

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY COUNCIL OF
THE CITY OF MERCED, CALIFORNIA,
APPROVING A PRE-ANNEXATION
DEVELOPMENT AGREEMENT BETWEEN THE
CITY OF MERCED AND LOU ANN BIANCHI FOR
THE HIGHWAY 59 AND SANTA FE
ANNEXATION**

WHEREAS, Section 65864 *et seq.* of the Government Code of the State of California and City of Merced Resolution 2005-101 authorize the execution of agreements establishing and maintaining requirements applicable to the development of real property; and,

WHEREAS, In accordance with the procedure specified in said Resolution, Lou Ann Bianchi, hereinafter “the Developer” has filed with the City of Merced an application for a Pre-Annexation Development Agreement (hereinafter “this Agreement”), for property generally located at the northwest corner of North Highway 59 and Santa Fe Drive, and said application has been reviewed and accepted for filing by the Director of Development Services; and,

WHEREAS, Notice of the City’s intention to consider adoption of this Agreement with the Developer has been duly given in the form and manner required by law, and the Planning Commission and City Council of said City have each conducted public hearings on June 6, 2018 (Planning Commission), and July 16, 2018 (City Council) at which time each heard and considered all evidence relevant and material to said subject.

**THE CITY COUNCIL OF THE CITY OF MERCED DOES ORDAIN
AS FOLLOWS:**

SECTION 1. FINDINGS. The City Council hereby finds and determines, with respect to this Agreement by and between the City of Merced and the Developer, that it:

- A. Is consistent with the objectives, policies, general land uses, and programs specified in the City of Merced’s General Plan in that this Agreement makes reasonable provision for the use of certain real

property for commercial development consistent with the General Plan's land use designation of Thoroughfare Commercial (CT);

- B. Is compatible with the uses authorized in, and the regulations prescribed for, the land use district in which the Subject Property referred to therein is located as this Agreement provides for commercial development;
- C. Is in conformity with the public convenience, general welfare, and good land use practice because it makes reasonable provision for a balance of land uses compatible with the remainder of the City;
- D. Will not be detrimental to the health, safety, or general welfare because it provides adequate assurances for the protection thereof;
- E. Notice of the public hearing before the Planning Commission was published in a newspaper of general circulation at least ten (10) days before the Planning Commission public hearing, and mailed or delivered at least ten (10) days prior to the hearing to the project applicant and to each agency expected to provide water, sewer, schools, police protection, and fire protection, and to all property owners within three hundred feet (300') of the property as shown on the latest equalized assessment roll;
- F. Notice of the public hearing before the Planning Commission included the date, time, and place of the public hearing, the identity of the hearing body, a general explanation of the matter to be considered, a general description and text or by diagram of the location of the real property that is the subject of the hearing, and of the need to exhaust administrative remedies;
- G. Notice of the public hearing before the City Council was published in a newspaper of general circulation at least ten (10) days prior to the City Council public hearing, mailed at least ten (10) days prior to the hearing to the project applicant, to each agency expected to provide water, sewer, schools, police protection, and fire protection, and to all property owners within three hundred feet (300') of the property as shown on the latest equalized assessment roll;

- H. Notice of the City Council hearing included the date, the time, and place of the public hearing, the identity of the hearing body, the general explanation of the matter to be considered, a general description in text or by diagram of the location of the Subject Property that is the subject of the hearing, and the notice of the need to exhaust administrative remedies;
- I. City Council approved this Agreement by Ordinance based upon evidence and findings of the Planning Commission and new evidence presented at its hearing on this Agreement, giving its reasons therefore and set forth their relationship between this Agreement and the General Plan;
- J. The benefits that will accrue to the people of the City of Merced from this legislation and this Agreement are as follows:
 - a. Participation in future Financing Districts to finance the expansion of the City's sewer facilities and system to upgrade the City's sewer treatment facility;
 - b. Upgrade, improvement, and replacement of existing public infrastructure adjacent to and within the Subject Property, including as follows:
 - i. Install all public improvements, including but not limited to, sidewalk, curb, gutter, street lights, and street trees along the property frontage along North Highway 59 and Santa Fe Drive;
 - ii. Extension of City water and sewer facilities across the full frontage of the property along Santa Fe Avenue;
 - iii. Provide fire hydrants as determined by the Fire Marshal; and,
 - iv. Provide storm drainage tie-in into existing storm water drainage system.

- c. Underground all utilities within the Subject Property site, but shall not be responsible for undergrounding existing utilities outside of the Subject Property;
- d. Connect all development to the City water system and pay all applicable connection fees;
- e. Developer agrees to form a Mello-Roos Community Facilities District (CFD) for infrastructure and maintenance within the Subject Property with waiver of protest rights;
- f. Improve/upgrade/replace all existing County infrastructure (road, utilities, etc.) adjacent to and within the Subject Property consistent with City of Merced standards.

The foregoing improvements are to be constructed and paid for by Developer.

SECTION 2. APPROVAL. This Agreement, attached hereto and incorporated herein by this reference as Attachment “1” is hereby approved. The City Manager is authorized and directed to evidence such approval by executing this Agreement for, and in the name of, the City of Merced; and the City Clerk is directed to attest thereto; provided, however, that this Agreement shall not be executed by the City until this Ordinance takes effect and the City has received from the applicant two executed originals of said Agreement.

SECTION 3. EFFECTIVE DATE. This Ordinance shall be in full force and effect thirty (30) days after its adoption.

SECTION 4. SEVERABILITY. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance, is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have adopted this Ordinance, and each section, subsection, subdivision, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

SECTION 5. PUBLICATION. The City Clerk is directed to cause a copy of this Ordinance to be published in the official newspaper at least once within fifteen (15) days after its adoption.

The foregoing Ordinance was introduced at a regular meeting of the City Council of the City of Merced on the 2nd day of July 2018, and was passed and adopted at a regular meeting of said City Council held on the 16th day of July 2018, by the following called vote:

AYES: Council Members:

NOES: Council Members:

ABSTAIN: Council Members:

ABSENT: Council Members:

APPROVED:

Mayor

**ATTEST:
STEVE CARRIGAN, CITY CLERK**

**BY: _____
Assistant/Deputy City Clerk**

(SEAL)

APPROVED AS TO FORM:

 6-15-2018

City Attorney **Date**

NOTICE OF POTENTIAL INTRODUCTION OF ORDINANCE

CITY OF MERCED

NOTICE IS HEREBY GIVEN that on _____, 2018, the City Council of the City of Merced is scheduled to consider the introduction of an Ordinance entitled:

**AN ORDINANCE OF THE CITY COUNCIL OF
THE CITY OF MERCED, CALIFORNIA,
APPROVING A PRE-ANNEXATION
DEVELOPMENT AGREEMENT BETWEEN THE
CITY OF MERCED AND LOU ANN BIANCHI FOR
THE HIGHWAY 59 AND SANTA FE
ANNEXATION**

at its regular meeting to be held at 6:00 pm in the City Council Chambers at 678 West 18th Street, Merced, California. The public is invited to provide any oral or written comments regarding this proposed Ordinance.

If adopted, this Ordinance would approve a pre-annexation development agreement between the City of Merced and Lou Ann Bianchi for the Highway 59 and Santa Fe Annexation.

A copy of the full text of the proposed Ordinance is available for review in the Office of the City Clerk, City of Merced, 678 West 18th Street, Merced, California, and on the City's website at www.cityofmerced.org.

ASSISTANT CITY CLERK

PUBLISH:

PUBLIC NOTICE OF ADOPTION OF ORDINANCE

CITY OF MERCED

ORDINANCE NO. _____

NOTICE IS HEREBY GIVEN that on _____, 2018, the City Council of the City of Merced adopted Ordinance No. _____, entitled:

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MERCED, CALIFORNIA, APPROVING A PRE-ANNEXATION DEVELOPMENT AGREEMENT BETWEEN THE CITY OF MERCED AND LOU ANN BIANCHI FOR THE HIGHWAY 59 AND SANTA FE ANNEXATION

Ordinance No. _____ approves a Pre-Annexation Development Agreement between the City of Merced and Lou Ann Bianchi for the Highway 59 and Santa Fe Annexation.

