

ATTACHMENT 1

FACILITY USE AGREEMENT for the RALPH SHANNON PARCADE

THIS FACILITY USE AGREEMENT ("Agreement") dated _____, 2019, ("Approval Date") is by and among the City of Merced, a California Charter Municipal Corporation ("City"), the Parking Authority of the City of Merced, a parking authority created pursuant to Street and Highways Code Section 32500 et seq ("Authority"), and El Capitan Hotel Merced, LLC ("Hotel").

WHEREAS, Hotel has secured approval from the City Planning Commission/Design Review Commission for the redevelopment of the El Capitan Hotel; and

WHEREAS, Hotel includes uses such as restaurants, retail and hotel lobby on the first floor, supporting a 114- room hotel renovation project; and

WHEREAS, Authority is the owner of certain real property described as follows: Ralph Shannon Parcade located at 626 W. 18th Street, Merced CA, as shown on the map attached hereto as Exhibit A ("Premises"); and

WHEREAS, Hotel requires 60 parking spaces, and desires to lease 60 parking spaces at the Premises from the Authority; and

WHEREAS, Hotel seeks to enter and use a portion of the Premises as follows: dedicated covered parking spaces on the Second Floor and uncovered parking spaces on the Third Floor as indicated on the maps attached hereto as Exhibits B (Parcade – Second Floor Parking) and C (Parcade – Third Floor Parking).

NOW, THEREFORE, Authority and the Hotel hereby agree as follows:

ARTICLE 1 – GRANT OF LICENSE

1.1 Authority hereby grants Hotel and to its agents, employees, guests, and invitees an exclusive, revocable license to enter and use the Premises for the purpose, and at the times, set forth in Article 3, below.

ARTICLE 2 – TERM

2.1 The initial term of this Agreement shall be five years beginning on the date City issues a Certificate of Occupancy to Hotel. Hotel may extend the term of this Agreement for three successive five-year additional terms beyond the initial term, subject to approvals by the Authority and the Merced City Council, both of which shall not be unreasonably withheld. In order to extend the term of this Agreement beyond the initial term and each successive five-year term, Hotel must submit a notice in writing of its request to extend no later than ninety (90) days prior to the end of the initial term of this Agreement and ninety (90) days prior to the end of each successive five year additional term.

2.2 All parties, understand, acknowledge and agree that if Hotel extends the terms of this Agreement pursuant to section 2.1 above, that Authority shall, in its sole discretion, set the price to be paid by Hotel for the parking spaces during the extended term of this Agreement, and all prices set by Authority shall be based off then current fair market value rates.

ARTICLE 3 – USE OF PREMISES

3.1 Hotel shall use the Premises as parking for self and valet parking for the El Capitan Hotel premises, including any associated restaurant or retail operations, located at 1715 M Street in Merced, California.

3.2 Time of Use. Hotel shall have access to their reserved 60 parking spaces at all times to address hotel guest demand schedules. For purposes of clarity, the Hotel will operate as a 24 hour, 7 day per week, 365-day business that will remain open indefinitely; hence the need for continuous and uninterrupted use of Hotel spaces.

3.3 Park Only. The leased parking spaces granted by Authority to the Hotel under this Agreement are provided pursuant to an exclusive license for parking only, and shall be used solely by the Hotel for the parking of motor vehicles by its employees, agents, and guests in the parking facilities identified in this Agreement, under the terms, conditions, and obligations herein and in accordance with the rules and regulations posted at the parking facilities. Notwithstanding the aforementioned, the Hotel shall be able to use the leased parking spaces for temporary storage during times of heavy maintenance or renovation projects. Subject to the indemnification and hold harmless provision of paragraph 8.2 of this Agreement and the requirements of the Vehicle Code, the leased spaces are intended to be treated as private property for purposes of the California Vehicle Code only including, but not limited to, section 22658.

3.4 Identification. The Hotel, at its sole expense, shall provide signage or markings for parking spaces to identify reserved parking spaces for exclusive use by the Hotel. Said signage or markings require prior written approval from the Authority or its designee, which shall not be unreasonably withheld.

3.5 Employee Parking. Hotel shall exercise its best and reasonable efforts to ensure that employees park in locations other than the Merced Center Parking Garage, located at the corner of M and 18th Streets and the Ralph Shannon Parade.

