 below which are applicable to development of the Project.

2.5 "Effective Date" means the date upon which the Ordinance approving this Agreement becomes effective, which date is thirty (30) days following the date the City Council adopted such Ordinance absent a referendum challenge.

2.6 "Existing Development Approval(s)" means those certain development approvals in effect as of the effective date of this Agreement with respect to the Property, including, without limitation, the "Existing Development Approvals" listed in Exhibit "B" attached hereto and incorporated herein by this reference, which were approved by the City.

2.7 "Financing District" means a Community Facilities District formed pursuant to the Mello-Roos Community Facilities Act of 1982, (California Government Code Sections 53311 *et seq.*, as amended, and referred to herein as the "Mello-Roos" Law); an assessment district formed pursuant to the Landscaping and Lighting Act of 1972, (California Streets and Highways Code Sections 22500 *et seq.*, as amended); a special assessment district formed pursuant to the Municipal Improvement Act of 1913, (California Streets and Highways Code Section 10100, *et seq.*, as amended); or any other special assessment district pursuant to State law or by virtue of the City's status as a Charter City, formed for the purposes of financing the cost of public improvements, facilities, services and/or public facilities fees within a specific geographical area of the City.

2.8 "Future General Regulations" means all ordinances, resolutions, codes, rules, regulations, and official policies of City applicable to all properties in the City after the Effective Date and as stipulated in Section 14 of this Agreement.

2.9 "Land Use Regulations" means all ordinances, resolutions, codes, rules, regulations, and official policies of City, governing the development and use of land including without limitation, the permitted use of land; the density or intensity of use; subdivision requirements; the maximum height and size of proposed buildings; the provisions for reservation or dedication of land for public purposes; and the design, improvement, and construction standards and specifications applicable to the development of the Property listed on Exhibit "C" attached hereto and incorporated herein by this reference, which are a matter of

public record on the Effective Date of this Agreement. "Land Use Regulations" does not include any County or City ordinance, resolution, code, rule, regulation, or official policy governing:

- (a) The conduct of businesses, professions, and occupations;
- (b) Taxes and assessments;
- (c) The control and abatement of nuisances;
- (d) The redevelopment authority of the Redevelopment Agency of the City of Merced;
- (e) The provision, maintenance, expansion, termination, conditions and limitations of municipal water and sewer services;
- (f) The granting of encroachment permits and the conveyance of rights and interests which provide for the use of or the entry upon public property;
- (g) The exercise of the power of eminent domain.

2.10 "Owner" means the person or entity having a legal or equitable interest in the Property and Project and all successors, transferees, or assigns thereof;

2.11 "Project" or "Projects" is the development of the Property in accordance with the Development Plan.

2.12 "Property" is the real property legally described in Exhibit "A" and depicted on the map thereto, both attached hereto and incorporated herein by this reference.

2.13 "Subdivision" shall have the same meaning as that term is defined in Government Code Section 66424.

2.14 "Subsequent Development Approvals" means all development approvals required subsequent to the Effective Date in connection with development of the Property.

2.15 "Subsequent Land Use Regulation" means any Land Use Regulation adopted and effective after the Effective Date of this Agreement.

3. Interest of Owner. Owner represents that it has the fee title or equitable interest in the Property, and that all other persons holding legal or equitable interests in the Property are to be bound by this Agreement.

4. Exhibits. The following documents are referred to in this Agreement attached hereto, incorporated herein, and made a part hereof by this reference:

| <u>Exhibit Designation</u> | <u>Description</u> |
|----------------------------|-------------------------------------|
| Exhibit A | Property Legal Description and Map |
| Exhibit B | Existing Development Approvals |
| Exhibit C | Land Use Regulations |
| Exhibit D | Public Benefits |
| Exhibit E | Notice of Default to Mortgagee |
| Exhibit F | Assignment and Assumption Agreement |
| Exhibit G | Planning Commission Resolution |

5. Term of Agreement.

5.1 Term. The term of this Agreement shall commence on the Effective Date and shall extend for a period of twenty (20) years thereafter or buildout, whichever first occurs, but in no event longer than the term of the bonds issued as called for in Section 20.4, unless this Agreement is sooner terminated, modified, or extended by circumstances set forth in this Agreement or by mutual consent of the parties hereto.

5.2 Time to Annex. Except as otherwise expressly provided in this Agreement, this Agreement shall terminate and be of no further force and effect if the change of organization or reorganization ("Annexation") of the Property is not approved by the Merced County Local Agency Formation Commission ("LAFCO") and the City Council of City and any other appropriate public agencies having jurisdiction thereover within two (2) years after the effective date of this Agreement unless extended in writing by mutual agreement of the parties.

5.3 Termination by Litigation. This Agreement shall terminate and be of no force and effect upon the occurrence of the entry of a final judgment or

issuance of a final order after exhaustion of any appeals directed against the City as a result of any lawsuit filed against the City to set aside, withdraw, or abrogate the approval by the City Council of City of this Agreement.

5.4 Subdivision Map Act Compliance. Any tentative map prepared for the Subdivision under this Agreement shall comply with the provisions of Government Code Section 66473.7.

6. Permitted Use and Density. The permitted use of the Property is a mixed use development with approximately 67.65 acres of Low Density Residential single family homes at 4.7 dwelling units per acre (320 units), approximately 12.9 acres of Village Residential at a minimum of 10 dwelling units per acre (129 units) up to a maximum of 20 dwelling units per acre (258 units), and approximately 11.3 acres of Community Park and 1.1 acres of Neighborhood Park as well as approximately 7.4 acres of Linear Open Space. For the Low Density Residential, the minimum lot area is 5,000 square feet with a minimum lot width of 50 feet and maximum lot coverage of 50%. For the Village Residential, there is a minimum of 7 dwelling units per acre and a maximum of 30 dwelling units per acre. The maximum lot coverage is 65% for single family and townhouse development; all other lot coverage amounts will be determined at the time of approval of the conditional use permit. The maximum height and size of proposed buildings in the Project are 2½ stories or 35 feet for the R-1-5 areas and 3 stories or 40 feet for Residential Planned Development #61.

7. Public Benefits. In accordance with Section 1 of City Resolution No. 2005-101, specific public benefits are provided to City beyond those already forthcoming through Project approvals in return for the City's commitments to maintain present plans as regulations for the determinate period set forth in this Agreement. These specific public benefits are set forth on Exhibit "D" attached hereto and incorporated herein by this reference as if set forth in full. Owner agrees to provide all public benefits identified in said Exhibit "D" in such manner and within such timeframe as provided therein.

8. Annexation.

8.1 Annexation-Owner's Obligations. Owner shall take all actions reasonably necessary to process and complete proceedings before LAFCO on the Annexation. Owner shall pay all LAFCO processing fees required in connection with the Annexation and shall pay any generally applicable City processing fees required for the Annexation. Owner shall reimburse City for its actual and

reasonable costs incurred in the processing of this Agreement. Owner agrees to take all steps reasonably necessary to support annexation to the City, including voting in favor of annexation. Owner shall assist City in preparing the Plan of Services required by LAFCO.

8.2 City's Duty to Cooperate. City shall cooperate and assist in the processing of the Annexation before LAFCO by timely taking the following actions:

- (a) Providing all information reasonably required or requested by LAFCO with respect to the Annexation including, without limitation, a Plan of Services providing information to LAFCO with respect to the provision of municipal services to the Annexation Property by the City; and,
- (b) Providing a written statement of support for the Annexation to LAFCO prior to the LAFCO public hearing on the Annexation.

8.3 City to Purchase Park Land upon Annexation. City agrees to purchase from Absolute, LLC and Leeco, LLC ("Absolute-Leeco") the park land designated as a community park and the area designated a neighborhood park on the Development Plan for the Projects owned or controlled by Absolute-Leeco ("Absolute-Leeco Park Land") containing 11.3 acres of land (gross) of community park and 1.1 acres of land (gross) of neighborhood park. The City shall pay Absolute-Leeco One Hundred Eighty Thousand and No/100th Dollars (\$180,000.00) per acre (gross) based upon the City's current determination of Fair Market Value of the City's Park Service Areas and adjusted as amended thereafter by the City until such obligation is paid. The total purchase price shall be Two Million Three Hundred Twelve Thousand and No/100th Dollars (\$2,312,000.00), as adjusted as set forth herein for the Absolute-Leeco Park Land, plus credit for the Linear Park/Tower Transmission Line Easement and less Absolute-Leeco's obligation for impact fees for parks under the City's impact fee schedule in effect at such time according to the final number of lots approved for the Absolute-Leeco tentative map. City shall pay Absolute-Leeco the total purchase price in U.S. Dollars at such time as the tentative map for Absolute-Leeco is approved. Neither Bright Development nor BP Investors, LLC owns or controls any land designated as a community park or neighborhood park on the Development Plan for the Project. For purposes of calculating park impact fees for the Projects within the

Development Plan the land designated V-R (Village Residential) shall be assumed to be built at 10 units per acre.

9. Assignment.

9.1 Right to Assign. The Owner shall have the right to sell, transfer, or assign the Property in whole or in part (provided that no such partial transfer shall violate the Subdivision Map Act, Government Code Sections 66410, *et seq.*, or Chapter 18.04 of the Merced Municipal Code to any person, partnership, joint venture, firm, limited liability company, or corporation at any time during the term of this Agreement; provided, however, that any such sale, transfer, or assignment shall include the assignment and assumption of the rights, duties, and obligations arising under or from this Agreement and be made in strict compliance with the following conditions precedent:

- (a) No sale, transfer, or assignment of any right or interest under this Agreement shall be made unless made together with the sale, transfer, or assignment of all or a part of the Property. Owner agrees to provide specific notice of this Agreement, including the record or document number, where a true and correct copy of this Agreement may be obtained from the County Clerk/County Recorder of the County of Merced, in any grant deed or other document purporting to transfer the title or an interest in the Property during the term of this Agreement or any extension thereof.
- (b) No less than thirty (30) business days prior to any such sale, transfer, or assignment, the Owner shall notify City, in writing, of such sale, transfer, or assignment and shall provide City with an executed Assignment and Assumption Agreement, in a form acceptable to the City Attorney, by the purchaser, transferee, or assignee and providing therein that the purchaser, transferee, or assignee expressly and unconditionally assumes all the duties and obligations of the owner under this Agreement. Where multiple sales, transfers, or assignments are contemplated by Owner to more than one purchaser, transferee, or assignee, said Assignment

and Assumption Agreement shall expressly specify and apportion shared obligations amongst various purchasers, transferees, or assignees.

Any sale, transfer, or assignment not made in strict compliance with the foregoing conditions shall be null and void and shall constitute a material default by the Owner under this Agreement. Notwithstanding the failure of any purchaser, transferee, or assignee to execute the agreement required by Paragraph (b) of this Subsection, the burdens of this Agreement placed upon Owner shall run with the land and shall be binding upon any purchaser, transferee, or assignee, but the benefits of this Agreement shall not inure to such purchaser, transferee, or assignee until and unless such agreement is executed.

9.2 Release of Transferring Owner. Notwithstanding any sale, transfer, or assignment, a transferring Owner shall continue to be obligated under this Agreement unless such transferring Owner is given a release in writing by City, which release shall be provided by City upon the full satisfaction by such transferring Owner of **ALL** of the following conditions:

- (a) The Owner no longer has a legal interest in all or any part of the Property except as a beneficiary under a deed of trust.
- (b) The Owner is not then in default under this Agreement.
- (c) The Owner or purchaser has provided City with the notice and executed Assignment and Assumption Agreement required under Paragraph (b) of Subsection 9.1 above, attached hereto as Exhibit F.
- (d) The purchaser, transferee, or assignee provides City with security equivalent to or better than any security previously provided by Owner to guarantee the installation of the improvements set forth on the improvement plans and subdivision agreement for the portion of the Project being transferred or assigned pursuant to the Subdivision Map Act and Sections 18.24.100, 18.24.110 and 18.24.150 of the Merced Municipal Code. Except as set forth herein, this provision shall not be construed to give the City any

additional right of approval of the purchaser, transferee or assignee.

- (e) The Owner or purchaser, transferee or assignee has reimbursed City for any and all City costs associated with Owner's transfer of all or a portion of the Property.
- (f) The Owner has reimbursed City for any and all costs relating to this Agreement.
- (g) The purchaser, transferee or assignee has agreed in the Assignment and Assumption Agreement required under Paragraph (b) of Subsection 9.1 above to assume all the conditions in Section 20.4 (Sewer Facility Capital Expansion Improvement Bonds).

9.3 Termination of Agreement with Respect to Individual Lots upon Sale to Public and Completion of Construction. With the exception of Section 20.4, the provisions of Subsection 9.1 shall not apply to the sale or lease (for a period longer than one year) of any lot which has been finally subdivided and is individually (and not in "bulk") sold or leased to a member of the public or other ultimate user. Notwithstanding any other provisions of this Agreement, this Agreement shall terminate with respect to any lot and such lot shall be released and no longer be subject to this Agreement without the execution or recordation of any further document upon satisfaction of all of the following conditions:

- (a) The lot has been finally subdivided and individually (and not in "bulk") sold or leased (for a period longer than one year) to a member of the public or other ultimate user; and
- (b) A Certificate of Occupancy has been issued for a building on a lot, and the fees set forth in this Agreement have been paid; and
- (c) The conditions in Section 20.4 (Sewer Facility Capital Expansion Improvement Bonds) have been completely satisfied or are no longer required.

9.4 Subsequent Assignment. Any subsequent sale, transfer, or assignment after an initial sale, transfer, or assignment shall be made only in accordance with and subject to the terms and conditions of this Section.

10. Mortgagee Protection. Neither entering into this Agreement nor committing a Default under this Agreement shall defeat, render invalid, diminish, or impair the lien of Mortgagees having a Mortgage on any portion of the Property made in good faith and for value, unless otherwise required by law. No Mortgagee shall have an obligation or duty under this Agreement to perform Owner's obligations, or to guarantee such performance prior to any foreclosure or deed in lieu of foreclosure, but upon acquiring the right to possession pursuant to a Mortgage on the Property or any portion thereof, the Mortgagee shall be subject to the terms and conditions of this Agreement. The term of this Agreement shall not be extended based on the fact that a Mortgagee held title to the Property for all or any part of the term of this Agreement.

11. Notice of Default to Mortgagee; Right to Cure.

11.1 Timely Notice to City Clerk. If the City Clerk timely receives notice, on the form set forth on Exhibit "E," attached hereto and incorporated herein by this reference, from a Mortgagee requesting a copy of any Notice of Default given to Owner under the terms of the Agreement, the City shall endeavor to provide a copy of that notice to the Mortgagee within ten (10) days of sending the Notice of Default to Owner. City shall have no liability for damages or otherwise to Owner, Owner's successor, or to any Mortgagee or successor therefor for failure to provide such notice.

11.2 Mortgagee Right to Cure. The Mortgagee shall have the right, but not the obligation, for a period up to ninety (90) days after the receipt of such notice from the City to cure or remedy, or to commence to cure or remedy, the Default unless a further extension of time to cure is granted in writing by the City. However, a Mortgagee to avail itself of the rights provided by this Section must notify the City in writing of its intent to attempt to remedy or cure within twenty (20) days of the date of the Notice of Default from City to Mortgagee. A failure by a Mortgagee to provide such timely notice to City shall extinguish the rights and protections provided by this Section. By providing the notice to City, Mortgagee is agreeing and consenting to the provisions of this Section and is further waiving the right to claim a prior lien on the Property. If the Default is of a nature which can only be remedied or cured by such Mortgagee upon obtaining possession, such Mortgagee shall seek to obtain possession with diligence and continually through

foreclosure, a receiver, or otherwise, and shall thereafter remedy or cure the Default within thirty (30) days after obtaining possession. If the Default cannot, with diligence, be remedied or cured within this thirty (30) day period, then the Mortgagee shall have such additional time as the City Council determines is reasonably necessary to remedy or cure the Default, if the Mortgagee commences cure during the thirty (30) day period and thereafter diligently pursues and completes the cure.

11.3 City Council Review of Mortgagee's Efforts. Such diligence by the Mortgagee on effectuating such cure shall be reviewed by the City's City Council every thirty (30) days thereafter until any and all Defaults are cured. If at any such review, the City Council determines that the Mortgagee is not making good faith efforts to cure any and all Defaults, the City Council shall have the authority to terminate this Agreement at its sole and complete discretion.

11.4 Reservation of City's Rights During Cure Period. In return for City granting to Owner, Owner's successors and transferees, and the Mortgagees of each of them, an extended time to remedy or cure a Default, Owner, Owner's successors and transferees, and the Mortgagees of each of them agree that once a Default is declared by City's City Council, the City may take the actions set forth below and lien and burden the Property for the costs thereof -- irrespective of any lien priority, construction loan, deed of trust, or other encumbrance. Such actions include the following:

- (a) Abate public nuisances following the City-adopted public nuisance ordinance;
- (b) Remedy any health or safety threat posed by the Property, construction, or other activities going on on the Property;
- (c) Control storm water run-off from the Property pursuant to Chapter 8.08 of the Merced Municipal Code;
- (d) Screen any unsightly appearance on the Property for aesthetic purposes;
- (e) Abate weeds; and,
- (f) Control noise, dust, or other offensive conditions on the Property.

11.5 Mortgagee Extension of Cure to Possession of Agency. In the event any obligation of Owner is for the payment of money or fees, other than standard permit or processing fees, and a Default is declared by City based upon such failure to pay, a Mortgagee may be granted an extended time to remedy or cure until such time as Mortgagee obtains possession of the Property; provided, Mortgagee agrees that any money due City which remains unpaid shall bear the higher of the legal rate of interest or the United States Department of Labor San Francisco-Oakland-San Jose Consumer Price Index as the measure of inflation.

12. Mortgagee Rights. The parties hereto agree that this Agreement shall not prevent or limit Owner, in any manner, at Owner's sole discretion, from encumbering the Property or any portion thereof or any improvement thereon by any mortgage, deed of trust, or other security device securing financing with respect to the Property. City acknowledges that the lenders providing such financing may require certain Agreement interpretations and modifications and agrees upon request, from time to time, to meet with the Owner and representatives of such lenders to negotiate in good faith any such request for interpretation or modification. City will not unreasonably withhold its consent to any such requested interpretation or modification provided such interpretation or modification is consistent with the intent and purposes of this Agreement. Owner shall reimburse City for any and all of City's reasonable costs associated with said negotiations, interpretations, and modifications and shall make reimbursement payments to City within thirty (30) days or receipt of an invoice from City.

Any Mortgagee of the Property shall be able to rely upon the provisions hereof and except as expressly provided in this Agreement, neither entering into this Agreement nor a breach of this Agreement shall defeat, render invalid, diminish, or impair the lien of any mortgage on the Property made in good faith and for value, unless otherwise required by law or specified herein.

13. Uniform Codes. This Agreement does not prevent the City from adopting and amending in compliance with State law certain Uniform Codes which are based on recommendations of a multi-state professional organization and which become applicable throughout the City -- including the Project and Property subject to this Agreement. Such Uniform Codes include, but are not limited to, the Uniform Building Code, Uniform Mechanical Code, National Electrical Code, and Uniform Fire Code.

14. Public Health and Safety Concerns, Application to Project of Future General Regulations.

14.1 City Authority to Adopt Future General Regulations. This Agreement does not prevent the City from adopting Future General Regulations and applying such Future General Regulations to the Project and the Property, provided the City Council adopts findings that a failure to apply such Future General Regulations would result in a condition injurious or detrimental to the public health and safety. These findings shall be based upon substantial evidence in the record from a hearing conducted by the City Council at which the Owner was provided at least ten (10) days advance written notice.

14.2 Application of Future General Regulations to Project. Notwithstanding Section 14.1 above, the City shall not apply to the Project or the Property any Future General Regulations which prevent, preclude, or unreasonably delay or alter or in any way affect the implementation of all or any portion of the Development Plan, unless the City Council, in accordance with Section 14.1 above also makes a finding that such Future General Regulations are reasonably necessary to correct or avoid such injurious or detrimental condition. Any Future General Regulations applied to the Project or the Property pursuant to this Section 14.2 shall only apply for the duration necessary to correct or avoid such injurious or detrimental condition.

15. Binding Effect of Agreement. The burdens of this Agreement bind and the benefits of the Agreement inure to the successors-in-interest to the parties to it in accordance with the provisions of and subject to the limitations of this Agreement.

16. Project as a Private Undertaking/Relationship of Parties. It is specifically understood and agreed by and between the parties hereto that the development of the Project is a private development, that neither party is acting as the agent of the other in any respect hereunder, and that each party is an independent contracting entity with respect to the terms, covenants, and conditions contained in this Agreement. No partnership, joint venture, or other association of any kind is formed by this Agreement. The only relationship between City and Owner is that of a government entity regulating the development of private property and the owner of such property.

17. Changes in Project. City may expand the permitted uses for the Property without amending this Agreement so long as Owner or Owner's successor retains his/her/their existing entitlements.

18. Timing of Development; Pardee Construction case. The parties acknowledge that Owner cannot at this time predict when, or at the rate at which the Property will be developed. Such decisions depend upon numerous factors which are not within the control of Owner, such as market orientation and demand, interest rates, absorption, completion and other similar factors. Since the California Supreme Court held in *Pardee Construction Co. v. City of Camarillo*, 37 Cal.3d 465 (1984), that the failure of the parties therein to provide for the timing of development resulted in a later adopted initiative restricting the timing of development to prevail over such parties, it is the parties intent to cure that deficiency by acknowledging and providing that the Owner shall have the right to develop the Property in such order, at such rate, and at such times as the Owner deems appropriate within the exercise of its subjective business judgment, subject only to any timing or phasing requirements set forth in the Development Plan and this Agreement.

19. Indemnity and Cost of Litigation.

19.1 Hold Harmless. The Owner shall indemnify, protect, defend, and hold harmless the City, and any agency or instrumentality thereof, and officers, employees, or agents thereof, from any and all claims, actions, suits, proceedings, or judgments against the City, or any agency or instrumentality thereof, and any officers, employees, or agents thereof to attack, modify, set aside, void, or annul, an approval of the City, or any agency or instrumentality thereof, advisory agency, appeal board, or legislative body, including actions approved by the voters of the City, concerning the Property, the Project, and the approvals related thereto. Furthermore, Owner shall indemnify, protect, defend, and hold harmless the City, or any agency or instrumentality thereof, and officers, employees, or agents thereof, against any and all claims, actions, suits, proceedings, or judgments against another governmental entity in which Owner's project is subject to that other governmental entity's approval and a condition of such approval is that the City indemnify and defend such governmental entity. City shall promptly notify the Owner of any claim, action, or proceeding. City shall further cooperate in the defense of the action by providing staff witnesses, documents, and related information.

19.2 Hold Harmless—Damages & Injury. Owner further agrees to and shall indemnify, protect, defend, and hold City, its officers, employees, agents, and representatives harmless from liability for any and all damage or claims for damage for personal injury, including death, and claims for property damage, resulting from intentional or negligent acts, errors, or omissions which may arise from the direct or indirect operations of the Owner or those of its employees, officers, agents, contractors, subcontractors, or other person acting on its behalf which relate to the Project, or from any violation of any federal, state, municipal law, ordinance, or regulation, to the extent caused, in whole or in part, by the intentional or negligent acts, errors, or omissions of Owner or its employees, officers, agents, contractors, subcontractors, or other person acting on its behalf, or by the quality or character of Owner's work, or resulting from the negligence of the City, its officers, employees, volunteers and agents, except for loss caused by the sole negligence of the City. It is understood that the duty of Owner to indemnify and hold harmless includes the duty to defend as set forth in Section 2778 of the California Civil Code. Acceptance by City of insurance certificates and endorsements required under this Agreement does not relieve Owner from liability under this indemnification and hold harmless clause. Owner agrees to and shall indemnify, protect, defend, and hold harmless the City and its officers, employees, agents, and representatives from actions for damages caused or alleged to have been suffered by reason of the operations referred to in this paragraph, regardless of whether or not City prepared, supplied, or approved plans or specifications for the Project. This indemnification requirement shall extend beyond the termination or expiration of this Agreement. By execution of this Agreement, Owner acknowledges and agrees to the provisions of this Section and that it is a material element of consideration.

19.3 Third Party Litigation Concerning Agreement. Owner shall indemnify, protect, defend, and hold harmless City, its officers, employees, or agents against any loss, cost, expense, claim, or counter-claim, complaint, or proceeding to attack, modify, set aside, void, or annul the approval of this Agreement or the approval of any permit or entitlement granted pursuant to this Agreement brought by a third party. City shall promptly notify Owner of any such claim, action, or proceeding, and City shall cooperate in the defense of the action by providing staff witnesses, documents, and related information. If City fails to promptly notify Owner of any such claim, action, or proceeding, or if City fails to cooperate in the defense of the action by providing staff witnesses, documents, and related information, Owner shall not thereafter be responsible to indemnify,

protect, defend, or hold harmless City. City may in its discretion participate in the defense of any such claim, action, or proceeding.

19.4 Environmental Assurances. Owner shall indemnify, protect, defend, and hold harmless City, its officers, employees, agents, assigns, and any successor or successors to City's interest from and against all claims, actual damages (including but not limited to special and consequential damages), natural resources damages, punitive damages, injuries, costs, response remediation and removal costs, losses, demands, debts, liens, liabilities, causes of action, suits, legal or administrative proceedings, interest, fines, charges, penalties and expenses (including but not limited to attorneys' and expert witness fees and costs incurred in connection with defending against any of the foregoing or in enforcing this indemnity) of any kind whatsoever paid, incurred, or suffered by, or asserted against, City or its officers, employees, or agents arising from or attributable to any repair, cleanup, or detoxification, or preparation and implementation of any removal, remedial, response, closure, or other plan (regardless of whether undertaken due to governmental action) concerning any Hazardous Substance or hazardous wastes at any place within the Property which is the subject of this Agreement. The foregoing indemnity extends beyond the term of this Agreement and is intended to operate as an agreement pursuant to Section 107(e) of the Comprehensive Environmental Response, Compensation, and Liability Act, "CERCLA," 42 U.S.C. Section 9607(e), and California Health and Safety Code Section 25364, and their successor statutes, to insure, protect, defend, hold harmless, and indemnify City from liability.

19.5 Release. Except for non-damage remedies, including the remedy of specific performance and judicial review as provided for in Sections 27.4 and 27.5 hereof, Owner, for itself, its successors and assignees, hereby releases the City, its officers, agents, and employees from any and all claims, demands, actions, or suits of any kind or nature arising out of any liability, known or unknown, present or future, including, but not limited to, any claim or liability, based or asserted, pursuant to Article I, Section 19 of the California Constitution, the Fifth Amendment of the United States Constitution, or any other law or ordinance which seeks to impose any other liability or damage, whatsoever, upon the City because it entered into this Agreement or because of the terms and/or operation of this Agreement.

19.6 Reservation of Rights. Owner's obligation to indemnify, protect, defend, and hold harmless under Sections 19.1 to 19.3 herein shall be

provided at Owner's sole expense, including but not limited to attorneys' fees and court costs, with legal counsel which Owner selects, hires, or otherwise engages to defend City hereunder to be approved by City. City reserves the right to conduct its own defense, provided, however, that Owner shall reimburse City forthwith for any and all reasonable expenses incurred for such defense, including, but not limited to, attorneys' fees and court costs, upon billing and accounting therefor.

19.7 Apportionment of Obligations Among Absolute-Bright Annexation Owners. For obligations of Owner under Sections 19.1 and 19.3, the obligation shall be shared among all Owners in the Absolute-Bright Annexation who have Pre-Annexation Development Agreements with the City (hereinafter the "Absolute-Bright Owners"). The defense obligation shall be joint and several as between the Absolute-Bright Owners while the costs and expenses thereof shall be apportioned among such Absolute-Bright Owners based on the percentage of equivalent dwelling units each Absolute-Bright Owner has relative to the total equivalent dwelling in the Absolute-Bright Annexation. In the event the City is not notified by all the Absolute-Bright Owners within ten (10) days of the City's tendering of the defense of such action to the Absolute-Bright Owners of the selection of counsel and commencement of defense, the City shall have the right to select counsel, prepare the defense, and charge the actual costs thereof, including City staff time, to the Absolute-Bright Owners based on the apportionment allocation set forth above, however, such action shall not relieve Owner from liability under the indemnification and hold harmless provisions. Owner agrees to promptly pay any invoice submitted.

For obligations of Owner under Sections 19.2 and 19.4, if the damage or injury occurs on Owner's property and/or involves only Owner's project, Owner shall be responsible for defense and indemnity obligation. If the damage or injury involves Owner's property and that of other Absolute-Bright Owners, the defense and indemnity obligation shall be shared as between the impacted Absolute-Bright Owners and apportioned among such Absolute-Bright Owners based on the percentage of equivalent dwelling units each Absolute-Bright Owner has relative to the total equivalent dwelling for the impacted properties in the Absolute-Bright Annexation. In the event the City is not notified by Owner within ten (10) days of the City's tendering of the defense of such action to Owner of the selection of counsel and commencement of defense, the City shall have the right to select counsel, prepare the defense, and charge the actual costs thereof, including City staff time, to the impacted Absolute-Bright Owners based on the apportionment allocation set forth above, however, such action shall not relieve Owner from

liability under the indemnification and hold harmless provisions. Owner agrees to promptly pay any invoice submitted.

19.8 Survival. The provisions of this Section 19 shall survive the termination of this Agreement.

20. Public Benefits, Public Improvements and Facilities.

20.1 Intent. The parties acknowledge and agree that this Agreement confers private benefits on the Owner which should be balanced by commensurate public benefits. Accordingly, the parties intend to provide consideration to the public to balance the private benefits conferred on the Owner by providing more fully for the satisfaction of the public needs resulting from development of the Project, as set forth on Exhibit "D" attached hereto and incorporated herein by this reference. Owner agrees to provide all public benefits identified in said Exhibit "D" in such manner and within such timeframe as provided therein.

20.2 Development Fees. Owner shall also pay all other customary and typical development exactions, for a Project of this size and nature, in existence as of the Effective Date and throughout the term of this Agreement, including but not limited to, Fire, Traffic Signal Mitigation, Public Facility Financing Plan Impact Fees, School Impact Fees (SB50), sewer and water connection fees, and permit fees pursuant to the provisions of City ordinances and resolutions in existence at the time of payment, including any periodic adjustments provided by said ordinances and resolutions. Notwithstanding any other language to the contrary herein, Absolute, LLC and Leeco, LLC shall not be required to pay to the City any Park Fees.

20.3 Public Works. If Owner is required by this Agreement, or any other obligation, to construct any public works facilities which will be dedicated to City or any other public agency upon completion, and if required by applicable laws to do so, Owner shall perform such work in the same manner and subject to the same requirements as would be applicable to City or such other public agency should it have undertaken such construction.

