

FRESNO CITY COUNCIL



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FRESNO CITY CLERK

Supplemental Information Packet

Agenda Related Items – ID 18-0129 (4:30 PM) #1

Content of Supplement: City of Fresno, City Attorney's Letter in Response to Ashley Werner

Item(s)

File ID 18-0129 (4:30 PM) #1 - CONTINUED HEARING to consider Development Permit Application No. D-16-109, located on the north side of East Central Avenue between South Orange and South Cedar Avenues (Council District 3) - Development and Resource Management Department.

1. ADOPT the Mitigated Negative Declaration prepared for Environmental Assessment No. D-16-109, dated September 18, 2017;

2. DENY the appeal and UPHOLD the Director's approval of Development Permit Application No. D-16-109 authorizing the development of an industrial business park for industrial uses with up to seven reinforced concrete buildings ranging in size from 124,200 square feet to 1,000,000 square feet, with a total building square footage not to exceed $\pm 2,145,420$.

Supplemental Information:

Any agenda related public documents received and distributed to a majority of the City Council after the Agenda Packet is printed are included in Supplemental Packets. Supplemental Packets are produced as needed. The Supplemental Packet is available for public inspection in the City Clerk's Office, 2600 Fresno Street, during normal business hours (main location pursuant to the Brown Act, G.C. 54957.5(2)). In addition, Supplemental Packets are available for public review at the City Council meeting in the City Council Chambers, 2600 Fresno Street. Supplemental Packets are also available on-line on the City Clerk's website.

Americans with Disabilities Act (ADA):

The meeting room is accessible to the physically disabled, and the services of a translator can be made available. Requests for additional accommodations for the disabled, sign language interpreters, assistive listening devices, or translators should be made one week prior to the meeting. Please call City Clerk's Office at 621-7650. Please keep the doorways, aisles and wheelchair seating areas open and accessible. If you need assistance with seating because of a disability, please see Security.



Douglas T. Sloan
City Attorney

January 24, 2018

Ashley Werner
764 P Street, Suite 012
Fresno, California 93721

Re: Development Permit Applicant No. D-16-109 and
Environmental Assessment No. D-16-109

Dear Ms. Werner:

This letter is in response to letters you sent on behalf of Leadership Counsel for Justice and Accountability (LCJA) regarding Development Permit Applicant No. D-16-109 and Environmental Assessment No. D-16-109. These letters include the comment letter you submitted on October 18, 2017, the appeal letter you submitted on November 8, 2017, and the hand delivered letter you submitted at Planning Commission on December 20, 2017. The City has received your most recent letters submitted for the January 25, 2018, Council agenda, however those letters are still under review.

This project is simply a Development Permit Application, a discretionary permit that can be conditioned by the City, to build seven shell buildings for future use on land that has been planned and zoned for industrial use since 1984. The project does not request a change to the zoning or planned land use, which has been industrial for over 30 years. Prior to operation, any future businesses would need to obtain, at a minimum, a zone clearance, which is a ministerial permit that requires compliance with all applicable laws and CEQA mitigation. In some cases, a conditional use permit would be required. Future business operations at this location are unknown at this time, so any guess as to what may eventually inhabit this project site would be pure speculation. To be clear, the issue of whether an industrial use may be situated on these sites has long been resolved through zoning and then again affirmed in the current General Plan, which was not contested. The owners have a vested property right to put these sites to an industrial use. There is no decision before Council to consider a change in use. Your correspondence appears to be focused on challenging an industrial use, which is misplaced.

The California Department of Justice was copied on your correspondence in this matter. However, based on information available to the City, the California DOJ was not informed that this land has been planned and zoned for industrial use since 1984. It was only after phone calls and e-mails were exchanged between planning staff, California DOJ staff, and the Fresno City Attorney's Office, that the entirety of the facts of this project were brought to the attention of the California DOJ. By narrowly selecting the information provided to the State Attorney General, by excluding relevant information about the land use and zoning history of the site, and by excluding relevant information about City procedures for review, approval, and monitoring of entitlements, the DOJ was initially misled regarding the complete context of both the history of the site and the surrounding area. City resources

and taxpayer dollars have been unnecessarily expended to address this issue, and have redirected City staff attention away from other projects that could benefit the community.

Your letter ostensibly challenges the adequacy of the Mitigated Negative Declaration (MND) prepared for this project, as well as the Director's decision to grant the Development Permit.

The MND Adequately Assesses the Project

Specifically, you allege the MND does not analyze or identify and adopt adequate mitigation for several potentially significant impacts, and because significant effects possibly could occur as a result of the project; you argue there are hydrology and water quality impacts because of construction and industrial uses; you argue that there are air quality impacts due to increased truck trips along Central Avenue that will affect nearby residences; you insist an Environmental Impact Report (EIR) must be prepared and there are cumulatively significant impacts; you argue that past, present, and future projects must be environmentally assessed; and you argue there are significant impacts on agricultural resources because the site is designated Prime Farmland and the City changed its Farmland Mitigation policies.