3.6 Parking Maintenance and Repair. Parking spaces within the Ralph Shannon Parade shall be maintained by the City and/or Authority in good order and repair including parking areas, signage, exits, streets, entrances, and sidewalks. In addition, City or Authority shall maintain and repair all utility lines necessary for lighting of the parking area as part of regular maintenance. Damage to any part of the Ralph Shannon Parade not caused by the Hotel, its guests, employees, or any person or business affiliated with the Hotel shall be repaired by the

City and Authority. If City and Authority are not able to repair or begin to repair such damage within 72 hours, Hotel may perform such repairs, and City shall forgive Hotel's quarterly payments in an amount equal to the costs of any repairs performed and paid for by Hotel. In contrast, damage to any part of the Ralph Shannon Arcade caused by the Hotel, its guests, employees, or any person or business affiliated with the Hotel shall be repaired by Hotel at its sole cost and Hotel shall repair or begin to repair such damage within 72 hours.

The City or Authority shall keep the parking area, including parking spaces, exit streets, entrances, sidewalks, and driveways in reasonably clean condition. If City and Authority are not able to keep the parking area reasonably clean, Hotel shall provide notice to City and Authority by contacting Frank Quintero or his designee at (209) 385-6826 or such other phone number that is provided to Hotel. If City or Authority is unable to bring the parking area into a reasonably clean condition within 72 hours of notice from Hotel, Hotel may perform such work, and the City and Authority shall forgive Hotel's quarterly payments in an amount equal to the costs of any work performed by Hotel.

Additional lighting, security, security cameras, and other amenities requested by the Hotel shall be fully paid for by the Hotel. Hotel must secure written permission from the City/Authority or its designee to install any improvements or amenities to the Ralph Shannon Arcade prior to making such changes or improvements.

3.7 Security Gates and Elevators. All parties to this Agreement agree to cooperate in good faith with respect to future issues regarding the use, maintenance, and coordination of the security gates and elevators related to the operations of the completed project prior to and during the terms of this Agreement. The City and Authority agree that security gates and elevators will be operated 24 hours a day, seven days a week. However, all parties understand and agree that the security gates and/or elevators may be non-operational from time to time to allow for maintenance, repairs, renovation or replacement.

ARTICLE 4 – CONSIDERATION

4.1 Pay Period. During the initial term of this Agreement Hotel shall pay Authority in advance the amounts specified below prior to the first day of each quarter (January, April, July, and October): Fifty Dollars (\$50) per month for each covered space and Thirty-Five Dollars (\$35) per month for each non-covered parking space. During any extended term of this Agreement, the amount to be paid by Hotel shall be determined by Authority in its sole discretion but shall be reasonably negotiated using then current fair market value rates. Notwithstanding the above, in no event shall the amount to be paid by Hotel be less than the rates charged during the initial term of this Agreement.

ARTICLE 5 – NOTICES

5.1 All notices to be addressed by the Hotel to City and/or Authority in connection with this Agreement shall be given in writing to Authority at:

Frank Quintero
Director of Economic Development
678 W. 18th Street
Merced, CA 95340

With a copy to:
City Attorney, City of Merced
678 W. 18th Street
Merced, CA 95340

All notices to be addressed by City or Authority to Hotel in connection with this Agreement shall be given in writing to:

John Martin
El Capitan Hotel Merced, LLC
3848 McHenry Avenue, Suite 135, #254
Modesto, CA 95356

All notices shall be sent by first class or certified mail, or by personal delivery, to the addresses set forth above. They will be deemed sent on the date of the postmark, or if personally delivered on the date of delivery provided delivery occurs prior to 5:00 p.m. If personally delivered after 5:00 p.m., the notice shall be deemed to have been sent on the following business day.

ARTICLE 6 – TERMINATION

6.1 Any Party to this Agreement may terminate this Agreement by providing at least ninety (90) days, written notice to the other Parties. Should the Agreement be terminated by City or Authority for any reason other than a breach of the Agreement by Hotel, City acknowledges that at time of the termination, the Hotel may be subject to a minimum parking requirement. City agrees to negotiate in good faith during the ninety day notice period to locate or provide parking on substantially similar economic terms, at one or more of the Parking Relocation Sites identified on Exhibit D.

