

**MEMORANDUM OF UNDERSTANDING  
BETWEEN CITY OF FRESNO AND THE MCCAFFREY GROUP, INC.,  
REGARDING CONSTRUCTION COSTS OF A BICYCLE AND  
PEDESTRIAN TRAIL ALONG THE NORTH SIDE OF HERNDON  
AVENUE AND ASSOCIATED WITH TRACT MAP 6052**

This MEMORANDUM OF UNDERSTANDING (MOU) is entered into this \_\_\_ day of January, 2017, between the CITY OF FRESNO, a municipal corporation to be addressed at 2600 Fresno Street, Fresno, California, 93721 ("City") and The McCaffrey Group, Inc., a California Corporation, to be addressed at 7020 North Van Ness Boulevard, Fresno, California, 93711 ("Developer").

**RECITALS**

WHEREAS, final Tract Map No. 6052 (**Tract 6052**) was approved subject to the Conditions of Approval dated January 15, 2014, and revised July 25, 2014, (collectively, the **Conditions of Approval**); and

WHEREAS, under Condition two for Tract 6052's Herndon Avenue project frontage (**Project Trail**), the Traffic and Engineering Services Division of the Public Works Department required the dedication and construction of a bicycle and pedestrian trail.

WHEREAS, City has determined the Project Trail was in need of construction when Tract 6052 was a tentative tract map. The City appropriated funding for the Project Trail and Developer agreed to perform the work at the City's expense in conjunction of Tract 6052.

WHEREAS, Developer has completed its obligation as required of the Tract 6052's Conditions of Approval, including the construction of the Project Trail.

WHEREAS, City and Developer now desire to memorialize their Agreement regarding the construction costs of the Project Trail.

**AGREEMENT**

NOW, THEREFORE, in consideration of the mutual covenants set forth herein and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereto, agree as follows:

1. Recitals. Each and all of the foregoing recitals of background facts are incorporated herein by this reference as though set forth herein verbatim.
2. Completion of Project Trail. The Project Trail shall be constructed by the Developer in accordance with plans and specifications prepared by Developer and approved by the City Public Works Department. The foregoing plans and specifications shall meet the City Public Works Department's standards for the construction of the Project Trail.
3. Cost of Construction. After City's acceptance of the Project Trail, the Developer shall submit evidence of full Contractor payment and request for reimbursement

the extent the costs are only associated with the Project Trail. The Project Trail reimbursement costs have been determined and shall not exceed \$96,065.09 as set forth in Exhibit "A."

4. Indemnity. To the furthest extent allowed by law including California Civil Code section 2782, Developer shall indemnify, hold harmless and defend the City and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage) incurred by the City, Developer or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly out of performance of this Contract. Developer's obligations under the preceding sentence shall apply regardless of whether the City or any of its officers, officials, employees, agents or volunteers are passively negligent, but shall not apply to any loss, liability, fines, penalties, forfeitures, costs or damages caused by the active or sole negligence, or the willful misconduct, of the City or any of its officers, officials, employees, agents or volunteers.

If the Developer should subcontract all or any portion of the work to be performed under this Contract, the Developer shall require each subcontractor to indemnify, hold harmless and defend the City and each of its officers, officials, employees, agents and volunteers in accordance with the terms of the preceding paragraph.

The two preceding paragraphs shall survive termination or expiration of this MOU.

5. Compliance with Governing Law. Each party shall comply with all federal, State, and local laws, rules and regulations in its pursuit hereof. No party in its performance of this MOU shall employ discriminatory practices on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, ethnicity, status as a disabled veteran or veteran of the Vietnam era.

6. Capacity of the Parties. Each party is acting in an independent capacity. Nothing in this MOU and nothing in the course of dealings between the parties hereunder shall be deemed to create any fiduciary relationship, trust, partnership, joint venture, agency or employment relationship, jointly and severally.

In addition and without limitation, each party shall be solely responsible for all matters relating to payment of its employees, including, but not limited to, compliance with applicable social security withholding, workers' compensation insurance, benefits and all other regulations governing such matters. Personnel supplied by the City will not for any purpose be considered employees or agents of Developer. The City assumes full responsibility for the actions of such personnel while they are performing services pursuant to this MOU, and shall be solely responsible for their supervision, daily direction and control, payment of salary (including withholding of income taxes and social security), disability benefits and the like, as applicable. Conversely, personnel supplied by the Developer will not for any purpose be considered employees or agents of the City. The Developer assumes full responsibility for the actions of such personnel while they are performing services pursuant to this MOU and shall be solely responsible for their

supervision, daily direction and control, payment of salary (including withholding of income taxes and social security), disability benefits, and the like, as applicable.

