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April 2, 2019

VIA E-MAIL AND U.S. MAIL

City of Merced Planning Commission
Chairperson Dylina Robert & Members of the
City Planning Commission
c/o Kim Espinosa, Planning Manager
678 West 18th Street
Merced, CA 95340
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Re: Agenda Item 4.2: Extension of Vesting Tentative Subdivision Map #1291

Dear Chairperson Robert and Honorable Members of the City of Merced Planning Commission:

Miller Starr Regalia represents Bright Development in its application to extend Vesting Tentative Subdivision Map #1291. As you know, the Planning Commission will be considering this application at its hearing on April 3, 2019, a continuation of its hearing on March 30, 2019. As you also know, the Planning Commission has received a number of letters from a neighboring development group, comprised of BP Investors, LLC, Leeco, LLC, and Exposition Properties, LLC (collectively referred to herein as "BP Investors"), alleging that extension of my client's subdivision map is unlawful.

Not one of these claims has legal merit, as explained below.

Summary of subdivision project and past environmental review. The City's staff reports have done an excellent job at summarizing the history of Bright Development's subdivision map, and so we will spend little time rehashing this history.

Essentially, prior to the expiration of the map in January 2018, Bright Development requested that it be extended. The Planning Commission ultimately granted an extension to January 16, 2019, but with some conditions. Generally, the Planning Commission asked Bright Development to reconfigure its subdivision map so that all lots and internal roads fit within my client's property holdings. My client modified the map, which resulted in a reduction of lots (i.e., from 168 to 161 dwellings), and which led to the following City actions: (1) on September 10, 2018, the planning

department found that the modifications did not result in new environmental impacts under the California Environmental Quality Act ("CEQA"), but that the modified subdivision fit within the scope of the project's original 2006 Mitigated Negative Declaration;[1] and (2) on October 3, 2018, the Planning Commission approved the proposed modifications and extended the life of the map until January 16, 2019.

These are the simple facts, and they suffice to defeat each and every one of BP Investors' claims.

Summary of claims. BP Investor's claims fall into three main categories:

(1) ***Environmental review issues.*** BP Investors claims the map extension requires additional environmental review, and past environmental review of the subdivision map was inadequate;

(2) ***Drainage swale issues.*** BP Investors claims the subdivision map's drainage infrastructure — a swale, in particular — extends onto BP Investors' property and does not comply with PG&E requirements; and

(3) ***Emergency access objection.*** BP Investors claims the subdivision's emergency vehicle access route is inconsistent with the City's general plan.

BP Investors has levied these claims in a series of disjointed letters that can be difficult to follow. When one disentangles these assertions, one finds that none of them amounts to a viable legal threat. We explain why below.

All claims about environmental review are void of legal merit. Insofar as BP Investors has attacked the Planning Commission's approval on October 3, 2018, whereby the City approved all modifications to my client's subdivision map, the time to institute a legal challenge has come and long passed.[2] BP Investors' remedy was to exhaust its administrative remedies and appeal the matter to the City Council, which BP Investors failed to do. (*See Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280; *O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 583-584.) As a matter of law, then, this party is precluded from further challenging the map's modifications.

Insofar as BP Investors claims the environmental review supporting the Planning Commission's previous approval is faulty, the same analysis applies. BP Investors failed to exhaust administrative remedies, which effectively destroyed its ability to

[1] This determination and the findings that support it are found as Attachment F to the staff report for the Planning Commission's October 3, 2018 meeting.

[2] BP Investors comments include, without limitation, those sent or voiced on January 31, 2019, February 14, 2019, March 19, 2019, March 20, 2019, and April 3, 2019.

levy a further legal attack. Even assuming, for the sake of the argument, that a court would hear this challenge, BP Investors' claims are untimely for a separate and independent reason: the CEQA statute of limitations period has passed. As noted above, the planning department made a CEQA determination on September 10, 2018. Under state law, planning staff have the authority to conclude that no further environmental review is warranted, and that a CEQA report adequately addresses the impacts of any modifications.[3] (*Comm. for Re-Evaluation of T-Line Loop v. San Francisco Mun. Transportation Agency* (2016) 6 Cal. App. 5th 1237, 1256; *see also* Merced Municipal Code, § 19.16.020 [planning staff authorized to make CEQA determinations].) Therefore, even assuming the longest CEQA limitation period applied here (i.e., 180 days), the time to institute a legal challenge would have expired on March 18, 2019.