- City staff prepared an initial study, and it was determined there are air quality, hazards and hazardous material, hydrology and water quality, public services, utilities and service systems, noise, and transportation and traffic related impacts that would be reduced to less than significant with project specific mitigation measures incorporated. These mitigation measures include compliance with the Fresno Metropolitan Flood Control District's requirements and construction of Master Plan Facilities, coordination with Caltrans regarding appropriate interim improvements to be located at the intersection at the SR 99 southbound off-ramp/Parkway at North Avenue until reconstruction of the interchange occurs, acoustical analyses for future entitlements which may result in noise levels that exceed noise level exposure criteria established by Tables 9-2 and 9-3 of the Fresno General Plan, payment of development impact fees, required submittal of business plans for businesses handling hazardous materials, compliance with San Joaquin Valley Air Pollution Control District requirements for Indirect Source Review, and the Departments of Public Works and Public Utilities' requirements related to street, sewer and water infrastructure, and orientation of truck routes as far away from sensitive receptors as reasonably possible. These potential impacts are adequately addressed in the MND prepared for the project. In addition, the MND is tiered off of the Fresno General Plan MEIR (Master Environmental Impact Report) which analyzed and mitigated these areas of concern through General Plan policies and the mitigation monitoring and reporting program prepared for the MEIR. The project has been conditioned to comply with all General Plan policies, Development Code requirements, the mitigation monitoring and reporting program for the Fresno MEIR, and the mitigation monitoring and reporting program for the MND. Even if a subsequent and as-yet-unknown application in the subject site does not rise to the level of a discretionary approval, any use in the site will be required to comply with the terms of the Development Permit and MND, per the requirements of the FMC

- An EIR is not required for this project, because all potentially significant impacts can be mitigated to less than significant impacts, and your letter does not provide substantial evidence to the contrary. CEQA Guidelines section 15384 states “argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.” Future projects are not required to be assessed because they are unknown at this time, and CEQA requires analyses when there is reasonable certainty of a project’s details to provide meaningful information for environmental assessment. Further, the MEIR analyzed and mitigated possible impacts of using this land for industrial purposes, arguably assessing past, present, and future projects, in compliance with Public Resources Code section 21083. This principle is well established in relevant case law. “Unsubstantiated opinions, concerns, and suspicions about a project, though sincere and deeply felt, do not rise to the level of substantial evidence supporting a fair argument of significant environmental effect. (*Newberry Springs Water Assn.*, 150 Cal.App.3d at 749; *Perley*, 137 Cal.App.3d at p. 434, fn. 5) Environmental decisions should be based on facts, not feelings.” *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1352.
- The “feeling” that a future use on the site may result in “significant impacts of varying degree” is not sufficient to require an analysis of theoretical impacts flowing from an imagined or speculative use. For the City to guess which of the potential uses may eventually be sited in the proposed buildings is the very definition of “speculation,” and to require the City to assess the impacts of every potential type of tenant for the site is neither possible nor required. Furthermore, since the proposed project does not include a request to change the land use designation or zoning for the site, the menu of allowable uses is neither new nor novel. Both the designation and zoning for this site, inclusive of potential uses enumerated in the development code, were considered by the Council during the General Plan Update, the Development Code Update, and the Citywide Rezone, along with all other parcels within City limits. In addition, the actions taken related to the General Plan Update maintained the land use designation for this site consistent with its designation and contemplated use from in the early 1980s. The time to challenge these actions has long since passed. The land use designation and zoning for industrial uses necessarily entail certain uses and activities, and those entitlements have existed for several decades.
- Policy RC-9-c in the Fresno General Plan dictates a Farmland Preservation Policy, and has not been removed by Council action. In this case, industrial use was already contemplated by the General Plan and the MEIR. Council’s recent action with respect to the policy was to adopt a resolution of initiation for a general plan amendment to remove the explicit requirement for agricultural conservation easements. A resolution of initiation is a formal action taken by the Council to begin the process of drafting and evaluating a plan amendment for processing. A substantive amendment has not been taken to Planning Commission or Council yet

for consideration. This means that the current language of Policy RC-9-c is still in place.

Required Development Permit Findings Were Made

Your letter alleges the City cannot make the findings required for the approval of the Development Permit application pursuant to Municipal Code Section 15-5206; you argue the industrial use is incompatible with the existing residential uses; that certain design standards need to be met, including loading area screening, building height, lighting, and air contaminants; it is not consistent with the General Plan and Roosevelt Community Plan; that there has been no analysis of an adequate water supply.