20.4 Sewer Facility Capital Expansion Improvement Bond. The City anticipates (i) forming one or more Financing Districts to finance the expansion of its sewer facilities and system to upgrade the City's sewer treatment facility to accommodate the additional sewer capacity required for growth attributable to the Project, and (ii) issuing sewer facility capital expansion improvement bonds or

other indebtedness (the "Bonds") to be secured in whole or in part from assessments or special taxes levied within such Financing Districts, or similar fees and charges. Owner, on behalf of itself and its successors, transferees, assignees, and subsequent purchasers of the Property, or any portion thereof, agrees to form or annex to a Financing District or pay fees and charges in lieu thereof when established, agrees to include the Property within a Financing District, and agrees to pledge and encumber the Property for purposes of the issuance of the Bonds and authorize, by petition, vote, or otherwise, that inclusion of the Property in the Financing District, the issuance of the Bonds, and the imposition by the City of a special tax or assessment on the Property in order to secure the Bonds. The Owner acknowledges that an assessment lien or special tax lien will be recorded against the Property and that the lien will continue in force and effect until the assessment or special tax obligation is prepaid or permanently satisfied and the lien cancelled in accordance with the law. The amount of the lien shall not exceed \$12,000 per equivalent dwelling unit. The amount of the lien for any non-residential development shall be calculated based upon the Treatment Plant, line, pump and the fees in effect at the time a building permit is obtained. By executing this Agreement, Owner, on behalf of itself and its successors, transferees, assignees, and subsequent purchasers of the Property, or any portion thereof, agrees and consents to waive any protest, suit, claim, or challenge to the Bond or any proceedings related thereto. The terms and condition in this Section 20.4 shall run with the land and shall survive beyond the termination or expiration of this Agreement.

21. Reservation of Authority.

21.1 Limitations, Reservations, and Exceptions. Notwithstanding any other provision of this Agreement, the following Subsequent Land Use Regulations shall apply to the development of the Property:

- (a) Processing fees and charges imposed by City to cover the estimated actual costs to City of processing applications for Subsequent Development Approvals.
- (b) Procedural regulations relating to hearing bodies, petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals, and any other matter of procedure.

- (c) Regulations imposing Development Exactions; provided, however, that no such subsequently adopted Development Exactions shall be applicable to development of the Property unless such Development Exactions are applied uniformly to development throughout the City.
- (d) Regulations governing construction standards and specifications including without limitation, the City's Building Code, Plumbing Code, Mechanical Code, Electrical Code, and Fire Code.
- (e) Regulations governing:
 - (1) The control and abatement of public nuisances;
 - (2) Storm water run-off from the Property;
 - (3) The remedy of any health or safety threat posted by the Property;
 - (4) The redevelopment authority of the Redevelopment Agency of the City of Merced; and,
 - (5) The provision, maintenance, expansion, termination, conditions and limitations of municipal water and sewer services.
- (f) Regulations which are in conflict with the Development Plan. Any regulation, whether adopted by initiative or otherwise, limiting the rate or timing of development of the Property shall be deemed to conflict with the Development Plan and shall therefore not be applicable to the development of the Property.
- (g) Regulations which are in conflict with the Development Plan provided Owner has given written consent to the application of such regulations to development of the Property.

21.2 Subsequent Development Approvals. This Agreement shall not prevent City, in acting on Subsequent Development Approvals, from applying the Subsequent Land Use Regulations which do not conflict with the Development Plan, nor shall this Agreement prevent City from denying or conditionally approving any Subsequent Development Approval on the basis of the Existing or Subsequent Land Use Regulations not in conflict with the Development Plan.

21.3 Modification or Suspension by State or Federal Law. In the event that State or Federal laws or regulations enacted after the Effective Date of this Agreement prevent or preclude compliance with one or more of the provisions of this Agreement, such provisions of this Agreement shall be modified or suspended as may be necessary to comply with such State or Federal laws or regulations, provided, however, that this Agreement shall remain in full force and effect to the extent it is not inconsistent with such laws or regulations and to the extent such laws or regulations do not render such remaining provisions impractical to enforce.

21.4 Regulation by Other Public Agencies. It is acknowledged by the parties that other public agencies not within the control of City possess authority to regulate aspects of the development of the Property separately from or jointly with City, and this Agreement does not limit the authority of such other public agencies.

22. Development of the Property, Vesting, and Changes/Amendments.

22.1 Rights to Develop. Contingent upon approval of Owner's annexation request by LAFCO and subject to the terms of this Agreement, Owner shall have a vested right to develop the Property in accordance with, and to the extent of the Development Plan. The Project shall remain subject to all Subsequent Development Approvals required to complete the Project as contemplated by the Development Plan. Except as otherwise provided in this Agreement, the permitted uses of the Property, the density and intensity of use, the maximum height and size of proposed buildings, and provisions for reservation and dedication of land for public purposes shall be those set forth in the Development Plan. In exchange for the vested right to develop pursuant to this Agreement, Owner expressly waives for itself and its successors, transferees, assignees, and subsequent purchasers of the Property, or any portion thereof, the right to challenge or contest the validity of the annexation and any condition of approval attached to any entitlement which is a part of the Development Plan.

22.2 Payment of Fees. Owner, for itself and its successors, transferees, assignees, and subsequent purchasers of the Property, or any portion thereof, agrees to pay all City and school district fees, taxes, and/or assessments in effect on the Effective Date of this Agreement, any increase in those fees, taxes, and/or assessments, and any new fees, taxes, and/or assessments which are in effect at the time building permits are issued, which may include public facility impact fees, other impact fees as applicable, and any special assessments or Mello-Roos taxes—whether for infrastructure, services, or any other activity or project authorized by a special assessment law or the Mello-Roos law, etc., (and to comply with the additional conditions set forth in Exhibit “G,” attached hereto and incorporated herein by this reference). Payment shall be made for each phase at the time of building permit issuance for such phase unless an Ordinance or other requirement of the City mandates or permits payment of such fees, taxes, and/or assessments at an earlier or subsequent time.

22.3 Compliance with Conditions. Owner agrees to comply with the conditions of approval set forth in Planning Commission Resolution No. ~~2871~~, attached hereto as Exhibit “G,” and within this Agreement and acknowledges that the conditions are necessary to mitigate the environmental impacts, if any, caused by Owner’s development or are necessary to offset the costs to the City generated by Owner’s development including sewer connection costs pursuant to Chapter 15.16 of the Merced Municipal Code.

22.4 Utility Connection Charge. Owner agrees to pay all sewer connection costs imposed by the City as delineated in Section 15.16.070 of the Merced Municipal Code and to pay all other costs required by Chapter 15.16 of the Merced Municipal Code.

22.5 Building Permits & Wastewater Treatment Plant Capacity. No building permit or other permit for the Project shall be issued if Owner is not in full compliance with this Agreement. Notwithstanding any provision to the contrary, in the event the City’s Wastewater Treatment Plant’s capacity or operation is insufficient to serve all development projects in the City seeking connections, available building permits and sewer connections (hereinafter “Connection Permit”), shall be allocated as follows:

- (a) The City reserves 5% of the available capacity, but not less than 100,000 gallons per day, to serve new commercial and industrial projects;

- (b) Among residential projects, first priority shall be given for up to 5% of available capacity, but not less than 100,000 gallons per day, for projects legally covenanted and required to sell or lease to persons of low or moderate income;
- (c) The balance of available capacity shall be allocated through the issuance of Connection Permits to Projects that have pledged their Property subject to this Agreement as security for the public financing essential to the expansion of the City's Wastewater Treatment Plant, and among those Projects that have done so meet the following additional criteria:
 - (1) Have approved final maps for their Project and completed all other discretionary approvals (such as Conditional Use Permits);
 - (2) Agree and are able to commence construction of buildings within 120 days of receiving a building permit;
 - (3) Agree pursuant to a construction phasing plan submitted with the Connection Permit application to diligently pursue construction until completion in accordance with the phasing plan; and,
 - (4) Allocation of Connection Permits shall be based on those applications approved meeting the requirements above with those approved first in time getting priority over those filing subsequent thereto.

Insufficient capacity shall be determined by the City Engineer considering existing agreements to serve and maximum flow to the Wastewater Treatment Plant at its highest average point.

This allocation method for Connection Permits shall continue until such time as capacity at the Wastewater Treatment Plant is able to meet all of the requests for service, as determined by the City Engineer, with a sufficient reserve capacity to meet unexpected needs or opportunities for the City.

If construction is not commenced within the time limit specified in Section 22.5(c)(2), any Connection Permit for which construction has not commenced under the building permit shall be deemed void and subject to reallocation.

Once a Connection Permit is issued for a Project, the Connection Permit is not transferable by the permit holder to another site or location. The Connection Permit may be transferred between parties, such as when one company buys out a site to complete the Project, so long as the location does not change. Any attempted transfer to another location shall be void and cause the Connection Permit to be immediately voided and subject to reallocation.

22.6 Effect of Agreement on Land Use Regulations. Except as otherwise provided under the terms of this Agreement, the rules, regulations, and official policies governing permitted uses of the Property, the density and intensity of use of the Property, the maximum height and size of proposed buildings, and the design, improvement and construction standards and specifications applicable to development of the Property shall be the existing Land Use Regulations in effect on the Effective Date of this Agreement. City shall exercise its lawful reasonable discretion in connection with Subsequent Development Approvals in accordance with the Development Plan, and as provided by this Agreement. City shall accept for processing, review, and action all applications for Subsequent Development Approvals, and such applications shall be processed in the normal manner for processing such matters. City may, at the request of Owner, contract for planning and engineering consultant services to expedite the review and processing of Subsequent Development Approvals, the cost of which shall be borne by Owner.

22.7 Changes and Amendments. The parties acknowledge that refinement and further development of the Project will require Subsequent Development Approvals and may demonstrate that changes are appropriate and mutually desirable in the Existing Development Approvals. In the event the Owner finds that a change in the Existing Development Approvals is necessary or appropriate, the Owner shall apply for a Subsequent Development Approval to effectuate such change. If approved by City under Section 25 below, any such change in the Existing Development Approvals shall be incorporated herein as addendum to this Agreement and may be further changed from time to time as provided in this Section. Owner, shall, within thirty (30) days of written demand by City, reimburse City for any and all reasonable costs, associated with any amendment or change to this Agreement that is initiated by Owner or Owner's successor -- without regard to the outcome of the request for amendment or change

to this Agreement. Unless otherwise required by law, as determined in City's reasonable discretion, a change to the Existing Development Approvals shall be deemed "minor" and not require an amendment to this Agreement provided such change does not:

- (a) Alter the permitted uses of the Property as a whole; or,
- (b) Increase the density or intensity of use of the Property as a whole; or,
- (c) Increase the maximum height and size of permitted buildings; or,
- (d) Delete a requirement for the reservation or dedication of land for public purposes within the Property as a whole; or,
- (e) Constitute a project requiring a subsequent or a supplemental Environmental Impact Report pursuant to Section 21166 of the Public Resources Code.

Notwithstanding the forgoing, the City is neither obligated nor required to make any change or amendment to this Agreement.

23. Periodic Review of Compliance with Agreement.

23.1 City Compliance Review. Pursuant to City Council Resolution No. 95-6, as it may be subsequently amended, City shall review this Agreement at least once during every twelve (12) month period from the Effective Date of this Agreement. The Owner or successor shall reimburse City for the reasonable and necessary costs of this review, within thirty (30) days of written demand from City.

23.2 Owner Good Faith Compliance. During each periodic review by City, the Owner is required to demonstrate good faith compliance with the terms of this Agreement. The Owner agrees to furnish such evidence of good faith compliance as City in the exercise of its discretion may require.

24. Financing District. In addition to any Financing District required by Section 20.4 hereof, upon the request of Owner, the parties shall cooperate in exploring the use of special assessment districts, special tax districts, and other similar financing districts for the financing of the construction, improvement, or

acquisition of public infrastructure, facilities, lands, and improvements to serve the Project, whether located within or outside the Property. It is acknowledged that nothing contained in this Agreement shall be construed as requiring City or City Council to form such a district or to issue or sell bonds therefor.

25. Amendment or Cancellation of Agreement. This Agreement shall not be amended, modified, or canceled, in whole or in part, unless in writing signed by both parties hereto, and only by mutual consent of the parties and in the manner provided for in Government Code Sections 65868, 65867, and 65867.5. The provisions of this Section do not impact the right of the City to terminate this Agreement because of Owner's breach or failure to comply in good faith with the requirements of this Agreement.

26. Enforcement. Unless amended or canceled as herein provided, this Agreement is enforceable by any party to it notwithstanding a change in the applicable general or specific plan, zoning, subdivision, or building regulations adopted by the City which alter or amend the rules, regulations, or policies governing permitted uses of the land, density, design, improvement, and construction standards and specifications.

27. Enforced Delay, Default, Remedies and Termination.

27.1 Default by Owner. If the City alleges an Owner Default, the City shall conduct a hearing utilizing the Annual Review procedures in Section 23.1 before the City may terminate this Agreement. Failure by Owner to reserve or dedicate any property pursuant to the Development Plan, or to pay fees and charges as required by the Land Use Regulations and this Agreement as they become due, shall constitute a separate material Owner Default. It shall also be deemed a material Owner Default of a material provision of this Agreement for more than forty-five (45) days to pass from City's written demand for reimbursement of any reimbursable costs under this Agreement and the receipt by City of such reimbursement. In the event of Owner Default, and in addition to any other remedy available to the City, the City shall have the right to rezone the Property back to its original designation.

27.2 Default by City. If Owner alleges a City Default by written notice served on City in accordance with Section 30 hereof and alleges that the City has not cured the Default within ninety (90) days, Owner may pursue any legal or equitable remedy available to it under this Agreement. It is acknowledged by the parties that City would not have entered into this Agreement if City were to

be subject to or liable for damages -- including monetary damages -- under or with respect to this Agreement or the application thereof, or with respect to the Project. Owner, for itself and its successors, transferees, assignees, and subsequent purchasers of the Property, or any portion thereof, expressly waives the right to seek damages -- including monetary damages -- against the City or any officer, or employee, , for any default or breach of this Agreement. Owner, on behalf of itself and its successors, transferees, assignees, and subsequent purchasers of the Property, or any portion thereof, covenants and agrees not to sue for or claim any damages -- including monetary damages -- for any purported breach of this Agreement by City. However, Owner shall have the right to pursue all its legal remedies against any third party for negligence or any other form of liability for the third party's failure to perform in the expansion of the sewer treatment plant. City may assign to Owner any right, claim or cause of action it may have against any third party for Owner to pursue at its own discretion in the event that City exercises its rights against Owner under the Agreement. During the time when Owner alleges the existence of a City Default and without limiting any of its other available remedies, Owner shall not be obligated to proceed with or complete the Project or any phase of the Project, nor to reserve or dedicate any property pursuant to the Development Plan or this Agreement. Upon a City Default, any resulting delays in Owner's performance shall neither be an Owner Default nor constitute grounds for termination or cancellation of this Agreement by the City.

27.3 Waiver. Failure or delay in giving Notice of Default shall not waive a Party's right to give future Notice of the same or any other Default.

27.4 Specific Performance Remedy. Due to the elimination of damages as a remedy against City and to the size, nature, and scope of the Project, it will not be practical or possible to restore the Property to its pre-existing condition once implementation of this Agreement has begun. After such implementation, Owner may be foreclosed from other choices it may have had to utilize the Property and provide for other benefits. Owner has invested significant time and resources and performed extensive planning and processing of the Project in agreeing to the terms of this Agreement and will be investing even more significant time and resources in implementing the Project in reliance upon the terms of this Agreement. It is not possible to determine the sum of money which would adequately compensate Owner for such efforts. For the above reasons, the City and Owner agree that damages would not be an adequate remedy if the City fails to carry out its obligations under this Agreement. Therefore, no money damages are available against City, or any officer, employee, or agent thereof.

Specific performance of this Agreement is necessary as the exclusive remedy to compensate Owner if the City fails to carry out its obligations under this Agreement and is also available to City, if Owner defaults hereunder.

27.5 Judicial Review. In the event City elects to terminate this Agreement pursuant to the provisions of Sections 11.7, 25, or 27.1, the Owner may challenge such termination by instituting legal proceedings in which event the court shall exercise its review, based on substantial evidence, as to the existence of cause for termination.

28. Events of Default. Owner is in default under this Agreement upon the happening of one or more of the following events or conditions:

- (a) If a warranty, representation, or statement made or furnished by Owner to City is false or proves to have been false in any material respect when it was made;
- (b) More than forty-five (45) days have passed since City's making of a written request to Owner for payment or reimbursement for a fee or service authorized or agreed to pursuant to this Agreement;
- (c) Failure by Owner to reserve or dedicate any property pursuant to the Development Plan, or to pay fees and charges as required by the Land Use Regulations and this Agreement as they become due; or
- (d) A finding and determination by City that upon the basis of substantial evidence the Owner has not complied in good faith with one or more of the terms or conditions of this Agreement.

29. Attorney's Fees and Costs. If legal action by either party is brought because of breach of this Agreement or to enforce a provision of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees and court costs.

30. Notices. All notices required or provided for under this Agreement shall be in writing and delivered in person or sent by certified mail, postage prepaid and presumed delivered upon actual receipt by personal delivery or within three (3) days following deposit thereof in United States Mail. Notice required to be given to City shall be addressed as follows:

To City: City of Merced
678 West 18th Street
Merced, California 95340
Attn: City Clerk

Notices required to be given to Owner shall be addressed as follows:

To Owner: ABSOLUTE, LLC
LEECO, LLC
BP INVESTORS, LLC
BRIGHT DEVELOPMENT, a California Corporation
C/O Rick Telegan
9 River Park Place East, Suite 101
Fresno, California 93720

With a copy to: J. Scott Dorius
Triebisch, Frampton, Dorius & Lima
300 N. Palm Street
P.O. Box 709
Turlock, CA 95381

A party may change the address by giving notice in writing to the other party and thereafter notices shall be addressed and transmitted to the new address.

31. Cooperation. City agrees that it shall accept for processing and promptly take action on all applications, provided they are in a proper form and acceptable for required processing for discretionary permits, tract or parcel maps, or other land use entitlement for development of the Project in accordance with the provisions of this Agreement. City shall cooperate with Owner in providing expeditious review of any such applications, permits, or land use entitlement and, upon request and payment of any costs and/or extra fees associated therewith by Owner, City shall assign to the Project planner(s), building inspector(s), and/or other staff personnel as required to insure the timely processing and completion of the Project.

32. Further Actions and Instruments. Each of the Parties shall cooperate with and provide reasonable assistance to the other to the extent necessary to implement this Agreement. Upon the request of either Party at any time, the other Party shall promptly execute, with acknowledgement or affidavit if reasonably

required, and file or record such required instruments and writings and take any actions as may be reasonably necessary to implement this Agreement or to evidence or consummate the transactions contemplated by this Agreement. In the event, Owner or Owner's successor requires supplemental or additional agreements for purposes of securing financing or similar purposes, City will endeavor to assist in this respect, provided, however, Owner or Owner's successor shall reimburse the City for any and all costs associated with processing, reviewing, negotiating, or acting on such agreements. Owner or Owner's successor agrees to reimburse City within thirty (30) days of written demand therefor.

33. Rules of Construction and Miscellaneous Terms.

- (a) The singular includes the plural; the masculine gender includes the feminine; "shall" is mandatory, "may" is permissive.
- (b) If there is more than one signer of this Agreement their obligations are joint and several.
- (c) The time limits set forth in this Agreement may be extended by mutual written consent of the parties in accordance with the procedures for adoption of the Agreement.
- (d) This Agreement is made and entered into for the sole protection and benefit of the parties and their successors and assigns. No other person, including but not limited to third party beneficiaries, shall have any right of action based upon any provision of this Agreement.

34. Running with Land. To the extent allowed by law, the conditions of this Agreement constitute covenants running with the land, and shall be enforceable by the City or by any present or future owner of any of the land described in Exhibit "A."

35. Waiver. In the event that either City or Owner shall at any time or times waive any breach of this Agreement by the other, such waiver shall not constitute a waiver of any other or succeeding breach of this Agreement, whether of the same or any other covenant, condition or obligation. Waiver shall not be deemed effective until and unless signed by the waiving party.

36. Venue. This Agreement and all matters relating to it shall be governed by the laws of the State of California and any action brought relating to this Agreement shall be held exclusively in a state court in the County of Merced.

37. Entire Agreement. This Agreement and the exhibits hereto contain the complete, final, entire, and exclusive expression of the agreement between the parties hereto, and is intended by the parties to completely state the agreement in full. Any agreement or representation respecting the matters dealt with herein or the duties of any party in relation thereto not expressly set forth in this Agreement shall be null and void.

38. Counterparts. This Agreement may be executed in multiple counterparts, each of which so fully executed counterpart shall be deemed an original. No counterpart shall be deemed to be an original or presumed delivered unless and until the counterpart executed by the other party to this Agreement is in the physical possession of the party seeking enforcement thereof.

39. Authority to Execute. Each party hereto expressly warrants and represents that he/she/they has/have the authority to execute this Agreement on behalf of his/her/their corporation, partnership, business entity, or governmental entity and warrants and represents that he/she/they has/have the authority to bind his/her/their entity to the performance of its obligations hereunder.

IN WITNESS WHEREOF this Pre-Annexation Development Agreement has been executed by the authorized representatives of the parties hereto.

CITY OF MERCED
A California Charter Municipal Corporation

BY: 
City Manager James G. Marshall

ATTEST:
JAMES G. MARSHALL, CITY CLERK

BY: 
Deputy City Clerk

ALL-PURPOSE ACKNOWLEDGMENT

STATE OF CALIFORNIA)

)

COUNTY OF MERCED)

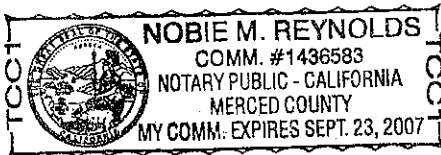
On April 18, 2006, before me, Nobie M. Reynolds,

Notary Public, personally appeared James G. Marshall

☒ personally known to me -OR-

☐ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies) and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.



Nobie M. Reynolds
SIGNATURE OF NOTARY

APPROVED AS TO FORM:

BY: *Shirley S. Pig* *2/24/06*
City Attorney Date

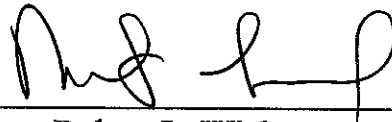
260948
ACCOUNT DATA:

BY: *[Signature]*
Verified by Finance Officer

no funds required 4-11-06 MHA
4-11-06 V.R. 5

(Signatures Continued on Next Page)

OWNER:
ABSOLUTE, LLC

BY: 
Robert L. Wiebe

Its: Member

Taxpayer I.D. No. 20-0307449

ADDRESS: 7090 N. Marks Ave., Suite 107
Fresno, CA 93711

TELEPHONE: 559/431-8334

FACSIMILE: 559/431-8379

E-MAIL: cindic@cpawiebe.com

ALL-PURPOSE ACKNOWLEDGMENT

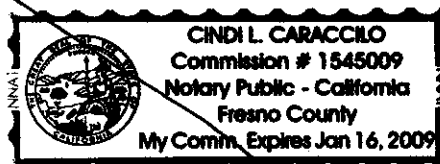
State of California

County of Fresno

On, February 28, 2006, before me, Cindi L. Caraccilo, Notary Public
personally appeared, Robert L. Wiebe
personally known to me (or proved to me on the basis of satisfactory evidence) to
be the person(s) whose name(s) is/are subscribed to the within instrument and
acknowledged to me that he/she/they executed the same in his/her/their authorized
capacity(ies), and that by his/her/their signature(s) on the instrument the person(s),
or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Cindi L. Caraccilo
Notary Public



(Seal)

CAPACITY CLAIMED BY SIGNER

- ☐ INDIVIDUAL(S)
☐ OFFICER(S) (TITLE[S]):

- ☐ PARTNER(S)
☐ ATTORNEY-IN-FACT
☐ TRUSTEE(S)
☐ SUBSCRIBING WITNESS
☐ GUARDIAN/CONSERVATOR
☒ OTHER: Manager

____ Chairperson _____

SIGNER IS REPRESENTING:
Name of person(s) or entity(ies):

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Fresno } ss.

On February 28, 2004 before me, Cindi L. Caraccilo, Notary Public
Date Name and Title of Officer (e.g., "Jane Doe, Notary Public")
personally appeared Robert L. Wiebe
Name(s) of Signer(s)



☒ personally known to me

☐ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

Place Notary Seal Above

WITNESS my hand and official seal.

Cindi L. Caraccilo
Signature of Notary Public

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: Pre-Annexation Development Agreement

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s).

Signer's Name: Robert L. Wiebe

- ☐ Individual
☒ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☒ Other: Manager

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER
Top of thumb here

Signer's Name: _____

- ☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER
Top of thumb here

OWNER:
LEECO, LLC

BY:


Lee V. Kolligian

Its: Member

Taxpayer I.D. No. 91-1918501

ADDRESS: 9 River Park Plaza East
Suite 101
Fresno, CA 93720

TELEPHONE: 559/434-8600

FACSIMILE: 559/434-8615

E-MAIL: LSKFresno@aol.com

ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Fresno

On February 28, 2006, before me, Cindi L. Caraccilo, Notary Public
personally appeared, Lee J. Kolligian,
~~personally known to me~~ (or proved to me on the basis of satisfactory evidence) to
be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and
acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized
capacity(ies), and that by his/~~her/their~~ signature(s) on the instrument the person(s),
or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Cindi L. Caraccilo
Notary Public



(Seal)

CAPACITY CLAIMED BY SIGNER

- ☐ INDIVIDUAL(S)
☐ OFFICER(S) (TITLE[S]):

☐ PARTNER(S)
☐ ATTORNEY-IN-FACT
☐ TRUSTEE(S)
☐ SUBSCRIBING WITNESS
☐ GUARDIAN/CONSERVATOR
☒ OTHER: manager

____ Chairperson _____

SIGNER IS REPRESENTING:
Name of person(s) or entity(ies):


OWNER:
BP INVESTORS, LLC

BY:


Lee J. Kolligian

Its: Member

BY:


Rick Telegan

Its: Member

Taxpayer I.D. No. 20-0050152

ADDRESS: 9 River Park Place East
Suite 101
Fresno, CA 93720

TELEPHONE: 559/434-0334

FACSIMILE: 559/434-8615

E-MAIL: Fresno3rdM@aol.com

ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Fresno

On February 28, 2006, before me, Cindi L. Caraccilo, Notary Public
personally appeared, Lee J. Kolligian
~~personally known to me~~ (or proved to me on the basis of satisfactory evidence) to
be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and
acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized
capacity(~~ies~~), and that by his/~~her/their~~ signature(s) on the instrument the person(s),
or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Cindi L. Caraccilo
Notary Public



(Seal)

CAPACITY CLAIMED BY SIGNER

- ☐ INDIVIDUAL(S)
☐ OFFICER(S) (TITLE[S]):

- ☐ PARTNER(S)
☐ ATTORNEY-IN-FACT
☐ TRUSTEE(S)
☐ SUBSCRIBING WITNESS
☐ GUARDIAN/CONSERVATOR
☒ OTHER: manager

____ Chairperson _____

SIGNER IS REPRESENTING:
Name of person(s) or entity(ies):

ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Fresno

On February 28 2006, before me, Cindi L. Caraccilo,
personally appeared, Rick Telegan,
~~personally known to me~~ (or proved to me on the basis of satisfactory evidence) to
be the person(s) whose name(s) is/are subscribed to the within instrument and
acknowledged to me that he/she/they executed the same in his/her/their authorized
capacity(ies), and that by his/her/their signature(s) on the instrument the person(s),
or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Cindi L. Caraccilo
Notary Public



(Seal)

CAPACITY CLAIMED BY SIGNER

- ☐ INDIVIDUAL(S)
☐ OFFICER(S) (TITLE[S]):

- ☐ PARTNER(S)
☐ ATTORNEY-IN-FACT
☐ TRUSTEE(S)
☐ SUBSCRIBING WITNESS
☐ GUARDIAN/CONSERVATOR
☒ OTHER: manager

Chairperson

SIGNER IS REPRESENTING:
Name of person(s) or entity(ies):

OWNER:
BRIGHT DEVELOPMENT, a
CALIFORNIA CORPORATION

BY: Calvin E. Bright
Calvin E. Bright

Its: President

Taxpayer I.D. No. 94-1741340

ADDRESS: 1620 N. Carpenter Rd. Bldg. B
Modesto, CA 95351

TELEPHONE: 209/526-8242

FACSIMILE: 209/578-1666

E-MAIL: nsoares@Bright-Homes.com

ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Stanislaus

On, March 14, 2006, before me, Terri Brock, Notary Public,
personally appeared, Calvin E. Bright,
personally known to me (~~or proved to me on the basis of satisfactory evidence~~) to
be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and
acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized
capacity(ies), and that by his/~~her/their~~ signature(s) on the instrument the person(s),
or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.



Terri Brock
Notary Public

(Seal)

CAPACITY CLAIMED BY SIGNER

- ☐ INDIVIDUAL(S)
☒ OFFICER(S) (TITLE(S)):
President
Bright Development
☐ PARTNER(S)
☐ ATTORNEY-IN-FACT
☐ TRUSTEE(S)
☐ SUBSCRIBING WITNESS
☐ GUARDIAN/CONSERVATOR
☐ OTHER: _____

____ Chairperson _____

SIGNER IS REPRESENTING:
Name of person(s) or entity(ies):

EXHIBIT A
PROPERTY LEGAL DESCRIPTION AND MAP

EXHIBIT 'A'

**ANNEXATION TO THE CITY OF MERCED
FOR
ABSOLUTE, LLC & LEECO, LLC**

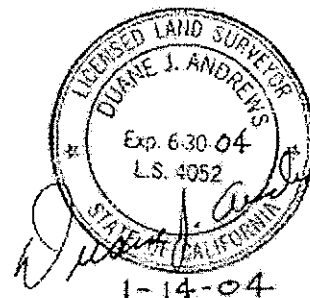
DESCRIPTION

All that certain real property, consisting of Parcel 2, as shown on the Parcel Map for Benber Company, recorded in Volume 45 of Parcel Maps at page 16, Merced County Records, in Section 5, Township 7, South Range 14 East, Mount Diablo Base and Meridian, in the County of Merced, State of California, described as follows:

Commencing at the southwest corner of said Section 5; thence N.00°44'00"E. along the west line of said section and the center line of a street known as 'G' Street, said centerline being the current east line of the city limits of the City of Merced, a distance of 1324.10 feet to the true POINT OF BEGINNING of this description; thence continuing N.00°44'00"E. along said west line of section 5 and said centerline of 'G' Street and said east line of city limits a distance of 1651.43 feet; thence N.89°55'02"E. along the westerly extension of and the north line of said Parcel 2 a distance of 2639.28 feet to the northeast corner of said Parcel 2; thence S.00°48'30"W. along the east line of said Parcel 2 a distance of 1651.32 feet to the southeast corner of said Parcel 2; thence S.89°54'51"W. along the south line of said Parcel 2 and its westerly extension a distance of 2637.13 feet to the POINT OF BEGINNING.