6.2 Notwithstanding the provisions of section 6.1 above, in the event that the Premises are damaged from any cause rendering the parking facilities totally or partially inaccessible or unusable during the term of this Agreement as reasonably determined by Authority, Authority may terminate this Agreement by giving the Hotel seven (7) days written notice thereof.

6.3 In the event that Hotel fails to perform any term, condition, or obligation under this Agreement, and such failure continues for at least 30 days after City or Authority provides written notice of such failure (each, a “default”), in addition to all other remedies provided by law, City or Authority may terminate this Agreement upon five days’ written notice to Hotel. Notwithstanding the foregoing, City and Authority agree to provide Hotel an additional period of 30 days to cure any default under this Agreement that cannot reasonably be cured within the initial 30 days period, provided that Hotel has begun to cure the default during the initial 30 day period after notice was provided to Hotel.

6.4 All parties understand and agree that the Director of Economic Development for City is empowered to terminate this Agreement on behalf of Authority.

6.5 No right or remedy herein conferred upon or reserved to Authority and/or City is intended to be exclusive of any other right or remedy, and each and every right and remedy shall be cumulative and in addition to any other right or remedy given hereunder or now or hereafter existing at law or in equity or by statute.

6.6 Upon expiration or earlier termination of this Agreement, the Hotel shall surrender all rights to use the parking facilities granted by this Agreement.

ARTICLE 7 - PARKING RULES AND REGULATIONS

7.1 In its use of the parking facilities, the Hotel shall at all times comply, and shall cause its employees, vendors and guests to comply, with any rules and regulations established by Authority ("Rules"). Authority may unilaterally modify or amend such Rules from time to time and will provide to Hotel written notification of such modification or amendment within 72 hours after any such modification or amendment. Hotel shall not be deemed to be in breach of this Agreement for violating any modified or amended rules or regulations prior to receiving notice of any modification or amendment.

ARTICLE 8 - INDEMNITY AND HOLD HARMLESS

8.1 Authority shall indemnify, defend and hold harmless City, Hotel, its officers, agents, and employees from and against any and all claims, damages, costs, expenses, or liabilities (collectively "Claims") arising out of or in any way connected with this Agreement including, without limitation, Claims for loss or damage to any property, or for death or injury to any person or persons, but only in proportion to and to the extent that such Claims arise from the negligent or wrongful acts or omissions of Authority, its officers, partners, agents, or employees.

8.2 Hotel shall indemnify, defend and hold harmless City, Authority, its officers, partners, agents, and employees from and against any and all Claims arising out of or in any way connected with this Agreement including, without limitation, Claims for loss or damage to any property or for death or injury to any person or persons, but only in proportion to and to the extent that such Claims arise from the negligent or wrongful acts or omissions of the Hotel, its officers, agents, employees, guests, invitees, or patrons.

8.3 City shall indemnify, defend and hold harmless Authority, Hotel, its officers, agents, and employees from and against any and all claims, damages, costs, expenses, or liabilities (collectively "Claims") arising out of or in any way connected with this Agreement including, without limitation, Claims for loss or damage to any property, or for death or injury to any person or persons, but only in proportion to and to the extent that such Claims arise from the negligent or wrongful acts or omissions of City, its officers, partners, agents, or employees.

ARTICLE 9 – INSURANCE

9.1 The Hotel, at its sole cost and expense, shall insure its activities in connection with this Agreement and obtain, keep in force and maintain insurance as follows:

- a. General Liability Insurance (contractual liability included) with minimum limits as follows:
 1. Each Occurrence \$ 1,000,000
 2. Products/Completed Operations Aggregate \$ 2,000,000
 3. Personal and Advertising Injury \$ 1,000,000
 4. General Aggregate \$ 2,000,000
- b. Business Automobile Liability Insured Program or Self-Insurance Program for owned, non-owned, or hired automobiles with a combined single limit of not less than one million dollars (\$1,000,000) per occurrence.
- c. Property, Fire and Extended Insurance in an amount sufficient to reimburse Authority for all of its equipment, trade fixtures, inventory, fixtures and other personal property located on or in the Premises including leasehold improvements hereinafter constructed or installed.
- d. Workers' Compensation as required by California law.

The coverages referred to under a. b. and c. of this Section 9.1 shall include City, Authority, and both of their officers, agents and employees as additional insureds. The Hotel, upon the execution of this Agreement, shall furnish City and Authority with certificates of insurance evidencing compliance with all requirements. Certificates shall provide for thirty (30) days advance written notice to the City and Authority of any material modification, change or cancellation of any of the above insurance coverages.