Ordinance No. _____ was adopted by the following roll call vote of the City Council:

AYES: Council Members:

NOES: Council Members:

ABSTAIN: Council Members:

ABSENT: Council Members:

A copy of the full text of Ordinance No. _____ is available for review in the Office of the City Clerk, City of Merced, 678 West 18th Street, Merced, California, and on the City's website at www.cityofmerced.org.

ASSISTANT CITY CLERK

PUBLISH:

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

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/PRE-ZONING NO. 15-01

“HIGHWAY 59 & SANTA FE ANNEXATION”

LOUANN BIANCHI

Date: _____

PRE-ANNEXATION DEVELOPMENT AGREEMENT
BETWEEN
CITY OF MERCED
AND
LOUANN BIANCHI

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

Louann Bianchi
151 N. Ulukoa Pl.
Lahaina, HI 96761-1969

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 on in January 2008.

I. Owner is the fee or equitable owner of two parcels totaling approximately 7.83 acres 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 the land uses and conditions of Pending Annexation and Rezoning #15-01 and Expanded Initial Study #15-36.

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 Two Thousand Three Hundred Thirty Dollars and Seventy-Five Cents (\$2,330.75.), which includes the Two Thousand Two Hundred Eighty Dollars and Seventy-Five Cents (\$2,280.75) fee required by Fish and Game Code Section 711.4(d)(3) plus the Fifty Dollar (\$50.00) 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. ____ adopted on _____, 2018, and effective on _____, 2018.

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 hererin 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 provision, maintenance, expansion, termination, conditions and limitations of municipal water and sewer services;

- (e) The granting of encroachment permits and the conveyance of rights and interests which provide for the use of or the entry upon public property;
- (f) 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	Planning Commission Resolution #3095

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 ten (10) years thereafter, 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 commercial center to include a gas station, mini-market, car wash, fast-food restaurant, and drive-through coffee shop along with other unknown commercial uses.

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.

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.
- (d) The purchaser, transferee, or assignee provides City with security equivalent to or better than any security previously provided by Owner to secure performance of its obligations hereunder.
- (e) The Owner 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 conditions in Section 20.4 (Sewer Facility Capital Expansion Improvement Bonds) have been completely satisfied, are no longer required or the obligations under Section 20.4 have been completely and unequivocally assumed by the subsequent Owner.

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 and in compliance with all Post Construction Standards required by the City's Municipal Separate Storm Sewer System (MS-4) Permit;
- (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. California Codes. This Agreement does not prevent the City from adopting and amending in compliance with State law certain 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 Codes include, but are not limited to, the California Building Code, California Mechanical Code, California Electrical Code, and California 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. 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.

19.2 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, 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 9667(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 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.

20.3 Public Improvements. If Owner is required by this Agreement, or any other obligation, to construct any public improvements which will be dedicated to City or any other public agency upon completion, and if required by applicable laws to do so, Owner shall construct such improvements 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.

As required by Mitigation Measure TRA-1 of Environmental Review #15-36, adopted by City Council and found at Exhibit G, a traffic signal may be required at such time as the City Engineer deems it necessary for safety reasons based on warrants associated with preventable accidents. The cost of the traffic signal shall be the responsibility of Owner.

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. 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; and,
 - (4) 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 City's Zoning Ordinance for Thoroughfare Commercial (C-T) Zone. 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 "F," 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. 3095, attached hereto as Exhibit “F,” 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.

If construction of the Project is not commenced within five (5) years, any sewer capacity allocated to this Property by this annexation shall be terminated. If, after five (5) years the sewer capacity allocation is terminated, the City Engineer shall determine when sufficient capacity is available for development.

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 may 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 provide sixty (60) days prior written notice of the alleged Owner Default and then conduct a hearing utilizing the Annual Review procedures in Section 23(a) 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 the Owner shall provide written notice of the alleged City Default and the City shall have ninety (90) days to cure said Default. If 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, employee, or agent thereof, 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. 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, provided, however, this Section 27.3 shall not preclude a Party from the protections provided under law or equity by the defenses of estoppel and/or laches.

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 attorneys' 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: Louann Bianchi
 151 N. Ulukoa Pl.
 Lahaina, HI 96761-1969

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:

CITY OF MERCED
A California Charter Municipal Corporation

BY: _____
City Manager

ATTEST:
STEVE CARRIGAN, CITY CLERK

BY: _____
Assistant/Deputy City Clerk

APPROVED AS TO FORM:

BY:  _____
City Attorney Date 8-22-2018

ACCOUNT DATA:

BY: _____
Verified by Finance Officer

OWNER:

BY: _____
Louann Bianchi

Taxpayer I.D. No. _____

ADDRESS: 151 N. Ulukoa Pl.
Lahaina, HI 96761-1969

TELEPHONE: _____

FACSIMILE: _____

E-MAIL: _____

EXHIBIT A
PROPERTY LEGAL DESCRIPTION AND MAP

EXHIBIT A
LEGAL DESCRIPTION

PARCEL 1: A portion of lot 96 and a portion of the West 40 feet of the 100 foot wide Southern Pacific Railroad-Oakdale Branch right-of-way (now abandoned) as shown on the map entitled, **MAP OF THE CROCKER COLONY**, recorded in Volume 5 of Official Plats, Page 6, Merced County Records, said portions being described as a whole as follows:

Commencing at the Northwest corner of said Lot 96 and running thence North 85° 48' 00" East 83.54 feet along the North line of said Lot 96 to a point on the Northeasterly line of Santa Fe Drive (a County Road) said point being the true point of beginning of this description; thence South 53° 11' 13" East, 308.33 feet along said Northeasterly line of Santa Fe Drive; thence Southeasterly along said northeasterly line of Santa Fe Drive along a 1,464.11 foot radius curve to the left, the long chord of which bears south 69° 35' 30" East 825.20 feet, through a central angle of 32° 44' 12", an arc distance of 836.54 feet, thence North 18° 36' 31" East 17.45 feet along said Northeasterly line of Santa Fe Drive to a point on the West line of State Highway 59; thence North 01° 24' 30" East 375.88 feet along the West line of State Highway 59 to the southeast corner of that certain real property described as Parcel II in deed from Crocker Land Company to Merced Water Company recorded in Volume 1483, Official Records, page 111, Merced County Records; thence North 8° 35' 30" West 100.00 feet to the Southwest corner of said Parcel II; thence North 01° 24' 30" East 180.34 feet along the West line of said Parcel II to a point on the North line of the aforesaid Lot 96; thence south 83° 48' 00" West 945.081 feet along the North line of said Lot 96 to the true point of beginning, all as delineated on map entitled, "RECORD OF SURVEY FOR J.F. COLLINS CO.", recorded in Book 13 of surveys, page 35, Merced County Records.

EXCEPTING therefrom all that portion conveyed to the County of Merced for road widening by deed recorded January 13, 1984, in volume 2407, page 718, Merced County Records.

ALSO EXCEPTING therefrom the property and property rights and reserved in deeds recorded August 4, 1961, in Volume 1539, page 504, as Instrument No. 14501, Official Records, March 3, 1971, in Volume 1881, page 555, as Instrument No. 3989, Official Records and March 3, 1972, in volume 1881, page 572, as Instrument No. 3991, Official Records, being all oil, gas and other hydrocarbons and all other mines and minerals found in solid, gaseous or viscid state lying below a depth of 500 feet.