Containing: 100.00 Acres, more or less.

Subject to rights of record, if any.



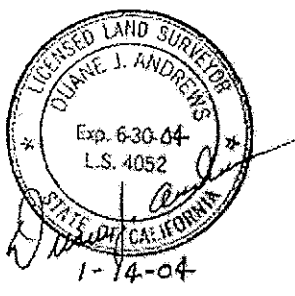
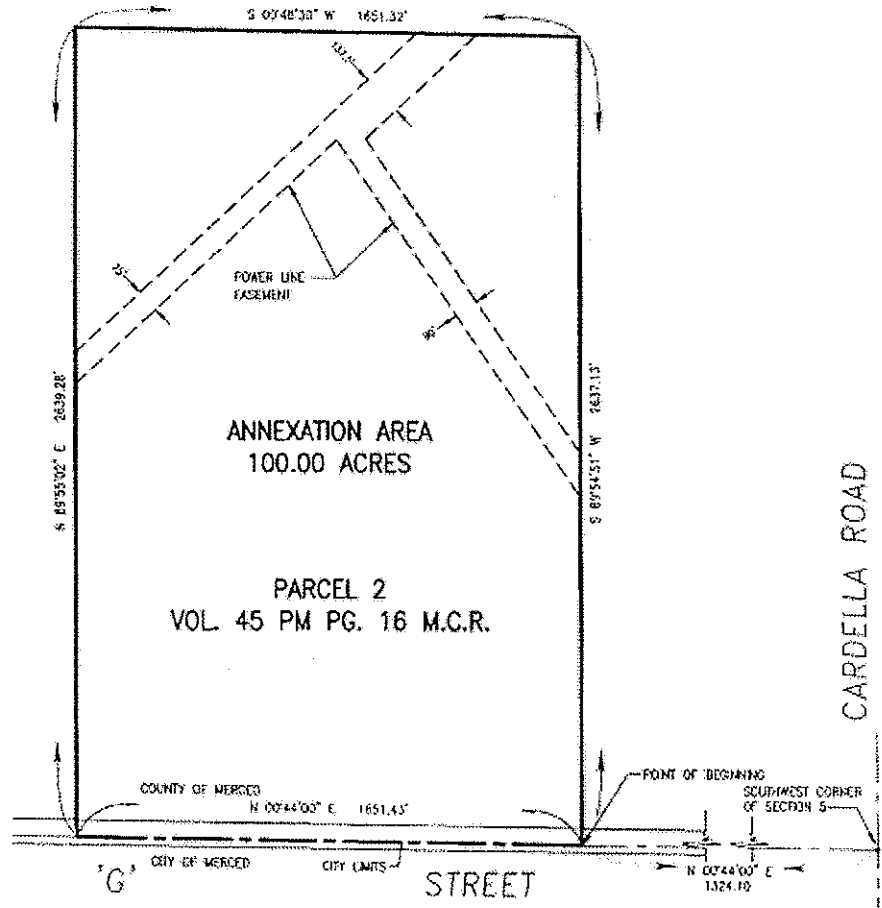
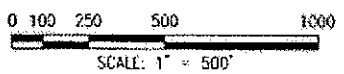


EXHIBIT 'B'
ABSOLUTE, LLC & LEECO, LLC ANNEXATION TO
THE CITY OF MERCED
SECTION 5, T.7S., R.14E., M.D.B. & M.



GOLDEN VALLEY
ENGINEERING & SURVEYING
15111 22nd Street, P.O. Box 349, Merced, CA 95349
Phone: (209) 722-3200 Fax: (209) 722-3214

03311-convx

EXHIBIT B
DEVELOPMENT APPROVALS

Annexation/Pre-Zoning No. 04-01

Establishment of Residential Planned Development (RP-D) No. 61

Expanded Initial Study No. 04-02 (Mitigated Negative Declaration and Mitigation Monitoring Program)

EXHIBIT C
LAND USE REGULATIONS

Merced Vision 2015 General Plan, as amended through
April 4, 2005

Charter of the City of Merced, as amended through
March 5, 2002

Merced Municipal Code, as amended through May 2005

City of Merced Design Standards, as amended through
November 15, 2004

Merced Specific Urban Development Plan (SUDP)

EXHIBIT D
PUBLIC BENEFITS

1. Owner shall participate in the upgrade to the sewer treatment plant in proportion to the growth attributable to the Project, as called for in Section 20.4. New development properties must be pledged against the future sewer bond. All development shall connect to the City sewer system and Owner shall pay all applicable connection fees.
2. Owner shall improve/upgrade/replace all existing County infrastructure (roads, utilities, etc.) within the Project consistent with City of Merced standards, specifically, but not limited to:
 - (a) Acquire and dedicate additional right-of-way for future widening of "G" Street.
 - (b) Install curbs, gutters, sidewalks, storm drains, and underground power lines (if applicable) on "G" Street and all collector, arterial, and interior roads within the annexation area.
 - (c) Underground overhead telephone lines on "G" Street.
 - (d) Install street lights as required on "G" Street and all collector, arterial, and interior roads within the annexation area.
 - (e) Install a 4-way traffic signal at the intersection of "G" Street and collector street into the annexation area, subject to applicable reimbursement.
 - (f) Install fire hydrants as required by the City's Fire Department.
3. Owner shall develop a storm drainage plan acceptable to the City, which may require an on-site storm retention/detention facility, and construct the facilities related thereto.

4. To the extent feasible, Owner shall connect all storm drains in the annexation area to storm drain lines in the Open Space area under high-voltage power lines that lead to "G" Street.
5. Owner shall pipe and cover the Merced Irrigation District irrigation canal running north/south and provide connection to school, public park and open space to allow for use of irrigation water for sprinklers at these facilities.
6. Owner shall connect all development to the City water system and pay all applicable connection fees.
7. Owner shall dedicate the northeast corner of the annexation area, identified as Open Space, for a public park.
8. Owner must agree to form a Mello-Roos Community Facilities District (CFD) for infrastructure and maintenance with waiver of protest rights.
9. Owner shall submit a development phasing plan that phases construction and development from south to north along with all infrastructure extensions.
10. Owner shall insure that at the time the first building permit is pulled that the City Fire Department's response time to an emergency in the annexation area is under 6 minutes.

EXHIBIT E
REQUEST FOR NOTICE OF DEFAULT UNDER
PRE-ANNEXATION DEVELOPMENT AGREEMENT

Pre-Annexation Development Agreement:
Specific Plan No. , /Name of Development/
Planning Application No.

Date:

To: City Clerk and Director of Development Services, City of Merced

Pursuant to Section 6(b) and (c) of the above-referenced Pre-Annexation Development Agreement, request is hereby made by as Mortgagee for the property (or portion thereof) to receive copies of any Notice of Default issued by City against Owner in accordance with the terms and conditions of such Pre-Annexation Development Agreement. Copies of any such Notices should be mailed to the following address:

_____ (Mortgagee)
_____ (Person/Department)
_____ (Address)
_____ (City/State/Zip)
_____ (Telephone No.)

A copy of this Notice should be filed with the project file to insure proper and timely notice is given. **Under the terms of said Pre-Annexation Development Agreement, _____ as Mortgagee is entitled to receive copies of any Notice of Default within ten (10) days of sending any such Notice to Owner. Failure to send any such Notice may have serious legal consequences for the City.**

This request is to remain in effect until revoked by _____ as Mortgagee or the Pre-Annexation Development Agreement is terminated.

The person executing this document on behalf of said Mortgagee warrants and represents that the entity he/she represents is a bonafide Mortgagee of said property and is entitled to receive copies of Notices of Default under said Pre-Annexation Development Agreement.

The undersigned declares the above information is true and correct under the penalty of perjury under the laws of the State of California.

Dated: __, 200__.

MORTGAGEE

By:

(signature)

(printed name)

Its: _____

(title)

[Notary required]

This Notice is to be sent to both the City Clerk and Director of Development Services for the City of Merced at 678 West 18th Street, Merced, California 95340 or such other location as Merced City Hall may be located in the future.

EXHIBIT F
ASSIGNMENT AND ASSUMPTION AGREEMENT

RECORDING REQUESTED BY:

City of Merced, A California charter
municipal corporation

WHEN RECORDED MAIL TO:

City of Merced
City Clerk
678 West 18th Street
Merced, California 95340

**Exempt Recording Per Gov't Code
Section 6103**

(Above for Recorder's Use Only)

**CONSENT TO ASSIGNMENT OF PRE-ANNEXATION DEVELOPMENT
AGREEMENT AND ASSUMPTION THEREOF**

This Consent to Assignment of Pre-Annexation Development Agreement and
Assumption Thereof ("Consent and Assumption Agreement") is made as of this ____ day
of _____, 2006 between the City of Merced, a California charter municipal
corporation ("City") and _____, a _____ ("Assignee").

RECITALS

A. The City of Merced executed a Pre-Annexation Development Agreement
entitled _____ dated _____, ("Agreement") a copy of which is
attached and incorporated by reference as Exhibit "1" pursuant to which City agreed with
_____ ("Owner/Assignor") to certain terms and
conditions related to the annexation and development of the area known as
_____ described in more detail in Exhibit "B" to Exhibit 1, attached

and incorporated by reference for a term commencing on _____ and ending on _____.

B. On _____, Assignor sold its rights and interests in the property to _____ (Assignee) and entered into an assignment and assumption agreement with _____.

C. On _____, Assignor assigned its interest in the Agreement to Assignee subject to the consent of the City.

D. Pursuant to Section 9.1 of the Agreement, City desires to consent to the assignment of the Agreement to Assignee, and Assignee desires to accept the assignment of the Agreement from Assignor, with the consent of the City, and assume all obligations of Assignor under the Agreement, including but not limited to, provision of all outstanding public benefits, commencing on _____.

Therefore, for good and valuable consideration, the receipt and adequacy of which are acknowledged, City and Assignee agree as follows:

SECTION 1. ASSIGNMENT. City consents to the assignment and transfer to Assignee of all right, title, and interest in the Agreement and Assignee accepts from Assignor all right, title, and interest subject to the terms and conditions set forth in this Consent and Assumption Agreement.

SECTION 2. ASSUMPTION OF AGREEMENT OBLIGATIONS. Assignee assumes and agrees to perform and fulfill all the terms, covenants, conditions, and obligations required to be performed and fulfilled by Assignor under the Agreement. Assignee specifically agrees to ALL of the following conditions:

- (a) Assignor no longer has a legal interest in all or any part of the Property except as a beneficiary under a deed of trust.
- (b) Assignor is not in default under the Agreement.
- (c) City has been provided with the notice and executed Assignment and Assumption Agreement required under Paragraph (b) of Subsection 9.1 of the Agreement..
- (d) The purchaser, transferee, or assignee provides City with security equivalent to or better than any security previously provided by Assignor to guarantee the installation of the improvements set forth on the improvement plans and subdivision agreement for the portion of the Project being transferred or assigned pursuant to the Subdivision Map Act and Sections 18.24.100, 18.24.110 and 18.24.150 of the Merced Municipal Code.
- (e) The Assignor or purchaser, transferee or assignee has reimbursed City for any and all City costs associated with Assignor's transfer of all or a portion of the Property.
- (f) The Assignor has reimbursed City for any and all costs relating to the Agreement.
- (g) The conditions in Section 20.4 (Sewer Facility Capital Expansion Improvement Bonds) of the Agreement have been completely satisfied, are no longer required, or the obligations under Section 20.4 have been completely and unequivocally assumed by the Assignor, purchaser, transferee or assignee.

SECTION 3. COVENANTS.

(a) City covenants that the copy of the Agreement attached as Exhibit 1 is a true and accurate copy of the Agreement as currently in effect and that there exists no other valid agreement affecting Assignor's rights and obligations under the Agreement.

(b) City covenants that the Agreement is in full effect and no defaults exist under the Agreement, nor any acts or events which, with the passage of time or the giving of notice or both, could become defaults.

SECTION 4. LITIGATION COSTS. If any litigation between City and Assignee arise out of this Consent and Assumption Agreement or concerning the meaning of interpretation of the Consent and Assumption Agreement, the losing party shall pay the prevailing party's costs and expenses of the litigation, including, without limitation, reasonable attorney fees.

SECTION 5. INDEMNIFICATION. Assignee agrees to indemnify City from and against any loss, costs, or expense, including attorney fees and court costs relating to the failure of Assignee to fulfill obligations under the Agreement, and accruing with respect to the period subsequent to the date of this Assignment.

SECTION 6. GOVERNING LAW. This Consent and Assumption Agreement shall be governed by and construed in accordance with California law.

The parties have executed this Consent and Assumption Agreement as of the date first above written.

"CITY"

CITY OF MERCED
A California charter municipal corporation

BY: _____
City Manager

ATTEST:
JAMES G. MARSHALL, CITY CLERK

BY: _____
Deputy City Clerk

APPROVED AS TO FORM:

BY: _____
City Attorney

ACCOUNT DATA:

[To be entered by Requesting Department]:

Account No.: _____

Amount \$ _____

VERIFIED:

BY: _____
Finance Officer

| |
|---|
| Finance Entry: Contract No.: _____ Vendor No.: _____ P.O. No.: _____ Funds Available: _____ |
|---|

ASSIGNEE:

BY: _____
(Signature)

(print name)

Taxpayer I.D. No. _____

ADDRESS: _____

TELEPHONE: () _____

EXHIBIT G
PLANNING COMMISSION RESOLUTION

CITY OF MERCED
Planning Commission

Resolution #2871

WHEREAS, the Merced City Planning Commission at its regular meeting of March 22, 2006, held a public hearing and considered **Pending Annexation and Pre-zoning Applications #04-01 and Establishment of Residential Planned Development #61**, initiated by Golden Valley Engineers for applicants Bright-Homes; Absolute, L.L.C; and Leeco, L.L.C., property owners. This application involves annexing 100 acres into the City of Merced; prezoning the area R-1-5 (Single Family Residential) and Residential Planned Development #61. The annexation is located on the east side of "G" Street, approximately 1,300 feet north of Cardella Road; also known as Assessor's Parcel Numbers 006-030-036 through -039; and,

WHEREAS, the Merced City Planning Commission concurs with Findings A through S of Staff Report #06-24; and,

WHEREAS, after reviewing the City's Initial Study and Draft Environmental Determination, and fully discussing all the issues, the Merced City Planning Commission does resolve to recommend to City Council adoption of a Mitigated Negative Declaration and Mitigation Monitoring Program (Exhibit A) regarding Expanded Initial Study #04-02 ("Absolute-Leeco Annexation"), and approval of Pending Annexation Application #04-01, Prezoning Application #04-01, and Establishment of Residential Planned Development (RP-D) #61, subject to the following conditions:

1. Approval of the Pending Annexation/Prezoning/Establishment of Residential Planned Development #61 is subject to the applicants entering into a written Pre-Annexation Development Agreement that they agree to all the conditions and shall pay all City and school district fees, taxes, and/or assessments, in effect on the date of any subsequent subdivision and/or permit approval, any increase in those fees, taxes, or assessments, and any new fees, taxes, or assessments, which are in effect at the time the building permits are issued, which may include regional traffic impact fees, a Parsons Avenue impact

PLANNING COMMISSION RESOLUTION #2871

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March 22, 2006

- fee, Mello-Roos, etc.; said agreement to be approved by the City Council prior to the adoption of the ordinance or resolution.
2. The proposed project shall comply with all standard Municipal Code and Subdivision Map Act requirements as applied by the Engineering Department.
 3. All other applicable codes, ordinances, policies, etc., adopted by the City of Merced shall apply.
 4. The developer/applicant shall indemnify, protect, defend, and hold harmless the City, and any agency or instrumentality thereof, and any officers, officials, employees, or agents thereof, from any and all claims, actions, suits, proceedings, or judgments against the City, or any agency or instrumentality thereof, and any officers, officials, employees, or agents thereof to attack, set aside, void, or annul, an approval of the City, or any agency or instrumentality thereof, advisory agency, appeal board, or legislative body, including actions approved by the voters of the City, concerning the project and the approvals granted herein. Furthermore, developer/applicant shall indemnify, protect, defend, and hold harmless the City, or any agency or instrumentality thereof, against any and all claims, actions, suits, proceedings, or judgments against any governmental entity in which developer/applicant's project is subject to that other governmental entity's approval and a condition of such approval is that the City indemnify and defend such governmental entity. City shall promptly notify the developer/applicant of any claim, action, or proceeding. City shall further cooperate fully in the defense of the action. Should the City fail to either promptly notify or cooperate fully, the developer/applicant shall not thereafter be responsible to indemnify, defend, protect, or hold harmless the City, any agency or instrumentality thereof, or any of its officers, officials, employees, or agents.
 5. The developer/applicant shall construct and operate the project in strict compliance with the approvals granted herein, City standards, laws, and ordinances, and in compliance with all State and Federal laws, regulations, and standards. In the event of a conflict between

PLANNING COMMISSION RESOLUTION #2871

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March 22, 2006

City laws and standards and a State or Federal law, regulation, or standard, the stricter or higher standard shall control.

6. Community Facilities District (CFD) formation is required for annual operating costs for police and fire services as well as storm drainage, public landscaping, street trees, street lights, parks and open space. CFD procedures shall be initiated before final map approval. Developer/Owner shall submit a request agreeing to such a procedure, waiving right to protest and post deposit as determined by the City Engineer to be sufficient to cover procedure costs and maintenance costs expected prior to first assessments being received.
7. As part of subsequent Tentative Subdivision Map entitlement processes, the applicants shall dedicate sufficient land along "G" Street (project frontage) to provide for a 128-foot right-of-way and construct their fair share of "G" Street (including safe transitions to the north and south) consistent with the Figure 4.4 of the *Merced Vision 2015 General Plan* (Major Arterial Cross-Section). All the "G" Street improvements required for this annexation (amounting to 1,651 feet of frontage), shall be completed in one construction project, and not be divided by ownership or tentative maps. These improvements shall include frontage improvements, traffic signals, the piping of the Six Mile Drain and the under-grounding of the existing telephone lines (details to be worked out at the tentative subdivision map process). Consistent with project Mitigation Measure 11-1, a minimum of 15-feet of additional landscaping together with a six-foot tall decorative wall (approved by City Planning Staff) shall be placed to the outside of the right-of-way to the east. The project infrastructure improvement plans for "G" Street may include a meandering sidewalk. Consistent with the City's Water Efficient Landscaping & Irrigation Ordinance (MMC 17.60), the landscaping along "G" Street shall be comply with the water conservation measures specified in said ordinance.
8. Collector street locations in subsequent Tentative Subdivision Map and Conditional Use Permit entitlements shall be provided consistent with the adopted circulation plan for this project (Attachment C of

PLANNING COMMISSION RESOLUTION #2871

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March 22, 2006

Staff Report #06-24), as well as with the local "road design standards" of Planned Development #61 (Attachment F of Staff Report #06-24 – Exhibit 1).

9. As part of subsequent Tentative Subdivision Map entitlement processes, dedication of land for use as a community park, neighborhood park and the storm-drainage / open space corridor shall be provided consistent with the proposed land use designations for this project (Attachment D of Staff Report #06-24).
10. Conceptual plans for the off-street bike path route, drainage basins and aesthetically designed open space within the PG&E transmission line easements, shall be included with subsequent Tentative Subdivision Map applications. Details, including any requirements for pedestrian/bike under-crossings, will be worked out during the mapping process
11. Concurrent with any application for a Conditional Use Permit or Tentative Subdivision Map within the "Village Residential" land use designation, the applicant shall submit a plan to the City showing the minimum densities necessary to attain an average minimum 10 units per acre gross density within the entire "Village Residential" site of the "Absolute-Leeco Annexation," along with a signed statement from the owner(s) of the other parcel(s) in the "Village Residential" site acknowledging the proposed density and of their obligation to construct a project on the remaining parcel(s) that results in an average minimum 10 units per acre gross density within the entire "Village Residential" site of the "Absolute-Leeco Annexation."
12. Except as may be changed by project conditions of approval herein, Residential Planned Development #61 shall be constructed/designed generally as shown on Attachment F (of Staff Report #06-24 - Planned Development Standards, including "road design standards"). The Development Services Director has authority to permit minor modifications to these approved plans.

PLANNING COMMISSION RESOLUTION #2871

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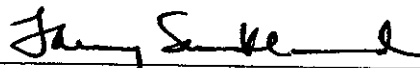
Upon motion by Commissioner Amey, seconded by Commissioner Burr,
and carried by the following vote:

AYES: Commissioners Acheson, Burr, Conte, Amey, Ward, and
Vice-Chairman Fisher

NOES: None

ABSENT: Chairman Shankland

Adopted this 22nd day of March, 2006



Chairman, Planning Commission
of the City of Merced, California

ATTEST:



Secretary

Exhibit A – Mitigation Monitoring Program

n:\shared:\planning\PC Resolutions:\#2871 Absolute-Leeco Annex

EXPANDED INITIAL STUDY #04-02
for
ABSOLUTE-LEECO ANNEXATION TO
THE CITY OF MERCED

Appendix A
Mitigation Monitoring Program
Document Date: 2-15-06

MITIGATION MONITORING CONTENTS

This mitigation monitoring program includes a brief discussion of the legal basis and purpose of the mitigation monitoring program, a key to understanding the monitoring matrix, a discussion of noncompliance complaints, and the mitigation monitoring matrix itself.

LEGAL BASIS AND PURPOSE OF THE MITIGATION MONITORING PROGRAM

Public Resource Code (PRC) 21081.6 requires public agencies to adopt mitigation monitoring or reporting programs whenever certifying an environmental impact report or mitigated negative declaration. This requirement facilitates implementation of all mitigation measures adopted through the California Environmental Quality Act (CEQA) process.

The City of Merced has adopted its own "Mitigation Monitoring and Reporting Program" (MMC 19.28). The City's program was developed in accordance with the advisory publication, *Tracking CEQA Mitigation Measures*, from the Governor's Office of Planning and Research.

As required by MMC 19.28.050, the following findings are made:

- 1) The requirements of the adopted mitigation monitoring program for the Absolute-Leeco Project shall run with the real property that is the subject of a General Plan Amendment/Annexation to the City of Merced. Successive owners, heirs, and assigns of this real property are bound to comply with all of the requirements of the adopted program.
- 2) Prior to any lease, sale, transfer, or conveyance of any portion of the subject real property, the applicant shall provide a copy of the adopted program to the prospective lessee, buyer, transferee, or one to whom the conveyance is made.

MITIGATION MONITORING PROCEDURES

In most cases, mitigation measures can be monitored through the City's construction plan approval/plan check process. When the approved project plans and specifications, with mitigation measures, are submitted to the City Development Services Department, a copy of the monitoring checklist will be attached to the submittal. The Mitigation Monitoring Checklist will be filled out upon project approval with mitigation measures required. As project plans and specifications are checked, compliance with each mitigation measure can be reviewed.

In instances where mitigation requires on-going monitoring, the Mitigation Monitoring Checklist will be used until monitoring is no longer necessary. The Development Services Department will be required to file periodic reports on how the implementation of various mitigation measures is progressing or is being maintained. Department staff may be required to conduct periodic inspections to assure compliance. In some instances, outside agencies and/or consultants may be required to conduct necessary periodic inspections as part of the mitigation monitoring program. Fees may be imposed per MMC 19.28.070 for the cost of implementing the monitoring program.

GENERAL PLAN MITIGATION MEASURES

As a second tier environmental document, the *Expanded Initial Study for Absolute-Leeco Annexation to the City of Merced* incorporates some mitigation measures adopted as part of the *Merced Vision 2015 General Plan Program Environmental Impact Report* (SCH# 95082050), as mitigation for potential impacts of the Project. Therefore, following the Absolute-Leeco Annexation Mitigation Monitoring Checklist is a list of these relevant General Plan mitigation measures.

NONCOMPLIANCE COMPLAINTS

Any person or agency may file a complaint asserting noncompliance with the mitigation measures associated with the project. The complaint shall be directed to the Director of Development Services in written form providing specific information on the asserted violation. The Director of Development Services shall cause an investigation and determine the validity of the complaint. If noncompliance with a mitigation measure has occurred, the Director of Development Services shall cause appropriate actions to remedy any violation. The complainant shall receive written confirmation indicating the results of the investigation or the final action corresponding to the particular noncompliance issue. Merced Municipal Code (MMC) Sections 19.28.080 and 19.28.090 outline the criminal penalties and civil and administrative remedies which may be incurred in the event of noncompliance. MMC 19.28.100 spells out the appeals procedures.

MONITORING MATRIX

The following pages provide a series of tables identifying the mitigation measures proposed specifically for the Absolute-Leeco Annexation. The columns within the tables are defined as follows:

| | |
|--|---|
| Mitigation Measure: | Describes the Mitigation Measure (referenced by number). |
| Timing: | Identifies at what point in time or phase of the project that the mitigation measure will be completed. |
| Agency/Department Consultation: | This column references any public agency or City department with which coordination is required to satisfy the identified mitigation. |
| Verification: | These columns will be initialed and dated by the individual designated to verify adherence to the project specific mitigation. |

Absolute-Leeco Annexation Mitigation Monitoring Checklist

Project Name: _____ File Number: _____
Approval Date: _____ Project Location: _____
Brief Project Description: _____

The following environmental mitigation measures were incorporated into the Conditions of Approval for this project in order to mitigate identified environmental impacts to a level of insignificance. A completed and signed checklist for each mitigation measure indicates that this mitigation measure has been complied with and implemented, and fulfills the City of Merced's Mitigation Monitoring Requirements (MMC 19.28) with respect to Assembly Bill 3180 (Public Resources Code Section 21081.6).

| Mitigation Measure | Timing | Agency or Department Consultation | City Verification (date and initials) |
|--|--|---|---------------------------------------|
| <p style="text-align: center;">2. AGRICULTURAL RESOURCES</p> <p>2-1 A provision shall be recorded by the applicants/developer or successors, at time of sale of any residentially-zoned property within the project that lies within 1,000 feet of the external boundary of any non-project property which currently has an active agricultural operation (including 4-H projects), or has had an agricultural operation on it during the calendar year preceding the year within which the sale takes place. This provision shall notify the buyer(s) and any subsequent owner(s) of the possible inconvenience or discomfort of farming operations, arising from the use of agricultural chemicals, including pesticides, and fertilizers, as well as from the pursuit of agricultural operations including plowing, spraying, and harvesting which occasionally generate dust, smoke, noise and odor, and the priority to which Merced County places on agricultural operations.</p> | <p style="text-align: center;"><i>Building Permits</i></p> | <p style="text-align: center;"><i>City Planning & Inspection Services</i></p> | |

| <i>Mitigation Measure</i> | <i>Timing</i> | <i>Agency or Department Consultation</i> | <i>City Verification (date and initials)</i> |
|---|----------------------------------|--|--|
| 3) AIR QUALITY | | | |
| 3-1. The design and construction of the Project within the Village Residential Portion of the Project shall adhere to the <i>Merced Vision 2015 General Plan</i> "Urban Design Goals, Policies and Actions" (Chapter 6). | <i>Tentative Subdivision Map</i> | <i>City Planning & Inspection Services</i> | |
| 3-2. The high-voltage power line easements shall be developed with a Class I Bike Path / pedestrian way, open space and linear open space storm drain basin, that provides residents an off-street connection to neighborhood parks, schools and commercial areas. | <i>Tentative Subdivision Map</i> | <i>City Planning & Inspection Services</i> | |
| 3-3. Roads between the core-commercial area (in the Bandoni Annexation Project Area to the south) and adjacent and surrounding residential areas shall be provided in a manner where they converge at the core commercial area south of the annexation area. In order to implement this design, the Project shall adhere to the General Plan policies as depicted in the Project's "Planned Development Standards," including its road design standards (Appendix F). | <i>Tentative Subdivision Map</i> | <i>City Planning & Inspection Services</i> | |

| <i>Mitigation Measure</i> | <i>Timing</i> | <i>Agency or Department Consultation</i> | <i>City Verification (date and initials)</i> |
|--|------------------------|--|--|
| 3-4. Development within the Village Residential areas shall be "pedestrian in scale" and shall provide direct and easy access to the core commercial area and transit stop. Residential buildings in the urban village shall "front" onto the street (no long uninterrupted walls). Building facades should be varied and articulated to provide visual interest to pedestrians. All through streets shall contain park strips with shade trees. In order to implement this design, the Project shall adhere to these General Plan policies as depicted in the Projects "Planned Development Standards," including its road design standards (Appendix F). | Conditional Use Permit | City Planning & Inspection Services | |
| 5) CULTURAL RESOURCES | | | |
| 5-1. If evidence of archaeological artifacts or paleontologic resources are discovered during construction, all operations within an area at and adjacent to the discovered site shall halt until a qualified archaeologist determines the extent of significance of the site. | Building Permits | City Planning | |
| 5-2. If evidence of human remains are discovered during construction, all operations at and adjacent to the discovered site shall halt, and the Merced County Coroner shall be contacted. | Building Permits | City Planning | |

| <i>Mitigation Measure</i> | <i>Timing</i> | <i>Agency or Department Consultation</i> | <i>City Verification (date and initials)</i> |
|---|----------------------------------|--|--|
| 5-3. On-site preservation of a resource is the preferred alternative. Preserving a cultural deposit maintains the artifacts in context and may prevent inadvertent discovery of, or damage to, human burials. Preservation may be accomplished through a number of means such as capping or covering the site with a layer of soil, fencing the site area, and/or incorporation of the resource in a park area. | <i>Building Permits</i> | <i>City Planning</i> | |
| 11) NOISE | | | |
| 11-1. Prior to or concurrent with submittal of a tentative subdivision map, the applicant shall provide a project development plan that includes a six-foot tall wall and a landscaped area between said wall and edge of the "G" Street right-of-way (behind the sidewalk) of no less than 15 feet. | <i>Tentative Subdivision Map</i> | <i>City Planning & Inspection Services</i> | |

Certificate of Completion:

By signing below, the environmental coordinator confirms that the required mitigation measures have been implemented as evidenced by the Schedule of Tasks and Sign-Off Checklist, and that all direct and indirect costs have been paid. This act constitutes the issuance of a *Certificate of Completion*.

