File #: 20-598, **Version:** 1

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SUBJECT: Continued Public Hearing to Consider Amendments Requested by Rick Telegan on Behalf of Exposition Properties, LLC to the Pre-Annexation Development Agreement for the Absolute-Bright Annexation Which Includes Approximately 100 Acres Located on the East Side of G Street, North of Cardella Road

REPORT IN BRIEF

Considers modifications to the Pre-Annexation Development Agreement for the Absolute-Bright Annexation.

RECOMMENDATION

City Council - Adopt a motion:

A. Open the Public Hearing and hear all testimony regarding the proposed amendments to the Pre-Annexation Development Agreement for the Absolute-Bright Annexation; and,

B. Provide direction to staff regarding approval or denial of the proposed amendments to the Pre-Annexation Development Agreement; or,

C. Continue the matter to a future City Council meeting.

ALTERNATIVES

1. Continue the public hearing to a future meeting (date to be specified in the motion).

AUTHORITY

Government Code Section 65868 and Merced Municipal Code Section 20.86 spell out procedures for adopting and amending Development Agreements.

DISCUSSION

The Absolute-Bright Annexation was approved by City Council on April 17, 2006, and became effective December 12, 2006. This annexation included approximately 100 acres located on the east side of G Street, north of Cardella Road (Attachment 1). When the annexation was approved by City Council, the Pre-Annexation Development Agreement (Attachment 2) was also approved and signed by all parties involved at the time. These parties included the City of Merced as well as Absolute, LLC; Leeco, LLC; BP Investors, LLC; and Bright Development, A California Corporation. The Agreement has a term of 20 years and would expire on April 17, 2026. In 2008, in compliance with the terms of the agreement when there is an ownership change, interest in the agreement was transferred from Absolute, LLC to Exposition Properties, LLC.

Rick Telegan, on behalf of Exposition Properties, LLC, and Leeco, LLC has requested to amend Exhibits “D” and “G” of the Pre-Annexation Development Agreement. The proposed change to Exhibit D would eliminate Public Benefit #9 from the Exhibit. This benefit states: “Owner shall submit a development phasing plan that phases construction and development from south to north along with all infrastructure extensions.”

Modifications to Exhibit “D”

One of the considerations for annexation, are the public benefits that would be provided by the annexation. In this case, Exhibit “D” of the Pre-Annexation Development Agreement provides 10 public benefits that would be provided (refer to Attachment 3, which includes the proposed changes). Benefit #9 requires that the phasing and construction be done from south to north. At the time of annexation, both developers were working together and development of the annexation area was imminent. Thus, it was reasonable to expect the development to occur from south to north in order to prevent there being a gap in City infrastructure. Currently, water and sewer lines exist in G Street to serve the annexation area. However, sidewalks, curbs, gutters, and other typical street improvements are needed on the east side of G Street along the annexation frontage. By removing the requirement for the development to occur south to north, there could be a gap in street improvements. Each developer with frontage along G Street would be required to install street improvements along the frontage of their property. Currently, there are two tentative subdivision maps approved that are conditioned to install the frontage improvements along G Street - Tentative Subdivision Map (TSM) #1291 for Bright Development and TSM #1312 for “The Palisades” (Attachments 4 and 5). By removing the requirement that the development must occur south to north, it would allow the Palisades subdivision to develop without having to wait on the Bright Development subdivision to be constructed. While this may not accomplish the public benefit envisioned by the Pre-Annexation Development Agreement, it would allow each development to function independently of each other and could ultimately result in development taking place sooner rather than later, which could be considered a public benefit. It should also be noted that sidewalks, curbs, gutters, etc. end at the north end of the Mercy Hospital property. When development occurs within this annexation area, there will still be a gap in infrastructure from Mercy Hospital to the annexation area (Attachment 6).

Modifications to Exhibit “G”

Exhibit “G” of the Pre-Annexation Development Agreement is Planning Commission Resolution #2871. Mr. Telegan has requested that Condition #7 be modified to eliminate the requirement that the G Street frontage improvements be done as one construction project (refer to Attachment 7 for Exhibit “G”, including the proposed modifications). Subsequent to the Planning Commission’s review, the parties conceptually agreed to alternative language regarding the modification of Exhibit “G.” Staff concurs with the language and recommends it be included if the City Council votes to approve the modification.