APN: 057-200-067

PARCEL 2: A portion of Lot 96 and a portion of the West 40 feet of the 100 foot wide Southern Pacific Railroad-Oakdale Branch right-of-way (now abandoned), according to the map entitled, **MAP OF CROCKER COLONY**, filed June 7, 1911, in book 5 of Maps, page 6 Merced County Records, and more particularly described as follows:

Commencing at a point that is the Southeast corner of said Lot 96, said point also being on the Northerly line of the Santa Fe Railroad right-of-way; thence South 88° 35' 30" East, 40.00 feet; thence North 01° 24' 30" West, a distance of 697 feet, to the true point of beginning; thence north 88° 25' 30" West, a distance of 100.00 feet; thence North 01° 24' 30" East, a distance of 189.93

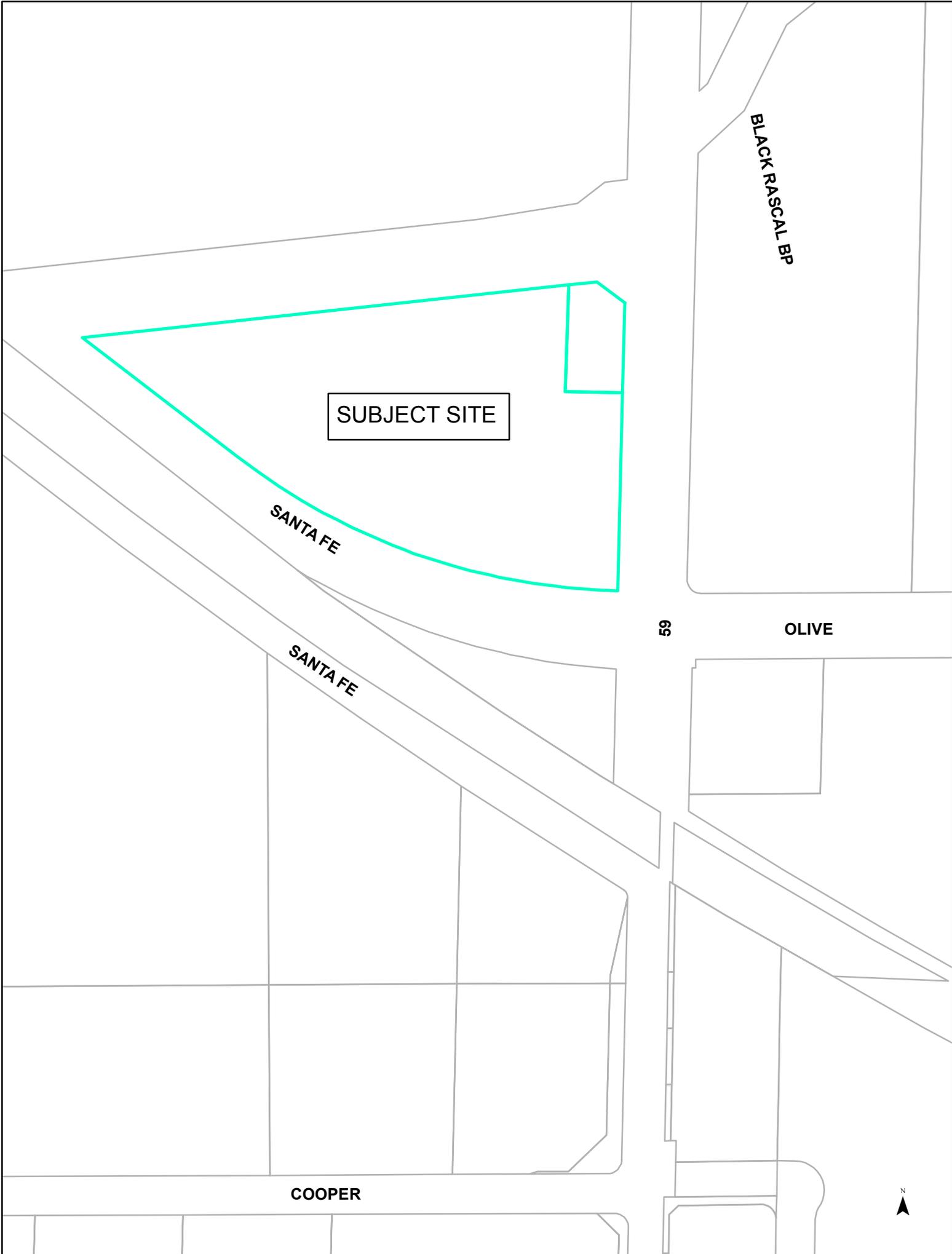
LEGAL DESCRIPTION

Page 2

feet; thence South $51^{\circ} 47' 00''$ East, a distance of 74.78 feet; thence South $40^{\circ} 05' 55''$ East, a distance of 60.36 feet; thence South $01^{\circ} 24' 30''$ West, a distance of 100.00 feet to the true point of beginning.

EXCEPTING therefrom the property and property rights excepted and reserved in deeds recorded August 4, 1961, in Volume 1539, page 504, as Instrument No. 14501, Official Records, March 3, 1971, in Volume 1881, page 555, as Instrument No. 3989, Official Records and March 3, 1972, in Volume 1881, page 572, as Instrument No. 3991, Official Records, being all oil, gas and other hydrocarbons and all other mines and minerals found in solid, gaseous or viscid state lying below a depth of 500 feet.

APN: 057-200-029



SUBJECT SITE

BLACK RASCAL BP

SANTA FE

59

OLIVE

SANTA FE

COOPER



EXHIBIT B
DEVELOPMENT APPROVALS

- Annexation/Pre-Zoning No. 15-01
- General Plan Amendment No. 15-04
- Expanded Initial Study No. 15-36 (Mitigated Negative Declaration and Mitigation Monitoring Program)

EXHIBIT C
LAND USE REGULATIONS

- Merced Vision 2030 General Plan.
- Charter of the City of Merced.
- Merced Municipal Code.
- City of Merced Design Standards.

EXHIBIT D
PUBLIC BENEFITS

1. Owner shall participate in the upgrade to the sewer treatment plant and sewer transmission lines in proportion to the growth attributable to the Project, as called for in Section 4.4.
2. Owner shall improve/upgrade/replace the following County infrastructure (roads, utilities, etc.) adjacent to and within the Project consistent with City of Merced standards, pursuant to this Agreement:
 - a) Construct curb, gutter, sidewalk, install street lights and street trees along the full property frontage on Santa Fe Avenue and North State Highway 59.
 - b) Provide fire hydrants as determined by the City of Merced Fire Department.
 - c) Extend water and sewer lines across the entire property frontage on Santa Fe Avenue and North Highway 59.
 - d) Provide storm drainage tie-in into the existing storm drainage system.
3. Owner shall underground all utilities serving the property along the property frontage, but is not responsible for undergrounding existing utilities beyond the property frontage.
4. Owner shall connect all development to the City sewer and water system and pay all applicable connection fees.
5. Owner must agree to annex into the City Community Facilities District for Services (CFD No. 2003-2) for the maintenance of street lights, storm drain facilities, landscaping in the public right-of-way, and the cost of police and fire services.

The forgoing improvements are to be jointly and severally constructed and paid for by Owner.

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: _____, 20____.

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
PLANNING COMMISSION RESOLUTION
INCLUDING THE MITIGATION MONITORING PROGRAM
FOR EXPANDED INITIAL STUDY #15-36

**CITY OF MERCED
Planning Commission**

Resolution #3095

WHEREAS, the Merced City Planning Commission at its regular meeting of June 6, 2018, held a public hearing and considered **Pending Annexation and Pre-zoning Applications #15-01 and General Plan Amendment #15-04**, initiated by Louann Bianchi, and Quad LLC, property owners. This application involves annexing 8.83 acres of land at the northwest and southwest corners of North Highway 59 and Santa Fe Drive into the City of Merced; changing the General Plan designation for the northwest corner from Open Space (OS) to Thoroughfare Commercial (CT) and pre-zoning the northwest corner as Thoroughfare Commercial (C-T) for the Thoroughfare Commercial development. The General Plan designation for the southwest corner would remain Industrial (IL) and this corner would be pre-zoned Light Industrial (I-L); also known as Assessor's Parcel Numbers 057-200-029, 057-200-067, and 057-200-042; and,

WHEREAS, the Merced City Planning Commission concurs with Findings A through M of Staff Report # 18-14; 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 hereby recommend to City Council adoption of a Mitigated Negative Declaration and Mitigation Monitoring Program (Exhibit B) regarding Initial Study #15-36, and approval of Pending Annexation and Pre-zoning Applications #15-01 and General Plan Amendment #15-04, subject to the Conditions set forth in Exhibit A attached hereto.