Environmental Coordinator

Date

APPLICABLE MITIGATION MEASURES OF THE GENERAL PLAN EIR— ABSOLUTE-LEECO ANNEXATION

| <i>Mitigation Measure</i> | <i>Timing</i> | <i>Agency or Department Consultation</i> | <i>City Verification (date and initials)</i> |
|---|----------------------------------|--|--|
| <i>Plant/Animal Life</i> | | | |
| 3-a) When site-specific development proposals are submitted to the City for review and action, surveys should be conducted for special-status species prior to the disturbance of potentially suitable habitat. All surveys will be conducted in accordance with applicable state and federal guidelines. | <i>Annexation</i> | <i>City Planning</i> | <i>Completed in March 2004 and 2005 with Biological Resources Inventory by Live Oaks Associates (Appendix D)</i> |
| <i>Traffic/Circulation</i> | | | |
| 7-a) Appropriate traffic studies shall be prepared for all development projects which can be expected to reduce a road segment or intersection levels of service below "D." | <i>Annexation</i> | <i>City Planning</i> | <i>Not Applicable (roads operating at LOS D or better.</i> |
| 7-b) The City shall require all development proposals to contribute, based on their proportionate share of impact, to circulation system improvements necessary to maintain at least a level of service "D" on all road segments and intersections impacted by the development project. | <i>Certificate of Occupancy</i> | <i>City Planning</i> | |
| <i>Public Facilities/Services</i> | | | |
| 8-c) Site designs will need to be reviewed to assure that development does not hinder efficient and cost-effective public services delivery. | <i>Tentative Subdivision Map</i> | <i>City Planning</i> | |
| 8-d) Development projects will be required to pay public facilities impact fees as established by the City in accordance with the requirements of State law. | <i>Certificate of Occupancy</i> | <i>City Planning</i> | |



ADMINISTRATIVE REPORT

AGENDA

ITEM: _____

MTG

DATE: _____

TO: James G. Marshall, City Manager

FROM: Bill King, Principal Planner

DATE: April 17, 2006

SUBJECT: Pending Annexation and Pre-zoning Applications #04-01 and Establishment of Residential Planned Development #61, initiated by Golden Valley Engineers for applicants Bright-Homes; Absolute, L.L.C; and Leeco, L.L.C., property owners. This application involves annexing 100 acres into the City of Merced; prezoning the area R-1-5 (Single Family Residential) and Residential Planned Development #61. The annexation is located on the east side of "G" Street, approximately 1,300 feet north of Cardella Road.

RECOMMENDATION:

- a) Adopt a motion (by minute order) to adopt a Mitigated Negative Declaration regarding Expanded Initial Study #04-02 (Enclosure #1 of Planning Commission Staff Report, Attachment 5, pages 25-258; together with the Mitigation Monitoring Program, Exhibit A of Attachment 2, pages 9-15); and,
- b) Adopt Resolution #06-__, "A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MERCED, CALIFORNIA, FOR APPLICATION BY THE CITY COUNCIL OF THE CITY OF MERCED TO THE LOCAL AGENCY FORMATION COMMISSION FOR THE ANNEXATION OF UNINHABITED PROPERTY LOCATED ON THE EAST SIDE OF "G" STREET, APPROXIMATELY 1,300 FEET NORTH OF CARDELLA ROAD" (Attachment 6, pages 259-262); and,
- c) Introduce Ordinance #_____, "AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MERCED, CALIFORNIA, AMENDING THE OFFICIAL ZONING MAP BY PREZONING CERTAIN PROPERTY GENERALLY LOCATED ON THE EAST SIDE OF "G" STREET, APPROXIMATELY 1,300 FEET NORTH OF CARDELLA

ROAD AS LOW DENSITY RESIDENTIAL (R-1-5)" (Attachment 7, pages 263-266); and,

- d) Introduce Ordinance #_____, "AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MERCED, CALIFORNIA, ESTABLISHING RESIDENTIAL PLANNED DEVELOPMENT #61 BY DESIGNATING CERTAIN PROPERTY LOCATED ¼ MILE EAST OF "G" STREET AND ¼ MILE NORTH OF CARDELLA ROAD (SOUTH OF PG&E TRANSMISSION TOWER EASEMENTS) AS RESIDENTIAL PLANNED DEVELOPMENT #61 (R-PD #61)" (Attachment 8, pages 267-276); and,
- e) Introduce Ordinance #_____, "AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MERCED, CALIFORNIA, APPROVING A PRE-ANNEXATION DEVELOPMENT AGREEMENT BETWEEN THE CITY OF MERCED AND ABSOLUTE, LLC; LEECO, LLC; BP INVESTORS, LLC; AND BRIGHT DEVELOPMENT, A CALIFORNIA CORPORATION FOR THE ABSOLUTE LEECO ANNEXATION (Attachment 9, pages 277-355); and,
- f) Approve the Pre-Annexation Development Agreement and authorize the City Manager to sign all related documents.

POSSIBLE CITY COUNCIL ACTIONS

- 1) Approve, as recommended by Planning Commission and Staff; or,
- 2) Deny the Application; or,
- 3) Refer back to the Planning Commission for reconsideration of specific items as requested by Council; or,
- 4) Continue item to a future Council meeting (date and time to be specified in motion).

AUTHORITY/CODE SECTION

The State of California's Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 outlines the procedures governing the annexation of uninhabited territory to local jurisdictions. Title 19 of the Merced Municipal Code outlines environmental review procedures and Title 20 of the Merced

Municipal Code (Zoning) regulates the use of land within the "Low Density Residential" (20.10), and "Planned Development" (20.42) zones. Pre-annexation development agreements are authorized by Government Code Section 65864 *et seq.*

DISCUSSION

Background

This is a request to annex and prezone approximately 100-acres in northeast Merced, including the establishment of Residential Planned Development #61 within the annexation area. The proposed zoning districts are consistent with the Land Use Diagram of the *Merced Vision 2015 General Plan*. The entire area of the annexation area is represented by the applicants; there are no additional parcels to be added to the annexation area.

During 2004 and 2005, the City worked with the applicant, Project property owners, Merced City School District, and property owners and/or their representatives of lands adjacent to the annexation site to devise a land use plan consistent with the *Merced Vision 2015 General Plan*. The objective of the meetings was to determine appropriate locations for residential, park and school uses. City Staff utilized the existing PG&E transmission corridor as a unifying feature of the neighborhood through creation of a linear open space corridor occupied by an off-street bike path that connects the schools and parks with the neighborhood. The resultant area land use plan (Attachment 5, page 42) is being used as a guide for development. A separate annexation proposal to the east of the Absolute-Leeco Annexation (Bandoni II Annexation) is now under review in the Planning Department, and it is consistent with this land use plan.

Review Criteria

The Project was reviewed against the following criteria:

- 1) Annexation Criteria / General Plan Implementing Action UE-1.3.f (see analysis in Planning Commission Staff Report (Attachment 5, pages 31-32);

- 2) Land Use Diagram of the *Merced Vision 2015 General Plan*;
- 3) Required Findings for Establishment of Planned Developments (Attachment 8, pages 267-276); and,
- 4) Urban Design Chapter of the *Merced Vision 2015 General Plan*.

Staff and the Planning Commission recommend that the City Council find that the Project is consistent with these criteria.

Pre-Annexation Development Agreement

A Pre-Annexation Development Agreement to insure the availability of public services, namely the City's Wastewater Treatment Plant, is a required part of the Project. The applicants have agreed to provide additional public benefits as specified in Attachment 9, pages 277-355).

Planning Commission Recommendation

On March 22, 2006, the Planning Commission held a public hearing on the proposed Annexation/Rezoning and Establishment of Residential Planned Development #61. Other than the applicant, no public testimony was provided. The Planning Commission recommended to the City Council by a 6-0-1 vote (6 yes, 0 no, 1 absent) approval of the Annexation, Rezoning, and Establishment of Residential Planned Development #61 (Planning Commission Resolution #2871, Attachment 2, pages 4-15, and Planning Commission Minutes, Attachment 4, pages 23-24).

Environmental Clearance

The Planning staff has conducted an environmental review of the project in accordance with the requirements of the California Environmental Quality Act (CEQA) and a Mitigated Negative Declaration has been prepared (see Expanded Initial Study #04-02—Enclosure #1 of the Planning Commission Staff Report, Attachment 5, pages 62-258).

Summary

Both the Planning Staff and Planning Commission recommend approval of this Project. The Planning Commission concurred with staff that the proposed annexation is consistent with the review criteria.

RESPECTFULLY SUBMITTED:

APPROVED:


BILL KING,
PRINCIPAL PLANNER


JACK D. LESCH,
DIRECTOR
OF DEVELOPMENT
SERVICES

REVIEWED AND APPROVED:

JAMES G. MARSHALL
CITY MANAGER

ATTACHMENTS:

- 1) Vicinity Map and Annexation Map (pages 1-3)
- 2) Planning Commission Resolution #2871 (pages 4-15)
- 3) Planning Commission Resolution #2872 (pages 17-22)
- 4) Planning Commission Minute Excerpts from March 22, 2006 (pages 23-24)
- 5) Planning Commission Staff Report #06-24 (pages 25-61) & Enclosure #1 for Env. Rev. #04-02 (pages 62-258)
- 6) Draft City Council Resolution (Annexation) (pages 259-262)
- 7) Draft Ordinance (R-1-5 Prezoning) (pages 263-266)
- 8) Draft Ordinance (RPD #61 Prezoning) (pages 267-276)
- 9) Draft Ordinance for Development Agreement (pages 277-355)

Shuping, Emily

From: Rozell, Kenneth
Sent: Friday, April 18, 2008 1:57 PM
To: Shuping, Emily
Cc: Davidson, Dana; Bingaman, Jamie
Subject: RE: Copy of Absolute Bright Pre-Annexation Development Agreement

Thanks for providing the documentation to us. I recommend that you keep all of the versions of the recorded document so that there is a clear paper trail on what occurred.
Ken.

*Kenneth D. Rozell
City Attorney's Office
City of Merced
678 West 18th Street
Merced, California 95340
(209) 385-6868
(209) 723-1780 (Fax)
rozellk@cityofmerced.org*

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-----Original Message-----

From: Shuping, Emily
Sent: Friday, April 18, 2008 12:50 PM
To: Rozell, Kenneth
Cc: Davidson, Dana; Bingaman, Jamie
Subject: RE: Copy of Absolute Bright Pre-Annexation Development Agreement

Good Afternoon Ken,

Attached is the imaged file for the Absolute Bright Pre-Annexation Development Agreement. The way it was processed, it was imaged and filed with three versions. The first (beginning on page 3) is an extra that was not recorded or marked as conforming, but it shows on page 61 and 62 that page F-4 of Exhibit F is missing. The second (beginning on page 77) is the conforming copy that we got back from the recorder's office upon original submission, which shows on page 136 that page F-4 was present. The third (beginning on page 157) is the original recorded document that we received back from the county which indicates on page 215 and 216 that F-4 was again omitted. I took the corrected document back to the county for recording and handled it with Connie, but I'm not certain if we have received the document back yet or not. Once received, I intended to consolidate the imaged and paper files to only include the final version, but if it would be better to keep everything to document the error, we could do that. Please let us know your preference.

Thanks!

Emily Shuping
x6866

<< File: absolute_bright.pdf >>

-----Original Message-----

From: Davidson, Dana
Sent: Friday, April 18, 2008 8:41 AM
To: Shuping, Emily; Bingaman, Jamie
Subject: FW: Copy of Absolute Bright Pre-Annexation Development Agreement

Could you assist Ken with his request? Thank you!

-----Original Message-----

From: Rozell, Kenneth

Sent: Thursday, April 17, 2008 4:50 PM

To: Davidson, Dana

Subject: Copy of Absolute Bright Pre-Annexation Development Agreement

Dana:

Can I please get a copy of the Absolute Bright Pre-Annexation Development Agreement that is dated as of April 17, 2006? According to a document provided by the developer, the document was re-recorded on March 20, 2008 as Doc. No. 2008-015282 because a page of the exhibits was omitted. I wanted to check the City's file copy to ensure that it was the same as the document provided by the developer.

Thanks for your assistance.

Ken.

Kenneth D. Rozell

City Attorney's Office

City of Merced

678 West 18th Street

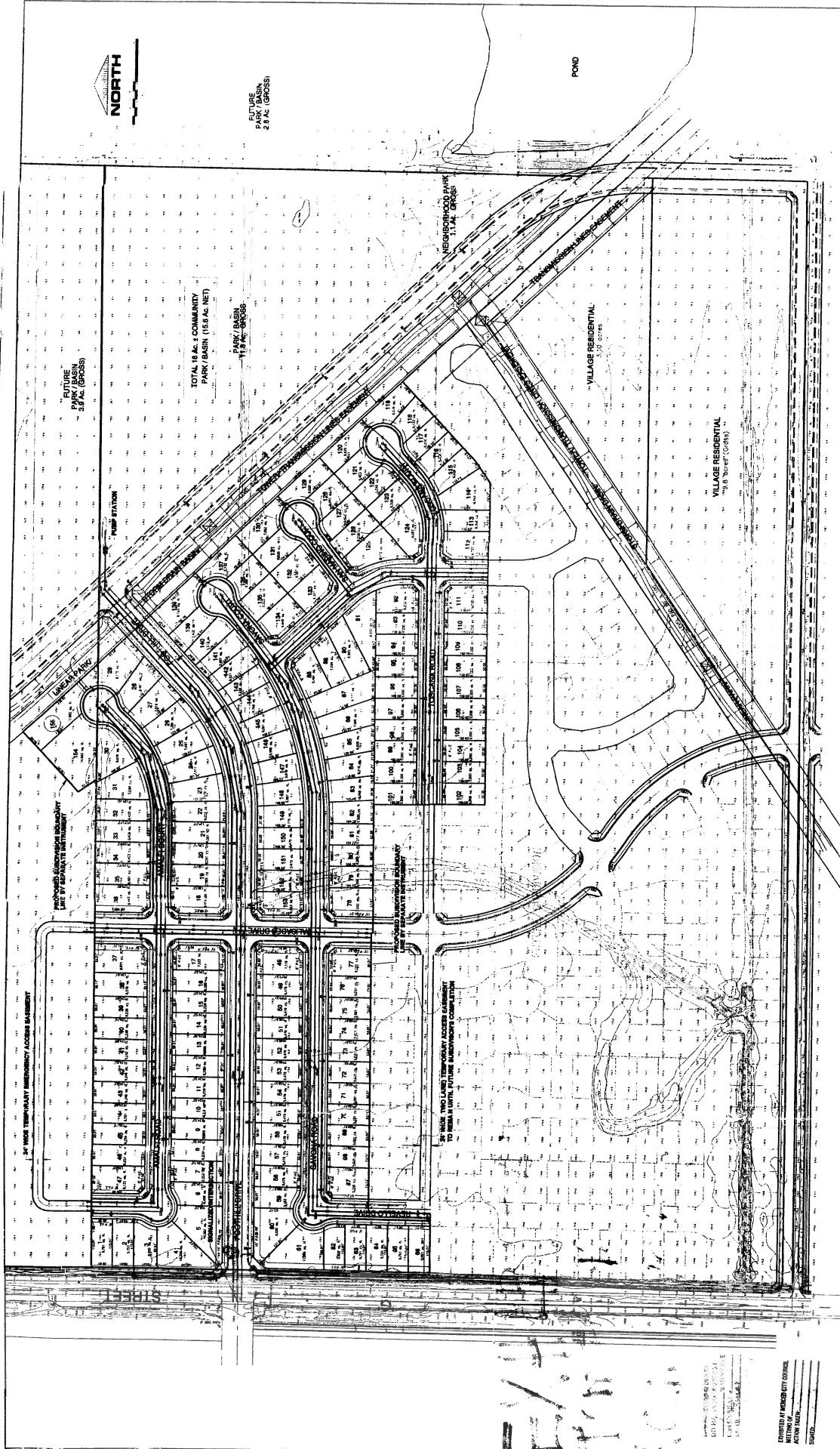
Merced, California 95340

(209) 385-6868

(209) 723-1780 (Fax)

rozellk@cityofmerced.org <<mailto:rozellk@cityofmerced.org>>

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ATTACHMENT F

VESTING TENTATIVE SUBDIVISION MAP
FOR

THE PALISADES
ABSOLUTE, LLC / LECO, LLC
PORTION SECTION 5 & 8, T.7 S., R.14 E., MDB&S, M.
CITY OF MERCED

TENTATIVE MAP

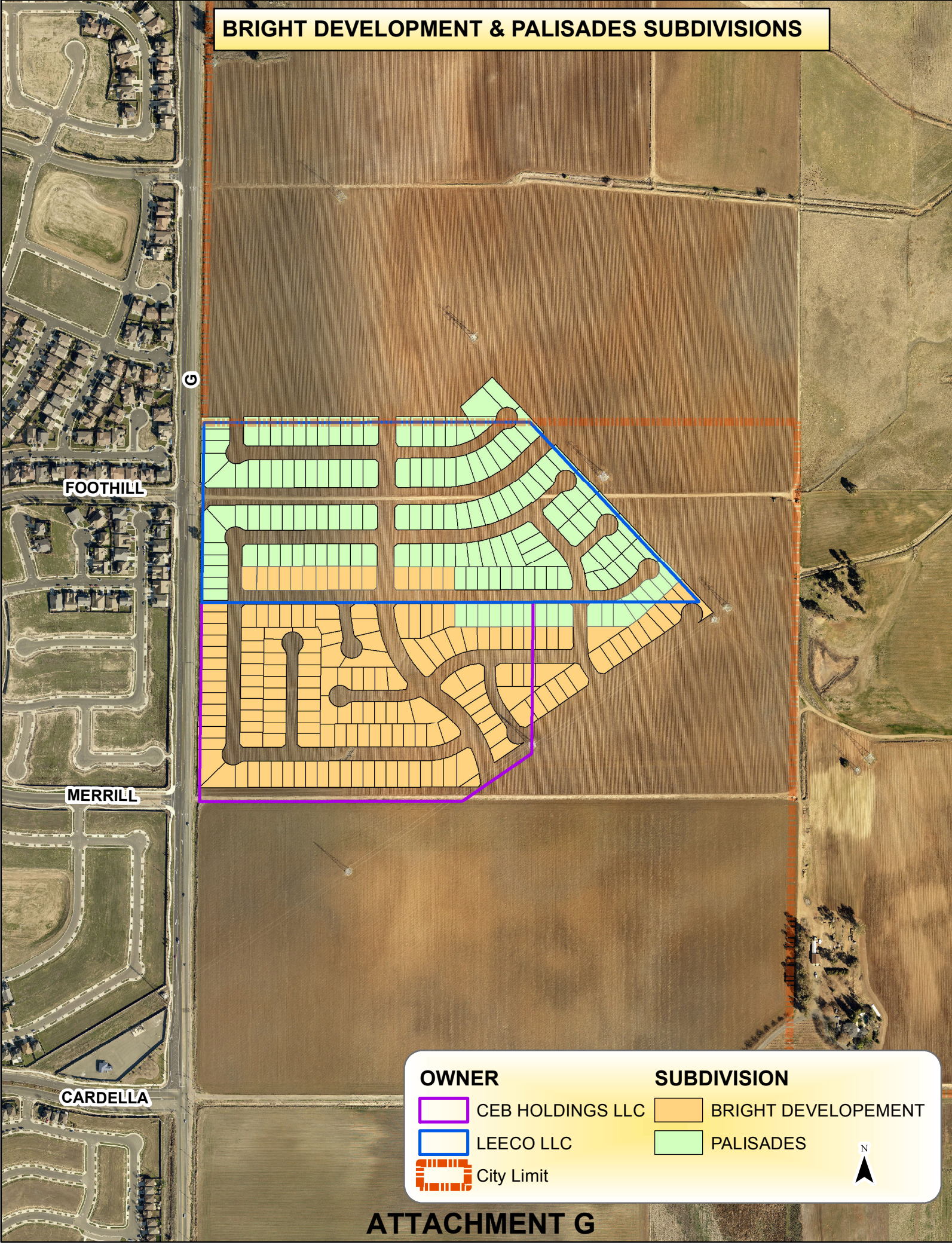
ABSOLUTE, LLC / LECO, LLC
9 RIVER PARK PLACE EAST
SUITE 101
FRESNO CA 93720
PROJECT: 559-434-0254

GOLDEN VALLEY
ENGINEERING & SURVEYING
400 W. 18th Street • P.O. Box 540 • Merced, CA 95340
Phone: (209) 725-0200 • Fax: (209) 725-0204

EXEMPTIONS

EXEMPTED AT REQUEST OF OWNER

BRIGHT DEVELOPMENT & PALISADES SUBDIVISIONS



SITE PLAN REVIEW COMMITTEE MINUTE EXCERPT
MARCH 15, 2018

- 4.1 Extension of Vesting Tentative Subdivision Map (VTSM) #1291 (“Bright Development”) for 168 single-family lots on 39.8 acres, located at the northeast corner of G Street and Merrill Place.

Associate Planner NELSON reviewed the request for the extension of VTSM #1291. She recapped the history of the approvals and previous extensions granted by the State of California. She stated that a letter from Miller Starr Regalia, attorneys for Bright Development, had submitted a letter to the Site Plan Review Committee on March 14, 2018, which stated that the Findings for denial (recommended by staff) were unwarranted and requested the Site Plan Committee approve the request for an extension. She also stated that a letter from Rick Telegan had been submitted on October 30, 2017, in opposition to the extension. For further information, refer to the memo to the Site Plan Review Committee dated March 15, 2018.

Chairperson McBRIDE opened the public hearing at 1:42 p.m.

Mark BEISSWANGER, representative for Bright Development, spoke in favor of the extension request. He read into the record the three bullet points from page 16 of the letter from Miller Starr Regalia to the City of Merced.

Rick TELEGAN, spoke in opposition to the extension. He stated that his map for the Palisades Subdivision (located north of the Bright Development Subdivision) was never valid because a portion of the property shown on the Palisades map was never annexed into the City.

The public hearing was closed at 1:47 p.m.

Interim City Attorney HOUSTON acknowledged receipt of the letter from Miller Starr Regalia and recommended to the Committee that this request be forwarded to the Planning Commission for final review and decision per Merced Municipal Code Section 20.68.050 C(2). She explained that the Committee may also deny the extension request or approve the request. Both of these actions would be subject to appeal to the Planning Commission and City Council.

Interim City Attorney HOUSTON further explained that by referring the decision to the Planning Commission, the Vesting Tentative Map would not

Site Plan Review Minutes Excerpt

March 15, 2018

Page 2

expire on March 16, 2018. The map would remain active until all actions have been taken and appeals have been heard.

M/S SON-ENGLAND, and carried by the following vote, to refer the request for an extension of VTSM #1291 to the Planning Commission for review and action:

AYES: Committee Members Son, England, and Chairperson McBride

NOES: None

ABSENT: None

Planning Commission Minutes Excerpt
JUNE 6, 2018

- 4.2 Extension to Vesting Tentative Subdivision Map (VTSM) #1291 (“Bright Homes”), initiated by Bright Development. This application involves a request for an extension of time for filing a final map for VTSM #1291. VTSM #1291 was approved on January 16, 2007, to allow the subdivision of 39.8 acres of land into 168 single-family lots generally located on the east side of G Street at Merrill Place (extended) within an R-1-5 zone with a General Plan designation of Low Density Residential (LD). This extension request was referred to the Planning Commission for final action by the City’s Site Plan Review Committee on March 15, 2018. (Item continued from meeting of April 18, 2018).

Associate Planner NELSON reviewed the report on this item. For further information, refer to Staff Report #18-10.

Public testimony was opened at 7:27 p.m.

Speakers from the Audience in Favor:

DAVE BUTZ, Bright Development, Applicant, Modesto

RICK TELEGAN, Exposition Properties, LLC., Fresno

There were no speakers from the audience in opposition to the project.

Public testimony was completed at 7:32 p.m.

M/S PADILLA-COLBY, to approve the Extension of Vesting Tentative Subdivision Map #1291 (“Bright Homes”), subject to the Findings and twenty-nine (29) Conditions set forth in Staff Report #18-10, with additional Conditions #30 and #31 (RESOLUTION #2904):

AYES: Commissioners Alshami, Camper, Colby, Martinez, Padilla, and Chairperson Dylina

NOES: None

ABSENT: None, (one vacancy)

ABSTAIN: None

Planning Commission Minutes Excerpt
OCTOBER 3, 2018

- 4.3 Modification to Tentative Subdivision Map #1291 (“Bright Homes”), initiated by Bright Development. This application involves a request for a modification of VTSM #1291 which would reconfigure the streets within the subdivision and reduce the number of lots from 168 lots to 161 lots. This property is generally located on the east side of G Street at Merrill Place (extended) within an R-1-5 zone with a General Plan designation of Low Density Residential (LD).

Associate Planner NELSON reviewed the report on this item. She noted an email received by the Planning Department and a memo from Staff (which were provided to the Commission at the meeting). The memo recommended modifications to Conditions #1, #10, #11, #12, #13, #22, and #25, the deletion of Condition #26, and the addition of Conditions #32 through #44. For further information, refer to Staff Report #18-29.

Public testimony was opened at 7:30 p.m.

Speakers from the Audience in Favor:

DAVE BUTZ, Bright Development, Applicant, Modesto
RICK TELEGAN, 3rd Millennium Investments, Fresno

Mr. TELEGAN voiced concerns regarding the compliance of the tentative map’s temporary emergency vehicle access (EVA).

There were no speakers from the audience in opposition to the project.

Public testimony was completed at 7:39 p.m.

Chairperson re-opened public testimony at 7:40 p.m. to allow the applicant to rebut public comment with his remaining time of 00:14:22.

Mr. BUTZ assured the public and the Commission that the map was reviewed by the Police Department and Fire Department and the temporary EVA did not raise concerns.

Public testimony was completed at 7:41 p.m.

M/S PADILLA-CAMPER, and carried by the following vote, to approve the modification to Vesting Tentative Map #1291 (“Bright Homes”) subject to the thirty-one (31) Conditions contained within Resolution #2904, including modifications to Conditions #1, #10, #11, #12, #13, #22, and #25, the deletion of Condition #26, and the addition of Conditions #32 through #44 as follows (RESOLUTION #2904):

(Note: ~~Strikethrough~~ deleted language, underline added language.)

- “1. The proposed project shall be constructed/designed as shown on Exhibit 1 [Proposed Vesting Tentative Map #1291 (Modified)] - Attachment C of Staff Report #18-29, subject to the listed conditions, except as modified by the conditions.
- “10. Developer shall design storm drainage with consideration as to whether the shared pump station pumping rate can or needs to be constructed in phases. Developer shall share costs of pump station with the ~~subdivision to the north (“Palisades Park”)~~ property owner to the north, if joint use occurs, or if pump station is necessary. Storm drainage shall comply with City Storm Drainage Master Plan.
- “11. Developer shall design sanitary sewer with consideration as to whether the shared pump station pumping rate can or needs to be constructed in phases. ~~Developer shall share costs of pump station with the subdivision to the north (“Palisades Park”) if joint use occurs, or if pump station is necessary.~~
- “12. Dedicate additional G Street right-of-way and easements to match *Merced Vision 2015 2030 General Plan* requirements for a 128-foot wide arterial, plus an additional 15 feet of right-of-way to accommodate the required landscape area, block wall, and utilities. A 7-foot-tall block wall shall be constructed along the project’s frontage on G Street. ~~landscape and public facilities easements of 15 feet in width, including the construction of a 6-foot high masonry wall.~~ Consistent with Planning Commission Resolution #2871 (Absolute Leeco Annexation), all of “G” Street within the annexation boundary shall be constructed at the time of improvements for the first tentative map, along with all other requirements listed in Condition #7 of said Resolution.

- “13. Dedicate additional right-of-way and easements along the northern half of Merrill Avenue to match *Merced Vision-2015 2030 General Plan* requirements for 74-foot wide collector (37-feet of ROW), an additional 10 feet of right-of-way to accommodate the required landscape area, block wall, and utilities. ~~plus landscape and public facilities easements varying from 10 feet to 12 feet in width, including the construction of a 6-foot high masonry wall along the northern portion of the roadway. These improvements shall terminate at the northeast corner of the intersection of Merrill Avenue and “K” Drive as indicated on the Tentative Map.~~ A 7-foot-tall block wall shall be constructed along the project’s frontage on Merrill Avenue (Place). The block wall may be constructed in phases consistent with the tentative map. All of the land required for this development’s share of Merrill Avenue (Place) shall be dedicated with the first final map.
- “22. ~~The secondary access point shall be located at the intersection of Foothill Drive and G Street. The secondary access point shall be installed prior to the issuance of the 1st certificate of occupancy permit.~~Secondary access to the subdivision shall be provided by a Temporary Emergency Vehicle Access easement constructed between Lots 1 and 15 of Modified Tentative Map #1291 to be maintained by the CFD.
- “25. ~~The cul-de-sac bulb, ‘J’ Court, shall be open end style including sidewalk connectors to adjacent linear parks (within the PG&E easement) and local streets and walls from back of house to back of house. The linear park and PG&E Easement shall be designed in an open manner, with no fences or other hindrances that would impede pedestrian accessibility. of both easements as they intersect with each other and ‘J’ Court~~
- “26. ~~The cul-de-sac bulb labeled as ‘D’ Court shall be designed with park strips due to its extended length.~~
- “32. At the time of Final Map, all references to a “PFE” (Public Facilities Easement) shall be changed to reflect the actual purpose of the easement. For example, if the easement is for utilities and a block wall, the easement should be labeled as a PUE (Public Utilities Easement) and Block Wall easement.

- “33. The Emergency Vehicle Access (EVA) is allowed on G Street as a temporary access only. The design of the EVA shall be approved by the Fire, Engineering, and Planning Departments. Pedestrian access should be implemented into the EVA.
- “34. Once Palisades Drive and Foothill Drive are constructed which provides secondary access into the subdivision, the EVA shall be abandoned at the owner’s expense.
- “35. All easements shall be large enough to provide room for all utilities without utilities being placed underneath the City sidewalk.
- “36. The Tentative Map shows the EVA as “Lot A” and the 3.10 acres at the eastern edge of the subdivision as “Lot A”. This shall be corrected on the final map so that there is no duplication of the lot designations.
- “37. Access to Lot A (at the eastern edge of the subdivision) as shown on VTSM #1291 (Modified) shall be provided from this subdivision. The exact location of the access point shall be determined when development occurs on Lot A.
- “38. The location of the pump station shown on the park/basin parcel is not approved. The exact location of the pump station will be determined prior to the first final map.
- “39. The cul-de-sacs at Court E and Court L shall be open-ended cul-de-sacs providing access to F Street.
- “40. The owner shall work with the City of Merced to obtain the additional right of way needed for the southern portion of Merrill Place.
- “41. The area shown as Lot A for the Emergency Vehicle Access on the tentative map shall be re-labeled due to duplication with the area to the east of the subdivision also shown as Lot A.
- “42. The Emergency Vehicle Access (EVA) Easement area shall be dedicated to the City. If sewer and water main lines are to be placed this area, a public utilities easement shall be maintained upon vacation of the EVA.

“43. The EVA area may remain open to allow pedestrian access to the subdivision from G Street if the developer desires to do so after it is no longer needed as an EVA. However, if the pedestrian access is not maintained or problems arise with the use of the access area, it shall be the responsibility of the developer/subdivider to install the block wall in this area.