This brings us to Bright Development's most recent request to extend the map. Importantly, this application for a map extension *entails no modifications to the project*.[4] Bright Development intends to implement the project according to the exact same development blueprint that the Planning Commission approved on October 3, 2018. In this context, and as California courts make clear, ***Bright Development's request for an extension, albeit a request for a discretionary approval, is not a project under CEQA, and requires no further environmental review***. In *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1056, the court held that resuscitation of an expired tentative map does not convert the subdivision into a "new project for purposes of CEQA review," and the expiration of a tentative map is "an abstract occurrence that [has] no effect on the project's environmental impacts." (*Id.*) The court further held that "a CEQA project is not to be defined by each of the discretionary approvals that may be required from government agencies," and the position that refreshing a map approval would require new CEQA review "could have potentially absurd and wasteful consequences." (*Id; see also id.* at 1047, 1053 [as a matter of law, unnecessary to consider new information concerning water usage and habitat delineation].)

[3] For this reason, too, BP Investors' claim that the City failed to adopt a CEQA determination about the map modifications is legally unsupportable.

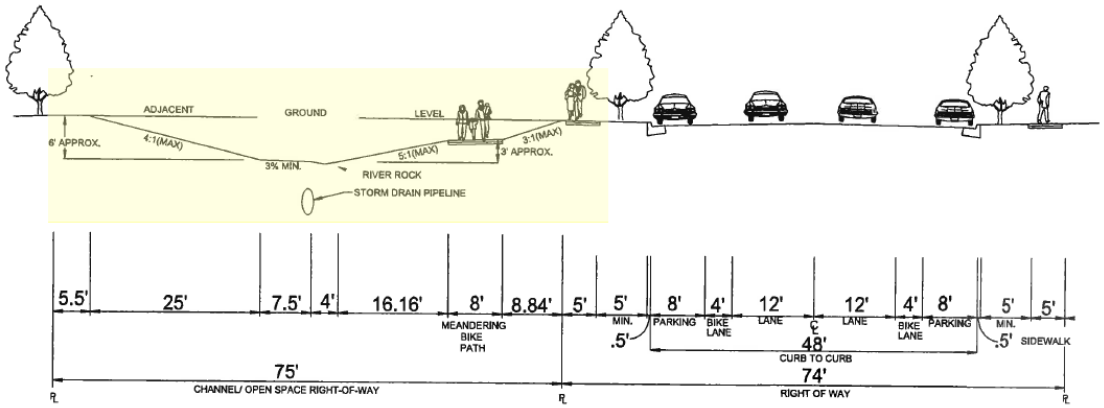
[4] While we do not want to belabor this point, but BP Investors states, multiple times in each of its many letters, that my client has changed Vesting Tentative Subdivision Map #1291 and thus re-triggered the CEQA process. Minor modifications to the map were made in the months leading up the October 3, 2018 Planning Commission hearing but, again, the City's planning staff addressed these refinements in its September 10, 2018 CEQA report. The Planning Commission thereafter approved these refinements, and the time to challenge them has elapsed. Since this approval, my client has not made a single change to its subdivision map, and the map before the Planning Commission now is the same exact map it approved last October.

In sum, the time to challenge any modifications to Bright Development's subdivision map has long passed, and the instant application to extend its life is not subject to CEQA review.[5]

Drainage swale. BP Investors contends that various drainage improvements shown on Bright Development's subdivision map encroach on BP Investors' property, and are otherwise illegal.

None of this is true.