Upon motion by Commissioner ALSHAMI, seconded by Commissioner MARTINEZ, and carried by the following vote:

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

NOES: Commissioner Padilla

ABSENT: None, (One Vacancy)

ABSTAIN: None

PLANNING COMMISSION RESOLUTION # 3095

Page 2

June 6, 2018

Adopted this 6th day of June, 2018



Chairperson, Planning Commission of
the City of Merced, California

ATTEST:



Secretary

Attachment:

Exhibit A – Conditions of Approval

Exhibit B – Mitigation Monitoring Program

n:\shared\planning\PC Resolutions\ANX-PREZ#15-01 & GPA#15-04 NorCal Foods

Conditions of Approval
Planning Commission Resolution #3095
Pending Annexation and Pre-zoning Applications #15-01
and General Plan Amendment #15-04

1. All new construction within the annexation area (including modifications to the developed site at the southwest corner of North Highway 59 and Santa Fe Drive) shall comply with all standard Municipal Code and Subdivision Map Act requirements as applied by the City Engineering Department.
2. All other applicable codes, ordinances, policies, etc. adopted by the City of Merced shall apply.
3. Approval of Pre-Annexation #15-01, Pre-zoning Application #15-01, and General Plan Amendment #15-04 is subject to the applicant's entering into a written (legislative action) 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 public facilities impact fees, a regional traffic impact fee, Mello-Roos taxes—whether for infrastructure, services, or any other activity or project authorized by the Mello-Roos law, etc. 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 requires payment of such fees, taxes, and or assessments at an earlier or subsequent time. Said agreement to be approved by the City Council prior to the adoption of the ordinance, resolution, or minute action.
4. The developer/applicant shall indemnify, protect, defend (with counsel selected by the City), 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 (with counsel selected by the City), 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 all future projects within the annexation area 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.

The following conditions apply to new construction within the annexation area:

6. Community Facilities District (CFD) formation is required for annual operating costs for police and fire services as well as storm drainage, public landscaping, public landscaping within State rights-of-way, street trees, street lights, parks and open space. CFD procedures shall be initiated before final map or first building permit 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.

The following conditions apply to the future development at the northwest corner of North Highway 59 and Santa Fe Drive:

7. All development shall be subject to the Mitigation Measures outlined in the Mitigation Monitoring Program for Initial Study #15-36.

8. Site Plan Review is required prior to construction on the northwest corner, the Site Plan Review Committee shall review the site design and determine which alternative at the western driveway is best to reduce the expected impacts. The alternatives may include those alternatives included in the traffic analysis or another alternative such as moving the driveway further to the west. The developer shall provide any additional documentation or studies needed for the Site Plan Review Committee to make this determination (Mitigation Measure TRA-1).
9. The southbound left-turn lane on SR 59 shall be lengthened as determined by the City Engineer and approved by Caltrans (Mitigation Measure TRA-1a).
10. The development shall contribute its fair share to the cost of improvements for the intersection of SR 59 and Olive Avenue (Mitigation Measure TRA-1b):
 - Reconstruct westbound Olive Avenue to provide dual left turn lanes on southbound SR 59; and,
 - Reconfigure the westbound right turn lane to create a combination through and right turn lane, and extend that through lane across SR 59 along the project's frontage; and,
 - Reconstruct the existing northbound right turn lane as a "free" right turn with a median island separating eastbound and right-turning traffic. Reconstruct the eastbound Santa Fe Drive approach to provide dual left turn lanes.
11. Prior to the issuance of a building permit, the developer shall work with the Merced County Transit Authority (aka: The Bus) to determine if a bus stop is needed at this location. If a bus stop is required, the stop shall be in an area to allow the bus to move completely out of the travel lanes. The location of all bus stops shall be subject to approval by the City Engineer and Caltrans if along SR 59 (Mitigation Measure TRA-6).
12. Any outdoor dining areas or other outdoor uses shall have the following setbacks to maintain an acceptable noise level of 70 dB for outdoor uses (Mitigation Measure NOI-2):
 - Road/Railroad - Required Setback
 - Santa Fe Drive - 54 Ft.

- North Highway 59 - 89 Ft.
 - BNSF Railroad - 137 F
13. At the time of construction, all required public improvements shall be installed along the property frontage. This includes, but is not limited to, sidewalk, curb, gutter, street lights, and street trees.
 14. The developer shall work with Caltrans and obtain all necessary permits for all work done within the state right of way.
 15. All construction shall comply with Post Construction Standards in accordance with the requirement for the City's Phase II MS-4 Permit (Municipal Separate Storm Sewer System).
 16. All new utilities serving the site shall be installed underground.
 17. All City sewer, water, and storm drain lines serving the site shall be extended across the full frontage of the property unless it is determined by the Public Works Director that these lines are not likely to be extended to serve any other property (consistent with Merced Municipal Code Section 15.40.030).
 18. All storm water shall be contained onsite and metered out to the City's storm water system in accordance with City Standards.
 19. A minimum turning radius of 33 feet inside, curb-to-curb and 49 feet wall-to-wall for fire apparatus access must be provided throughout the project site or as required by the Fire Department.
 20. The future commercial development shall provide pedestrian and bicycle access throughout the site. Connectivity throughout the site shall be provided by pedestrian pathways. Bicycle parking shall be provided as required by the City's Zoning Ordinance.
 21. The developer shall use proper dust control procedures during site development in accordance with San Joaquin Valley Air Pollution Control District rules.
 22. All landscaping shall be in compliance with the City's Water Efficient Landscaping and Irrigation Ordinance (Merced Municipal Code Section 17.60) and all state-mandated conservation and drought restrictions as well as the City's Zoning Ordinance Section 20.36 – Landscaping. This shall include the use of xeriscape landscaping as appropriate.

23. Irrigation for all onsite landscaping shall be provided by a low-volume system in accordance with the State's Emergency Regulation for Statewide Urban Water Conservation or any other state or city-mandated water regulations dealing with the current drought conditions.
24. All landscaping in the public right-of-way shall comply with the most recently adopted water regulations by the State and City addressing water conservation measures. If turf is proposed to be installed in medians or parkstrips, high quality artificial turf (approved by the City Engineer and Development Services Director) shall be installed.
25. Parking lot trees shall be installed per the City's Parking Lot Landscape Standards. Trees shall be a minimum of 15 gallons, and be of a type that provides a 30-foot minimum canopy at maturity (trees shall be selected from the City's approved tree list). Trees shall be installed at a ratio of 1 tree for every 6 parking spaces. A reduced number of trees may be required where there are carports with solar panels over the parking spaces. However, if all the parking spaces are covered by a carport with solar panels, then additional trees may be required at the discretion of the Development Services Director. Trees within the PG&E easement shall comply with the regulations of this easement which limits the height of trees to a maximum of 15 feet at full maturity.
26. All mechanical equipment shall be screened from public view.
27. The traffic signal at the western driveway and Satan Fe Drive, when warranted and required by the City Engineer, shall be synchronized with the traffic signal at the intersection of North State Highway 59 and Santa Fe Drive/Olive Avenue so as to ensure traffic stops and goes through both signals simultaneously.
28. The eastern driveway shall be an entrance-only drive way, allowing only right turns into the site.

Conditions
#27 & 28
added by
City Council
10/1/18



n:\shared\planning\PC Resolutions\ANX-PREZ#15-01 & GPA#15-04 Exhibit A

**ENVIRONMENTAL REVIEW #15-36
Mitigation Monitoring Program
Revised August 22, 2018**

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 Annexation and Pre-Zone Application #15-01 and General Plan Amendment #15-04 shall run with the real property. 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.