Condition #7 of Planning Commission Resolution #2871 is consistent with the Public Benefit outlined in Exhibit “D” requiring the development to occur from south to north. By requiring the improvements on G Street be done as one construction project, it ensures that all the infrastructure and improvements on G Street would be done with the first development. This also puts the burden of the cost of these improvements entirely on the first developer, which in keeping with Exhibit “D” would

be the Bright Development Subdivision. Typically, when a development occurs, the developer is responsible for the improvements along their project's frontage, not for improvements on frontage owned by others. The alternative language suggested by Bright Development and conceptually agreed upon by the other parties, would require the frontage improvements on G Street to be installed with each development's first phase of construction.

Amendments to the Agreement

Because development stalled shortly after this annexation, none of the development in this area has taken place. Staff supports the requested changes. However, in order for the City Council to approve the proposed changes, all parties must agree to the changes.

The Agreement includes two sections that appear to address amendments to the agreement. Mr. Telegan believes the changes may be approved under the provisions of Section 22.7 "Changes and Amendments," which states the following:

"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."

Upon first review of this section, City Staff, including Deputy City Attorney Campbell, determined this section did not apply because the proposed modifications affect the order of development, making it possible for the Palisades subdivision to develop before the Bright subdivision and was thus not a "minor" change. It was determined at that time that the proposed changes should be considered an amendment to the Agreement and fall under the provision for such under Section 25 of the Agreement. This was the interpretation presented to the Planning Commission in Staff Report #20-16 (Attachment 11) on July 22, 2020.

However, after further review, it was determined that Section 22.7 of the Agreement only applies to changes or amendments to development approvals, such as Conditional Use Permits, Tentative Maps, etc., not to the agreement itself. Therefore, amendments to the Agreement would be subject to Section 25 of the Agreement and to Government Code Section 65868 only. This information was presented to the Planning Commission on August 19, 2020 in Staff Report 20-16-Addendum (Attachment 14).

Section 25 of the Pre-Annexation Development Agreement entitled "Amendment or Cancellation of Agreement" states "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…" As explained above, the City has determined the requested modifications are subject to Section 25 of the Agreement. As such, all parties must mutually consent to the changes.

Additionally, Government Code Section 65868 requires all parties to mutually consent to all amendments (refer to Attachment 8).

At the time of Planning Commission review, all the parties had not mutually agreed to the modifications. Therefore, on August 19, 2020, the Planning Commission recommended denial to the City Council. This recommendation of denial was based in part on the request from the applicant that the Planning Commission take action and move the request on to the City Council. On October 5, 2020, City staff participated in a call with parties. At that time, Bright Development indicated they conceptually agreed with the proposed amendments, pending review by their legal team. It was anticipated that a letter would be forthcoming by October 9, 2020. However, to date, staff has not received the letter. If the letter is received prior to the City Council meeting, it will be provided to the Council at meeting.

Planning Commission Action

On the July 22, 2020, the Planning Commission held a duly noticed public hearing regarding this matter. After hearing testimony from the applicant and receiving written correspondence (Attachment 9) from John Dunn, attorney for Bright Development, the Planning Commission voted (5 Ayes, 0 Noes, 2 Absent) to continue the item to August 19, 2020, to allow the parties to come to an agreement on the proposed amendments to the agreement. The Planning Commission directed staff to participate in the negotiations to ensure the parties were acting in good faith in trying to come to an agreement. An excerpt of the minutes from the Planning Commission meeting are provided at Attachment 10. Planning Commission Staff Report #20-16 is provided at Attachment 11.

Planning Staff members Kim Espinosa, Planning Manager, and Julie Nelson, Associate Planner, participated in two calls which included Rick Telegan and Lee Kolligian on behalf of Exposition Properties, LLC and Leeco, LLC, as well as Mark Beisswanger and David Butz with Bright Development on August 3, 2020, and again on August 10, 2020. Both Ms. Espinosa and Ms. Nelson agreed that both parties were negotiating in good faith and working towards an agreement. It should be noted that the negotiations extended beyond the proposed amendments and included the possibility of a shared storm drainage system to serve both tentative map areas and the future apartments approved for BP Investors at the southeast corner of the annexation area. A call was held on August 17, 2020, in which neither Ms. Espinosa nor Ms. Nelson were available to attend.

