

EXHIBIT L

APPEAL LETTER DATED JUNE 17, 2019



**MILLER STARR
REGALIA**

1331 N. California Blvd.
Fifth Floor
Walnut Creek, CA 94596

T 925 935 9400
F 925 933 4126
www.msrllegal.com

Sean Marciniak
sean.marciniak@msrllegal.com

June 17, 2019

VIA EMAIL AND FEDERAL EXPRESS

Chairperson Serop Torossian and Honorable
Members of the City of Fresno Planning
Commission
c/o Jennifer Clark, DARM Director
City of Fresno
2600 Fresno St., Room 3065
Fresno, CA 93721
Email: jennifer.clark@fresno.gov

Re: Appeal of denial of Variance Application No. P19-02282, relating to
Outfront Media's request to construct an 86-foot-tall digital outdoor
advertising display on Highway 41

Dear Honorable Chairperson Torossian, Honorable Members of the Planning
Commission, and Ms. Clark:

Miller Starr Regalia represents Outfront Media LLC ("Outfront") in seeking land use entitlements to construct and operate an 86-foot-tall digital billboard on City-owned property located at 7229 North Howard Street¹ in the City of Fresno. We are in receipt of the City's May 31, 2019 letter, whereby the Development and Resource Management Department approved a 60-foot-tall sign, but denied Outfront's request for a variance that would have allowed a taller, 86-foot sign.

This letter constitutes an appeal of the Department's variance denial and, in support of this appeal, we hereby incorporate by reference the variance justifications in our letter of May 6, 2019. This appeal letter supplements that evidence by focusing exclusively on the Department's reasons for denial, as set forth in its May 31, 2019 letter. To this end, we have re-created the Department's findings in a tabular format, similar to how the Department organized them, and annotated this table with our responses, explaining why some of the Department's findings are unsupported by substantial evidence. This table is attached as Exhibit 1.

¹ The City's May 31, 2019 letter indicates the property address is 7221 North Howard Street, though we understand the street address is 7229 North Howard Street.

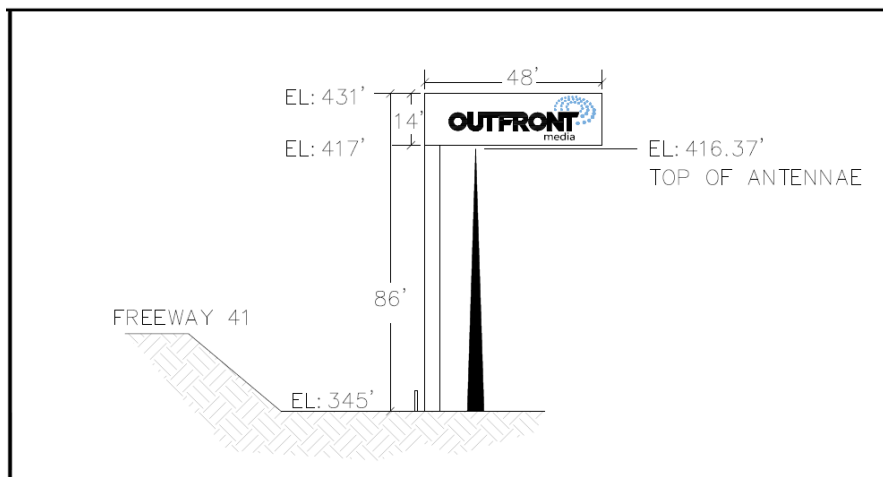
The injury of this variance denial is substantial. At 60 feet, the proposed billboard will be obstructed, front and center, by a 72-foot-tall telecommunications tower, as shown to the right. The other side of the sign, meanwhile, will be similarly obstructed by trees. These obstructions devastate the marketability of the sign whereas, at 86 feet, the sign clears these occlusions.



Outfront is somewhat perplexed by the City planning department's denial of the variance, especially after the Council District 6 Project Review Committee recommended approval of the taller sign on May 20, 2019. As explained at that meeting, Outfront chose to build the sign at 7229 North Howard Street because it is far from residential homeowners and other sensitive receptors. As such, it unclear why the Department more recently determined that an 86-foot-tall sign would be incompatible with surrounding development.