Mitigation Measure TRA-1 modified by City Council 10-1-18

GENERAL PLAN MITIGATION MEASURES

As a second tier environmental document, Initial Study #15-36 incorporates some mitigation measures adopted as part of the *Merced Vision 2030 General Plan Program Environmental Impact Report* (SCH# 2008071069), as mitigation for potential impacts of the Project.

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 Annexation and Pre-zone Application #15-01 and General Plan Amendment #15-04. 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 measure. |
| Verification: | These columns will be initialed and dated by the individual designated to verify adherence to the project specific mitigation. |

**Annexation and Pre-Zone Application #15-01 and General Plan Amendment #15-04
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).

A) Aesthetics				
Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
AES-4	<p>AES-4) <i>Lighting should be designed to provide ambiance, safety, and security without unnecessary spillover or glare onto adjacent properties.</i></p> <p><i>The quality of light, level of light (measured in foot-candles) and the type of bulb or source should be carefully addressed. Lighting levels should not be so intense as to draw attention to the flow or glare of the project site. The lighting plan should incorporate current energy-efficient fixtures and technology.</i></p> <p><i>Glare from any site lighting should be shielded from adjacent properties and directed at a specific object or target area. Exposed bulbs shall not be used.</i></p> <p><i>Wall-mounted light fixtures shall not extend above the height of the wall to which the fixtures are mounted.</i></p> <p><i>Blinking and flashing lights used to illuminate building facades or to outline buildings shall not be used.</i></p> <p><i>When security lighting is necessary, it should be recessed, hooded and located to illuminate only the intended area.</i></p> <p><i>Off-site glare and light trespass is prohibited.</i></p> <p><i>Pedestrian areas, sidewalks, parking lots, and building entrances shall be adequately lit to provide safety and security.</i></p> <p><i>All exterior lighting fixtures shall be efficient in terms of design and energy use.</i></p>	Building Permits	Planning Department	

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
AES-4	AES4a - <i>The project shall comply with Mitigation Measure 3.1-4 required by the Mitigation and Reporting Program for the Merced Vision 2030 General Plan EIR.</i>	Building Permits	Planning Department	
D) Biological Resources				
BIO-1	BIO-1) <i>Pre-construction surveys by a qualified biologist or other qualified professional shall be conducted for nesting Swainson’s hawks within 0.25 miles of the project site shall be done if construction commences between March 1 and September 15. If active nests are found, a qualified biologist shall determine the need (if any) for temporal restrictions on construction. The determination shall utilize criteria set forth by CDFW (CDFG 1994).</i>	Building Permit	Planning Department	
	BIO-1a) <i>Pre-construction surveys by a qualified biologist or other qualified professional shall be conducted for western pond turtles and their nests shall be conducted if construction commences between April 1 through October 31. This survey shall include a search for nests in uplands adjacent to the creek. If nest sites are located, a 50-foot buffer area around the nest, a 50-foot buffer area around the nest shall be established and work shall be delayed until hatching is complete and the young have left the nest site.</i>	Building Permit	Planning Department	
	BIO-1b) <i>Pre-construction surveys by a qualified biologist or other qualified professional shall be conducted for birds protected by the Migratory Bird Treaty Act of 1918. If nesting birds are found, work in the vicinity of the nest shall be delayed until the young fledge.</i>	Building Permit	Engineering Department	

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
BIO-3	BIO-3) <i>Avoidance of jurisdictional Waters of the U.S. is recommended, if possible. If complete avoidance of Black Rascal Creek is infeasible, impact shall be minimized to the maximum extent practicable, and permits from ACOE, CDFW, RWQCB, and possibly CVFPS shall be secured prior to the placement of any fill material (e.g., culverts, fill dirt, rock) within jurisdictional Waters of the U.S.</i>	Building Permit	Planning/Engineering Department	
CUL-1	CUL-1) <i>In the event that buried historic or archaeological resources are discovered during construction, operations shall stop within 50 feet of the find and a qualified archaeologist shall be consulted to evaluate the resource in accordance with CEQA Guidelines 15064.5. The applicant shall include a standard inadvertent discovery clause in every construction contract to inform contractors of this requirement. If the resource does not qualify as a significant resource, then no further protection or study is necessary. If the resource does qualify as a significant resource then the impacts shall be avoided by project activities. If the resource cannot be avoided, adverse impacts to the resource shall be addressed. The archaeologist shall make recommendations concerning appropriate mitigation measures that shall be implemented to protect the resources, including but not limited to excavation and evaluation of the finds in accordance with Section 15064.5 of the CEQA Guidelines. Any previously undiscovered resources found during construction within the project area should be recorded on appropriate Department of Parks and Recreation (DPR) 523 forms and evaluated for significance in terms of CEQA criteria.</i>	Grading	Inspection Services/ Planning Department	

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
CUL-3	<p>CUL-3) <i>In the event that fossils or fossil-bearing deposits are discovered during construction activities, excavations within a 50-foot radius of the find shall be temporarily halted or diverted. The project contractor shall notify a qualified paleontologist to examine the discovery. The applicant shall include a standard inadvertent discovery clause in every construction contract to inform contractors of this requirement. The paleontologist shall document the discovery as needed in accordance with Society of Vertebrate Paleontology standards and assess the significance of the find under the criteria set forth in CEQA Guidelines Section 15064.5. The paleontologist shall notify the appropriate agencies to determine procedures that would be followed before construction activities are allowed to resume at the location of the find. If the Applicant determines that avoidance is not feasible, the paleontologist shall prepare an excavation plan for mitigating the effect of construction activities on the discovery. The plan shall be submitted to the City of Merced for review and approval prior to implementation, and the Applicant shall adhere to the recommendations in the plan.</i></p>	Grading	Inspection Services/ Panning Department	

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
CUL-4	<p>CUL-4) <i>Guidelines Section 15064.5, Health and Safety Code Section 7050.5, and Public Resources Code (PRC) Sections 5097.94 and 5097.98 must be followed. If during the course of project development there is accidental discovery or recognition of any human remains, the following steps shall be taken:</i></p> <ol style="list-style-type: none"> <li data-bbox="302 570 1180 1149">1. <i>There shall be no further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent human remains until the County Coroner is contacted and determines if the remains are Native American and if an investigation of the cause of death is required. If the coroner determines the remains to be Native American, the coroner shall contact the Native American Heritage Commission (NAHC) within 24 hours, and the NAHC shall identify the person or persons it believes to be the most likely descendant (MLD) of the deceased Native American. The MLD may make recommendations to the landowner or the person responsible for the excavation work within 48 hours, for means of treating or disposing of, with appropriate dignity, the human remains and any associated grave goods as provided in PRC Section 5097.98.</i> <li data-bbox="302 1166 1180 1409">2. <i>Where the following conditions occur, the landowner or his or her authorized representative shall rebury the Native American human remains and associated grave goods with appropriate dignity either in accordance with the recommendations of the most likely descendant or on the project site in a location not subject to further subsurface disturbance:</i> 	Grading	Inspection Services/ Panning Department	

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
	<ul style="list-style-type: none"> • <i>The NAHC is unable to identify a most likely descendent or the most likely descendent failed to make a recommendation within 48 hours after being notified by the commission.</i> • <i>The descendant identified fails to make a recommendation.</i> • <i>The landowner or his authorized representative rejects the recommendation of the descendant, and mediation by the NAHC fails to provide measures acceptable to the landowner.</i> <p><i>Additionally, California Public Resources Code Section 15064.5 requires the following with regards to Native American Remains:</i></p> <p><i>When an initial study identifies the existence of, or the probable likelihood of, Native American Remains within a project, a lead agency shall work with the appropriate Native Americans as identified by the Native American Heritage Commission as provided in Public Resources Code Section 5097.98. The applicant may develop a plan for treating or disposing of, with appropriate dignity, the human remains and any items associated with Native American Burials with the appropriate Native Americans as identified by the NAHC.</i></p>	Grading	Inspection Services/ Panning Department	
GEO-2	<i>GEO-2) Prior to the approval of a tentative subdivision map or building permit, the City shall review plans for drainage and storm water run-off control systems and their component facilities to ensure that these systems are non-erosive in design.</i>	Tentative Map Building Permit	Engineering Department	