“44. “F” Street shall have a 94-foot-wide right-of-way to include the 74-foot-wide collector road and a 10-foot-wide easement. All walls, landscaping, and utilities shall be included in this easement area.”

AYES: Commissioners Camper, Drexel, Harris, Padilla, Rashe, and Chairperson Dylina

NOES: None

ABSENT: Commissioner Martinez

ABSTAIN: None

RICK TELEGAN
2206 E. Muncie Av.
Fresno, CA 93720
559.298.9300
email : fresno3rdm@aol.com

Re: Site Plan Review Committee Meeting,
January 31, 2019 @ 1:30 pm

On behalf of BP Investors, LLC, Leeco, LLC, and Exposition Properties, LLC, this letter represents our formal objection to Bright Development's request to the City of Merced for an extension of time to VTSM # 1291 and the associated Conditions of Approval, as modified on October 3, 2018.

The Conditions of Approval (Planning Commission Resolution # 2904), as modified, violates the terms of the **ABSOLUTE-BRIGHT PRE-ANNEXATION DEVELOPMENT AGREEMENT** executed by the City of Merced, Bright Development, BP Investors, LLC, Leeco, LLC and Absolute, LLC (Exposition Properties, LLC's predecessor by assignment), and re-recorded March 20, 2008. Specifically those conditions that violate the recorded agreement are : # 12, # 13, # 22, # 33, # 34, # 36, # 41, # 42 & # 43.

The request by Bright Development must either be denied, or continued until such time when the City of Merced can change the Conditions of Approval (Resolution # 2904) to comply with the terms of the previously recorded **ABSOLUTE-BRIGHT PRE-ANNEXATION DEVELOPMENT AGREEMENT**.

Date : January 30, 2019



RICK TELEGAN

ATTACHMENT K

SITE PLAN REVIEW COMMITTEE MINUTE EXCERPT
JANUARY 31, 2019

- 4.3 Extension of Vesting Tentative Subdivision Map (VTSM) #1291 (“Bright”), for 161 lots on 39.8 acres, located at the northeast corner of G Street and Merrill Place.

Associate Planner NELSON reviewed the request for the extension of VTSM #1291. She recapped the history of the approvals and previous extensions granted by the State of California. She outlined the regulations of the Subdivision Map Act for denying a request for the extension of a vesting tentative subdivision map. Ms. NELSON noted that correspondence from Rick Telegan had been received prior to the meeting. Because staff needs more time to review the information provided by Mr. Telegan, staff is recommending this request be continued to the Site Plan Committee meeting of February 14, 2019.

M/S McBRIDE-FRAZIER, and carried by the following vote to continue this request to the Site Plan Committee meeting of February 14, 2019:

AYES: Committee Members Cardoso, Frazier, and Chairperson
McBride
NOES: None
ABSENT: None

RICK TELEGAN

From: Moua, Bounma <
Sent: Thursday, August 24, 2017 2:57 PM
To: Rick Telegan
Cc: Moua, Bounma
Subject: RE: PG & E easement

Rick,
I hope all is well with you. I apologize for the late response, I've been extremely busy since my return.

I was able to determine that PG&E would not allow a swale to be created beneath the transmission tower lines. The response was that the proposed design would be unacceptable because it would impair our right to maintain our facilities as well it disturbing the grounds beneath the facilities.

I understand this isn't response you had hope for, but if you have other proposal that you would like review, please let me know.

Thank you.

Bounma Moua | Land Agent
Pacific Gas and Electric Company | Land Management
559.263.5688 office | 821.5688 internal |

From: Rick Telegan
Sent: Friday, July 21, 2017 10:32 AM
To: Moua, Bounma
Cc:
Subject: Fwd: PG & E easement

*******CAUTION:** This email was sent from an EXTERNAL source. Think before clicking links or opening attachments.*****

Bounma....This email is in response to your request for an exhibit depicting our proposed swale necessary for us to satisfy our storm water detention requirements of the city. Call me, or Jim (@GVE) if you have any questions. Thx

From: Jim Xu
To: Rick Telegan
Sent: 7/27/2017 10:08:01 A.M. Pacific Daylight Time
Subj: PG & E easement

Hi Rick,

Attached is sketch for proposed basin within PG & E easement.

Please let me know if you have any questions.

SITE PLAN REVIEW COMMITTEE MINUTE EXCERPT
FEBRUARY 14, 2019

- 4.3 Extension of Vesting Tentative Subdivision Map (VTSM) #1291 (“Bright”), for 161 lots on 39.8 acres, located at the northeast corner of G Street and Merrill Place. (Item continued from meeting of January 31, 2019)

Associate Planner NELSON reviewed the request for an extension of the tentative subdivision map. For more information, refer to the Memo to the Site Plan Committee dated February 14, 2019.

Rick TELEGAN voiced his concern about the requested extension. Mr. TELEGAN contended that the modified tentative subdivision map violates the Pre-Annexation Development Agreement for the “Absolute-Bright” annexation as well as General Plan policies related to access to a major arterial (G Street). Mr. TELEGAN also brought up concerns with the storm drainage proposed for the Bright Subdivision and submitted an e-mail from PG&E in response to his inquiry about using the area underneath the PG&E transmission lines for storm drain purposes.

Dave BUTZ, representative for Bright Development, asked the Site Plan Committee to approve the request for the extension since the request is consistent with the Subdivision Map Act.

After discussing Mr. TELEGAN’S comments and considering the request from Mr. BUTZ to grant the extension, the Site Plan Committee determined this matter should be referred to the Planning Commission for action to allow all comments to be considered at a public hearing.

M/S Cardoso-Frazier, and carried by the following vote to refer the request for an extension of Vesting Tentative Subdivision Map #1291 (“Bright”) to the Planning Commission for action.

AYES: Committee Members Cardoso, Frazier, and Chairperson McBride
NOES: None
ABSENT: None

MERCED : WRITTEN COMMENTS FOR MARCH 20,
2019 PLANNING COMMISSION MEETING
(BRIGHT DEVELOPMENT VTSM # 1291)

- * The second page of your staff memo accurately and correctly describes the two (2) requisite findings of the California Government Code Section 66498.1 (c) (1) & (2), either of which is necessary for the Planning Commission to deny Bright Development's request for an extension of VTSM # 1291 (as modified). My comments herein will address both of these required findings and why Bright's request *must* be denied.
- * On "Attachment C--page 5" (attached), "EASEMENT WIDTH SCHEDULE" included in your staff report, identifies the PG & E easement as eighty (80) feet in width, ½ (or 40 feet), on Bright's property and the other ½ (40 feet) on ours (BP Investors, LLC). Yet, "Attachment C--page 6" (attached) it shows the subdivision planned with a street and autos on one (1) portion of "Section A-A" (74 feet), and the remaining portion of "Section A-A" (75 feet), as a planned storm-drain basin/swale (8 to 12.5 feet deep). That storm-drain basin/swale appears to be depicted ½ on our property (within the 75 feet). Consequently, approximately 35 feet would extent into our Village Residential development where we intend to locate some of our required parking and a drive-aisle.

Because the applicant's plan offers only one (1) cross-section of the power-line easement proposed for a storm-drain basin/swale with an adjacent roadway (and autos), as shown on "Attachment C, page 6", the only reasonable conclusion one could make is that it represents a large majority of the length of that PG & E easement area, including that portion along our City approved student-housing project (CUP # 1200), which the City will likely want to review.

Should the City Planning Commission approve Bright's requested extension as shown, such approval may then constitute a public or private "taking" in violation of both the 5th Amendment to the U.S. Constitution, and Article 1, Section 19 of the California Constitution (See attached references). Clearly, that circumstance would achieve the threshold required by the State's Government Code. Therefore, Bright's extension request for VTSM #1291 (as modified) must be denied.

- * Regarding the use of the PG & E easement area : For many years the property owners and the City anticipated using the easement for, in part, as a storm-drainage area. When the City approved a student-housing development at Lake Road and Yosemite Avenue, the City conditioned that project with a requirement that before the City would issue any building permit, the developer would need written documentation to substantiate that PG & E would allow parking within their easement area (See attached City condition and responsive email). That established condition alerted me to question whether or not PG & E would allow the storm-drain basin/swale which has long been considered acceptable and planned by the City and both property owners as a part of the development for this area.

In the summer of 2017, I sought approval from PG & E to use its easement area for a storm-water collection basin/swale. On August 24, 2017, I received an email from PG & E's Land Agent (See attached email) stating that PG & E would NOT allow a basin/swale beneath their high-voltage power lines. Consequently, VTSM # 1291, as modified, can not be built as currently designed, and thus Bright's subdivision map extension request must be denied.

- * The "Environmental Clearance" in the City's **STAFF REPORT: # 18-29** describes an action to be taken by the Planning Commission

as, “1) Environmental Review # 18-56”, CEQA Section 15162 Findings (Approve/Disapprove/Modify) (attached) and according to that meeting’s official minutes posted on the City’s web-site, the City failed to make a CEQA Determination (See the attached official Planning Commission minutes for the meeting of October 3, 2018).

Further, on page 4 of that Staff Report is the paragraph referred to as **Environmental Clearance**, which we believe was intended to summarize staff’s Section 15162 Findings, and included in the Staff Report as Attachment F. The paragraph states, in part, “...and concluded that Environmental Review # 18-54 (sic) is a second tier environmental document, based upon the City’s determination that the proposed development remains *consistent with the current general plan* and provisions of CEQA Guidelines, Section 15162...” [Emphasis added]. On October 3, 2018, the “current general plan” was the *MERCED VISION 2030 GENERAL PLAN*, adopted on January 3, 2012. The reference to the proposed development as being “consistent” with the 2030 General Plan is in **direct** conflict with “Exhibit C” of the “ABSOLUTE-BRIGHT” **PRE-ANNEXATION DEVELOPMENT AGREEMENT** signed by Absolute LLC, Leeco LLC, BP Investors LLC, Bright Development, a California Corporation and the City of Merced (See attached “Exhibit C”). That Agreement clearly describes in the “Land Use Regulations” (Section 2.9) “...all ordinances, resolutions, codes, rules, regulations, and official policies of City, governing the development and use of land including without limitation, the permitted use of land...listed on “Exhibit C” attached...”. “Exhibit C” specifically lists “*Merced Vision 2015 General Plan*, as amended through April 4, 2005” (excerpts from Chapter 4—Transportation and Circulation attached).

Consequently, because the CEQA Section 15162 Findings were “based” (or evaluated) on the 2030 General Plan (not adopted until 2012), the purported Environmental Determination is, or had it been made, would have been flawed.

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 Modesto, CA 95201
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 Fax: (209) 526-4244
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 Website: www.goldenvalleyeng.com

| | |
|------------------|---|
| Project Name | BRIGHT DEVELOPMENT |
| Project Location | Portion Section 5 & 8, T.7S., R.14E., M.D.B. & M. |
| Project Date | April 2018 |
| Drawn By | ASD |
| Checked By | ASD |
| Reviewed By | ASD |
| Project Status | Final |

CALIFORNIA
 BRIGHT DEVELOPMENT
 MODIFIED VESTING TENTATIVE SUBDIVISION MAP FOR
 PORTION SECTION 5 & 8, T.7S., R.14E., M.D.B. & M.

SECTION 5 & 8, T.7S., R.14E., M.D.B. & M.
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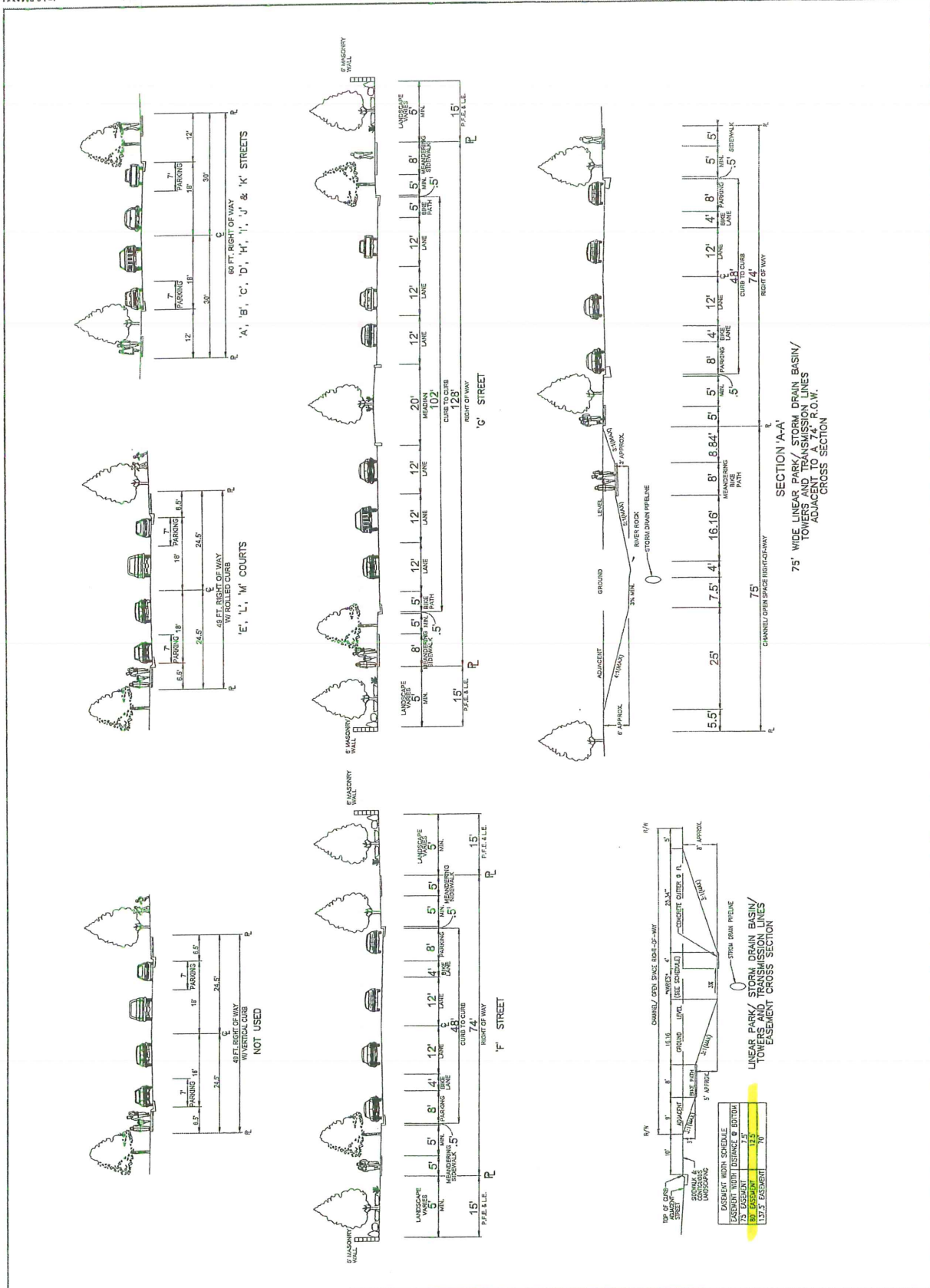
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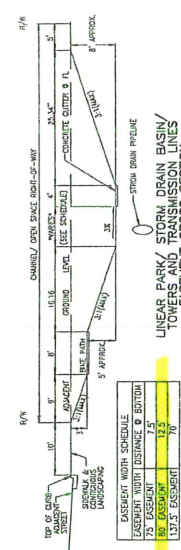
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SECTION 'A-A'
 75' WIDE LINEAR PARK/ STORM DRAIN BASIN/
 TOWERS AND TRANSMISSION LINES
 ADJACENT TO A 74' R.O.W.
 CROSS SECTION



Takings clause

Eminent domain

The Supreme Court has held that the federal government and each state has the power of eminent domain—the power to take private property for "public use." The *Takings Clause*, the last clause of the Fifth Amendment, limits the power of eminent domain by requiring that "just compensation" be paid if private property is taken for public use. The just compensation provision of the Fifth Amendment did not originally apply directly to the states, but since *Chicago, B. & Q. Railroad Co. v. Chicago* (1897), federal courts have held that the Fourteenth Amendment extended the effects of that provision to the states. The federal courts, however, have shown much deference to the determinations of Congress, and even more so to the determinations of the state legislatures, of what constitutes "public use". The property need not actually be used by the public; rather, it must be used or disposed of in such a manner as to benefit the public welfare or public interest. One exception that restrains the federal government is that the property must be used in exercise of a government's enumerated powers.

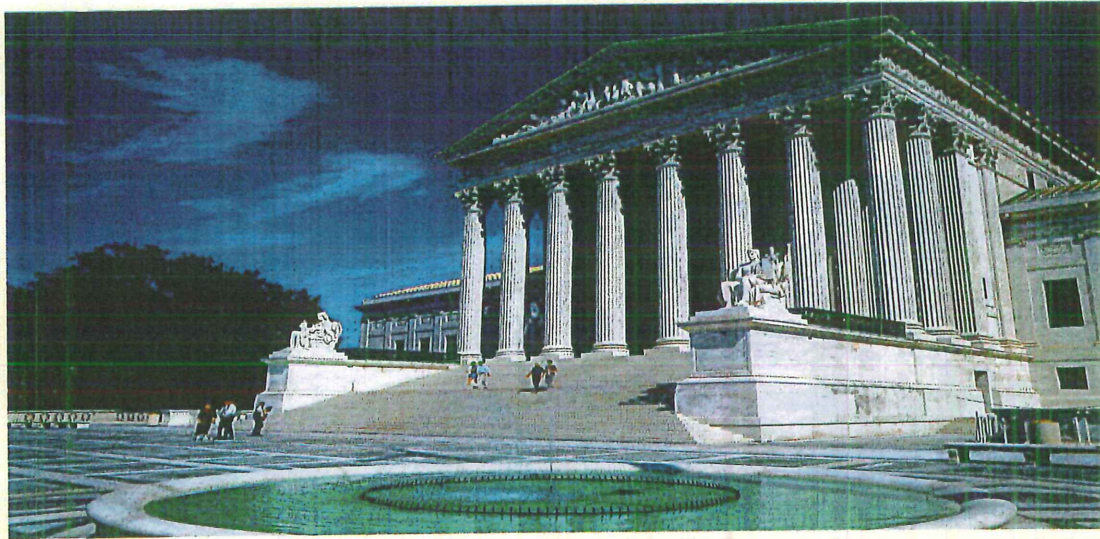
https://en.wikipedia.org/wiki/Fifth_Amendment_to_the_United_States_Constitution

3/6/2019

"Just compensation"

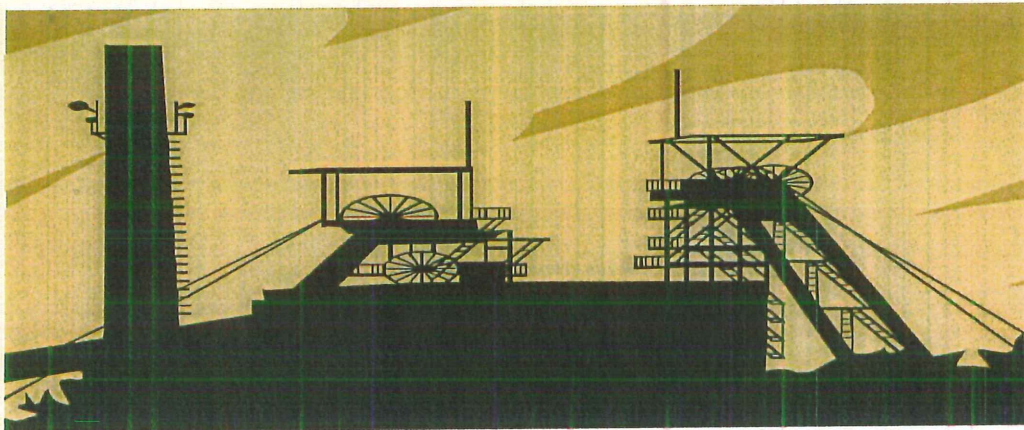
The last two words of the amendment promise "just compensation" for takings by the government. In *United States v. 50 Acres of Land* (1984), the Supreme Court wrote that "The Court has repeatedly held that just compensation normally is to be measured by "the market value of the property at the time of the taking contemporaneously paid in money." *Olson v. United States*, 292 U.S. 246 (1934) ... Deviation from this measure of just compensation has been required only "when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public." *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

The Takings Clause Fifth Amendment, U.S. Constitution

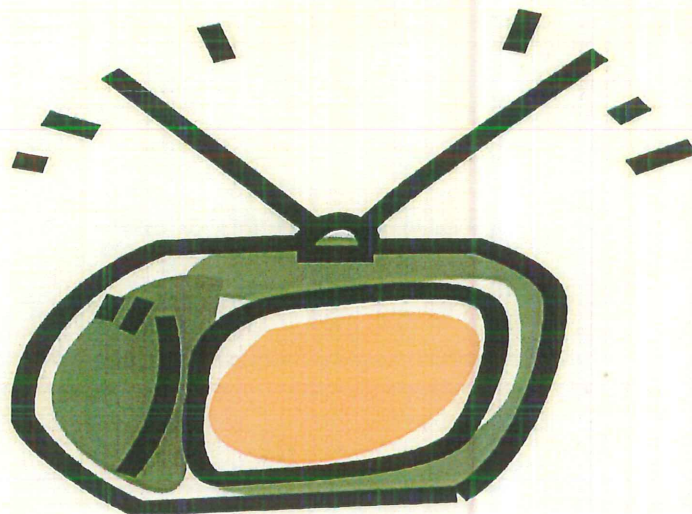


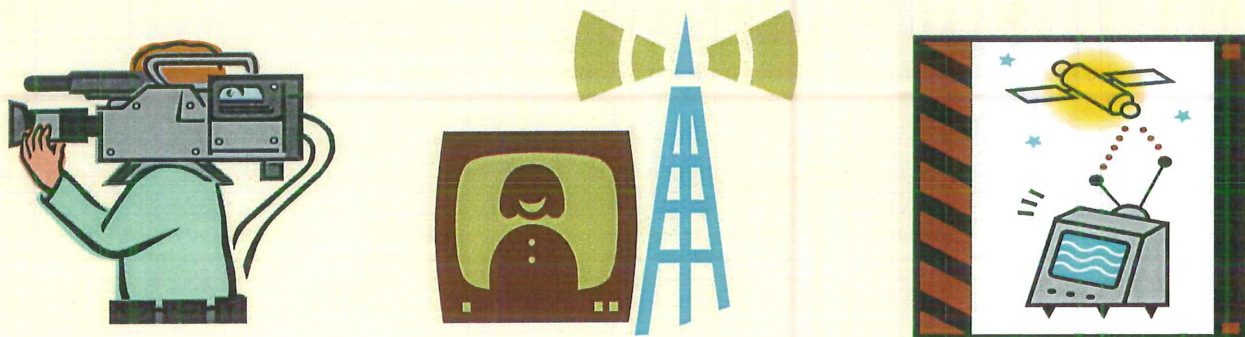
“No person shall be....deprived of...property with due process of law; nor shall private property be taken for public use, without just compensation.”

The doctrine of **regulatory takings** aims to identify regulatory actions that are functionally equivalent to the classic taking. Thus, it is a taking when a state regulation forces a property owner to submit to a **permanent physical occupation**, or deprives him of **all economically beneficial use** of his property. “[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).



It is a taking when a state regulation forces a property owner to submit to a permanent physical occupation, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-426, (1982) (CATV cables in rental housing by city franchise).





To succeed on a takings claim, a citizen would have to show that the State's action affected a “legally cognizable property interest.” *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 428 (3d Cir.2004) (upholding FCC regulation of airwaves).

CALIFORNIA CONSTITUTION
ARTICLE 1 DECLARATION OF RIGHTS

SEC. 19. Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

CALIFORNIA CONSTITUTION
ARTICLE 1 DECLARATION OF RIGHTS



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* CALIFORNIA CONSTITUTION - CONS

ARTICLE I DECLARATION OF RIGHTS [SECTION 1 - SEC. 32] (Article 1 adopted 1879.)

SEC. 19. (a) Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

(b) The State and local governments are prohibited from acquiring by eminent domain an owner-occupied residence for the purpose of conveying it to a private person.

(c) Subdivision (b) of this section does not apply when State or local government exercises the power of eminent domain for the purpose of protecting public health and safety; preventing serious, repeated criminal activity; responding to an emergency; or remedying environmental contamination that poses a threat to public health and safety.

(d) Subdivision (b) of this section does not apply when State or local government exercises the power of eminent domain for the purpose of acquiring private property for a public work or improvement.

(e) For the purpose of this section:

1. "Conveyance" means a transfer of real property whether by sale, lease, gift, franchise, or otherwise.
2. "Local government" means any city, including a charter city, county, city and county, school district, special district, authority, regional entity, redevelopment agency, or any other political subdivision within the State.
3. "Owner-occupied residence" means real property that is improved with a single-family residence such as a detached home, condominium, or townhouse and that is the owner or owners' principal place of residence for at least one year prior to the State or local government's initial written offer to purchase the property. Owner-occupied residence also includes a residential dwelling unit attached to or detached from such a single-family residence which provides complete independent living facilities for one or more persons.
4. "Person" means any individual or association, or any business entity, including, but not limited to, a partnership, corporation, or limited liability company.
5. "Public work or improvement" means facilities or infrastructure for the delivery of public services such as education, police, fire protection, parks, recreation, emergency medical, public health, libraries, flood protection, streets or highways, public transit, railroad, airports and seaports; utility, common carrier or other similar projects such as energy-related, communication-related, water-related and wastewater-related facilities or infrastructure; projects identified by a State or local government for recovery from natural disasters; and private uses incidental to, or necessary for, the public work or improvement.
6. "State" means the State of California and any of its agencies or departments.

(Sec. 19 amended June 3, 2008, by Prop. 99. Initiative measure.)

36. The applicant shall provide written documentation from PG&E agreeing to allow the proposed parking spaces within their easement area. This documentation shall be provided with the submittal of the first building permit that includes the parking in this area.

n:shared:planning:PC Resolutions:GPA#16-06/ZC#242/Est. of PD #76 (Student Housing Village) Exhibit A

RICK TELEGAN

From: Nelson, Julie <NelsonJ@cityofmerced.org>
Sent: Monday, February 4, 2019 1:44 PM
To: Fresno3rdm@aol.com
Subject: Project at Lake & Yosemite
Attachments: PG&E approval for parking in easement_5-24-18.pdf

Good afternoon, Rick. Attached is the documentation from PG&E to allow the parking in the easement area. No structures are allowed, but they can have the parking lot within the easement area. Hopefully this will help with your efforts. Have a good day!

Julie Nelson,
Associate Planner
City of Merced
209-385-6967
209-388-7314 (fax)



**Pacific Gas and
Electric Company**

Bounma Moua
Land Agent

Land Management
650 "O" Street, Mail Bag 23
Fresno, CA 93760-0001
(559) 263-5688
B2M3@pge.com

May 21, 2018

Doug Parsons
Principal Engineer
QK Inc.
2816 Park Ave
Merced, CA 95348

Re: Merced Station Student Housing, 2980 E. Yosemite Ave, Merced, CA

Dear Doug:

Thank you for the opportunity to review the site plans for the proposed Merced Station Student Housing project. PG&E has the following comments to offer.

1. PG&E owns and operates electric transmission and distribution facilities located within the project area. To promote the safe and reliable maintenance and operation of utility facilities, the California Public Utilities Commission (CPUC) has mandated specific clearance requirements between utility facilities and surrounding objects or construction activities. To ensure compliance with these standards, project proponents should coordinate with PG&E early in the development of their project plans. Any proposed development plans should provide for unrestricted utility access, and prevent easement encroachments that might impair the safe and reliable maintenance and operation of PG&E's facilities.
2. Developers will be responsible for the costs associated with the relocation of existing PG&E facilities to accommodate their proposed development. Because facilities relocations require long lead times and are not always feasible, developers should be encouraged to consult with PG&E as early in their planning stages as possible.
3. Relocations of PG&E's electric transmission and substation facilities (50,000 volts and above) may also require formal approval from the California Public Utilities Commission. If required, this approval process may take up to two years to complete. Proponents with development plans that may affect such electric transmission facilities should be referred to PG&E for additional information and assistance in the development of their project schedules.
4. We have the following specific comments and recommended modifications regarding the site plans for your Merced Station Student Housing project:
 - a. The proposed storm drains and sewer lines that are shown to be approximately 21 feet from the base of the two electric towers have been reviewed and approved by PG&E's Electric Transmission Engineering Department. Those two towers being Tower 057/364 and Tower 003/022 of the MELONES-WILSON 230kV / WARNERVILLE-WILSON 230kV and EL CAPITAN-WILSON 115kV / WILSON-ATWATER #2 115kV electric transmission lines. Any changes that differ from the Developer's provided design will invalidate this approval.
 - b. PGE and the Developer has agreed on the proposed parking lot layout plan, to which no structures are to be erected within PG&E's easement area, as shown on attachment titled

A1.0. Any changes that differ from the Developer's provided design will invalidate this approval.

- c. PGE and the developer has agreed on the proposed street light poles as shown on attachment title E1.2, to which the maximum height of the street light poles is to not exceed the maximum height of 16 feet from the finish grade. Any changes that differ from the Developer's provided design will invalidate this agreement.
- d. The Developer is to make sure that the 6 feet tall galvanize steel fence surrounding the perimeter of the project site, as it is labeled on the Site Plans A1.0, must be grounded.
- e. Landscaping within overhead electric transmission easement such as trees and shrubs are limited to those varieties that do not exceed 15 feet in height at maturity. Do not plant trees or deep-rooted shrubs within 10 feet of the transmission structures. Reasonable access to PG&E facilities is to be maintained, including access by heavy equipment. Greenbelts are encouraged.

5. The California Constitution vests in the California Public Utilities Commission (CPUC) exclusive power and sole authority with respect to the regulation of privately owned or investor owned public utilities such as PG&E. This exclusive power extends to all aspects of the location, design, construction, maintenance and operation of public utility facilities. Nevertheless, the CPUC has provisions for regulated utilities to work closely with local governments and give due consideration to their concerns. PG&E must balance our commitment to provide due consideration to local concerns with our obligation to provide the public with a safe, reliable, cost-effective energy supply in compliance with the rules and tariffs of the CPUC.

Sincerely,

Bounma Moua
Land Agent

Attachments:

A0.1 & A1.0 - Site plans

Storm drain plans

Engineering profile near base of towers

Doc. 10107, Volume 1423, Official Records, Page 507, MCR – Easement Document

Document 11105, Volume 128 Official Records, Page 344, MCR - Easement Documents

E1.2 - Engineers street light plans

RICK TELEGAN

From: Moua, Bounma <b2m3@pge.com>
Sent: Thursday, August 24, 2017 2:57 PM
To: 'Fresno3rdM@aol.com'
Cc: Moua, Bounma
Subject: RE: PG & E easement

Rick,

I hope all is well with you. I apologize for the late response, I've been extremely busy since my return.