The coverages required herein shall not limit the liability of the Hotel.

ARTICLE 10 - EXTERIOR SIGNS

10.1 Any and all signs or advertisements of any nature extending into, on, or located over the Premises, shall conform to all City of Merced zoning and building codes and shall be approved, but approval shall not unreasonably withheld by Authority in writing prior to construction, use, or erection thereof. Approval by Authority shall not be unreasonably withheld, conditioned or delayed, as to location, graphics, type, content, and architectural or engineering standards.

ARTICLE 11 - COVENANTS AGAINST DISCRIMINATION

11.1 City, Authority and the Hotel each agree for itself, its heirs, executors, administrators, and assigns, and all persons claiming under or through them, as follows:

"There shall be no discrimination against or segregation of any person or group of persons on account of race, color creed, national origin, religion, sex, disability, marital status, or ancestry, in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the Premises herein granted, nor shall the Hotel, or any person claiming under or through it, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, occupancy of tenants, lessees, sublessees, subtenants or vendees in the Premises herein granted."

ARTICLE 12 - WAIVER

12.1 Any party's failure to enforce any breach of any term, covenant or condition contained herein shall not be deemed to be a waiver of such terms, covenants or conditions, or any subsequent breach of same, or any other term, covenant or condition contained herein.

ARTICLE 13 - ASSIGNMENT OR TRANSFER

13.1 This Agreement or the right to use the parking facility may not be assigned or transferred by the Hotel by voluntary act or otherwise without the City's and Authority's prior written consent, which shall not be unreasonably withheld. Any attempted assignment or other transfer of this Agreement in violation of this Section shall be void.

ARTICLE 14 - GOVERNING LAW

14.1 The law governing this Agreement shall be that of the State of California.

ARTICLE 15 – VENUE

15.1 The Parties hereto agree that any and all lawsuits or legal proceedings relating to this Agreement, its interpretation or the Parties' performance of this Agreement, shall take place in Merced County Superior Court.

ARTICLE 16 – ATTORNEY'S FEES

16.1 If any Party to this Agreement brings an action to enforce the terms of this Agreement or to declare rights hereunder, the substantially prevailing party in any such action, on trial or appeal, shall be awarded its reasonable attorney's fees to be paid by the substantially losing party as fixed by the Court.

ARTICLE 17 – ENTIRE AGREEMENT

17.1 This Agreement contains the entire agreement and understanding between the parties and supersedes all prior written or oral agreements with respect to the subject matter herein. No representation, warranty, condition, or agreement of any kind or nature whatsoever shall be binding upon the parties hereto unless incorporated in this Agreement. This Agreement may be modified only by a written Amendment signed by City, Authority and the Hotel.

IN WITNESS WHEREOF, the parties have executed this Facility Use Agreement as of the date first written above.

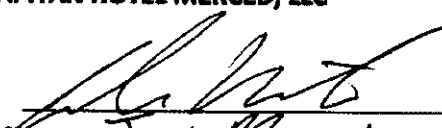
AUTHORITY:

HOTEL:

PARKING AUTHORITY OF THE CITY OF MERCED

EL CAPITAN HOTEL MERCED, LLC

By: _____
Name: _____
Title: _____

By: 
Name: David Martinez
Title: Development Manager

CITY:

ATTEST:


CITY OF MERCED
A California Charter Municipal Corporation

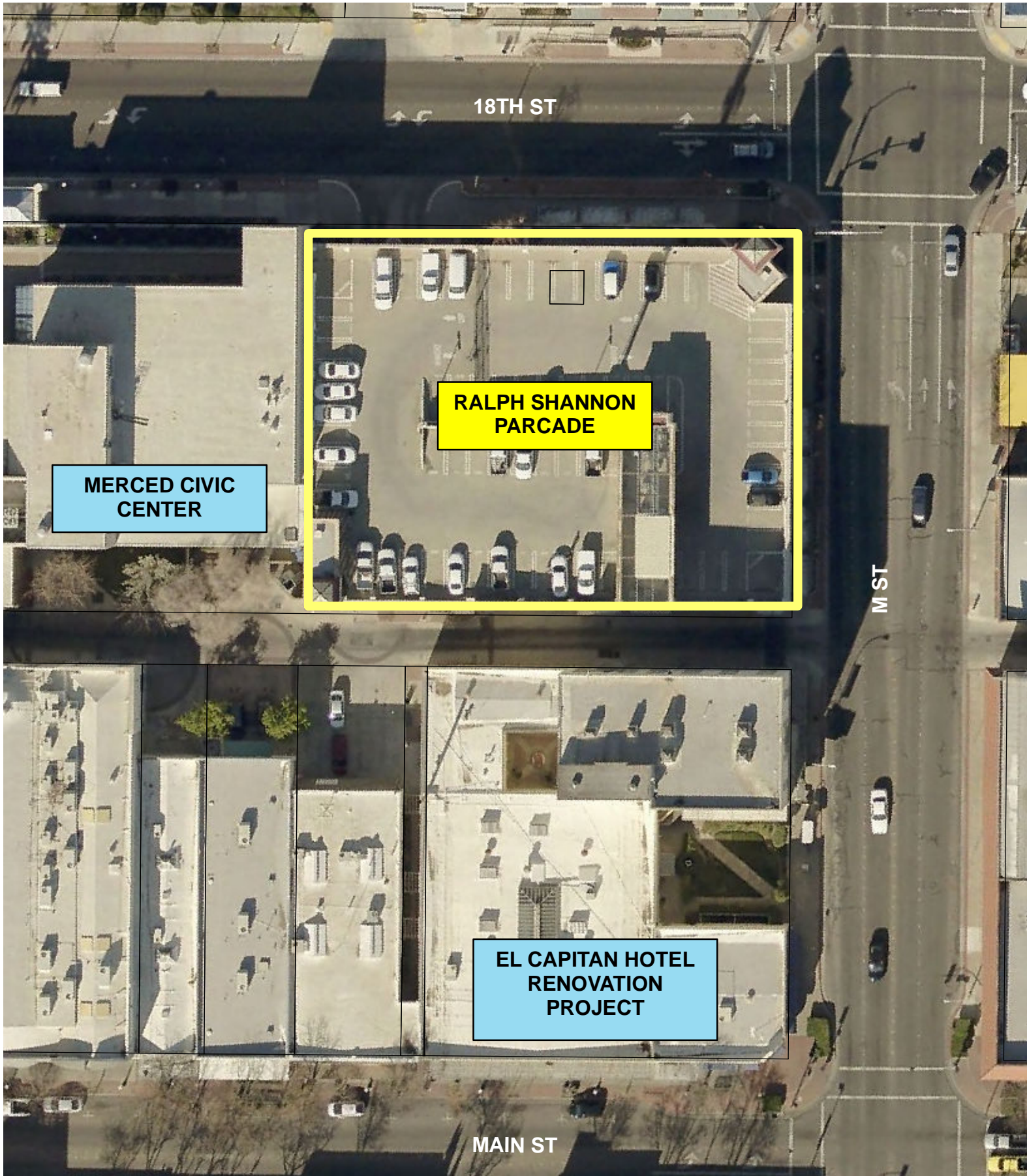
STEVE CARRIGAN, CITY CLERK

By: _____
Name: _____
Title: _____

By: _____
Assistant/Deputy City Clerk

APPROVED AS TO FORM:

By: 
Name: Phaedra A. Norton
Title: City Attorney



**EXHIBIT A
CITY OF MERCED
RALPH SHANNON PARCADE**

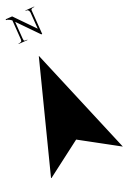
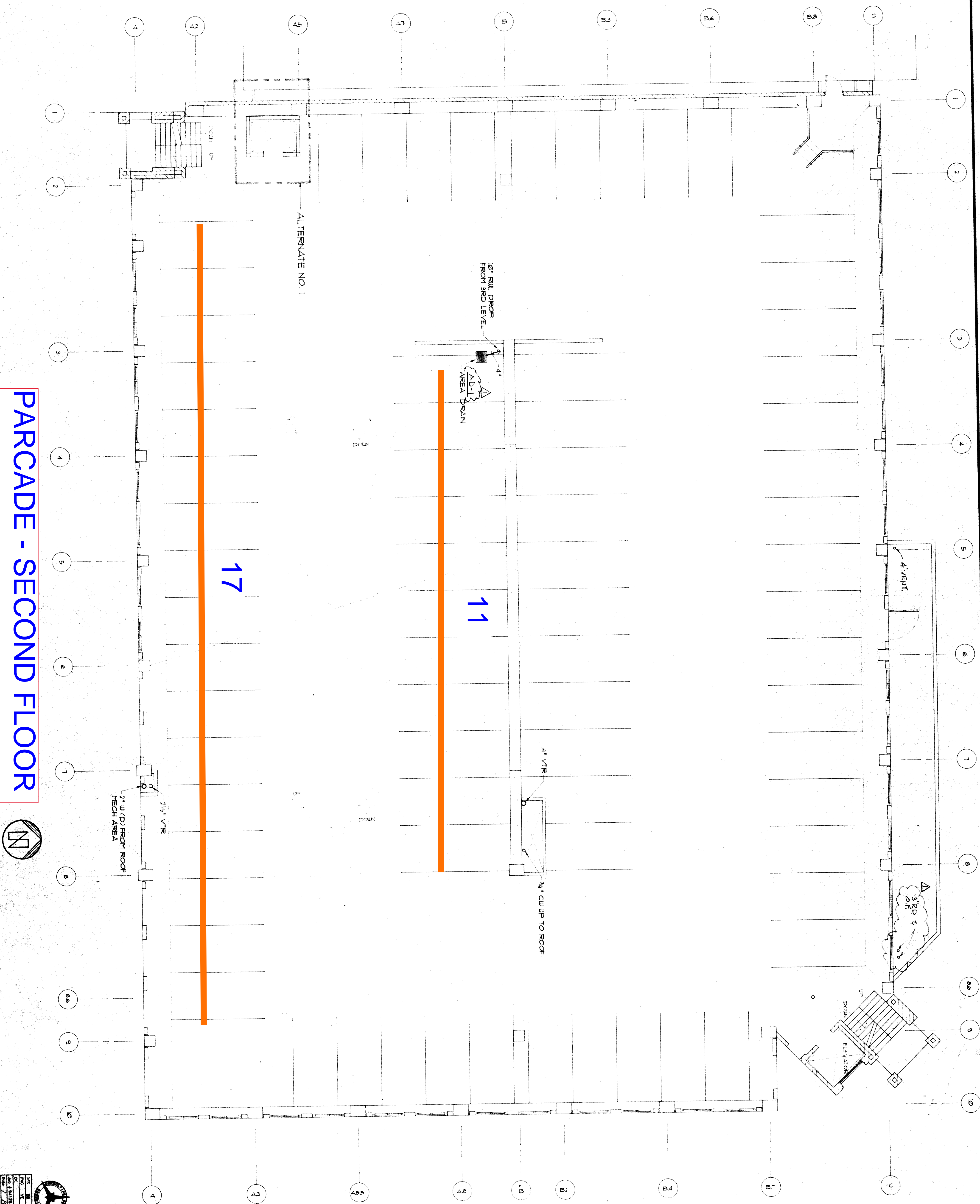
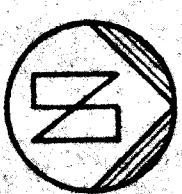



EXHIBIT B



PARCADE - SECOND FLOOR





 American Consulting
 Engineers Council
 Member
 Supporting Experience
 in Engineering

DES	_____
ENG	_____
CK	_____
Job #	44128
Date	7/84

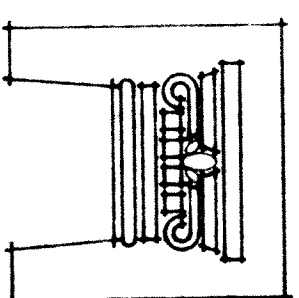
By _____
 TUNLEY PROVENCAL
 Mechanical Engineers
 8300 Avenida, California