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
GEO-2	<i>GEO-2a) Upon completion of phased construction, subsequent phases shall re-vegetate all exposed soil surfaces within 30 days, or as otherwise approved by the City, to minimize potential topsoil erosion. Reasonable alternatives to re-vegetation may be employed, especially during peak high temperature periods or to avoid negative impacts to nearby agricultural activities, subject to the approval of the City.</i>	<i>Building Permit</i>	<i>Inspection Services</i>	
GEO-4	<i>GEO-4 A geotechnical study shall be provided prior to the issuance of a building or grading permit for this site. All recommendations for addressing expansive soils and site grading shall be implemented as well as any other recommendations determined relevant by the Chief Building Official or City Engineer.</i>	<i>Building Permit</i>	<i>Inspection Services/ Engineering</i>	
HAZ-5	<i>HAZ-5 Prior to the issuance of any subsequent land use entitlement for construction of a building or the issuance of a building permit, the developer shall demonstrate compliance with the requirements of the Merced County Airport Land Use Compatibility Plan (ALUCP). If compliance is not feasible, the development plan shall be modified to make compliance possible.</i>	<i>Site Plan Review/Building Permit</i>	<i>Planning Department</i>	
HYD-1	<i>HYD 1a Prior to the issuance of grading permits, the applicant shall file a “Notice of Intent” with and obtain a facility identification number from the State Water Resources Control Board. The project shall also submit a Stormwater Pollution Prevention Plan (SWPPP) to the City of Merced that identifies specific actions and Best Management Practices (BMP’s) to prevent stormwater pollution during construction activities. (continued on next page)</i>	<i>Grading Permit</i>	<i>Inspection Services/ Engineering</i>	

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
HYD-1	<p><i>The SWPPP shall identify a practical sequence for BMP implementation, site restoration, contingency measures, responsible parties, and agency contacts. The SWPPP shall include, but not be limited to, the following elements:</i></p> <ul style="list-style-type: none"> <i>• Comply with the requirements of the State of California’s most current Construction Stormwater Permit.</i> <i>• Temporary erosion control measures shall be implemented on all disturbed areas.</i> <i>• Disturbed surfaces shall be treated with erosion control measures during the October 15 to April 15 rainy season.</i> <i>• Sediment shall be retained on-site by a system of sediment basins, traps, or other BMPs.</i> <i>• The construction contractor shall prepare Standard Operating Procedures for the handling of hazardous materials on the construction site to eliminate discharge of materials to storm drains.</i> <i>• BMP performance and effectiveness shall be determined either by visual means where applicable (e.g., observation of above-normal sediment release), or by actual water sampling in cases where verification of contaminant reduction or elimination (such as inadvertent petroleum release) is required by the Central Valley Regional Water Quality Control Board to determine adequacy of the measure. (continues on next page)</i> 	<i>Grading Permit</i>	<i>Inspection Services/Engineering</i>	

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
HYD-1	<i>In the event of significant construction delays or delays in final landscape installation, native grasses or other appropriate vegetative cover shall be established on the construction site as soon as possible after disturbance, as an interim erosion control measure throughout the wet season.</i>			
HYD-1	HYD-1b <i>Prior to the issuance of building permits, the project applicant shall submit a final Storm Water Mitigation Plan (SWMP) to the City of Merced for review and approval. The plan shall be developed using the California Stormwater Quality Association’s “New Development and Redevelopment Handbook.” The SWMP shall identify pollution prevention measures and BMPs necessary to control stormwater pollution from operational activities and facilities, and provide for appropriate maintenance over time. The SWMP shall include design concepts that are intended to accomplish a “first flush” objective that would remove contaminants from the first 2 inches of stormwater before it enters area waterways. The project applicant shall also prepare and submit an Operations and Maintenance Agreement to the City identifying procedures to ensure that stormwater quality control measures work properly during operations.</i>	<i>Grading Permit</i>	<i>Inspection Services/ Engineering</i>	

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
HYD-5	<i>HYD-5 Prior to the issuance of a building permit for this project, the applicant shall demonstrate to the City that proposed storm drainage facilities are adequate to meet the Project demands and that improvements are consistent with the City’s Storm Drainage Master Plan and the Post Construction Standards for the City’s Phase II MS4 permit.</i>	<i>Grading Permit</i>	<i>Inspection Services/ Engineering</i>	
HYD-8	<i>HYD-8 Development of the site is required to provide fill dirt to raise the elevation of the site and achieve protection from flooding. The fill must be elevated above the computed 200-year flood elevation and freeboard is highly recommended by DWR (note: freeboard is the difference between the fill elevation and the computed flood elevation). A freeboard of 1-foot or greater will help to account for the inherent uncertainty in estimating peak flood discharges and the computed flood elevations. A Summary of the proposed fill elevations is provided in the Table below. The required fill elevation ranges from 168.4 to 167.7 ft. (NAVD88 vertical datum)</i>	<i>Grading Permit</i>	<i>Inspection Services/ Engineering</i>	

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)								
NOI-1	<i>NOI-1 The construction contractor shall limit all noise-producing construction activities, including deliveries and warming up of equipment, to the hours of 7:00 a.m. to 7:00 p.m., Monday through Saturday. No such work shall be permitted on Sundays or federal holidays without prior approval from the City.</i>	<i>Grading Permit</i>	<i>Inspection Services/ Engineering</i>									
NOI-1	<p><i>NOI-2 Any outdoor dining areas or other outdoor uses shall have the following setbacks to maintain an acceptable noise level of 70 dB for outdoor uses:</i></p> <table border="0"> <tr> <td><i>Road/Railroad</i></td> <td><i>Required Setback</i></td> </tr> <tr> <td><i>Santa Fe Drive</i></td> <td><i>54 Ft.</i></td> </tr> <tr> <td><i>North Highway 59</i></td> <td><i>89 Ft.</i></td> </tr> <tr> <td><i>BNSF Railroad</i></td> <td><i>137 Ft.</i></td> </tr> </table>	<i>Road/Railroad</i>	<i>Required Setback</i>	<i>Santa Fe Drive</i>	<i>54 Ft.</i>	<i>North Highway 59</i>	<i>89 Ft.</i>	<i>BNSF Railroad</i>	<i>137 Ft.</i>	<i>Building Permit</i>	<i>Inspection Services/ Planning</i>	
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<i>BNSF Railroad</i>	<i>137 Ft.</i>											
TRA-1	<p><i>TRA-1 The following improvements shall be incorporated into the development of the northwest corner of North Highway 59 and Santa Fe Drive. These improvements are the sole responsibility of the property owner/developer.</i></p> <ol style="list-style-type: none"> <i>1. Restripe Santa Fe Drive to create a two-way left-turn (TWLT) lane east of the western access. This will improve the Level of Service by accommodating two-step left turns,</i> <i>2. Modify the layout of the access to Santa Fe Drive to either prohibit outbound right turns from the eastern driveway or provide a continuous auxiliary acceleration-deceleration lane between the driveways. These measures will address the horizontal curve on the alignment of Santa Fe Drive as it relates to the western driveway.</i> 	<i>Building Permit</i>	<i>Engineering/ Planning</i>									

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
TRA-1	<p><u>A traffic signal may be required at the western-most driveway. Traffic conditions at the western access shall be monitored and a traffic signal shall be installed if determined to be needed by the City Engineer based on warrants associated with preventable accidents. The cost of the traffic signal shall be the responsibility of the owner/developer.</u></p> <p>Prior to construction, the Site Plan Review Committee shall review the site design and determine which alternative at the western driveway is best to reduce the expected impacts. The alternatives may include those alternatives included in the traffic analysis or another alternative such as moving the driving further to the west. The developer shall provide any additional documentation or studies needed for the Site Plan Review Committee to make this determination.</p>	<p>Building Permit</p>	<p>Engineering/ Planning</p>	
	<p>TRA-1a The southbound left-turn lane on SR 59 shall be lengthened as determined by the City Engineer and approved by Caltrans.</p>	<p>Building Permit</p>	<p>Engineering/ Planning</p>	

Note: Underlined text is new text, strikethrough text is deleted text.