I was able to determine that PG&E would not allow a swale to be created beneath the transmission tower lines. The response was that the proposed design would be unacceptable because it would impair our right to maintain our facilities as well it disturbing the grounds beneath the facilities.

I understand this isn't response you had hope for, but if you have other proposal that you would like review, please let me know.

Thank you.

Bounma Moua | Land Agent
Pacific Gas and Electric Company | Land Management
559.263.5688 office | 821.5688 internal | b2m3@pge.com

From: Fresno3rdM@aol.com [mailto:Fresno3rdM@aol.com]
Sent: Friday, July 21, 2017 10:32 AM
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Cc: jkashian@caddispropertiesllc.com
Subject: Fwd: PG & E easement

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Subj: PG & E easement

Hi Rick,

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CITY OF MERCED
Planning & Permitting Division

STAFF REPORT: #18-29

AGENDA ITEM: 4.3

FROM: Kim Espinosa,
Planning Manager

PLANNING COMMISSION
MEETING DATE: Oct. 3, 2018

PREPARED BY: Julie Nelson,
Associate Planner

SUBJECT: **Vesting Tentative Subdivision Map (VTSM) #1291**, initiated by Bright Development. This application involves a request for a modification of VTSM #1291 which would reconfigure the streets within the subdivision and reduce the number of lots from 168 lots to 161 lots. This property is generally located on the east side of G Street at Merrill Place (extended) within an R-1-5 zone with a General Plan designation of Low Density Residential (LD). *PUBLIC HEARING*

ACTION: Approve/Disapprove/Modify

- 1) Environmental Review #18-56 (CEQA Section 15162 Findings)
- 2) Modifications to Vesting Tentative Subdivision Map #1291

SUMMARY

Vesting Tentative Subdivision Map (VTSM) #1291 was approved January 16, 2007, to subdivide 39.8 acres of land generally located on the east side of G Street at Merrill Place (extended) (Attachments A and B). The State of California granted tentative subdivisions maps several automatic extensions which kept the map alive. After a referral from the Site Plan Review Committee, the Planning Commission granted an additional extension of the map which extended the expiration date to January 16, 2019.

When the Planning Commission approved the extension, the following conditions were added to the tentative map approval:

- 30) A revised vesting tentative map shall be submitted within 60 days of the date this extension is granted. The revised map shall include the following:
 - a. All lots shall be on property owned by the applicant.
 - b. All roads through the subdivision shall be on property owned by the applicant.
 - c. Access from Merrill Place into the subdivision on Palisades Drive shall be on property owned by the applicant or the right-of-way must have been dedicated to the City of Merced prior to submitting the revised map.
- 31) If after 60 days the above conditions have not been met, Vesting Tentative Map #1291 will automatically expire.

- 4.3 Modification to Tentative Subdivision Map #1291 ("Bright Homes"), initiated by Bright Development. This application involves a request for a modification of VTSM #1291 which would reconfigure the streets within the subdivision and reduce the number of lots from 168 lots to 161 lots. This property is generally located on the east side of G Street at Merrill Place (extended) within an R-1-5 zone with a General Plan designation of Low Density Residential (LD).

Associate Planner NELSON reviewed the report on this item. She noted an email received by the Planning Department and a memo from Staff (which were provided to the Commission at the meeting). The memo recommended modifications to Conditions #1, #10, #11, #12, #13, #22, and #25, the deletion of Condition #26, and the addition of Conditions #32 through #44. For further information, refer to Staff Report #18-29.

Public testimony was opened at 7:30 p.m.

Speakers from the Audience in Favor:

DAVE BUTZ, Bright Development, Applicant, Modesto
RICK TELEGAN, 3rd Millennium Investments, Fresno

Mr. TELEGAN voiced concerns regarding the compliance of the tentative map's temporary emergency vehicle access (EVA).

There were no speakers from the audience in opposition to the project.

Public testimony was completed at 7:39 p.m.

Chairperson re-opened public testimony at 7:40 p.m. to allow the applicant to rebut public comment with his remaining time of 00:14:22.

Mr. BUTZ assured the public and the Commission that the map was reviewed by the Police Department and Fire Department and the temporary EVA did not raise concerns.

Public testimony was completed at 7:41 p.m.

M/S PADILLA-CAMPER, and carried by the following vote, to approve the modification to Vesting Tentative Map #1291 ("Bright Homes") subject to the thirty-one (31) Conditions contained within Resolution #2904, including modifications to Conditions #1, #10, #11, #12, #13, #22, and #25, the deletion of Condition #26, and the addition of Conditions #32 through #44 as follows (RESOLUTION #2904):

(Note: ~~Strikethrough~~ deleted language, underline added language.)

- "1. The proposed project shall be constructed/designed as shown on Exhibit 1 [Proposed Vesting Tentative Map #1291 (Modified)] - Attachment C of Staff Report #18-29, subject to the listed conditions, except as modified by the conditions.
- "10. Developer shall design storm drainage with consideration as to whether the shared pump station pumping rate can or needs to be constructed in phases. Developer shall share costs of pump station with the ~~subdivision to the north ("Palisades Park")~~ property owner to the north, if joint use occurs, or if pump station is necessary. Storm drainage shall comply with City Storm Drainage Master Plan.
- "11. Developer shall design sanitary sewer with consideration as to whether the shared pump station pumping rate can or needs to be constructed in phases. ~~Developer shall share costs of pump station with the subdivision to the north ("Palisades Park") if joint use occurs, or if pump station is necessary.~~

- “12. Dedicate additional G Street right-of-way and easements to match *Merced Vision 2015 2030 General Plan* requirements for a 128-foot wide arterial, plus an additional 15 feet of right-of-way to accommodate the required landscape area, block wall, and utilities. A 7-foot-tall block wall shall be constructed along the project’s frontage on G Street. landscape and public facilities easements of 15 feet in width, including the construction of a 6-foot high masonry wall. Consistent with Planning Commission Resolution #2871 (Absolute Leeco Annexation), all of “G” Street within the annexation boundary shall be constructed at the time of improvements for the first tentative map, along with all other requirements listed in Condition #7 of said Resolution.
- “13. Dedicate additional right-of-way and easements along the northern half of Merrill Avenue to match *Merced Vision-2015 2030 General Plan* requirements for 74-foot wide collector (37-feet of ROW), an additional 10 feet of right-of-way to accommodate the required landscape area, block wall, and utilities. ~~plus landscape and public facilities easements varying from 10 feet to 12 feet in width, including the construction of a 6-foot high masonry wall along the northern portion of the roadway. These improvements shall terminate at the northeast corner of the intersection of Merrill Avenue and “K” Drive as indicated on the Tentative Map.~~ A 7-foot-tall block wall shall be constructed along the project’s frontage on Merrill Avenue (Place). The block wall may be constructed in phases consistent with the tentative map. All of the land required for this development’s share of Merrill Avenue (Place) shall be dedicated with the first final map.
- “22. ~~The secondary access point shall be located at the intersection of Foothill Drive and G Street. The secondary access point shall be installed prior to the issuance of the 1st certificate of occupancy permit.~~ Secondary access to the subdivision shall be provided by a Temporary Emergency Vehicle Access easement constructed between Lots 1 and 15 of Modified Tentative Map #1291 to be maintained by the CFD.

- ~~“25. The cul-de-sac bulb, ‘J’ Court, shall be open end style including sidewalk connectors to adjacent linear parks (within the PG&E easement) and local streets and walls from back of house to back of house. The linear park and PG&E Easement shall be designed in an open manner, with no fences or other hindrances that would impede pedestrian accessibility, of both easements as they intersect with each other and ‘J’ Court~~
- ~~“26. The cul-de-sac bulb labeled as ‘D’ Court shall be designed with park strips due to its extended length.~~
- “32. At the time of Final Map, all references to a “PFE” (Public Facilities Easement) shall be changed to reflect the actual purpose of the easement. For example, if the easement is for utilities and a block wall, the easement should be labeled as a PUE (Public Utilities Easement) and Block Wall easement.
- “33. The Emergency Vehicle Access (EVA) is allowed on G Street as a temporary access only. The design of the EVA shall be approved by the Fire, Engineering, and Planning Departments. Pedestrian access should be implemented into the EVA.
- “34. Once Palisades Drive and Foothill Drive are constructed which provides secondary access into the subdivision, the EVA shall be abandoned at the owner’s expense.
- “35. All easements shall be large enough to provide room for all utilities without utilities being placed underneath the City sidewalk.
- “36. The Tentative Map shows the EVA as “Lot A” and the 3.10 acres at the eastern edge of the subdivision as “Lot A”. This shall be corrected on the final map so that there is no duplication of the lot designations.
- “37. Access to Lot A (at the eastern edge of the subdivision) as shown on VTSM #1291 (Modified) shall be provided from this

subdivision. The exact location of the access point shall be determined when development occurs on Lot A.

- “38. The location of the pump station shown on the park/basin parcel is not approved. The exact location of the pump station will be determined prior to the first final map.
- “39. The cul-de-sacs at Court E and Court L shall be open-ended cul-de-sacs providing access to F Street.
- “40. The owner shall work with the City of Merced to obtain the additional right of way needed for the southern portion of Merrill Place.
- “41. The area shown as Lot A for the Emergency Vehicle Access on the tentative map shall be re-labeled due to duplication with the area to the east of the subdivision also shown as Lot A.
- “42. The Emergency Vehicle Access (EVA) Easement area shall be dedicated to the City. If sewer and water main lines are to be placed this area, a public utilities easement shall be maintained upon vacation of the EVA.
- “43. The EVA area may remain open to allow pedestrian access to the subdivision from G Street if the developer desires to do so after it is no longer needed as an EVA. However, if the pedestrian access is not maintained or problems arise with the use of the access area, it shall be the responsibility of the developer/subdivider to install the block wall in this area.
- “44. “F” Street shall have a 94-foot-wide right-of-way to include the 74-foot-wide collector road and a 10-foot-wide easement. All walls, landscaping, and utilities shall be included in this easement area.”

AYES: Commissioners Camper, Drexel, Harris, Padilla, Rashe,
and Chairperson Dylina
NOES: None
ABSENT: Commissioner Martinez
ABSTAIN: None

4.4 Cancellation of October 17, 2018, Planning Commission
Meeting due to Lack of Items.

M/S PADILLA-RASHE, and carried by unanimous voice vote (one
absent), to cancel the Planning Commission meeting of October
17, 2018, due to lack of items.

5. INFORMATION ITEMS

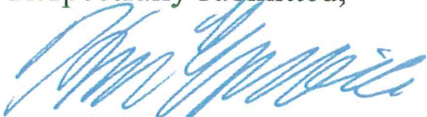
5.1 Calendar of Meetings/Events

Planning Manager ESPINOSA briefed the Planning Commission on
items for the next few Planning Commission meetings.

6. ADJOURNMENT

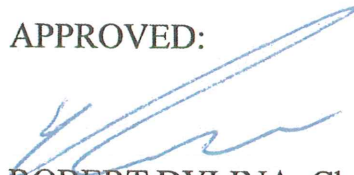
There being no further business, Chairperson DYLINEA adjourned the meeting
at 7:46 p.m.

Respectfully submitted,



KIM ESPINOSA, Secretary
Merced City Planning Commission

APPROVED:



ROBERT DYLINEA, Chairperson
Merced City Planning Commission

EXHIBIT C
LAND USE REGULATIONS

Merced Vision 2015 General Plan, as amended through
April 4, 2005

Charter of the City of Merced, as amended through
March 5, 2002

Merced Municipal Code, as amended through May 2005

City of Merced Design Standards, as amended through
November 15, 2004

Merced Specific Urban Development Plan (SUDP)

The location and intensity of development has an effect on traffic levels in the surrounding area and on the City as a whole. Transportation engineers have developed several mathematical tools to monitor the relationship between land use and the transportation system. One tool is the traffic forecasting model. This model forecasts traffic volumes and simulates traffic conditions under future land use scenarios based on a) estimates of traffic which will be generated by new development; b) streets the traffic will use; c) and the amount of new traffic the street system can ultimately accommodate.

To evaluate the General Plan Land Use Plan, the City used a traffic model developed by the Merced County Association of Governments (MCAG) for the State Route 99 Merced-Atwater Corridor Study (see Section 4.7.3). The resulting roadway level of service capacity is summarized in Appendix 4.8.4. Major street projects needed to support the planned land uses in the City are summarized in *Table 4.1* and described in more detail in the Appendix (Section 4.8.3). The financing of these needed improvements is discussed in Section 4.7.6. The resulting Circulation Plan (map) is shown in *Figure 4.1*.

4.2 CIRCULATION PLANNING

People continue to drive more. Vehicle miles of travel and the number of automobiles registered per person have continued to increase throughout the State. Shifts in employment patterns and other factors have concentrated auto use during peak daily use periods. This has special implications for an area like

Merced, which has grown from a small, relatively isolated community to a large metropolitan urban area within much less than a lifetime.

4.2.1 Merced's Historic Circulation Planning

The City of Merced has grown dramatically in the past quarter century. The 1968 General Plan formally re-oriented proposed community growth from east-west to the current north-south orientation. This change was based upon major environmental constraints as well as growth pressures.

In response to growth, changes have occurred in Merced's transportation and circulation planning in the past few years. A major catalyst for these changes was the *Merced 2030: How Should We Grow?* report (1990). (See Section 2.2.2 of the Urban Expansion chapter.)

The *Merced 2030* report described possible growth scenarios for the City over a forty-year period. The "Northern City" scenario, showing growth predominantly to the north of the City towards Lake Yosemite (*Figure 2.1* in the Urban Expansion chapter), was subsequently adopted in 1990.

The *Merced 2030* document also visualized a continuation of the existing system of major north-south roadways into the northern growth areas and an M Street transit corridor. Further reports, such as the "Working Paper on Circulation Options in Future City of Merced" and the *North Merced Conceptual Land Use Plan* (1991), were subsequently prepared and introduced the concept of a Highway 59 expressway.

These reports, combined with public input, have helped to shape and modify Merced's circulation system with new features. These features were incorporated into the City's General Plan Transportation and Circulation Element in 1993 and are included in the *Merced Vision 2015 General Plan*. These features (*Figure 4.1*) include:

- a comprehensive system of arterial streets in a one-half to one mile grid system;
- an upgraded Highway 59 to serve as a beltway or "ring-road" to carry cross-town traffic around established portions of the community; and
- a major transit corridor (M Street) designated along the central core of the entire City.

4.2.2 Opportunities and Challenges

The transportation/circulation environment of Merced offers a number of challenges and opportunities. Chief among these will be the location of the University of California (UC) campus northeast of Lake Yosemite. The UC will have major circulation needs, but also offers a significant opportunity for a concentrated transit destination.

The closure of military operations for nearby Castle Air Force Base (CAFB) presents significant economic challenges to the area. Successful conversion to a large civilian job base can also create a major challenge to regional circulation. Again, however, it also offers the opportunity to become a concentrated transit destination.

When considering circulation alternatives, Merced has year-around weather that is quite favorable to non-automobile options. In addition, an enhanced M Street transit corridor, within an urban area that remains strongly oriented north-south, could continue to offer convenient non-automobile access to nearly every major destination in Merced--a truly unique opportunity!

4.2.3 Coordination of Circulation System Planning

Coordination between various transportation planning agencies is an important method of managing traffic growth as well as local and regional traffic problems. It is important that land use and transportation/circulation policies be carefully coordinated on a regional level.

This offers the best possible opportunity for achieving consistent comprehensive planning including a well-balanced jobs to housing relationship, which in turn can reduce the length and number of commute trips in the Merced urban area.

Merced County's land use and circulation decisions in the area have significant potential for affecting the City's circulation system. As an example, a large number of subdivision lots/dwellings in a location even miles from Merced City can create peak hour traffic impacts on a particular urban area road if most of the subdivision residents commute to and from work in Merced at similar times.

The Merced County Association of Governments (MCAG) is Merced County's regional (county-wide) planning agency, responsible for coordinating

4.3 ELEMENTS OF THE CIRCULATION SYSTEM

4.3.1 Regional Circulation System

Current Regional Access

Three routes currently provide regional access for the City of Merced (*Figure 4.2*).

State Route 99 is an important north/south highway connecting the major cities of the Great Central Valley. It is a four to six lane facility extending from Interstate 5 near Bakersfield at its southern end to Interstate 5 near Redding at its northern end. It passes through a number of Valley communities, including Bakersfield, Visalia, Fresno, Merced, Modesto, Lodi, Stockton, and Sacramento. State Route 99 serves as the primary farm-to-market route for the transportation of agricultural products, as a major commuter route within many of the cities it serves, and as a popular route for recreational traffic.

State Route 59 is a north/south facility extending from Route 152 south of El Nido to Snelling north of Merced. It enters Merced from the south via Martin Luther King Jr. Way (South J Street), crosses the City via Route 99, and continues northward on its own Highway 59 corridor. This route primarily serves local and truck traffic.

State Route 140 is an east/west facility connecting I-5 and Yosemite National Park. It is a two-lane road serving local traffic and a high volume of recreational traffic. It enters the City from the west at the intersection of 13th and V Streets, crosses the City via Route 99, and

continues eastward on its Route 140/Yosemite Park Way corridor.

G Street and Santa Fe Drive play more limited regional roles by connecting Merced with the nearby communities of Snelling and Atwater respectively.

Expanded Regional Access

As a part of the *Merced 2030* and *North Merced Conceptual Plan* process, the City adopted a circulation plan of major streets (arterials) and an expressway (Highway 59 by-pass) for prospective growth areas north of the existing community. That system has been subsequently modified and expanded in concept over time as a result of the work of the City/County Liaison Committee, the General Plan Update, and the Highway 99 Corridor Study (by City, County, Atwater, Caltrans, and the Merced County Association of Governments).

The resulting circulation plan also contains a more inclusive future regional loop or beltway system, designed to provide additional options for regional traffic to travel around the fringes rather than through the urban area. This prospective loop system is formed by Highway 59 and Thornton Avenue to the west, Mission Avenue to the south, a route within the Lake/Kibby Road area to the east, and Bellevue Road to the north. An interchange in the vicinity of Thornton Road/Highway 99 is a key western link within this loop. An interchange in the vicinity of Mission Avenue/Highway 99 is a key eastern link within this loop. Such a system has elements which will need to be initiated within the next 20 to 30 years.

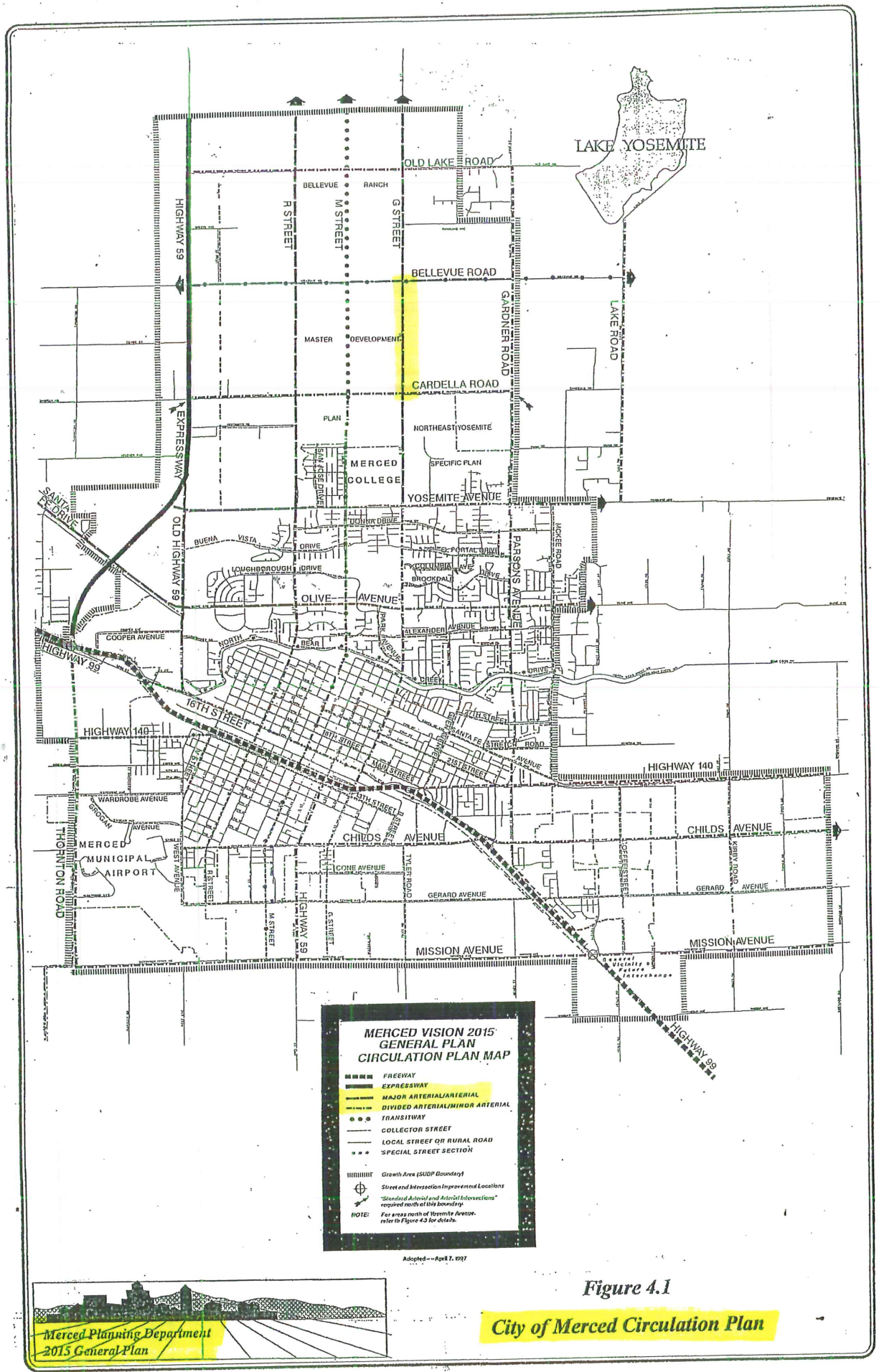


Figure 4.1

City of Merced Circulation Plan

4.3.2 Functional Road Classifications and Design Standards

City and regional streets and highways are classified by categories that reflect their importance and function. Freeways are the highest level of roadway, with fully controlled access, high operating speeds and volumes, and highest design standards. Local streets and alleys are the lowest functional classification, with low speeds and volumes and direct access to adjacent property.

The accompanying table (*Table 4.2*) and representative cross-sections which follow summarize the characteristics of roadway categories. (*More detailed design standards and additional cross-sections are described in Section 4.8.1.*) Specific design requirements are found in the City of Merced's Standard Designs of Common Engineering Structures, which are amended on a regular basis.

Roadway characteristics and standards described in the Circulation Element apply to most common situations and generally should be considered as minimums. However, detailed traffic and design studies for specific development projects or roadway improvements may indicate that higher levels of improvements are required or that other standards may be permitted. Like other infrastructure, circulation improvements will be required as development occurs (See Chapter 5, Public Services and Facilities, for related policies regarding the timing of improvements.)

4.3.3 Streets and Highways

Major Road System

The City has had a one-mile grid system of major north-south roadways identified

for many years (Highway 59, R Street, G Street, and Parsons Avenue are all one mile apart) . This existing system will be extended and expanded to the north and south to serve Merced's new growth areas.

The circulation system concept for projected new growth areas to the north of Merced provides for one-mile grids formed by major arterial and arterial roadways. The north-south major arterials in the City's primary growth area would distribute traffic throughout the community. East-west arterials would carry traffic to a convenient north-south major arterial or expressway for ultimate distribution to the downtown, other more distant community destinations, or to Highway 99. (*Figure 4.3*).

Rights-of-Way and Access Spacing

The prospective arterial grid system has two basic requirements if it is to be successful --1) adequate right-of-way (ROW) preservation to accommodate the amount of traffic expected from major future growth, and 2) strict access control to maintain efficient movement for this greatly expanded traffic.

In order for the street system to function properly, enough capacity must be built into the roadways to handle the traffic for the next 20 to 40 years and beyond. For that purpose, the rights-of-way (ROW's) for major arterials, such as Bellevue Road, G Street, and R Street, need to be substantial.

Along with the amount of right-of-way, access control greatly affects street capacity. Every street has a maximum traffic-carrying capacity -- the maximum

Table 4.2

*City of Merced
Summary of Street and Highway Standards*

| ROAD CLASSIFICATION | RIGHT- OF- WAY | # OF LANES | DRIVEWAY ACCESS RESTRICTIONS | STREET INTERSECTION SPACING | PARKING |
|------------------------|-----------------------|------------------|------------------------------------|-----------------------------------|--|
| Expressway | 150 ft | 6-8 | Full | 1 mile | No |
| Major Arterial | 128 feet | 4-6 | Full | 1/4 - 1/2 mile | No |
| Arterial | 128 feet | 4-6 | ¹ Partial | 1/4 - 1/2 mile | No |
| Divided Arterial | 118 feet | 4-6 | ¹ Partial | 1/4 - 1/2 mile | No |
| Minor Arterial | 94 feet | 2-4 | ¹ Partial | 1/8 - 1/4 mile | Generally Not Permitted |
| Major Collector | ² 68-74 ft | 2-4 | ³ Partial | As needed | ³ Permitted in Selected Areas |
| Collector | 68 ft | 2 | ⁴ Partial | As needed | ⁴ Permitted in Selected Areas |
| Local | 49-60 ft | 2 | No | As needed | Permitted |
| Transitway | ⁵ Varies | 2-6 | ⁵ Varies | ⁵ Varies | ⁵ Varies |

¹Generally no direct access to adjacent property. Right-turn-in/right-turn-out local streets or combined access driveways may be permitted at the City's discretion at 1/8 mile points.

²Less (68 feet) right-of-way (ROW) may be permitted where supported by a traffic analysis to assure that the narrower street would not be overloaded. Analysis would include trip generation and distribution based on existing and future land use and circulation system. Additional width may be necessary at intersections where analysis shows need for turn lane(s).

³ Generally no direct access (fronting lots and residential driveways) allowed.

⁴ Fronting lots would be permitted on Collectors where a traffic analysis shows daily traffic volumes will not exceed 1,500 vehicles under ultimate conditions. Driveways or other direct access and parking are to be avoided if feasible within 300 feet of existing signalized intersection or an intersection with realistic prospects for future signalization

⁵There are different kinds of transitways, depending on their function. Some segments will allow buses only (refer to Bellevue Ranch Master Development Plan) while others will function as normal arterials except they will offer exclusive "High-Occupancy Vehicle" lanes.

NOTE: These are general standards appropriate for most situations. Higher standards may be required or less standards may be permitted based on detailed design studies. Expanded ROW's may be required at intersections to accommodate turn lanes. On-street parking may be deleted if adequate, convenient off-street parking is provided in a subdivision design. A subdivision design deleting on-street bicycle lanes may be permitted if an adequate, convenient Class I bicycle path(s) is available (subject to possible reimbursement and/or maintenance costs for existing system).

Currently adopted standards are contained in the City of Merced Standard Designs of Common Engineering Structures.

number of vehicles that can be carried at a particular speed past any given point.

To maintain this capacity, speed must be maintained. Therefore, unnecessary disruptions to peak hour traffic flow must be avoided. Carefully controlling the number of intersections is the key to maintaining such roadway efficiency.

The intersections that are allowed must also be located at specific distances from each other. This in turn allows future traffic signals to be located at proper distances to provide the most efficient timing possible. The more effective the timing coordination, the more efficient the system (more vehicles carried more quickly over a given period of time).

City traffic studies have indicated that the most efficient spacing for signalized intersections should be a) no less than one-half mile apart on Major Arterials (G and R Streets north of Yosemite Avenue), and b) at least one-quarter mile apart on Arterials (Bellevue Road) and Divided/Minor Arterials (Cardella Road). This spacing maintains an adequate flow of traffic and allows proper synchronization of traffic signals.

Right-turn-in/right-turn-out intersections (regulated by a road median) are allowed at the one-quarter mile points on Major Arterials and at the one-eighth mile points on Arterials and Divided/Minor Arterials. This conceptual arterial grid system was first recommended by the Planning Commission and adopted by the City Council in 1992 as part of the *North Merced Conceptual Plan* (Section 2.2.3).

Designation and function of the following major roadways are to a large degree

based upon the level of required access restrictions.

Highway 59 (Expressway)

- * Anticipated to be the major cross-town traffic carrier for Merced's prospective growth areas to the north in the foreseeable future;
- * East-west minor arterials to feed traffic onto the Expressway at one mile signalized intervals (no other direct access allowed);
- * Major concentration of business parks, commercial centers, industrial activities and other service/employment oriented land uses along this corridor;
- * Adjacent land uses served directly from frontage roads running parallel to the Expressway;
- * By-passes the existing City road system, to provide direct access to Highway 99 and alternative access to the downtown area.

R Street/G Street (Major Arterials)

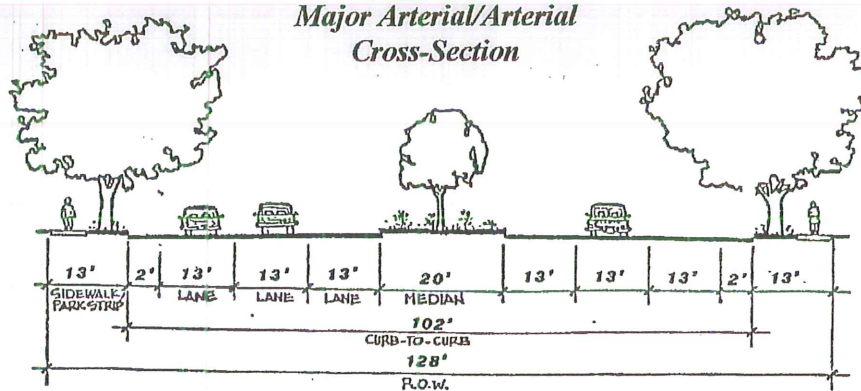
- * Located parallel to each other at one-mile intervals, in the direction (north-south) that is anticipated over time will carry the longer distance, higher speed cross-town vehicle trips for Merced's prospective growth areas to the north (*Figure 4.3*);
- * Cross-town function anticipated to become more important as the City extends further northward;
- * Access to Major Arterials (*Figure 4.4*) is limited to no more than every quarter mile; signalized (four-way) intersections only allowed at every

mile (at east-west Arterials) and intervening half-mile point at major collectors; (other access points, at intervening quarter miles, limited to

right-turn-in, right-turn-out traffic only).