- The City complied with the Development Code requirements for issuance of Development Permits in accordance with Article 52 of the FMC. The project is consistent with applicable standards, as demonstrated in the Property Development Standards Checklist imposed on the project. Pursuant to FMC Section 15-5205, a public notice of Director's action is not required. A public notice of the attached MND finding for Environmental Assessment No. D-16-109 (Exhibit K) was published in the Fresno Bee and posted at the Fresno County Clerk's Office on September 18, 2017.
- The project is consistent with the General Plan, and staff has even highlighted four General Plan Policies which it conforms to (ED-1-e, LU-1-a, LU-2-A, and LU-7-b). LCJA participated in the formulation and adoption of the General Plan and its policies, and did not challenge any of these policies within the statute of limitations for doing so. The Roosevelt Community Plan does not contain any policies that are applicable or more restrictive than those contained in the FMC or the Fresno General Plan. As you are aware, the Southwest Fresno Specific Plan specifically prioritizes this location for new industrial development with Policy LU-8.2. LCJA was an active participant in drafting the Southwest Fresno Specific Plan and you personally participated in shaping the plan for a significant period of time. In a letter of support for the Southwest Specific Plan, Leadership Counsel for Justice and Accountability stated:
 - "To further increase opportunity for employment with relatively better wages, West Fresno residents should be notified of employment opportunities as development of the Plan Area commences. Whether that be in commercial zoning, office spaces, or the reverse triangle where industrial development is planned for [these sites], surrounding community should have priority access to these jobs. This will not only bring economic stability to a community where most jobs are being outsourced, but greenhouse gas emissions will be reduced if you aren't having residents from across town driving their typical 20-30 minute commute. Access to good quality jobs is one of the items identified through this process and others, that the residents have identified as a priority to create a self-sufficient community."

- The project complies with all applicable design guidelines of the Heavy Industrial zone district as demonstrated in the Property Development Standards Checklist attached to the Conditions of Approval dated October 24, 2017.
- The Initial Study and comments submitted by the Department of Public Utilities analyze and ensure an adequate water supply.

District Implementation Committee is Inactive

Your letter alleges the City did not comply with Municipal Code Section 15-4906(D) which requires the District Implementation Committee to consider and provide recommendations on every application for a development permit to develop property within the committee's boundaries.

- There is no active District Plan Implementation Committee to recommend approval of the project, thus no comments or recommendations could have been received. This fact could have easily been discovered by LCJA with a call or email to any planner or manager in the Development and Resource Management Department or Council District 3.
- In addition, the requirement that District Implementation Committees review certain projects does not prohibit the Planning Commission or Council from considering matters that have not been heard by a Committee. Rather, the FMC language requires that when a matter is taken before a District Implementation Committee, they must take some action and cannot indefinitely delay consideration of a project by failing to make a recommendation.

No Disproportionate Adverse Impacts Exist

Your letter alleges approval of Development Permit Application and EA No. D-16-109 would result in disproportionate adverse impacts to residents of the City and County of Fresno based on race, color, country of origin, and other protected characteristics in violation of the state and federal fair housing and civil rights laws, including but not limited to the California Fair Employment and Housing Act (Gov. Code § 12955(l)); Government Code Sections 1135 and 65008.

- The land to the West of this project is currently Open Space/Ag but zoned Heavy Industrial/Urban Growth Management. The land to the East of the project site is currently Heavy Industrial/Vacant, but zoned Heavy Industrial/Urban Growth Management. The land to the South of the project site is currently Rural/Low Density Residential and Vacant, but zoned Heavy Industrial/Urban Growth Management – City and Limited Agriculture, 20 Acres and Heavy Industrial – County. This land to the South, which contains 9 lots, is the only area adjacent to the project site which is currently being used for residential purposes. It is surrounded by land planned and zoned for industrial use, which has been zoned that way for decades.

In summary, it appears there is a misunderstanding of the Council's proposed action. The property at issue has been zoned industrial for over 30 years, and the Council is not changing that. The issue solely concerns construction of shell buildings consistent with

L- Ashley Werner
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zoning, with the ultimate particular occupants and uses not yet known. The City has adequately assessed and disclosed any potential impacts via CEQA, and all other procedural requirements have been met.

Sincerely,


DOUGLAS T. SLOAN
City Attorney

cc: Fresno City Council
Mayor Lee Brand
Jennifer Clark, Director, DARM
Sandra Celedon-Castro, Fresno Building Healthy Communities
Tanisha Sorrell, Building Youth Tomorrow Today
Dolores Weller, Central Valley Air Quality Coalition
Kevin Hamilton, Central California Asthma Collaborative
Thomas Weiler, Faith in Fresno
Laura Moreno, Friends of Calwa
Arsenio Mataka, Office of the Attorney General
Xavier Becerra, Department of Justice
V.O.I.C.E.

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