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
	<p><i>TRA-1b The development shall contribute its fair share to the cost of improvements for the intersection of SR 59 and Olive Avenue:</i></p> <ul style="list-style-type: none"> • <i>Reconstruct westbound Olive Avenue to provide dual left turn lanes on southbound SR 59; and,</i> • <i>Reconfigure the westbound right turn lane to create a combination through and right turn lane, and extend that through lane across SR 59 along the project’s frontage; and,</i> • <i>Reconstruct the existing northbound right turn lane as a “free” right turn with median island separating eastbound and right turning traffic. Reconstruct the eastbound Santa Fe Drive approach to provide dual left turn lanes.</i> 	<i>Building Permit</i>	<i>Planning</i>	
TRA-6	<p><i>TRA-6 Prior to the issuance of a building permit, the developer shall work with the Merced County Transit Authority (aka: The Bus) to determine if a bus stop is needed at this location. If a bus stop is required, the stop shall be in an area to allow the bus to move completely out of the travel lanes. The location of all bus stops shall be subject to approval by the City Engineer and Caltrans if along SR 59.</i></p>	<i>Building Permit</i>	<i>Planning</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

EXHIBIT G
MITIGATION MEASURES ADOPTED BY
CITY COUNCIL

ENVIRONMENTAL REVIEW #15-36
Mitigation Monitoring Program
Revised August 22, 2018

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 Annexation and Pre-Zone Application #15-01 and General Plan Amendment #15-04 shall run with the real property. 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, Initial Study #15-36 incorporates some mitigation measures adopted as part of the *Merced Vision 2030 General Plan Program Environmental Impact Report* (SCH# 2008071069), as mitigation for potential impacts of the Project.

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 Annexation and Pre-zone Application #15-01 and General Plan Amendment #15-04. 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 measure.
- Verification:** These columns will be initialed and dated by the individual designated to verify adherence to the project specific mitigation.

**Annexation and Pre-Zone Application #15-01 and General Plan Amendment #15-04
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).

A) Aesthetics				
Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
AES-4	<p>AES-4) <i>Lighting should be designed to provide ambiance, safety, and security without unnecessary spillover or glare onto adjacent properties.</i></p> <p><i>The quality of light, level of light (measured in foot-candles) and the type of bulb or source should be carefully addressed. Lighting levels should not be so intense as to draw attention to the flow or glare of the project site. The lighting plan should incorporate current energy-efficient fixtures and technology.</i></p> <p><i>Glare from any site lighting should be shielded from adjacent properties and directed at a specific object or target area. Exposed bulbs shall not be used.</i></p> <p><i>Wall-mounted light fixtures shall not extend above the height of the wall to which the fixtures are mounted.</i></p> <p><i>Blinking and flashing lights used to illuminate building facades or to outline buildings shall not be used.</i></p> <p><i>When security lighting is necessary, it should be recessed, hooded and located to illuminate only the intended area.</i></p> <p><i>Off-site glare and light trespass is prohibited.</i></p> <p><i>Pedestrian areas, sidewalks, parking lots, and building entrances shall be adequately lit to provide safety and security.</i></p> <p><i>All exterior lighting fixtures shall be efficient in terms of design and energy use.</i></p>	Building Permits	Planning Department	

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
AES-4	AES4a - <i>The project shall comply with Mitigation Measure 3.1-4 required by the Mitigation and Reporting Program for the Merced Vision 2030 General Plan EIR.</i>	Building Permits	Planning Department	
D) Biological Resources				
BIO-1	BIO-1) <i>Pre-construction surveys by a qualified biologist or other qualified professional shall be conducted for nesting Swainson's hawks within 0.25 miles of the project site shall be done if construction commences between March 1 and September 15. If active nests are found, a qualified biologist shall determine the need (if any) for temporal restrictions on construction. The determination shall utilize criteria set forth by CDFW (CDFG 1994).</i>	Building Permit	Planning Department	
	BIO-1a) <i>Pre-construction surveys by a qualified biologist or other qualified professional shall be conducted for western pond turtles and their nests shall be conducted if construction commences between April 1 through October 31. This survey shall include a search for nests in uplands adjacent to the creek. If nest sites are located, a 50-foot buffer area around the nest, a 50-foot buffer area around the nest shall be established and work shall be delayed until hatching is complete and the young have left the nest site.</i>	Building Permit	Planning Department	
	BIO-1b) <i>Pre-construction surveys by a qualified biologist or other qualified professional shall be conducted for birds protected by the Migratory Bird Treaty Act of 1918. If nesting birds are found, work in the vicinity of the nest shall be delayed until the young fledge.</i>	Building Permit	Engineering Department	

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CUL-1	CUL-1) <i>In the event that buried historic or archaeological resources are discovered during construction, operations shall stop within 50 feet of the find and a qualified archaeologist shall be consulted to evaluate the resource in accordance with CEQA Guidelines 15064.5. The applicant shall include a standard inadvertent discovery clause in every construction contract to inform contractors of this requirement. If the resource does not qualify as a significant resource, then no further protection or study is necessary. If the resource does qualify as a significant resource then the impacts shall be avoided by project activities. If the resource cannot be avoided, adverse impacts to the resource shall be addressed. The archaeologist shall make recommendations concerning appropriate mitigation measures that shall be implemented to protect the resources, including but not limited to excavation and evaluation of the finds in accordance with Section 15064.5 of the CEQA Guidelines. Any previously undiscovered resources found during construction within the project area should be recorded on appropriate Department of Parks and Recreation (DPR) 523 forms and evaluated for significance in terms of CEQA criteria.</i>	Grading	Inspection Services/ Panning Department	

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Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
	<ul style="list-style-type: none"> • <i>The NAHC is unable to identify a most likely descendent or the most likely descendent failed to make a recommendation within 48 hours after being notified by the commission.</i> • <i>The descendant identified fails to make a recommendation.</i> • <i>The landowner or his authorized representative rejects the recommendation of the descendant, and mediation by the NAHC fails to provide measures acceptable to the landowner.</i> <p><i>Additionally, California Public Resources Code Section 15064.5 requires the following with regards to Native American Remains:</i></p> <p><i>When an initial study identifies the existence of, or the probable likelihood of, Native American Remains within a project, a lead agency shall work with the appropriate Native Americans as identified by the Native American Heritage Commission as provided in Public Resources Code Section 5097.98. The applicant may develop a plan for treating or disposing of, with appropriate dignity, the human remains and any items associated with Native American Burials with the appropriate Native Americans as identified by the NAHC.</i></p>	Grading	Inspection Services/ Panning Department	
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GEO-4	<i>GEO-4 A geotechnical study shall be provided prior to the issuance of a building or grading permit for this site. All recommendations for addressing expansive soils and site grading shall be implemented as well as any other recommendations determined relevant by the Chief Building Official or City Engineer.</i>	<i>Building Permit</i>	<i>Inspection Services/ Engineering</i>	
HAZ-5	<i>HAZ-5 Prior to the issuance of any subsequent land use entitlement for construction of a building or the issuance of a building permit, the developer shall demonstrate compliance with the requirements of the Merced County Airport Land Use Compatibility Plan (ALUCP). If compliance is not feasible, the development plan shall be modified to make compliance possible.</i>	<i>Site Plan Review/Building Permit</i>	<i>Planning Department</i>	
HYD-1	<i>HYD 1a Prior to the issuance of grading permits, the applicant shall file a "Notice of Intent" with and obtain a facility identification number from the State Water Resources Control Board. The project shall also submit a Stormwater Pollution Prevention Plan (SWPPP) to the City of Merced that identifies specific actions and Best Management Practices (BMP's) to prevent stormwater pollution during construction activities. (continued on next page)</i>	<i>Grading Permit</i>	<i>Inspection Services/ Engineering</i>	