The City and Developer agree and acknowledge their relationship is strictly and solely that of an independent contractor to each other. The City's employees and or agents are not entitled to any employee benefits or insurance, including without limitation any health care, worker's compensation, unemployment or disability benefits, to be provided by the Developer. The Developer agrees and acknowledges its employees and or agents are not entitled to any employee benefits or insurance, including without limitation any health care, worker's compensation, unemployment or disability benefits, to be provided by the City.

The parties further agree and acknowledge that each party is solely responsible for determining the method and means by which it will fulfill its obligations hereunder. Each shall be solely responsible for payment of all sales, use, or other taxes assessed against or associated with the performance of each party's respective obligations or on the exercise of their rights under this MOU, including without limitation income, payroll or employment-related taxes and payments.

Neither party shall engage any person or entity to serve in any capacity, or incur any expense or obligation on behalf of the other without the prior written consent of both parties.

7. Attorney's Fees. If any legal action or proceeding arising out of or relating to this MOU is brought by either party to this MOU, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorney's fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

8. Notices. Any notice required or intended to be given to a party under the terms of this MOU shall be in writing and shall be deemed to be duly delivered the earlier of (a) actual receipt by personal delivery or in lieu of such personal service, by way of Federal Express or other similar courier addressed to such party at the appropriate address set forth herein, (b) the date of receipt by facsimile to the City or the Developer, or (c) three business days after the date of mailing (postage pre-paid return receipt requested). Either party may change its address for the purpose of this Paragraph by giving written notice of such change to the other.

9. Waiver. The waiver by any party of a breach by the other of any provision of this MOU shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this MOU.

No provisions of this MOU may be waived unless in writing and approved by and signed by all parties to this MOU. Waiver of any one provision herein shall not be deemed to be a waiver of any other provision herein.

No action or omission by either party shall constitute a breach of this MOU unless the injured party first notifies the other party of the purported breach in writing setting forth the alleged breach or default and said party does not cure the same within a reasonable period

of time. The payment of any fee or compensation or performance of any obligation hereunder by either party shall not constitute a waiver of any breach by the other party or of any of the rights and remedies which either party may have as a result of such breach. No waiver by either party of breach of the MOU shall be implied from any failure by the other party to take action on account of such breach if such breach persists or is repeated. Waivers by either party of any covenant, term or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition.

10. Governing Law and Venue. This MOU shall be governed by, and construed and enforced in accordance with, the laws of the State of California. Venue for purposes of the filing of any action regarding the enforcement or interpretation of this MOU and any rights and duties hereunder shall be Fresno, California.

11. Headings. The section headings in this MOU are for convenience and reference only and shall not be construed or held in any way to explain, modify or add to the interpretation or meaning of the provisions of this MOU.

12. Severability. The provisions of this MOU are severable. The invalidity or unenforceability of any one provision in this MOU shall not affect the other provisions.

13. Interpretation. The parties acknowledge this MOU in its final form is the result of the combined efforts of the parties and that, should any provision of this MOU be found to be ambiguous in any way, such ambiguity shall not be resolved by construing this MOU in favor or against any party, but rather by construing the terms in accordance with their generally accepted meaning.

14. Binding Effect. This MOU shall be binding upon the parties and upon their heirs, administrators, successors and assigns.

15. Effective Date of Agreement. This MOU shall become effective upon execution of said MOU by all parties shown below.

16. Entire MOU. It is mutually understood and agreed the foregoing along with any attached Exhibits constitutes the entire MOU between the parties. Any modifications or amendments to this MOU must be in writing signed by an authorized agent of each party.

IN WITNESS WHEREOF, the parties have entered into this Memorandum of Understanding on the date and year first written above.

CITY OF FRESNO, a Municipal corporation

By: \_\_\_\_\_  
Scott Mozier  
Director of Public Works

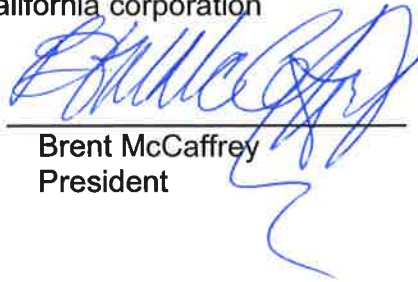
ATTEST:  
YVONNE SPENCE  
City Clerk

By: \_\_\_\_\_  
Deputy

Approved as to Form:  
DOUGLAS SLOAN  
City Attorney

By: \_\_\_\_\_  
Tracy N. Parvanian  
Deputy City Attorney

The McCaffrey Group, Inc.  
a California corporation

By:   
Brent McCaffrey  
President

