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April 20, 2020

**VIA EMAIL TRANSMISSION AND HAND DELIVERY**  
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Director of Development Services  
c/o Julie Nelson  
City of Merced  
678 W. 18th Street, 1st Fl.  
Merced, CA 95340

Attention: Kim Espinosa, Planning Manager, and Julie Nelson, Associate Planner

Re: Appeal of Site Plan Review #455  
Merced Holdings LP Project at Yosemite Avenue and McKee Road  
Planning Commission Hearing Approval Date: April 13, 2020  
Agenda Item 4.1  
[Pursuant to City of Merced Zoning Ordinance Chapter 20.74]

Dear Gentilepersons:

Pursuant to the authorization and direction of my client, Casey Steed, I am hereby filing an Appeal of the Planning Commission's Approval of Site Plan Review #455 and of the Mitigated Negative Declaration identified as Initial Study #19-37 for this project which was relied upon by the Planning Commission for its approval of Site Plan Review #455.

In addition my clients, Merced Smart Growth Advocates (MSGAs), a California unincorporated association, and the San Joaquin Valley Environmental Defense Center, a California non-profit corporation, join in, and support this appeal.

**Preliminary Procedural Objections to Approval of Site Plan Review #455**

At the outset, Appellants raise two preliminary procedural objections to the approval of the above-referenced project.

1. Appellants object to the consideration of or approval of this Site Plan Review, based on the fact Conditional Use Permit #1238, which was approved by the City Planning

Commission on January 22, 2020, was applied for by the Applicant prior to the expiration of less than one (1) year from the denial of what Applicant characterizes as substantially the same project by the City Council's grant of Appellant's appeal of the same project on or about October 7, 2019. This objection is based on the fact that there is no evidence in the record before the Commission and the Council that the grant of Mr. Steed's previous appeal of the Planning Commission's previous approval of the same project within less than a year was made "without prejudice" to the Applicant.

2. Appellants object to the Commission's approval of the Site Plan Review #455 based on the fact that the hearing on CUP #1238, which was timely appealed on January 29, 2020, by Mr. Steed, was not heard with the Site Plan Review #455 on January 22, 2020. [[Merced Municipal Code (MCC) Section 20.32]. The grounds for this objection are that the Appellants and other members of the public were denied their right to meaningful participation in the environmental review process required by the California Environmental Quality Act [Public Resources Code section 21000 et seq.] and the California Environmental Quality Act Guidelines [California Code of Regulations, title 14, section 15000 et seq. (CCR)] See, CEQA Guidelines, section 15201 (*Concerned Citizens of Costa Mesa v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929).

Appellants hereby appeal the CEQA determination to the City Council, pursuant to PRC section 21151, subd. (c) to be reviewed in its entirety based on all facts and evidence produced at the time of the hearing on this Appeal, including, without limitation, the following grounds.

#### **Additional Grounds for Appeal of Approval of Site Plan Review #455**

1. Appellants hereby incorporate by reference all of the grounds set forth in Appellants' Appeal of the Planning Commission approval of CUP #1238, dated January 29, 2020, as supplemented by his letter of January 31, 2020.

2. Under "**FINDINGS/CONSIDERATIONS**", Staff Report #20-03 states, "Although the General Plan encourages mixed-use developments, it does not specifically address the density allowed within a commercial zone for a mixed-use project." [p. 6, para. A] Since neither High-Medium Density (HMD) and High Density (HD) is expressly included in the Neighborhood Commercial (CN) land use designation nor in the zoning classification of Neighborhood Commercial (C-N) Commercial, The proper legal inference should be that the City Council did not intend to include either HMD nor HD within the CN land use nor the C-N zoning designation. Absent express language to the contrary, the Applicant needs to apply for a General Plan Amendment and a Zoning Amendment to include express language to provide internally consistency between the General Plan Land Use Element and the Zoning Ordinance, before the Site Plan may rely upon either HD or HMD entitlement sought by the Applicant. The Commission abused its discretion by making this finding.