**PLUMBING
SECOND FLOOR
PLAN**

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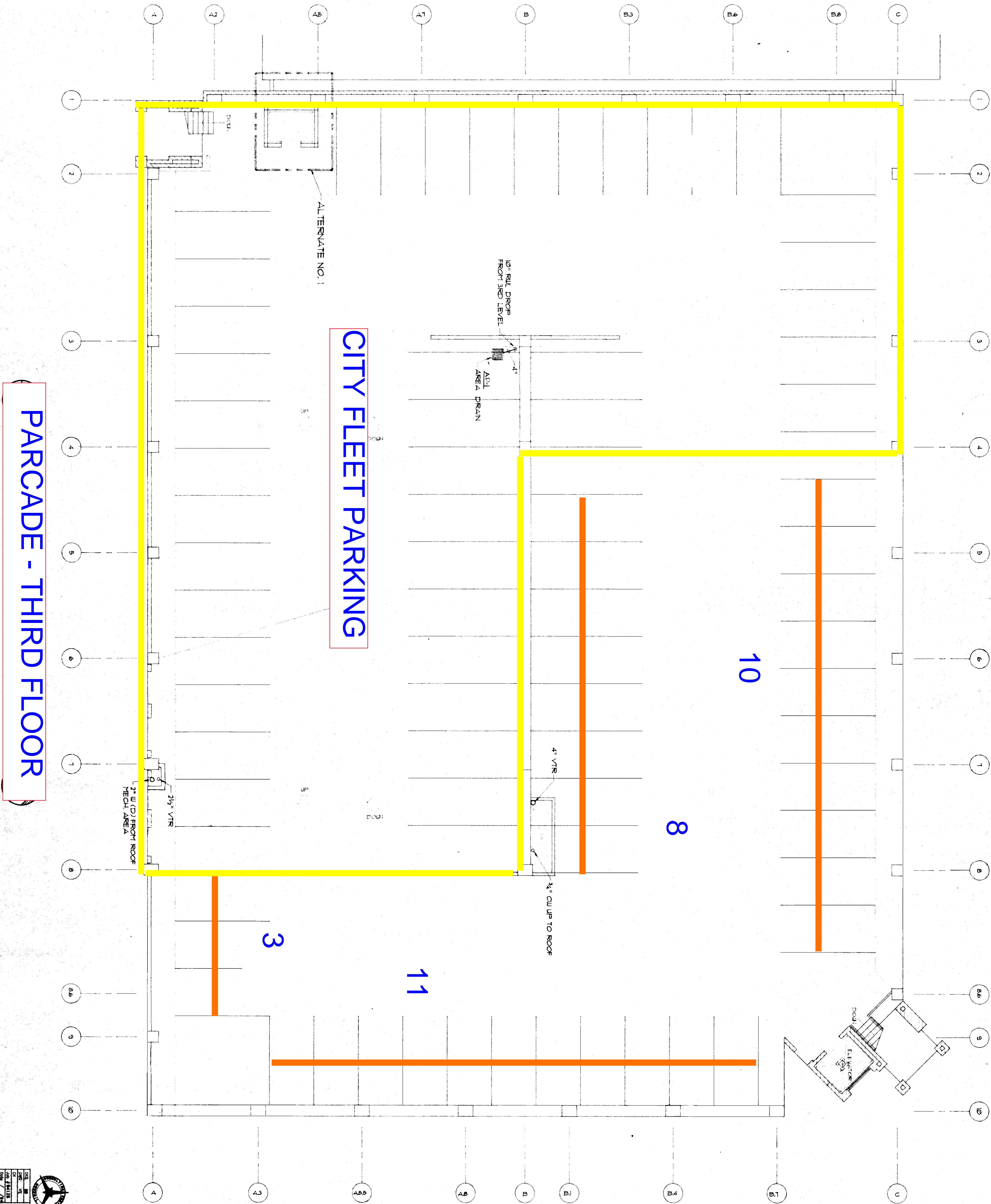
638 W. 19th STREET
MERCED, CA. 95340
(209) 722-3346 (MERCED)
(209) 576-8222 (MODESTO)

**DU PERTUIS
PRATT
NAVARRO
ARCHITECTS
PLANNERS**



OLD TOWN CENTER
 ◆ P A R C A D E ◆
 CITY OF MERCED REDEVELOPMENT AGENCY
 18th & M STREET
 ◆ MERCED, CALIFORNIA 95340 ◆

EXHIBIT C



OLD TOWN CENTER
PARCADE
CITY OF MERCED REDEVELOPMENT AGENCY
18th & M STREET
MERCED, CALIFORNIA 95340

DU PERTUIS
PRATT
NAVARRO
ARCHITECTS
PLANNERS

638 W. 19th STREET
MERCED, CA 95340
(209) 722-3346 (MERCED)
(209) 576-8222 (MOBILE)

MECHANICAL
THIRD FLOOR
PLAN

P-4