Figure 4.4

Major Arterial/Arterial Cross-Section



Bellevue Road and Cardella Road/Old Lake Road (Arterials)

- * Arterials, one mile apart in a parallel (east-west) pattern perpendicular to the major arterials.
- * Anticipated to accommodate more, but shorter, vehicle trips, distributing vehicles to major arterials.
- * Less stringent access restrictions, to accommodate heavier traffic loads for shorter periods of time -- basically, designed to carry traffic to the nearest appropriate major

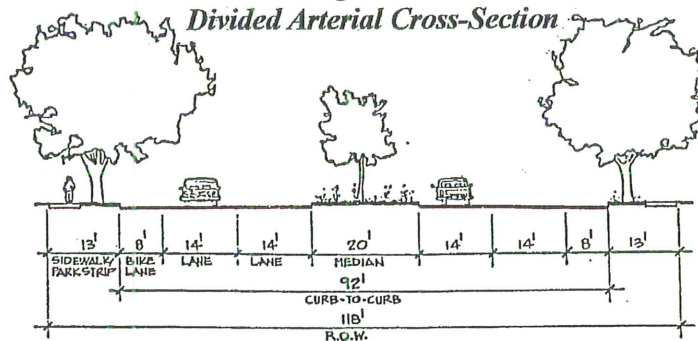
arterial, expressway or collector, for further trip distribution.

- * Bellevue Road has a larger right-of-way requirement (128 feet, 150 feet at major intersections) because it is designated as a transitway in addition to its designation as an arterial. Cardella Road and Old Lake Road are both designated Divided Arterials (118 feet, 140 feet at intersections) (Figure 4.5)

(NOTE: Yosemite Avenue is to function as an Arterial in part but with special designations -- Figure 4.3.)

Figure 4.5

Divided Arterial Cross-Section



Policy 7-1.1

Design Streets Consistent with Circulation Function and Affected Land Uses

It is extremely important to coordinate circulation and land use planning. Street systems are intended to move motor vehicles but streets also are expected to provide access to near-by land uses. Smaller streets called upon to carry heavy traffic to major activity centers can create large circulation problems. Large streets carrying heavy traffic through residential or other sensitive land use areas can create significant conflicts.

Implementing Actions:

1.1.a Implement the General Plan Circulation Plan (Figure 4.1) as development occurs.

The City will implement the General Plan Circulation Plan as development occurs in new growth areas and in developed areas, as feasible. This may be accomplished through the dedication of needed right-of-way or transportation easements, the construction of roadway improvements, and/or the collection of fees, consistent with the impacts of new development.

1.1.b Whenever feasible implement a system of arterials and higher order streets in new growth areas based upon the adopted concept of arterials/expressways.

The adopted concept of arterials/expressways is designed to carefully separate streets by circulation function, and locate land uses consistent with these functions (Figure 4.1). Arterials and higher order streets will carry the higher-speed traffic to adjacent commercial, industrial and other major destinations. Collectors and local streets will be designed for local, neighborhood traffic that is either traveling towards a neighborhood destination or is exiting the area. It is important to try to apply these same principles to the extent possible in planning partially developed areas that have incomplete road networks.

1.1.c Evaluate existing streets in older portions of the City, and identify means of upgrading the system where necessary.

As in-fill development and redevelopment occurs, existing street systems should be evaluated to determine if there are ways that circulation efficiency can be improved without causing undue impacts on the neighborhoods.

1.1.d Design and build residential collector streets that balance as effectively as possible competing needs to be safe and efficient.

The community needs to continue to seek and evaluate design options and other ways that might help to reconcile the competing functions of residential collector streets (to be safe for local neighborhood residents while being reasonably efficient traffic carriers). The City also needs to distinguish collector streets ("Major Collectors") that, because of certain characteristics, are likely as time passes to experience increasing traffic pressures and impacts on adjacent residential settings.

[NOTE: A "Major Residential Collector" is defined as 1) being of one-half mile or more in uninterrupted length; 2) having a current or projected ADT (Average Daily Trips) of 1,500 or higher; and 3) having outlets to at least one higher order street at an intersection which is either signalized or projected for future signalization. A Major Collector by its location a) is a central element of its neighborhood circulation system with connection to additional neighborhoods; and b) will receive, or is projected to receive, significant through traffic increases from outside its primary service area to major destinations to which the major collector has convenient access. Major Collectors would be the same width as other Collectors, but should have no residential driveways accessing directly upon them. See Appendix 4.8.1.]

1.3.h Obtain whenever feasible necessary rights-of-way in proximity to major intersections for needed turn lanes.

Intersections can become bottlenecks to efficient traffic movement. A key to maintaining smooth-flowing traffic is to avoid as much as possible the disruption of through traffic by turning vehicles. Turn lanes of sufficient length are effective for removing traffic that is slowing to turn, with a minimum of impact upon through traffic. This can be especially important in older areas of the City where widening the entire street may not be possible, but where expanded intersections can reduce congestion.

1.3.i In new growth areas, obtain expanded arterial intersection rights-of-way (ROW) requirements.

As development projects are proposed in new growth areas, the expanded arterial intersection ROW's generally described in the Appendix (Section 4.8) should be dedicated, so that turn lanes can be established in these intersections when traffic conditions warrant.

1.3.j Maintain the land use and access restrictions identified for major collector and higher order street intersections.

Streets have functions that are often at odds with each other. Major roads are expected to carry large amounts of traffic at reasonable speeds. Each intersection, driveway access, or median break that allows other traffic to enter or otherwise disrupt the traffic flow of a major street reduces efficiency (traffic-carrying ability) from that major street. An intersection of two major streets becomes a point where each disruptive movement within proximity to the intersection has heightened potential to affect traffic flows on each street. Major traffic entering and leaving large commercial complexes or other major vehicle destinations create a variety of traffic movements that can magnify disruptions on traffic flow. Avoiding driveway access movements in the vicinity of major intersections promises to help maximize traffic flows, thereby maintaining efficiency while reducing air quality impacts at those intersections.

1.3.k Approve driveway access locations only if consistent with approved minimum acceptable distances from major intersections, except in unusual circumstances.

Driveways can help disrupt major street traffic flows. Over time a driveway can be expanded, land uses can intensify, and other changes can take place that can significantly increase the impacts of a driveway on major street traffic. It is important to maintain adopted driveway location standards, and to avoid driveway locations that can conflict with major street intersections. It is also important to consider the ultimate build-out of the area when determining needs at the time of initial construction.

(Notes: Chapter 5, Public Services and Facilities, contains policies relating to the timing of infrastructure improvements, including circulation improvements.)

4.8 APPENDIX

4.8.1 Functional Road Classifications and Design Standards

Functional Classification

Functional road classification categorizes each existing street or proposed street according to its primary function. This creates a hierarchical system as the basis for establishing standards, designing streets, selecting necessary traffic control measures, establishing a priority for construction, and measuring the quality of movement. In many cases, this system will also define appropriate land uses, the intensity of development, and the location of public facilities. The City's classification system is based on functional categories used by County, Regional, State, and Federal agencies.

The functional classification of streets and highways rests on the following concepts:

- Streets and highways are classified into separate and distinct systems in accordance with their intended primary circulation purpose. Each system serves the movement of traffic and the access to property to a different degree.
- Street classification governs design standards and construction and improvement priorities.
- The City's circulation system must be coordinated with the networks of the State and County.
- All major streets and highways have continuity, logical termini, and adequate capacity to allow and provide a high quality of flow.

The functional classification system used in the Circulation Element and Map (*Figure 4.1*) divides all streets and highways into categories. *Table 4.3* and the cross-sections on the following pages summarize the characteristics of each roadway category. These are illustrative characteristics only. Official design requirements are found in the City of Merced's Standard Designs of Common Engineering Structures.

Bikeways

Class I Bikeways (Off-Street Bike Paths) are designed to serve corridors not served by streets and highways, to provide recreational opportunities, or to provide high-speed commute routes for bicycles. In Merced, such bikepaths are found along Bear, Black Rascal, Cottonwood, and Fahrens Creeks, and will be expanded along powerline easements, canals, and abandoned railroad corridors in the future. All bikeways are designed to meet Caltrans minimum standards. Class II Bikeways (Bike Lanes), which provide striped lanes for bicycles along streets, are included in the street cross-sections on the following pages.

Major Arterials

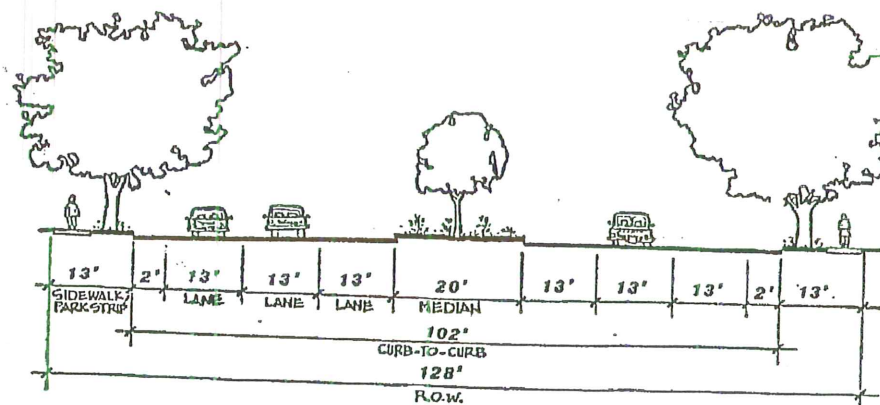
Major arterials are roads typically designed for new growth areas. They are intended to carry moderately heavy traffic volumes at moderate speeds on longer intra-city and cross-town trips, to regional destinations, and to State/Interstate routes for continuing longer trips. The extensions of "R" and "G" Streets north of Yosemite Avenue in the North Merced growth area are classified as "major arterials." Access is controlled, crossings are at-grade.

There are medians between traffic traveling in opposite directions. Expanded arterial intersections are generally at every mile, where they intersect a divided arterial or higher order street (beginning with and north of Cardella Road in the North Merced growth area). Intervening intersections with collector streets may be permitted every one-quarter mile (right-turn-in, right-turn out movements only) and one-half mile (signalized four-way intersections with appropriate median break).

The basic right-of-way for major arterials is typically 128 feet. At 970 feet from standard arterials intersections, the basic right-of-way for the major arterial will typically begin expanding; the maximum curb-to-curb width of 150 feet will be reached for the final 400 feet approaching the major intersection, or as designed in those standards to be established in the City of Merced Standard Designs of Common Engineering Structures. Access to abutting properties is restricted to internal streets or frontage roads. Parking is prohibited. Capacity varies depending upon lane width, lateral clearance, and distance between intersections. Major arterials should be heavily landscaped to give them a parkway-type character and to identify their function to the driver. Bikeways are permitted on-street when the major arterials are four lanes, but are eliminated when they are widened to six lanes due to safety concerns.

Figure 4.31

Major Arterial/Arterial Cross-Sections



Major Arterial/Arterial

Consequently, because the CEQA Section 15162 Findings were “based” (or evaluated) on the 2030 General Plan (not adopted until 2012), the purported Environmental Determination is, or had it been made, would have been flawed.

Windows/Docs:Merced Final Written Comments 3202019

RESPONSES TO STAFF REPORT # 19-11 :

Page 1 ; “Summary”, 2nd Paragraph

The report fails to mention that an “**ACTION**” item (“Environmental Clearance”) was not approved (or certified) at the October 3, 2018 Planning Commission hearing, and tonight’s hearing, contrary to October 3, 2018 hearing, totally ignores any CEQA determination despite the fact that this VTSM extension request is clearly “discretionary” and as the City admits on page 3, paragraph “B”. [Public Resources Code, 21080, subdivisions (a), (b)(1) and CEQA Guidelines Sections 15268, 15357, 15369)].

According to the Staff Report, the Planning Commission “**ACTION**” is to “Approve/Disapprove/Modify” VTSM # 1291 and the Conditions of Approval, similar to the 2nd **ACTION** item on the Planning Commission agenda for

the October 3, 2018 hearing. I am now timely reasserting all issues raised in my January 30, 2019 letter (“ATTACHMENT K”). The Planning Commission has the authority and duty to consider all of those issues just as if they were raised at the October 3, 2018 hearing.

On the bottom of page 2 and top of page 3, the Staff Report states the City Attorney concluded that the time within which I may raise those issues had expired and, therefore, may not be considered. While that opinion may have been accurate with regard to planning and zoning issues (according to the California Government Code), that opinion from the City Attorney is wrong with regard to CEQA [according to California Public Resources Code Section 21167 (a)]. Specifically, the modified Conditions of Approval must analyze the environmental impact(s) associated with the

changing project description and the changed background setting. The background setting is substantially different than it was in 2006 [Note: the current Staff Report declares that “Environmental Review #06-26 – CEQA Section 15162 Findings remains sufficient for this project”]. The City’s Staff Report # 19-11 describes how the applicant will **again** modify the subdivision by relocating the drainage basin. This planned and privately conceived modification *denies* the public and adjoining property owners (like myself) the rightful opportunity to review a “stable, finite, and accurate” project description and make comments regarding the latest changes to the project.

The most significant modification to this ever-changing subdivision map is the proposed Emergency Vehicle Access (EVA). According to Staff

Report # 19-11, the City is now relying on Environmental Review # 06-26, prepared in 2006, in contrast to “Environmental Review # 18-56 (CEQA Section 15162 Findings)” presented to the Planning Commission on October 3, 2018. In 2006 the project was not designed to include an EVA and therefore, the environmental analysis could not possibly have considered the environmental impacts of allowing *any* direct access on to “G” Street.

Further, at that time, the *MERCED VISION 2015 GENERAL PLAN* was the supreme planning document by which all Conditions of Approval would need to be evaluated. Since the 2015 General Plan strictly prohibits access to and from “Major Arterials” (“G” Street) and to or from adjoining properties, the EVA modification cannot be approved, and the outdated environmental review documents must be revised and updated, based on the current environmental baseline. [See, *Woodward Park Homeowners Ass’n v.*

City of Fresno (2007) 150 Cal.App. 4th 683.] Also, because the current Conditions of Approval for VTSM # 1291 (as modified by the Planning Commission at the October 3, 2018 hearing : see “ATTACHMENT J”) referenced the *MERCED VISION 2030 GENERAL PLAN*, the City must revise those Conditions of Approval that reference the EVA and the *MERCED VISION 2030 GENERAL PLAN*.

[Please see attached references and legal citations, including highlighted provisions from the Remy, Thomas, Moose & Manley treatise, especially the authors’ comments concerning the citations supporting the lead agency’s duty to disclose and consider current baseline background conditions when reviewing prior environmental review documents supporting discretionary approvals.]

RICK TELEGAN,
Manager, BP INVESTORS, LLC

March 19, 2019



ELEVENTH [11TH] EDITION

GUIDE TO CEQA

California Environmental Quality Act

Michael H. Remy

Tina A. Thomas

James G. Moose

Whitman F. Manley

**CITED AS AN AUTHORITATIVE
SOURCE BY THE CALIFORNIA COURTS**

If the project falls within a categorical exemption, then the agency must inquire whether the categorical exemption is negated because the project is subject to an exception to the categorical exemptions.

not proceed to perform further environmental review (unless some abbreviated level of further review is required by the terms of the applicable exemption itself). *See* chapter V (Exempt Activities), section C.2 (statutory exemptions).

If the project falls within a categorical exemption, then the agency must make a fourth inquiry: whether the categorical exemption is negated because the project is subject to an *exception* to the categorical exemptions. CEQA Guidelines, § 15300.2; Pub. Resources Code, § 21084. If the project's ostensible categorical exemption is subject to one of these *exceptions*, then the agency cannot rely on a categorical exemption, but must prepare an initial study and eventually a negative declaration or EIR. *See* chapter V (Exempt Activities), section C.3.d (exceptions to categorical exemptions).

The fifth potential inquiry occurs where the agency has determined that its action involves approval of a project, but the project does not fall within a statutory or categorical exemption. That inquiry is whether, as a matter of common sense, "it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." CEQA Guidelines, § 15061, subd. (b)(3); Discussion following CEQA Guidelines, § 15061; *Davidon Homes v. City of San Jose* (6th Dist. 1997) 54 Cal. App. 4th 106, 112–120 [62 Cal. Rptr. 2d 612]. If the answer to the fifth inquiry is in the affirmative, no further review is required, though the agency should justify its conclusion in writing. *See* chapter V (Exempt Activities), section C.8 (the common sense exemptions).

1. Is the Agency Considering "Approval" of a Proposed Action?

CEQA generally applies to discretionary projects proposed to be carried out or approved by public agencies.

CEQA generally applies to "discretionary projects proposed to be carried out or approved by public agencies..." Pub. Resources Code, § 21080, subd. (a) (italics added). The CEQA Guidelines and case law have interpreted this quoted language to require a threshold, two-part analysis to determine the applicability of CEQA. The relevant inquiry is whether an agency proposes (1) to "approve," (2) a "project." *Lexington Hills Association v. State of California* (6th Dist. 1988) 200 Cal. App. 3d 415, 430–433 [246 Cal. Rptr. 97].

a. "Approval" Occurs When the Agency Commits to a Definite Course of Action. CEQA does not define the term "approve." The CEQA Guidelines, however, define "approval" as:

[T]he decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by a person. The exact date of approval of any project is a matter determined by each public agency according to its rules, regulations, and ordinances. Legislative action in regard to a project often constitutes approval.

CEQA Guidelines, § 15352, subd. (a)

For private projects, "approval occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project." CEQA Guidelines, § 15352, subd. (b).

no need to comply with CEQA in approving the agreement, and could instead limit its CEQA obligations to its *future* consideration of a specific plan and tentative map for the site. What is clear is that the opinion neither explicitly holds that CEQA does not apply to the legislative action of approving a development agreement (*see* Gov. Code, § 65867.5) nor discusses any possible legal authority for such a proposition. To the extent that readers might glean from the case any suggestion that CEQA generally does not apply to development agreements that unambiguously vest applicants' rights to develop property, the authors of this book believe that such a conclusion is contrary to long-settled principles of CEQA case law, for reasons discussed in chapter II (The Public Policies Explicit and Implicit in CEQA), section B.

In City of Chula Vista, the Court of Appeal considered what constitutes an approval for purposes of triggering the 180-day statute of limitations for challenging an action treated as exempt from CEQA.

NOE = Notice of exemption

b. "Approval" for Purposes of Triggering the 180-Day Statute of Limitations. In *City of Chula Vista v. County of San Diego* (4th Dist. 1994) 23 Cal. App. 4th 1713 [29 Cal. Rptr. 2d 89] (*City of Chula Vista*), the Court of Appeal considered what constitutes an "approval" for purposes of triggering the 180-day statute of limitations for challenging an action treated as exempt from CEQA. The action at issue was a five-year agreement pursuant to which the respondent county had authorized the continuing operation of a hazardous waste treatment and transfer facility. The petitioner city had filed its lawsuit within 180 days of the formal *execution* of the agreement, but had not filed within 180 days of the board of supervisors' decision authorizing its staff to *negotiate* the agreement. The county had filed a "notice of exemption" (NOE) after authorizing these negotiations, as though its decision constituted final project approval for CEQA purposes. In rejecting the city's lawsuit, the court agreed with the county's characterization of its action, reasoning that "the facts alleged in the city's petition... clearly show that the 'project' (*i.e.*, the agreement) was approved by the county on November 28, 1989, and the actual agreement executed on January 29, 1992, was not substantially different from the original 'project.'"⁴ *Id.* at p. 1720.⁵

The *City of Chula Vista* decision does not cite to *Miller v. City of Hermosa Beach*, (2d Dist. 1993) 13 Cal. App. 4th 1118 [17 Cal. Rptr. 2d 408] (*Miller*) (discussed in footnote 3, *supra*), even though these decisions are arguably in tension. *Miller* had held that a statute of limitations for a challenge to a hotel project ran from the formal issuance of a building permit rather than the prior approval of an "Approval in Concept." *Miller, supra*, 13 Cal. App. 4th at pp. 1142–1143. One possible means of reconciling these cases is to consider dispositive, or at least important, the fact in the *Miller* case, when the city granted its "Approval in Concept," the city apparently did not file a notice of exemption or undertake any other action indicating that the city regarded its CEQA obligations as being completed. *Id.* at pp. 1124, 1142–1143. In contrast, in *City of Chula Vista*, the county filed an NOE at the time it authorized its staff to negotiate the agreement with the operator of the hazardous waste facility. *City of Chula Vista, supra*, 23 Cal. App. 4th at p. 1717. The county thus provided public notice of the fact that it believed it had fulfilled its CEQA obligations. Together, the cases suggest that the courts may defer to an agency's own characterization of whether its action constitutes an "approval" of a project within the meaning of CEQA.

Together, these cases suggest that the courts may defer to an agency's own characterization of whether its action constitutes an approval of a project within the meaning of CEQA.

Notably, the court's decision in *City of Chula Vista* may have the unintended effect of requiring petitioners in similar situations to challenge agency actions that are somewhat tentative in nature, at least where the agency in question has filed

a notice of exemption or notice of determination after taking its action. In other words, based on this precedent, would-be litigants may now feel obligated (and in fact may be required) to file lawsuits prior to the execution of contracts between public agencies and private parties, even though the negotiation process, with its give and take, might eventually obviate the perceived need for such litigation.

c. “Disapproval” Does Not Require CEQA Compliance. CEQA does not apply to projects that an agency disapproves. Pub. Resources Code, § 21080, subd. (b)(5); CEQA Guidelines, § 15270, subd. (a); *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (4th Dist. 2000) 82 Cal. App. 4th 473, 479 [98 Cal. Rptr. 2d 202] (petitioner’s appeal could not compel a city to require supplemental environmental analysis based on changed circumstances in connection with a design review application where the city had *denied* the application); *Native Sun/Lyon Communities v. City of Escondido* (4th Dist. 1993) 15 Cal. App. 4th 892, 906–907 [19 Cal. Rptr. 2d 344] (EIR requirement is triggered only when “a public agency *proposes to carry out or approve* a project which may have a significant effect on the environment”) (italics in original); *Main San Gabriel Basin Watermaster v. State Water Resources Control Board* (2d Dist. 1993) 12 Cal. App. 4th 1371, 1379–1384 [16 Cal. Rptr. 2d 288] (an EIR was not required to disapprove a proposal to expand a landfill); *City of National City v. State of California* (4th Dist. 1983) 140 Cal. App. 3d 598, 602–603 [189 Cal. Rptr. 682] (CEQA review was not required to rescind a decision to construct a highway and release rights-of-way).

CEQA does not apply to projects that an agency disapproves.

2. Does the Subject Matter of the Proposed Action Constitute a “Project”?

After an agency determines that it proposes to “approve” an action, its next inquiry is whether the decision finalizing its commitment constitutes a “project.” See Pub. Resources Code, § 21065; CEQA Guidelines, §§ 15357, 15377, 15378.

After an agency determines that it proposes to approve an action, its next inquiry is whether the decision finalizing its commitment constitutes a project.

a. “Project” Definition—Public Resources Code Section 21065. As amended in 1994, CEQA defines “project” to mean “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:

- (a) An activity which is directly undertaken by any public agency.
- (b) An activity by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
- (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

Pub. Resources Code, § 21065⁶

According to the statutory definition, an activity that will not cause any *direct* environmental effects but that may cause some *indirect* environmental effects is not a “project” unless those indirect effects are “reasonably foreseeable.”

In *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal. 3d 247, 257–262 [104 Cal. Rptr. 761], the California Supreme Court held that the term “project” includes not only government-initiated actions, but also the government’s approval of privately-initiated “permits, leases, and other entitlements.” The statutory definition

An activity that will not cause any direct environmental effects but that may cause some indirect environmental effects is not a project unless those indirect effects are reasonably foreseeable.

has codified this conclusion. Pub. Resources Code, § 21065, subd. (c). To constitute a “project,” however, a proposed government action affecting private activity must bear “some minimal link with the [private] activity, either by direct proprietary interest or by permitting, regulating, or funding private activity.” *Simi Valley Recreation & Park District v. Local Agency Formation Commission* (2d Dist. 1975) 51 Cal. App. 3d 648, 664 [124 Cal. Rptr. 635] (*Simi Valley*).⁷ The “minimal link” may be “direct” or “ultimate.” CEQA Guidelines, § 15378, subd. (a).

i. CEQA Defines “Project” Broadly. Some early Court of Appeal decisions understood the term “project” to have a “sweeping definition.” *City of Santa Ana v. City of Garden Grove* (4th Dist. 1979) 100 Cal. App. 3d 521, 526–527 [160 Cal. Rptr. 907].⁸ As recently as 1997, one Court of Appeal stated that “CEQA defines a ‘project’ extremely broadly...” *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (2d Dist. 1997) 52 Cal. App. 4th 1165, 1188 [61 Cal. Rptr. 2d 447].

Other Court of Appeal decisions appear to reflect a fear that too broad an application of the concept of “project” would place too great a burden on agency activities. In *Lexington Hills Association v. State of California* (6th Dist. 1988) 200 Cal. App. 3d 415, 434 [246 Cal. Rptr. 97], for example, the Court of Appeal for the Sixth District described “the burden of preparing environmental reports” as “onerous.” In *Simi Valley Recreation & Park District v. Local Agency Formation Commission* (2d Dist. 1975) 51 Cal. App. 3d 648 [124 Cal. Rptr. 635] (*Simi Valley*), the Court of Appeal for the Second District stated:

CEQA was not intended to make and cannot reasonably be construed to make a project of every activity of a public agency, regardless of the nature and objective of such activity. Such a construction would invoke the expensive and time-consuming procedures required to complete at least a negative declaration in respect of virtually every action of a public agency. It is difficult to conceive of any such action which could not have a ‘potential for significant environmental effect[.]’

Id. at p. 663

Even actions that might be disparaged as mere governmental paper-shuffling can constitute projects, so long as they culminate in physical impacts to the environment.

ii. Planning Decisions That May Lead to Physical Environmental Impacts Are Considered “Projects.” Even actions that might be disparaged as mere “governmental paper-shuffling” (e.g., the adoption of a general plan) can constitute projects, so long as they “culminate” in physical impacts to the environment. *Bozung v. Local Agency Formation Commission* (1975) 13 Cal. 3d 263, 277–281 [118 Cal. Rptr. 249]. Thus, a discretionary agency action qualifies as a “project” whenever it is “necessary to the carrying out of some private project involving a physical change in the environment.” *Simi Valley Recreation & Park District v. Local Agency Formation Commission* (2d Dist. 1975) 51 Cal. App. 3d 648, 664 [124 Cal. Rptr. 635].¹⁰ For example, general plan amendments frequently can culminate in significant environmental effects, particularly where they will allow specific areas to be developed for previously disallowed land uses,¹¹ or set new policies with reasonably foreseeable real-world consequences.¹²

Similarly, the rezoning of property to achieve consistency with an existing coastal plan may necessitate the preparation of an EIR, particularly where the rezoning is the first step in processing a development project. In *City of Carmel-By-the-Sea v. Board of Supervisors of Monterey County* (6th Dist. 1986) 183 Cal. App. 3d 229

[227 Cal. Rptr. 899], for example, the court held that the agency must prepare an EIR, rather than a negative declaration, before the agency rezoned property to achieve consistency with a Land Use Plan prepared pursuant to Coastal Act (Pub. Resources Code, § 30000 *et seq.*). The court noted that the rezoning was the first step in processing a proposal to develop the land for residential, commercial, and recreational uses. *Id.* at pp. 243–244.

b. “Project” Definition—CEQA Guidelines Section 15378. The definition of “project” in the CEQA Guidelines includes language similar to that found in the statute (Pub. Resources Code, § 21065), and adds some significant detail. The Guidelines provide that “project” means “the *whole* of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment[.]” CEQA Guidelines, § 15378, subd. (a) (*italics added*). Examples of “activit[ies] directly undertaken by any public agency” include, but are not limited to, “public works construction and related activities, clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption and amendment of local General Plans or elements thereof pursuant to Government Code Sections 65100–65700.” CEQA Guidelines, § 15378, subd. (a)(1).

The Guidelines provide that “project” means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.

“The term ‘project’ refers to the activity that is being approved and that may be subject to several discretionary approvals by governmental agencies. The term ‘project’ does not mean each separate governmental approval.” CEQA Guidelines, § 15378, subd. (c); *see also Sherwin-Williams Co. v. South Coast Air Quality Management District* (2d Dist. 2001) 86 Cal. App. 4th 1258, 1286 [104 Cal. Rptr. 2d 288]; *Committee for a Progressive Gilroy v. State Water Resources Control Board* (3d Dist. 1987) 192 Cal. App. 3d 847, 863 [237 Cal. Rptr. 723]. “The purpose of Guidelines section 15378, subdivision (c) is to ensure that a project proponent does not file separate environmental reports for the same project to different agencies thereby preventing ‘consideration of the cumulative impact on the environment....’” *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (2d Dist. 1997) 52 Cal. App. 4th 1165, 1190, fn. 5 [61 Cal. Rptr. 2d 447] (quoting *City of Santee v. County of San Diego* (4th Dist. 1989) 214 Cal. App. 3d 1438, 1452 [263 Cal. Rptr. 340]).

The term project refers to the activity that is being approved and that may be subject to several discretionary approvals by governmental agencies. The term project does not mean each separate governmental approval.

CEQA Guidelines section 15378 also lists several activities that do *not* fall within the meaning of the term “project,” and thus are not subject to CEQA. These activities are: (1) proposals for legislation to be enacted by the State legislature; (2) continuing administrative or maintenance activities; (3) the submittal of proposals to a vote of the people of the state or of a particular community that does not involve an agency-sponsored initiative;¹³ (4) “[t]he creation of government funding mechanisms or other government fiscal activities which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment”; and (5) organizational or administrative activities of government that will not result in direct or indirect physical changes in the environment. CEQA Guidelines, § 15378, subs. (b)(1)–(5).¹⁴

c. “Project” Definition—Leading Cases. Whether a particular activity constitutes a project is a question of law as to which a reviewing court owes no deference to the judgment of a respondent agency. *Fullerton Joint Union High School District v. State Board of Education*

B. CEQA Applies to Discretionary Projects

CEQA applies to “discretionary projects.” CEQA does not apply to projects that are purely “ministerial.” Pub. Resources Code, § 21080, subds. (a), (b)(1); CEQA Guidelines, §§ 15268, 15357, 15369.¹⁸ One early Court of Appeal decision indicates, however, that even where a government approval involves virtually no discretion, CEQA review may be required if the approval “is the only point at which the environmental impact of the project may be publicly considered.” *Day v. City of Glendale* (2d Dist. 1975) 51 Cal. App. 3d 817, 824 [124 Cal. Rptr. 569] (*Day*) (issuance of grading permit was the only chance for CEQA review in process by which ridge would be cut and canyons filled to facilitate highway construction);¹⁹ see also *Friends of Westwood, Inc. v. City of Los Angeles* (2d Dist. 1987) 191 Cal. App. 3d 259, 271–273 [235 Cal. Rptr. 788] (*Friends of Westwood*) (in order to interpret CEQA “in such manner as to afford the *fullest possible protection* to the environment within the *reasonable* scope of the statutory language,” it may be necessary to apply CEQA “even where the process is largely ministerial”) (italics in original).