Please also consider that:

- (1) There are a number of telecommunication towers nearby that will dwarf the 86-foot sign, meaning a taller sign will fit at the location in terms of scale.
- (2) The elevation of the City's property is as much as 26 feet below the nearby highway (the place from where the sign will be visible), meaning the perceived height of the sign will actually be only 60 feet. Please see the elevation diagram below.



- (3) The City approved an 85-foot digital display a short distance south on the same highway, and under almost the same exact circumstances.

Members of the Planning Commission and Jennifer Clark
City of Fresno
June 17, 2019
Page 3

For the reasons outlined above, as well as in Exhibit 1, Outfront respectfully requests that the Planning Commission approve Outfront's variance request, allowing the sign to be constructed at a height of 86-feet.

Please do not hesitate to contact our office if you have any questions or comments regarding the above.

Sincerely,

MILLER STARR REGALIA

Sean Marciniak



Sean Marciniak
SRM/kli
Attachments

cc: Clients
Anthony Leones, Esq., Miller Starr Regalia
Travis Brooks, Esq., Miller Starr Regalia
Wilma Quan, City Manager, City of Fresno, wilma.quan@fresno.gov
Laura Merrill, Deputy City Manager, City of Fresno, laura.merrill@fresno.gov
Mike Sanchez, Assistant DARM Director, City of Fresno,
mike.sanchez@fresno.gov
Jarred Olsen, Planner II, City of Fresno, jarred.olsen@fresno.gov
Brandon Collet, esq., City Attorney's Office, City of Fresno,
brandon.collet@fresno.gov
Cecilia Lopez, City of Fresno, cecilia.lopez@fresno.gov

EXHIBIT 1: Table of Development and Resource Management Department's Findings for Denial of Variance and Applicant's Responses

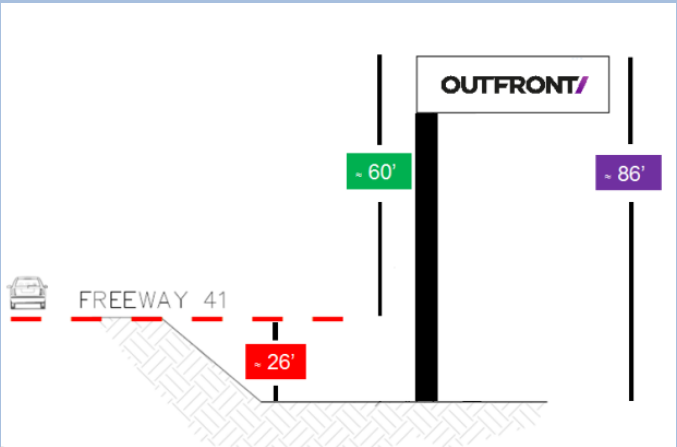

Required Finding	Department's Preliminary Determination	Applicant's Response
<p><i>Finding a(1). There are exceptional or extraordinary circumstances or conditions applicable to the property involved that do not apply generally to property in the vicinity and identical zoning classification, and ...</i></p>	<p>Department Finding: There are exceptional and extraordinary circumstances and conditions applicable to the property involved that do not apply generally to property in the vicinity and identical zoning classification: 1) The property is located directly adjacent to an elevated freeway, and 2) the ownership of this specific O (Office) district property allows for greater uses.</p>	<p>The applicant agrees that there are exceptional and extraordinary circumstances and conditions that apply to the property. We wish to clarify that the exceptional and extraordinary circumstances are cumulative in nature, and exist for the following reasons:</p> <ol style="list-style-type: none"> <li data-bbox="730 354 1220 716">1. The site is disadvantaged due to topography, such that the surface of the project site is as much as 26 feet below the surface of the adjacent highway's main traveled way. Accordingly, the height of an 86-foot sign would in fact stand approximately 60 feet above the lanes of travel from which the sign would be visible, as depicted to the right.  <ol style="list-style-type: none"> <li data-bbox="730 821 1965 919">2. The site is crowded by tall structures, which include a 72-foot-tall telecommunications tower, a 112-foot-tall telecommunications tower, and various street and parking lights, as depicted below (where the photos compare existing conditions versus placement of a shorter sign).  <ol style="list-style-type: none"> <li data-bbox="730 1406 1934 1471">3. The south-facing display of a 60-foot sign would be obstructed by trees and would require they be topped, whereas Caltrans does not allow for the topping of trees.