After this meeting, staff received an e-mail from Mr. Kolligian indicating the negotiations were not moving forward and requesting that the Planning Commission move the request forward rather than delay the request any longer. On August 19, 2020, Ms. Nelson spoke with Mr. Beisswanger on the phone. Mr. Beisswanger indicated that Bright Development remains willing to negotiate and hopes to come to an agreement in the near future.

On August 19, 2020, the Planning Commission was presented with the information above regarding the negotiations. City staff recommended to the Planning Commission that they should either continue the item or recommend denial of the proposed amendments. At that time, the applicant, requested that the Planning Commission take action instead of continuing the item. The applicant felt that since the Planning Commission's action was a recommendation to the City Council, they preferred to move the matter forward for City Council consideration. After hearing additional

testimony from Mr. Telegan and considering Mr. Telegan's and Mr. Kolligian's request to move the request for modifications to the Agreement forward, the Planning Commission voted (6 Ayes, 0 Noes, 1 Absent) to deny the requested modifications due to the fact that all parties had not agreed to the proposed changes. An excerpt of the minutes for this meeting are provided at Attachment 12, Planning Commission Resolution #4044 recommending denial of the proposed modifications is provided at Attachment 13, and the Planning Commission Staff Report (SR #20-16 - Addendum) is provided at Attachment 14.

City Council Meeting of September 21, 2020

This matter was originally scheduled and noticed to be heard at the City Council meeting of September 21, 2020. However, because the parties agreed to more discussions regarding the proposed changes, Mr. Telegan requested this matter be continued to October 5, 2020, which the City Council approved.

A call is scheduled between all the parties and Ms. Espinosa and Ms. Nelson on Friday, September 25, 2020. Staff will provide an update on the negotiations at the October 5, 2020, City Council meeting.

On October 5, 2020, staff advised City Council that negotiations had been moving favorably and that an agreement seemed to be forthcoming. To allow more time for the parties to come to terms, the applicant requested, and all parties agreed, that this request should be continued to October 19, 2020.

As explained above, the letter had not been received at the time this report was published, but if it is received prior to the City Council meeting on October 19, 2020, it will be provided to the City Council at the meeting.

Findings Required by City Council Resolution No. 1995-06

In reviewing the requirements for the approval of an amendment to a Pre-Annexation Development Agreement, staff reviewed City Council Resolution No, 1995-06. Section 301 of this Resolution sets forth findings that the Planning Commission is required to make. Although the Planning Commission recommended denial of the request because all parties had not agreed on the proposed modifications, the Planning Commission did not take action on the findings set forth in City Council Resolution 1995-06. Upon further review by the City Attorney's office, it has been the determined that in order for the City Council to approve the proposed modification, the Planning Commission must make a recommendation based on the Findings required by Section 301 of City Council Resolution 1995-06.

Staff Recommendation

Since the applicants and Bright Development now agree on the proposed modifications, staff recommends the City Council provide direction to initiate the approval process. As previously explained, in order for the City Council to approve the modifications, the matter should be sent back to the Planning Commission for action on the findings required by Section 301 of City Council Resolution No. 1995-06 as well as for a recommendation on the proposed changes agreed to by both

parties after the Planning Commission took action.

City Council Action

If the letter from Bright Development has not been received, the Council should open the public hearing and continue it to November 2, 2020.

If the letter from Bright Development has been received and provided to Council, the Council should hold the public hearing and provide direction as to whether the City Council wishes to approve or deny the proposed modifications. If the Council wishes to approve the proposed modifications, the matter should be sent back to the Planning Commission for action on the Findings required by City Council Resolution No. 1995-06 as well as a recommendation on the recent changes.

If the City Council wishes to deny the request, the City Council should provide direction on findings to support the denial. Based on this direction, staff will prepare a resolution and bring it back to a future City Council meeting for adoption.

IMPACT ON CITY RESOURCES

There would be no impact on City resources with this request.

ATTACHMENTS

1. Location Map
2. Pre-Annexation Development Agreement
3. Exhibit “D”
4. TSM #1291 - Bright Development
5. TSM #1312 - The Palisades
6. Gap in Infrastructure
7. Exhibit “G”
8. Gov’t Code Section 65868
9. Letter from John Dunn
10. PC Minutes Excerpt 7/22/20
11. Staff Report 20-16
12. PC Minutes Excerpt 8/19/20
13. Planning Commission Resolution #4044
14. Staff Report 20-16-Addendum