A “discretionary project” is one that “requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations.” CEQA Guidelines, § 15357.²⁰

“Ministerial projects,” on the other hand, “[involve] little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out.” CEQA Guidelines, § 15369.²¹ “The determination of what is ‘ministerial’ can most appropriately be made by the particular agency involved based upon its analysis of its own laws, and each public agency should make such determination either as part of its implementing regulations or on a case-by-case basis.” CEQA Guidelines, § 15268, subd. (a).²²

Projects with both ministerial and discretionary attributes are treated as discretionary. CEQA Guidelines, § 15268, subd. (d); *Miller v. City of Hermosa Beach* (2d Dist. 1993) 13 Cal. App. 4th 1118, 1139 [17 Cal. Rptr. 2d 408]; *Friends of Westwood, supra*, 191 Cal. App. 3d at pp. 270–271; *Citizens for Non-Toxic Pest Control v. California Department of Food and Agriculture* (1st Dist. 1986) 187 Cal. App. 3d 1575, 1583 [232 Cal. Rptr. 729]; *Environmental Law Fund v. City of Watsonville* (1st Dist. 1981) 124 Cal. App. 3d 711, 713 [177 Cal. Rptr. 542]; *San Diego Trust and Savings Bank v. Friends of Gill* (4th Dist. 1981) 121 Cal. App. 3d 203, 210–211 [174 Cal. Rptr. 784]; *Natural Resources Defense Council, Inc. v. Arcata National Corp.* (1st Dist. 1976) 59 Cal. App. 3d 959, 970 [131 Cal. Rptr. 172] (*Natural Resources Defense Council*); *Day, supra*, 51 Cal. App. 3d at pp. 823–824.²³ “[D]oubt whether a project is ministerial or discretionary should be resolved in favor of the latter characterization.” *Friends of Westwood, supra*, 191 Cal. App. 3d at p. 271 (quoting *People v. Department of Housing and Community Development* (3d Dist. 1975) 45 Cal. App. 3d 185, 194 [119 Cal. Rptr. 266]).

CEQA applies to discretionary projects; it does not apply to projects that are purely ministerial.

Ministerial projects involve little or no personal judgment by the public official as to the wisdom or manner of carrying out the project; he merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision.

Projects with both ministerial and discretionary attributes are treated as discretionary.

local agency decides to file an NOE, then the document is filed with the county clerk. If a state agency decides to file an NOE, then the document is filed with the Office of Planning and Research (OPR). Pub. Resources Code, §§ 21108, subd. (b), 21152, subd. (b); CEQA Guidelines, § 15062.²² “All public agencies are encouraged to make [their NOEs] available in electronic format on the Internet. Such electronic postings are in addition to the procedures required” by the CEQA Guidelines “and the Public Resources Code.” CEQA Guidelines, § 15062, subd. (c)(3). Practitioners should note, however, that while the filing of an NOE is generally optional, there are certain situations in which, by statute, agencies must file with OPR notices that they have determined that approvals of certain kinds of housing projects (*see* Pub. Resources Code, §§ 21159.22–21159.24, discussed in this chapter in section C.2.h, *infra*) have been treated as exempt from CEQA. Pub. Resources Code, § 21152.1, subd. (a).²³

If the agency files an NOE, then interested persons have 35 days in which to file a legal challenge to the agency's determination of exemption.

ii. Filing a Notice of Exemption Triggers 35-Day Statute of Limitations. If the agency files an NOE, then interested persons have 35 days in which to file a legal challenge to the agency's determination of exemption. Pub. Resources Code, § 21167, subd. (d); CEQA Guidelines, §§ 15062, subd. (d), 15112, subd. (c)(2); *Apartment Association of Greater Los Angeles v. City of Los Angeles* (2d Dist. 2001) 90 Cal. App. 4th 1162, 1171 [109 Cal. Rptr. 2d 504]. The NOE cannot be filed until after the agency acts to approve the project; thus, an NOE filed prior to project approval does not trigger the 35-day statute of limitations. CEQA Guidelines, § 15062, subd. (a); *County of Amador v. El Dorado County Water Agency* (3d Dist. 1999) 76 Cal. App. 4th 931, 962–964 [91 Cal. Rptr. 2d 66] (*County of Amador*). Further, for the 35-day period to apply, state agencies must file NOEs with OPR; and local agencies must file them with the county clerk. Pub. Resources Code, §§ 21108, 21152, 21167, subd. (f); CEQA Guidelines, § 15062, subd. (c); *Lewis v. Seventeenth District Agricultural Association* (3d Dist. 1985) 165 Cal. App. 3d 823, 831 [211 Cal. Rptr. 884]. Once the local agency files the notice with the clerk, the clerk must post the document within 24 hours, for a period of 30 days. Pub. Resources Code, § 21152, subd. (c); *County of Amador, supra*, 76 Cal. App. 4th at pp. 962–963.²⁴

If the agency does not file an NOE, or if the notice is materially defective, then the statute of limitations period to challenge its determination is 180 days.

If the agency does not file an NOE, or if the notice is materially defective, then the statute of limitations period to challenge its determination is 180 days. Pub. Resources Code, § 21167, subd. (d); CEQA Guidelines, § 15062, subd. (d); *Apartment Association of Greater Los Angeles, supra*, 90 Cal. App. 4th at p. 1171; *County of Amador, supra*, 76 Cal. App. 4th at p. 963; *City of Chula Vista v. County of San Diego* (4th Dist. 1994) 23 Cal. App. 4th 1713, 1719–1720 [29 Cal. Rptr. 2d 89].²⁵

iii. Required Contents of a Notice of Exemption. Appendix E of the CEQA Guidelines provides a suggested format for an NOE, which must contain the following information:

- A brief description of the project
- The location of the project either by street address or map
- A finding that the project is exempt, including a citation to the relevant CEQA Guideline section under which the project is exempt; and
- A brief statement of reasons to support the finding

CEQA Guidelines, § 15062, subd. (a)

environment and are beyond the reach of CEQA. For all intents and purposes, what was visible before will be no different than what will be visible if the modifications are completed. [Footnote omitted.] Both theoretically and practically, the concept of an "environment" must mean something more than what is perceivable only by the one person who wishes to change his or her own decor and those who may visit him at his home."); *id.* at p. 404 (the "sine qua non of CEQA is missing here; no one not actually inside Martin's house will have any percipient awareness that interior modifications have been made.

*** *Destruction of an irreplaceable antiquity not being savored by the public does not qualify as a significant effect.*" (italics added.)). A broad reading of the case might for instance lead to the conclusion that impacts to all historical or archeological resources that are underground on private property are not protected by CEQA. Such a conclusion would appear to be at odds with Public Resources Code sections 21083.2 and 21084.1 and CEQA Guidelines section 15064.5, subdivision (c).

18. See also *Qwest Communication Corp. v. City of Berkeley* (N.D. Cal. 2001) 146 F. Supp. 2d 1081, 1105 (CEQA did not apply to an application for excavation because approval of the proposal under the city's general excavation permit process involved a ministerial act).

19. The quotation set forth above may be dicta, and has not been followed by other courts. In any event, the Court of Appeal in *Day v. City of Glendale* (2d Dist. 1975) 51 Cal. App. 3d 817, 824 [124 Cal. Rptr. 569] (*Day*) found that the respondent city's grading ordinance was of a "mixed ministerial-discretionary" character, because the factors to be considered in issuing the permit "require[d] the exercise of judgment, deliberation, and decision by the city engineer." *Day, supra*, 51 Cal. App. 3d at p. 823. As discussed in more detail elsewhere in this section, projects with both ministerial and discretionary attributes are generally treated as being discretionary. CEQA Guidelines, § 15268, subd. (d).

20. See also CEQA Guidelines, § 15002, subd. (i) (CEQA applies to discretionary actions); *Johnson v. State of California* (1968) 69 Cal. 2d 782, 788 [73 Cal. Rptr. 240] ("[a] discretionary act is one which requires 'personal deliberation, decision and judgment' while an act is said to be ministerial when it amounts 'only to... the performance of a duty in which the officer is left no choice of his own'"); *Prentiss v. City of South Pasadena* (2d Dist. 1993) 15 Cal. App. 4th 85, 90-91 [18 Cal. Rptr. 2d 641] (*Prentiss*) (quoting CEQA

Guidelines sections 15357 and 15369 defining "discretionary" and "ministerial" actions, respectively); *Miller v. City of Hermosa Beach* (2d Dist. 1993) 13 Cal. App. 4th 1118, 1139 [17 Cal. Rptr. 2d 408] (*Miller*) (same); *Natural Resources Defense Council, Inc. v. Arcata National Corp.* (1st Dist. 1976) 59 Cal. App. 3d 959, 969-970 [131 Cal. Rptr. 172] (*Natural Resources Defense Council*) (discussing general principles in determining whether an action is "discretionary" or "ministerial," and concluding that "[a]lthough whether an act qualifies as discretionary or ministerial in a concrete instance is subject to varying interpretation, the cases dealing with environmental disputes point out that statutory policy, not semantics, is the controlling standard"); *Day, supra*, 51 Cal. App. 3d at p. 822 (discussing CEQA Guidelines definitions of "discretionary" and "ministerial" actions and concluding that CEQA does not give local agencies absolute power to determine which projects are ministerial).

21. See also CEQA Guidelines, § 15268, subd. (b) (outlining CEQA exemption for ministerial projects).

22. See also *Friends of Davis v. City of Davis* (3d Dist. 2000) 83 Cal. App. 4th 1004, 1015 [100 Cal. Rptr. 2d 413] (quoting CEQA Guidelines, § 15268, subd. (a), in explaining that respondent city's interpretation of the scope of its own design review ordinance is entitled to great weight unless clearly erroneous or unauthorized).

23. Cf. *Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal. 4th 105, 119 [65 Cal. Rptr. 2d 580] ("the Legislature intended CEQA to apply to discretionary projects, even when the agency's discretion to fully comply with CEQA is constrained by the substantive laws governing its actions").

24. Compare *Nacimiento Regional Water Management Advisory Com. v. Monterey County Water Resources Agency* (2d Dist. 1993) 15 Cal. App. 4th 200, 207-208 [19 Cal. Rptr. 2d 1] (relying on the implied statutory exemption for projects commenced prior to the enactment of CEQA rather than on the express statutory exemption for ministerial projects, the Court of Appeal held that the respondent water agency was not required to comply with CEQA before making its annual decision to allocate reservoir water amongst various competing agricultural, municipal, and environmental uses; the dam in question had been built in the 1950's); *First Presbyterian Church v. City of Berkeley* (1st Dist. 1997) 59 Cal. App. 4th 1241, 1255-1257 [69 Cal. Rptr. 2d 710] (the Ellis Act (Gov. Code, § 7060 *et seq.*), which allows owners of rental units

**CITY OF MERCED
Planning Commission**

Resolution #2904

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|---|
| MODIFIED by Planning Commission on 10/3/18 –see pg. 3-13 |
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| AMENDED by Planning Commission on 6/6/18 – see pg. 10 |
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| Extended on 7/15/08, 7/15/09, 7/15/11, 7/11/13, and 10/10/15–See Pages 9-10 |
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| AMENDED by City Council on 1/16/07 – Pg 3 |
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WHEREAS, the Merced City Planning Commission at its regular meeting of November 8, 2006, held a public hearing and considered **Vesting Tentative Subdivision Map #1291** (“Bright Development”), initiated by Golden Valley Engineering, applicants for Bright Homes Corporation, property owner, to allow the subdivision of 39.8 acres into 168 single-family residential lots. The area is located east of G Street, and ¼ mile north of Cardella Road within an R-1-5 (Low Density Residential, 5,000-square-foot lot minimum) pre-zone; also known as Assessor’s Parcel No. 061-030-017 and -038; and,

WHEREAS, the Merced City Planning Commission does not concur with Findings A through V of Staff Report #06-41 – 4th Addendum, and finds as follows in additional Finding W:

“W. During their testimony during the public hearing, the project applicants indicated that they wanted changes to Condition Numbers 2, 16, 20, & 21 and the deletion of Condition #29. Planning staff indicated that these changes were not recommended since they appeared to be in conflict with the Voting Rights Act and the adopted Pre-Annexation Development Agreement signed by the applicants. The Planning Commission reviewed various documents regarding the Annexation Agreement and the City Attorney clarified the delay with the recordation of the annexation pending required pre-clearance under the Voting Rights Act.

“At that time, the Commission indicated that they didn't feel they had enough information to make a decision to approve the project at this point and they did not want to contradict the previous agreements. However, the applicants had asked that a decision be made at this meeting due to the previous continuances. Given the above, the Planning Commission voted to deny the applications and informed the applicants that they could appeal their decision to the City Council.”

WHEREAS, after reviewing the City’s Initial Study and Draft Environmental Determination, and fully discussing all the issues, the Merced City Planning

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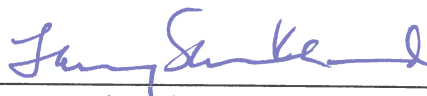
November 8, 2006 / January 16, 2007 / August 3, 2010 / July 15, 2011 / July 11, 2013 /
October 10, 2015 / June 6, 2018 / October 3, 2018

WHEREAS, after reviewing the City's Initial Study and Draft Environmental Determination, and fully discussing all the issues, the Merced City Planning Commission does resolve to hereby deny Vesting Tentative Subdivision Map #1291.

Upon motion by Commissioner Amey, seconded by Commissioner Burr, and carried by the following vote:

AYES: Commissioners Acheson, Amey, Burr, and Chairman
Shankland
NOES: Commissioner Ward
ABSENT: Commissioners Conte and Fisher

Adopted this 8th day of November, 2006



Chairman, Planning Commission of
the City of Merced, California

ATTEST:


Secretary

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January 16, 2007: At their regularly scheduled City Council meeting of January 16, 2007, the City Council considered the Applicant's appeal of the Planning Commission Denial of Vesting Tentative Subdivision Map #1291 ("Bright Development") and took the following action:

Upon Motion by Council Member Gabriault-Acosta, Seconded by Council Member Pollard, duly carried, resolved, to approve Findings A through S, finding that the previous environmental review [Expanded Initial Study #04-02 (Mitigated Negative Declaration) for the Absolute/Leeco Annexation] remains sufficient and no further documentation is required (Subsequent EIR/ND Section 15162 Findings), and approves Vesting Tentative Subdivision Map Application No. 1291 ("Bright Development"), subject to the amended conditions as recommended by Staff to the Planning Commission on November 8, 2006, and modification of Condition #21 of Staff Report No. 06-42 – 4th Addendum, as follows:

Modified
by PC on
10/3/18.
See pg. 11

1. ~~The proposed project shall be constructed/designed as shown on Exhibit 1 (Proposed Vesting Tentative Map) Attachment C, subject to the listed conditions.~~
2. All conditions contained in Resolution #1175-Amended ("Standard Tentative Subdivision Map Conditions") shall apply, as well as conditions and mitigation measures spelled out in the Pre-Annexation Development Agreement for Absolute/Leeco Annexation (including the need to comply with the 6-minute emergency response time in the Pre-Annexation Development Agreement), adopted April 17, 2006, and any subsequent amendments (see Attachment F for mitigation measures).
3. The proposed project shall comply with all standard Municipal Code (including R-1-5 design standards) and Subdivision Map Act requirements as applied by the City Engineering Department.
4. All other applicable codes, ordinances, policies, etc., adopted by the City of Merced shall apply.

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5. Community Facilities District (CFD) formation is required for annual operating costs for police and fire services as well as storm drainage, public landscaping, street trees, street lights, parks and open space. CFD procedures shall be initiated before final map approval. Developer/Owner shall submit a request agreeing to such a procedure, waiving right to protest and post deposit as determined by the City Engineer to be sufficient to cover procedure costs and maintenance costs expected prior to first assessments being received.
6. The developer/applicant shall indemnify, protect, defend, and hold harmless the City, and any agency or instrumentality thereof, and any officers, officials, employees, or agents thereof, from any and all claims, actions, or proceedings against the City, or any agency or instrumentality thereof, and any officers, officials, employees, or agents thereof to attack, set aside, void, or annul, an approval of the City, or any agency or instrumentality thereof, advisory agency, appeal board, or legislative body, including actions approved by the voters of the City, concerning the project and the approvals granted herein. City shall promptly notify the developer/applicant of any claim, action, or proceeding. City shall further cooperate fully in the defense of the action. Should the City fail to either promptly notify or cooperate fully, the developer/applicant shall not thereafter be responsible to indemnify, defend, protect, or hold harmless the City, any agency or instrumentality thereof, or any of its officers, officials, employees, or agents.
7. The developer/applicant shall construct and operate the project in strict compliance with the approvals granted herein, City standards, laws, and ordinances, and in compliance with all State and Federal laws, regulations, and standards. In the event of a conflict between City laws and standards and a State or Federal law, regulation, or standard, the stricter or higher standard shall control.
8. Street names to be approved by City Engineer.
9. Dedicate, by Final Map, all interior street rights-of-way and all necessary easements and as needed for irrigation, utilities, drainage,

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landscaping, and open space, including any right-of-way necessary to reflect the modified alignment of the north-south oriented collector road in the eastern portion of the project located adjacent to the park and linear open space corridor.

Modified
by PC on
10/3/18.
See pg. 11

- ~~10. Developer shall design storm drainage with consideration as to whether the shared pump station pumping rate can or needs to be constructed in phases. Developer shall share costs of pump station with the subdivision to the north (“Palisades Park”) if joint use occurs, or if pump station is necessary. Storm drainage shall comply with City Storm Drainage Master Plan.~~

Modified
by PC on
10/3/18.
See pg. 11

- ~~11. Developer shall design sanitary sewer with consideration as to whether the shared pump station pumping rate can or needs to be constructed in phases. Developer shall share costs of pump station with the subdivision to the north (“Palisades Park”) if joint use occurs, or if pump station is necessary.~~

Modified by
PC on
10/3/18. See
pg. 11

- ~~12. Dedicate additional G Street right of way and easements to match Merced Vision 2015 General Plan requirements for 128 foot wide arterial, plus landscape and public facilities easements of 15 feet in width, including the construction of a 6 foot high masonry wall. Consistent with Planning Commission Resolution #2871 (Absolute Leeco Annexation), all of “G” Street within the annexation boundary shall be constructed at the time of improvements for the first tentative map, along with all other requirements listed in Condition #7 of said Resolution.~~

Modified by
PC on
10/3/18. See
pg. 11

- ~~13. Dedicate additional right of way and easements along the northern half of Merrill Avenue to match Merced Vision 2015 General Plan requirements for 74 foot wide collector (37 feet of ROW), plus landscape and public facilities easements varying from 10 feet to 12 feet in width, including the construction of a 6 foot high masonry wall along the northern portion of the roadway. These improvements shall terminate at the northeast corner of the intersection of Merrill Avenue and “K” Drive as indicated on the Tentative Map.~~

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14. Provide for City review and approval of landscape/irrigation plans, prepared by a licensed landscape architect, for all areas of landscaping that are to be maintained by City.
15. Compliance with the 40-foot visual corner is required for corner lots (approximately 20 lots), and may result in the applicant constructing smaller homes on these lots or increasing the front yard setbacks. A 4-foot encroachment for the porch area can be allowed within this area. Details to be worked out with staff.
16. The effective date of this tentative map approval shall be the effective date of the final annexation for Absolute/Leeco. (Annexation to the City has not yet been finalized and is subject to pre-clearance under the Voting Rights Act before the Annexation can become effective.)
17. The proposed Community Park shall be designed for park and recreational use only. Basin or storm-water retention allowed within this park shall be consistent with the Park Master Plan. All bike trails within the linear park shall be a minimum width of 10-12 feet as per the Park Master Plan.
18. Refuse containers shall be stored out of site of the general public, including those homes located on the private driveways. A concrete pad (3 x 6 foot minimum) shall be installed in the side or back yard of each unit to house refuse containers with a paved path to the street.
19. There shall be no valley (cross) gutters installed within this subdivision.
20. Merrill Avenue shall be constructed to include a paved travel lane that is 23.5 feet wide curb-to-curb, with a 6-inch vertical asphalt curb along the south boundary line. The north side of Merrill Avenue will need to include curb and gutter, park strip, and a 5-foot sidewalk. Developer shall construct the roadway prior to issuance of the first certificate of occupancy. Developer shall complete the intersection of Foothill Drive and G Street by expanding the intersection to a 4-way, signalized intersection prior to the issuance of the 50th building permit. This

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includes a median at the intersection of G Street and Merrill Avenue. The Developer shall coordinate the design of this roadway, to the extent feasible, with the adjoining property owner to the south.

21. The drainage basins along the PG&E power-line easements and within the neighborhood park/basins shall be designed in an open manner with no barriers, fences, etc., hindering their use as open space. All basins will need to be constructed and functional with City acceptance prior to issuance of the first certificate of occupancy. The linear and neighborhood parks will need to be transferred to the City of Merced per the terms of the Pre-Annexation Development Agreement.

Modified by
PC on
10/3/18. See
pg. 12

- ~~22. The secondary access point shall be located at the intersection of Foothill Drive and G Street. The secondary access point shall be installed prior to the issuance of the 1st certificate of occupancy permit.~~

23. City staff encourages and recommends the applicant to seek a water agreement with Merced Irrigation District for the usage of non-potable water for the use of irrigation of the City Landscaped areas such as Park-Strips, Parks, and any other area where non-potable water is allowed to be used and is approved by the Public Works Director.

24. The street tree and street light locations shall be approved by City Staff prior to approval of the first Final Map.

Modified
by PC on
10/3/18.
See pg. 12

- ~~25. The cul-de-sac bulb, 'J' Court, shall be open end style including sidewalk connectors to adjacent linear parks (within the PG&E easement) and local streets and walls from back of house to back of house. The linear park and PG&E Easement shall be designed in an open manner, with no fences or other hindrances that would impede pedestrian accessibility of both easements as they intersect with each other and 'J' Court.~~

Deleted by
PC on
10/3/18.

- ~~26. The cul-de-sac bulb labeled as 'D' Court shall be designed with park-strips due to its extended length.~~

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27. City utility service (water and sewer) connections shall be located under the driveway for each lot that faces a City street. Water lines are privately owned and maintained between the meter and the home. Sewer lines are privately owned and maintained from the point of connection to the City-owned main sewer line.
28. Fire Hydrants to be provided and spaced in accordance with City of Merced standards. The maximum spacing between hydrants is 500 feet. Due to width issues of G Street, fire hydrants will need to be placed along the east side of this arterial roadway. The number and placement of fire hydrants to be worked out with the Fire Department.
29. The following design features shall be added to the elevations for the homes throughout the subdivision:
 - a. *Garages Doors*: Design features such as windows and door molds, or driveway pavement treatments, such as aggregate, integral color, and stamped patterns, shall be added. These designs shall be varied from one lot to the other.
 - b. *Front Elevations*:
 - i. All proposed elevations show stucco as the primary building facia material. At least one of the plans shall be amended to show wood siding as the primary facia material, or stone or brick panels (approximately 3 feet high) along the bottom of the facia as a required element, not an option.
 - ii. Each elevation is to be evenly distributed throughout the site. Prior to submittal of building permits, the applicant shall provide the Development Services Director with a “distribution plan” showing the: house plan elevation, color, roof material, porch design, and garage door/pavement design selected for each lot. In no case, shall any more than two adjacent lots in a row have the same elevation.

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- iii. Blank rear and side elevations visible from a street are not permitted. The elevation shall include functional features (windows and doors, or be adorned with attractive features in addition to landscaping).
- iv. The color palette for houses shall be varied (at least 6 distinct sets of colors) and be consistent with the style of the house.
- v. High quality aesthetically pleasing materials (wood, stone, iron, pre-formed plastic fencing, etc.) shall be used.

BY THE FOLLOWING VOTE:

AYES: COUNCIL MEMBERS: SPRIGGS, CORTEZ, GABRIALT-ACOSTA, POLLARD, SANDERS, WOOTEN
NOES: COUNCIL MEMBERS: NONE
ABSTAIN: COUNCIL MEMBERS: NONE
ABSENT: COUNCIL MEMBERS: OSORIO

July 15, 2008/July 15, 2009: On July 15, 2008, the State of California gave a one-year extension to all active (not expired) tentative maps that were otherwise scheduled to expire on or before December 30, 2010. On July 15, 2009, the State of California gave a second, two-year extension. Therefore, this Tentative Map #1291 hereby has its expiration date extended to January 16, 2012.

July 15, 2011: On July 15, 2011, the State of California gave a 24-month extension to all active (not expired) tentative maps that were otherwise scheduled to expire on or before January 1, 2014. Therefore, Vesting Tentative Subdivision Map #1291 hereby has its expiration date extended to January 16, 2014.

July 11, 2013: On July 11, 2013, the State of California gave a 24-month extension to all active (not expired) tentative maps that were approved on or after January 1, 2000. Therefore, Vesting Tentative Subdivision Map #1291 hereby has its expiration date extended to January 16, 2016.

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October 10, 2015: On October 10, 2015, the State of California gave a 24-month extension to all active (not expired) tentative maps that were approved on or after January 1, 2002, and not later than July 11, 2013. Therefore, Vesting Tentative Subdivision Map #1291 hereby has its expiration date extended to January 16, 2018.

June 6, 2018: At their regularly scheduled meeting of June 6, 2018, the Planning Commission approved the Extension of Vesting Tentative map #1291 (“Bright Homes”) for one year (to January 16, 2019), subject to the following additional conditions:

30. A revised vesting tentative map shall be submitted within 60 days of the date this extension is granted. The revised map shall include the following:
 - a. All lots shall be on property owned by the applicant.
 - b. All roads through the subdivision shall be on property owned by the applicant.
 - c. Access from Merrill Place into the subdivision on Palisades Drive shall be on property owned by the applicant or the right-of-way must have been dedicated to the City of Merced prior to submitting the revised map.
31. If after 60 days the above conditions have not been met, Vesting Tentative Map #1291 will automatically expire.

Upon motion by Commissioner PADILLA, seconded by Commissioner COLBY, and carried by the following vote:

AYES: Commissioners Alshami, Camper, Colby, Martinez, Padilla, and Chairperson Dylina

NOES: None

ABSENT: None, (One vacancy)

ABSTAIN: None

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October 3, 2018: At their regularly scheduled meeting of October 3, 2018, the Planning Commission approved the modifications to Vesting Tentative map #1291 (“Bright Homes”) subject to the conditions contained within this resolution, including modifications to Conditions #1, #10, #11, #12, #13, #22, and #25, the deletion of Condition #26, and the addition of Conditions #32 through #44. :

1. The proposed project shall be constructed/designed as shown on Exhibit 1 [Proposed Vesting Tentative Map #1291 (Modified)] - Attachment C of Staff Report #18-29, except as modified by the conditions.
10. Developer shall design storm drainage with consideration as to whether the shared pump station pumping rate can or needs to be constructed in phases. Developer shall share costs of pump station with the property owner to the north, if joint use occurs, or if pump station is necessary. Storm drainage shall comply with City Storm Drainage Master Plan.
11. Developer shall design sanitary sewer with consideration as to whether the shared pump station pumping rate can or needs to be constructed in phases.
12. Dedicate additional G Street right-of-way and easements to match *Merced Vision 2030 General Plan* requirements for a 128-foot wide arterial, plus an additional 15 feet of right-of-way to accommodate the required landscape area, block wall, and utilities. A 7-foot-tall block wall shall be constructed along the project’s frontage on G Street. Consistent with Planning Commission Resolution #2871 (Absolute Leeco Annexation), all of “G” Street within the annexation boundary shall be constructed at the time of improvements for the first tentative map, along with all other requirements listed in Condition #7 of said Resolution.
13. Dedicate additional right-of-way and easements along the northern half of Merrill Avenue to match *Merced Vision 2030 General Plan* requirements for 74-foot wide collector (37-feet of ROW), an additional 10 feet of right-of-way to accommodate the required landscape area, block wall, and utilities. A 7-foot-tall wall shall be constructed along the project’s frontage on Merrill Avenue (Place). The

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- block wall may be constructed in phases consistent with the tentative map. All of the land required for this development's share of Merrill Avenue (Place) shall be dedicated with the first final map.
22. Secondary access to the subdivision shall be provided by a Temporary Emergency Vehicle Access easement constructed between Lots 1 and 15 of Modified Tentative map #1291 to be maintained by the CFD.
 25. The linear park and PG&E Easement shall be designed in an open manner, with no fences or other hindrances that would impede pedestrian accessibility.
 32. At the time of Final Map, all references to a "PFE" (Public Facilities Easement) shall be changed to reflect the actual purpose of the easement. For example, if the easement is for utilities and a block wall, the easement should be labeled as a PUE (Public Utilities Easement) and Block Wall easement.
 33. The Emergency Vehicle Access (EVA) is allowed on G Street as a temporary access only. The design of the EVA shall be approved by the Fire, Engineering, and Planning Departments. Pedestrian access should be implemented into the EVA.
 34. Once Palisades Drive and Foothill Drive are constructed which provides secondary access into the subdivision, the EVA shall be abandoned at the owner's expense.
 35. All easements shall be large enough to provide room for all utilities without utilities being placed underneath the City sidewalk.
 36. The Tentative Map shows the EVA as "Lot A" and the 3.10 acres at the eastern edge of the subdivision as "Lot A". This shall be corrected on the final map so that there is no duplication of the lot designations.
 37. Access to Lot A (at the eastern edge of the subdivision) as shown on VTSM #1291 (Modified) shall be provided from this subdivision. The exact location of the access point shall be determined when development occurs on Lot A.
 38. The location of the pump station shown on the park/basin parcel is not approved. The exact location of the pump station will be determined prior to the first final map.

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39. The cul-de-sacs at Court E and Court L shall be open-ended cul-de-sacs providing access to F Street.
40. The owner shall work with the City of Merced to obtain the additional right of way needed for the southern portion of Merrill Place.
41. The area shown as Lot A for the Emergency Vehicle Access on the tentative map shall be re-labeled due to duplication with the area to the east of the subdivision also shown as Lot A.
42. The Emergency Vehicle Access (EVA) Easement area shall be dedicated to the City. If sewer and water main lines are to be placed this area, a public utilities easement shall be maintained upon vacation of the EVA.
43. The EVA area may remain open to allow pedestrian access to the subdivision from G Street if the developer desires to do so after it is no longer needed as an EVA. However, if the pedestrian access is not maintained or problems arise with the use of the access area, it shall be the responsibility of the developer/subdivider to install the block wall in this area.
44. "F" Street shall have a 94-foot-wide right-of-way to include the 74-foot-wide collector road and a 10-foot-wide easement. All walls, landscaping, and utilities shall be included in this easement area.

Upon motion by Commissioner PADILLA, seconded by Commissioner HARRIS, and carried by the following vote:

AYES: Commissioners Camper, Drexel, Harris, Padilla, Rashe, and Chairperson Dylina

NOES: None

ABSENT: Commissioner Martinez

ABSTAIN: None