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
HYD-1	<p><i>The SWPPP shall identify a practical sequence for BMP implementation, site restoration, contingency measures, responsible parties, and agency contacts. The SWPPP shall include, but not be limited to, the following elements:</i></p> <ul style="list-style-type: none"> <i>• Comply with the requirements of the State of California’s most current Construction Stormwater Permit.</i> <i>• Temporary erosion control measures shall be implemented on all disturbed areas.</i> <i>• Disturbed surfaces shall be treated with erosion control measures during the October 15 to April 15 rainy season.</i> <i>• Sediment shall be retained on-site by a system of sediment basins, traps, or other BMPs.</i> <i>• The construction contractor shall prepare Standard Operating Procedures for the handling of hazardous materials on the construction site to eliminate discharge of materials to storm drains.</i> <i>• BMP performance and effectiveness shall be determined either by visual means where applicable (e.g., observation of above-normal sediment release), or by actual water sampling in cases where verification of contaminant reduction or elimination (such as inadvertent petroleum release) is required by the Central Valley Regional Water Quality Control Board to determine adequacy of the measure. (continues on next page)</i> 	<i>Grading Permit</i>	<i>Inspection Services/ Engineering</i>	

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
HYD-1	<i>In the event of significant construction delays or delays in final landscape installation, native grasses or other appropriate vegetative cover shall be established on the construction site as soon as possible after disturbance, as an interim erosion control measure throughout the wet season.</i>			
HYD-1	<i>HYD-1b Prior to the issuance of building permits, the project applicant shall submit a final Storm Water Mitigation Plan (SWMP) to the City of Merced for review and approval. The plan shall be developed using the California Stormwater Quality Association's "New Development and Redevelopment Handbook." The SWMP shall identify pollution prevention measures and BMPs necessary to control stormwater pollution from operational activities and facilities, and provide for appropriate maintenance over time. The SWMP shall include design concepts that are intended to accomplish a "first flush" objective that would remove contaminants from the first 2 inches of stormwater before it enters area waterways. The project applicant shall also prepare and submit an Operations and Maintenance Agreement to the City identifying procedures to ensure that stormwater quality control measures work properly during operations.</i>	<i>Grading Permit</i>	<i>Inspection Services/ Engineering</i>	

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
HYD-5	<i>HYD-5 Prior to the issuance of a building permit for this project, the applicant shall demonstrate to the City that proposed storm drainage facilities are adequate to meet the Project demands and that improvements are consistent with the City's Storm Drainage Master Plan and the Post Construction Standards for the City's Phase II MS4 permit.</i>	<i>Grading Permit</i>	<i>Inspection Services/ Engineering</i>	
HYD-8	<i>HYD-8 Development of the site is required to provide fill dirt to raise the elevation of the site and achieve protection from flooding. The fill must be elevated above the computed 200-year flood elevation and freeboard is highly recommended by DWR (note: freeboard is the difference between the fill elevation and the computed flood elevation). A freeboard of 1-foot or greater will help to account for the inherent uncertainty in estimating peak flood discharges and the computed flood elevations. A Summary of the proposed fill elevations is provided in the Table below. The required fill elevation ranges from 168.4 to 167.7 ft. (NAVD88 vertical datum)</i>	<i>Grading Permit</i>	<i>Inspection Services/ Engineering</i>	

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)								
NOI-1	<i>NOI-1 The construction contractor shall limit all noise-producing construction activities, including deliveries and warming up of equipment, to the hours of 7:00 a.m. to 7:00 p.m., Monday through Saturday. No such work shall be permitted on Sundays or federal holidays without prior approval from the City.</i>	<i>Grading Permit</i>	<i>Inspection Services/ Engineering</i>									
NOI-1	<p><i>NOI-2 Any outdoor dining areas or other outdoor uses shall have the following setbacks to maintain an acceptable noise level of 70 dB for outdoor uses:</i></p> <table border="0"> <tr> <td><i>Road/Railroad</i></td> <td><i>Required Setback</i></td> </tr> <tr> <td><i>Santa Fe Drive</i></td> <td><i>54 Ft.</i></td> </tr> <tr> <td><i>North Highway 59</i></td> <td><i>89 Ft.</i></td> </tr> <tr> <td><i>BNSF Railroad</i></td> <td><i>137 Ft.</i></td> </tr> </table>	<i>Road/Railroad</i>	<i>Required Setback</i>	<i>Santa Fe Drive</i>	<i>54 Ft.</i>	<i>North Highway 59</i>	<i>89 Ft.</i>	<i>BNSF Railroad</i>	<i>137 Ft.</i>	<i>Building Permit</i>	<i>Inspection Services/ Planning</i>	
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TRA-1	<p><i>TRA-1 The following improvements shall be incorporated into the development of the northwest corner of North Highway 59 and Santa Fe Drive. These improvements are the sole responsibility of the property owner/developer.</i></p> <ol style="list-style-type: none"> <i>1. Restripe Santa Fe Drive to create a two-way left-turn (TWLT) lane east of the western access. This will improve the Level of Service by accommodating two-step left turns,</i> <i>2. Modify the layout of the access to Santa Fe Drive to either prohibit outbound right turns from the eastern driveway or provide a continuous auxiliary acceleration-deceleration lane between the driveways. These measures will address the horizontal curve on the alignment of Santa Fe Drive as it relates to the western driveway.</i> 	<i>Building Permit</i>	<i>Engineering/ Planning</i>									

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
TRA-1	<p><u>A traffic signal may be required at the western-most driveway. Traffic conditions at the western access shall be monitored and a traffic signal shall be installed if determined to be needed by the City Engineer based on warrants associated with preventable accidents. The cost of the traffic signal shall be the responsibility of the owner/developer.</u></p> <p>Prior to construction, the Site Plan Review Committee shall review the site design and determine which alternative at the western driveway is best to reduce the expected impacts. The alternatives may include those alternatives included in the traffic analysis or another alternative such as moving the driving further to the west. The developer shall provide any additional documentation or studies needed for the Site Plan Review Committee to make this determination.</p>	<p>Building Permit</p> <div data-bbox="1247 574 1621 708" style="border: 1px solid black; padding: 5px; margin: 10px auto; width: fit-content;"> <p>Note: <u>Underlined</u> text is new text, strikethrough text is deleted text.</p> </div>	<p>Engineering/ Planning</p>	
	<p>TRA-1a The southbound left-turn lane on SR 59 shall be lengthened as determined by the City Engineer and approved by Caltrans.</p>	<p>Building Permit</p>	<p>Engineering/ Planning</p>	

Impact No.	Mitigation Measures	Timing	Agency or Department	City Verification (date and initials)
	<p><i>TRA-1b The development shall contribute its fair share to the cost of improvements for the intersection of SR 59 and Olive Avenue:</i></p> <ul style="list-style-type: none"> <i>• Reconstruct westbound Olive Avenue to provide dual left turn lanes on southbound SR 59; and,</i> <i>• Reconfigure the westbound right turn lane to create a combination through and right turn lane, and extend that through lane across SR 59 along the project's frontage; and,</i> <i>• Reconstruct the existing northbound right turn lane as a "free" right turn with median island separating eastbound and right turning traffic. Reconstruct the eastbound Santa Fe Drive approach to provide dual left turn lanes.</i> 	<i>Building Permit</i>	<i>Planning</i>	
TRA-6	<p><i>TRA-6 Prior to the issuance of a building permit, the developer shall work with the Merced County Transit Authority (aka: The Bus) to determine if a bus stop is needed at this location. If a bus stop is required, the stop shall be in an area to allow the bus to move completely out of the travel lanes. The location of all bus stops shall be subject to approval by the City Engineer and Caltrans if along SR 59.</i></p>	<i>Building Permit</i>	<i>Planning</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