EXHIBIT 1: Table of Development and Resource Management Department's Findings for Denial of Variance and Applicant's Responses


<p><i>Finding a(2). The granting of a Variance will not constitute a granting of a special privilege inconsistent with the limitations on the property in the vicinity and identical zone classifications;</i></p>	<p>Department Finding: The granting of the Variance would constitute a granting of a special privilege inconsistent with the limitations on the property in the vicinity and identical zone classifications.</p> <p>As the applicant-provided photosimulations show, the digital billboard is visible at a Code-compliant height of 60 feet from the southbound travel direction of State Route 41. The applicant states that the billboard cannot be marketable due to the location of existing cell towers on the same property ("a jungle of infrastructure"). Staff's analysis shows that the cell tower pole obstructs at most two (2) percent of the billboard. Furthermore, the applicant's own Media Kit for Fresno shows existing billboards blocked to the same degree by streetlights and traffic signals.</p> <p>From the northbound view, the applicant-provided photosimulation does show trees substantially obstructing</p>	<p>The evidence does not support any assertion that issuance of a variance here would be a special privilege.</p> <p>The Department appears to believe the proposed billboard would be marketable at 60 feet, and that an 86-foot-tall sign would be an indulgence. The Department's analysis is based on three grounds: (1) the cell phone tower that obstructs the shorter sign occupies only about two percent of the billboard; (2) the applicant's "Media Kit" shows existing billboards blocked to a similar degree; and (3) to the extent the sign's south-facing would be occluded by trees, those trees may be trimmed.</p> <p><i>A two percent obstruction does not reduce sign revenues by two percent, but by 50 percent, endangering the economic feasibility of the project.</i> The relationship between a billboard's marketability and the size of an obstruction is not linear. In other words, a two percent obstruction of a sign's facing does not equate to a two percent reduction in revenues. As the applicant demonstrated at the District 6 Project Review Committee hearing on May 20, 2019, the obstruction of a 60-foot-tall sign, which would entail a cell phone tower bisected the very center of the sign's facing, would cut revenues by 50 percent, endangering the economic feasibility of the sign project. The projected financial figures are attached hereto as <u>Attachment A</u>. For convenience, we have reproduced a visual simulation of the 60-foot sign below, showing the obstruction at issue.</p> <div data-bbox="682 792 1367 1479">  </div> <p>This type of occlusion is jarring to passing motorists and passengers, and can significantly dilute the effectiveness of any affected advertising content. The experience is akin to a leaky faucet that drips throughout the night. The actual decibel level is extremely low, but the nature of the interference pollutes the ambient noise background in a disproportionate manner.</p> <p>Outfront's revenue estimates are based on decades of experience marketing signs, and supported by common sense. A company wishing to advertise on a sign, and put its best foot forward in the marketplace, would not agree to post ad copy on a billboard panel with a tower cutting through its center. The relationship between obstructions and the value of signs is discussed in greater</p>
--	---	--

EXHIBIT 1: Table of Development and Resource Management Department's Findings for Denial of Variance and Applicant's Responses

(30%) the view of the billboard at a Code compliant, reduced to less than 1% at the proposed height. These trees however are located on CalTrans right-of-way, and there are procedures available to the applicant to have these trees trimmed.

detail in our letter of May 6, 2019. Ultimately, the Department's linear calculation of reduced revenue is based on a faulty methodology, and should be disregarded.