3. The Planning Commission proceeded in a manner not in compliance with law by

making findings and approving Site Plan Review #455 and adopting the environmental review characterized as the adoption of a Mitigated Negative declaration and Mitigation Monitoring Program regarding Environmental Review #19-37 based on the fact that the Traffic fails to disclose, analyze, discuss and consider adequately the cumulative impacts to traffic congestion and safety by making the assumption that only students will be residents in the a single units identified as such by Applicant. There is no evidence in the record that the Applicant or ultimate owners of the proposed project will be able to limit such single units and by failing to identify the right hand turns from the parking lot onto northbound McKee Road and the congestion and safety hazards caused by non-student drivers turning left on Yosemite Avenue and McKee during peak a.m. hours when families are dropping their children off at the Providence Christian School on the north side of Yosemite Avenue (westbound), when non-student traffic is turning right on Yosemite and exiting the parking lot eastbound onto Yosemite Avenue and making a U-turns onto westbound Yosemite Avenue we [K2 Traffic Engineering, Inc. Traffic Impact Study, Exhibits 4-6] Relying on the inadequate Traffic Study constitutes an abuse of discretion under CEQA. [Public Resources Code section 21168,5]

4. The Traffic Study included in the Mitigated Negative Declaration relied on by Staff for the environmental review for this project does not include an internal circulation plan nor disclose, analyze, or mitigate the potentially significant cumulative adverse impacts to peak a.m. traffic safety and congestion caused by right turns from the curb cut on Yosemite Avenue.[MCC Section 20.68,050 (F)(6)]

5. The grounds stated in paragraphs 3 and 4, above, are compounded by the terms of COA No. 14, included in CUP #1238, which is on appeal, due the fact that COA No. 14 defers the determination and dedication of the necessary right-of-way along the property frontage is not identified, disclosed, or discussed and is improperly deferred to the issuance of the first building permit. But, the Site Plan cannot be found consistent with CUP #1238, because the future upgrade of Yosemite Avenue between McKee Road and Campus Parkway to 118' shown in Table 4.1, at page 4.3 of the City's Transportation and Circulation Element of the General Plan and the Circulation map.[MCC Sections 20.68.050 (F)(1) and (6)] This issue regarding the correct ROW must be analyzed and determined prior to the approval of the Site Plan Review and identified on Site Plan #455. This should not be deferred.

6. The Planning Commission proceeded in a manner not in compliance with law by making findings and approving Site Plan Review #455 and adopting the environmental review characterized as the adoption of a Mitigated Negative declaration and Mitigation Monitoring Program regarding Environmental Review #19-37 based on the fact that CUP #1238 (which was timely appealed to the City Council) includes and relies upon an insufficiently specific and unenforceable mitigation measure incorporated into the Conditions of Approval (COA 8) set forth in COA 10, which provides:

“The developer shall provide an operations and maintenance plan for the on-site wastewater storage tank to address the timing of the off-peak discharge, emergency procedures for breakdowns and repairs, and odor control. The plan shall include steps to ensure ongoing objectionable odors do not affect the site or surrounding

area. The operations and maintenance plan shall be approved by the City Public Works Director and/or City Engineer.”

This “Mitigation Measure” and “Condition of Approval” is insufficiently specific to be Enforceable, and the non-public exercise of discretion by City Staff deprives the Appellants and the general public of their right to meaningful participation in the exercise of discretion. Therefore, this provision constitutes an improper delegation of discretion and constitutes an abuse of discretion under CEQA. [ PRC section 21168.5]

7. There appears to be a similar problem with Initial Study #19-37, with respect to Mitigation Measure HYDRO-4, which provides: “Additionally, at the time of construction, the developer would be required to provide calculations to demonstrate that the proposed on-site retention and the City’s storm water system would be able to accommodate the additional run-off from the site.”.(p.54)

8. Similarly, COA No. 30, which provides for the preparation of a “parking demand analysis” as “COA” or a “deferred mitigation measure” constitutes an impermissible delegation of discretion and deprives the Appellants and the general public of their right to meaningful participation in the public decision-making process and the right to open public decision making. Therefore, the inclusion of this “COA” or “mitigation measure” constitutes a failure to proceed in the manner required by law and an abuse of discretion by the Planning Commission

9. The Site Plan provides no identification of the location of the 43,000-gallon underground waste water storage facility to be designed and constructed on site (Conditions 9 and 10 and mitigation measure) to store and pump untreated effluent in the Yosemite Avenue sewer main during off-peak hours. This infrastructure and the location of the storm water discharge point into the Merced Irrigation District irrigation canal adjacent to the project need to be identified in the Site Plan. [MCC Sections 20.68,050 (F)(3) and (6)] This information should also be disclosed, analyzed, discussed, and considered in the environmental review documentation for the proposed project.

## **Conclusion**

Based on the foregoing deficiencies in the Site Plan Review #455 process before the Planning Commission, Appellants request the City Council to grant this Appeal and to deny the proposed project with prejudice.

Respectfully submitted,

/s/ *Richard L. Harriman*  
RICHARD L. HARRIMAN  
Attorney at Law