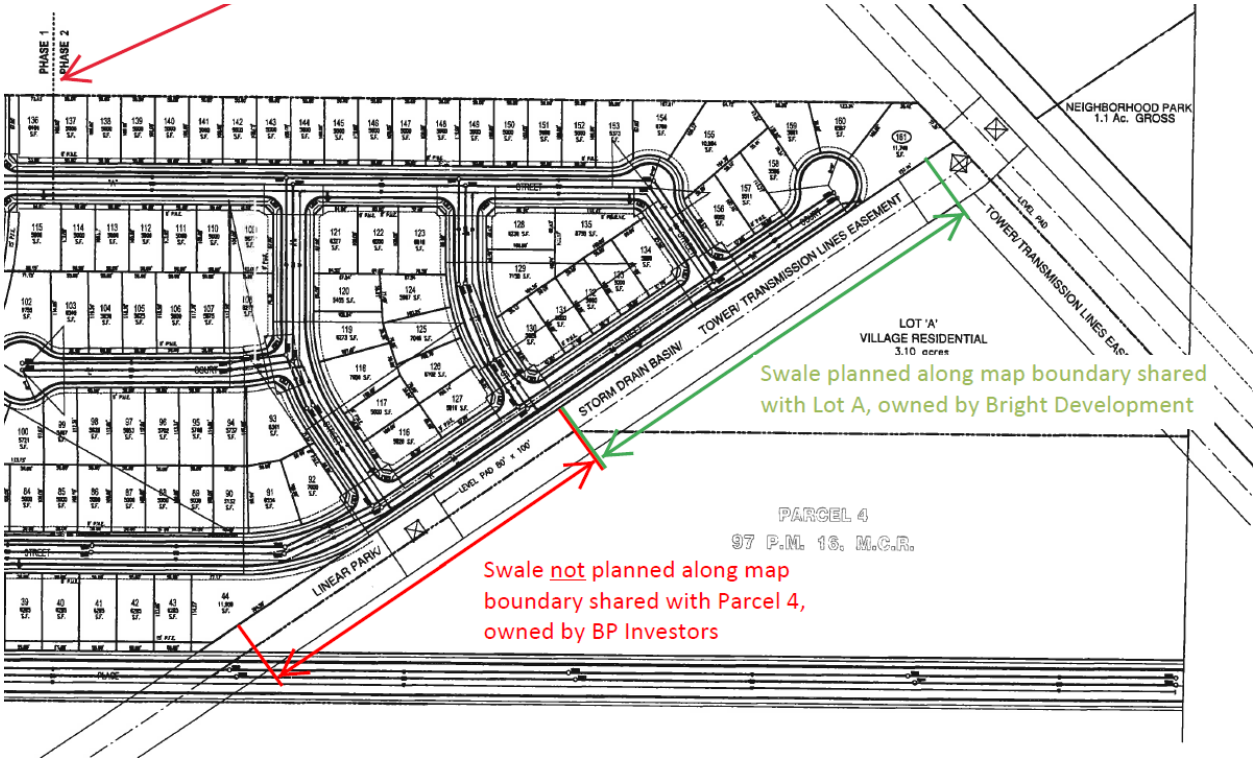
First, the proposed drainage swale does not encroach on property outside Bright Development's control. The drainage swale, as depicted on page 5 of the subdivision map, indeed does contemplate a 75-foot-wide area. Please see the image below, copied from Vesting Tentative Subdivision Map #1291.



SECTION 'A-A'
75' WIDE LINEAR PARK/ STORM DRAIN BASIN/
TOWERS AND TRANSMISSION LINES
ADJACENT TO A 74' R.O.W.
CROSS SECTION

[5] We hesitate to address the substance of BP Investors' CEQA claims, given the procedural defects that, as a threshold matter, neuter the company's ability to challenge my client's map. That said, each of these claims is devoid of merit. For instance, BP Investors' comment that the environmental baseline has changed, due to the demise of the Palisades subdivision map and more recent cumulative development, is fundamentally flawed because it fails to recognize that an environmental baseline is established under CEQA when a Notice of Preparation is issued or environmental review otherwise commences. The California Legislature adopted this rule so that public agencies would not have to continually update environmental review documents. Moreover, the fact that the subdivision map for the Palisades project expired does not make that neighboring project unforeseeable, given the fact that the Development Agreement which governs building of the area, as well as other annexation approvals, require that this neighboring project site be developed in a manner consistent with the residential development contemplated in the expired map.

However, the swale is not planned along the boundary shared with BP Investors' property, but in the area adjacent to Lot A, which is owned by Bright Development. The illustration below, an annotated copy of Vesting Tentative Subdivision Map #1291, shows the general location of the planned drainage swale:



Accordingly, Bright Development will implement the subdivision and its drainage improvements on property belonging wholly and exclusively to Bright Development, and not on property belonging to any neighbors.

BP Investors also has alleged that Bright Development's proposed drainage swale is inconsistent with the operation of PG&E's powerlines. This conclusion, however, is based on misinformation:

- PG&E in fact reviewed Vesting Tentative Subdivision Map #1291, and approved the concept of the linear drainage swale. Please note that Bright Development's proposal includes 80' by 100' flat areas around each of the PG&E's towers, so that PG&E can safely access its infrastructure.

- It is unclear what information BP Investors provided to PG&E in its informal email exchange of July 21, 2017. (4/3/2019 PC Staff Report, Ex. K; 3/20/19 PC Staff Report, Ex. K.) It seems unlikely BP Investors was sending PG&E information about my client's project and, if BP Investors indeed was seeking an opinion on my client's project, whether its agent sent a full and complete

> plan set to the utility company and otherwise made the proper representations.

It is important to note that Bright Development does not need the proposed drainage swale to meet applicable stormwater requirements. My client could rely on a drainage basin to be located at a nearby City park (APN No. 06-030-040), as contemplated in the relevant annexation approvals and the Development Agreement that governs the area. Alternatively, my client could rely on a drainage basin located on Lot A which, again, is owned by Bright Development. At this time, and as stressed above, *Bright Development is not proposing these modifications to its subdivision map*. We raise these possibilities because they demonstrate the ease with which a project refinement could be made. In fact, as the City suggests in its staff reports, a refinement to the drainage basin could even occur during processing of the final map. (4/3/19 PC Staff Report, p. 4; 3/20/19 PC Staff Report, p. 4.) BP Investors was extended this same courtesy when the City approved its student housing project on property located south of Lot A, which contemplated drainage infrastructure located either on-site or in the proposed City park.[6]

Ultimately, an alternative location for the drainage basin is irrelevant to the question of whether the City should extend the map, since Bright Development is not proposing any such alternative location. As such, the subdivision map is consistent with all applicable law, and any allegation to the contrary is based on misinformation and attempts to confuse the Planning Commission.

All claims about general plan inconsistencies are void of legal merit. Citing sections of the City's 2015 General Plan, BP Investors claims the emergency vehicle access ("EVA") depicted on my client's subdivision map is unlawful.

First, as with BP Investors' environmental claims, the time to make planning-related claims has long passed. Administrative remedies were not exhausted with respect to the Planning Commission's approval on October 3, 2018 and, regardless, challenges to a permitting condition or a subdivision-related approval is 90 days. (*See* Gov. Code, §§ 65009(c), 66499.37.) Even if a legal challenge were possible, the deadline to file a lawsuit expired months ago.

[6] More specifically, BP Investors relied on the very same flexible arrangement — i.e., use of the park basin — in entitling its student housing project in 2015. (*See* 8/3/2015 Staff Report, p. 8 ["if storm water cannot be contained on [BP Investors'] site, the developer would be required to … direct water to a basin in the park located to the north of the site"].) The conditions of approval for BP Investors' project, meanwhile, echoed this flexibility in locating the applicant's drainage infrastructure. (*See* CUP #1200, COA Nos. 16, 17.) We respectfully ask the Planning Commission to extend to my client the same rules of play it extended to BP Investors during the entitlement of its own project.

From a substantive standpoint, BP Investors is wrong as well. The 2015 General Plan indeed does have intersection spacing requirements that apply to G Street and other major arterials,[7] but these rules do not govern the establishment of EVAs.

The General Plan regulates the "arterial grid system" and the intersection of roadways open to the general public at all times of the day, and specifically provides that intersections of public rights of way with major arterials shall be spaced ¼ to ½ miles apart. (*See, e.g.,* 2015 General Plan Transportation and Circulation Element, pp. 4-9, 4-11.) The EVA depicted on my client's subdivision map, and outlined in the project's conditions of approval, would not allow for general public access, but would be maintained by the City's fire department, and would allow for usage only by emergency vehicles responding to calls for service. Moreover, this EVA would be temporary, and expire at the time the property to the north of Bright Development's subdivision was developed consistent with the City's annexation approvals and the Development Agreement to which BP Investors, Bright Development, and the City are party.[8]

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[7] We note that the 2015 General Plan and the 2030 General Plan have the same exact spacing requirements, undermining BP Investors' claims that mention of the later General Plan in any of the conditions of approval for Vesting Tentative Subdivision Map #1291 makes a meaningful difference. Meanwhile, the map conditions that mention the 2030 General Plan do not in fact change the substantive requirements with which my client must comply. Specifically, in setting forth easement requirements consistent with General Plan policy, the City is requiring my client to dedicate a right of way for G Street that measures 128-feet in width, with an additional 15-foot-wide right of way for landscaping — a requirement that has never changed since the map was first approved more than a decade ago. Finally, the fact that recent City approvals indicate a project is consistent with the 2030 General Plan does not preclude them from being consistent with the 2015 General Plan, and it is our contention that Vesting Tentative Subdivision Map #1291 is consistent with both legislative planning documents in all relevant respects. Notwithstanding all of this, any such claims by BP Investors are ineffective from a procedural standpoint, given applicable statutes of limitation have long expired, as explained above in this letter (i.e., both an exhaustion requirement and a 90-day limitations period applied for land use challenges to the map approval in October 2018).

[8] It appears BP Investors believes adoption of the EVA, insofar as it results in an inconsistency with the City's general plan, constitutes a contractual breach of this Development Agreement. As discussed above, the project is consistent with all applicable general plan policies, and Bright Development's map is consistent with the terms of the Development Agreement. As is also discussed above, the EVA is temporary, and will disappear once BP Investors develops its property in accordance with the Development Agreement. To the extent BP Investors is arguing that mere reference to the 2030 General Plan constitutes a breach of the Development Agreement, such reference does not prejudice BP Investors, nor does it engenders a claim of breach.

Under these facts, the Planning Commission found, correctly and within its authority, that Vesting Tentative Subdivision Map #1291 was consistent with all applicable City policies and laws.

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There is no merit to any of BP Investors' claims. They have no legal underpinning, and to the extent factual representations are made, they are based on half-truths and misrepresentations. Moreover, some of the entitlements which BP Investors would have you deny my client are the same entitlements that BP Investors sought, and received, in advancing its own development plans in past years.

Sincerely,

MILLER STARR REGALIA

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