The applicant does not operate profitable highway billboards with similar obstructions, as asserted. The City has indicated that Outfront successfully operates billboards with similar obstructions, referring to a "Media Kit" that Outfront publishes on its website. What follows are "snapshots" from this Media Kit, and presumably what the Department is relying upon:



There is an important distinction that the Department has not recognized. The billboards pictured here are located on City streets, and not state highways. This difference is critical.

In the market for City street signs, the audience for advertisements is not just motorists, but also pedestrians and bicyclists. Pedestrians and bicyclists travel more slowly than vehicles, and therefore have more opportunity to observe advertisements. Local vehicle

traffic, moreover, also operates at slower speeds when compared to highway travel, and so while urban utilities might occlude view of a sign from some angles and for certain periods of time, there



EXHIBIT 1: Table of Development and Resource Management Department's Findings for Denial of Variance and Applicant's Responses

are equal amounts of time when a City street sign can be viewed without obstruction. More plainly, the view of local street signs involves a changing kaleidoscope of views and, at slower speeds, the audience has ample opportunity to view ad copy without obstructions, and come away with a meaningful impression. Moreover, audiences in these urban environments are accustomed to more clutter, and can tolerate fleeting obstructions from poles and streetlights.

Signs located along freeways do not share these characteristics. The 60-foot alternative at the project site along Highway 41, by contrast: (1) would be visible to an audience that has only limited time to view an advertisement (usually only 6 to 8 seconds), and that is not accustomed to significant obstructions in a highway setting; and (2) would be **occluded at all times, from all viewing angles**, by the telecommunications tower pictured on page 2 of this Exhibit. To this last point, the cell tower would sit virtually in front of the sign's facing, and in the very middle of any displayed advertising copy. While conventional wisdom might perceive the market for signage as a "blunt" industry, there are in fact very many nuances that affect a billboard's economic feasibility, and the Department's analysis does not take account of these distinctions.

Caltrans trees can sometimes be trimmed, but cannot be topped. Various trees by the side of the highway would obstruct view of a 60-foot sign. Please see the photo simulation below, depicting a view of the south-facing display at a height of 60 feet.

The Department indicates that Caltrans allows for the trimming of trees, and so the City should take account of any trees that threaten the visibility of a 60-foot sign. There are some problems with this statement. First, Caltrans presently is operating under drought protocols, and apparently has not allowed parties to trim trees. Second, merely trimming the trees here (i.e., thinning foliage on branches) will not open up sightlines to a shorter sign. Rather, tree *topping* would be necessary to ensure visibility of the sign, and Outfront's experience has been that Caltrans will not allow the topping of trees under any circumstance, drought or otherwise.

As such, the fact that procedures exist for the trimming of trees is not relevant. Topping is necessary, and topping is not allowed.





EXHIBIT 1: Table of Development and Resource Management Department's Findings for Denial of Variance and Applicant's Responses

<i>Finding b. The granting of the application is necessary to prevent a physical hardship which is not of the applicant's own actions or the actions of a predecessor in interest;</i>	<p>Department Finding: The applicant states that the presence of existing wireless telecommunication facilities found on the same property constitutes a physical hardship, due to the tower pole obstructing the messaging that would be found on a billboard of Code-compliant height.</p> <p>The mere existence of an obstruction blocking 2% of a message does not constitute a physical hardship, as a great majority of signage within City limits—including billboards—are blocked to some minor degree by City equipment. Furthermore, the billboard would be located approximately 33 feet higher than the largest allowed CalTrans directional sign.</p>	<p>The focus on a “two percent” obstruction is misplaced, and minimizes the importance of the cell phone tower obstructions, as discussed extensively above. The Department's other rationales are similarly misleading.</p> <p>The Department asserts that a “great majority of signage within City limits — including billboards — are blocked to some minor degree by City equipment.” This statement simply is not true. Outfront operates approximately 500 billboards in the City alone, and not one of these signs has City equipment obstructing the center of a facing. While it is conceivable that any given sign, if viewed from a far enough distance and a carefully selected angle, would have an obstructing traffic light or street sign, the critical question is whether there is an obstruction immediately in front of a display's facings. With the 60-foot-tall billboard at issue, the problem is not a hypothetical, academic obstruction, but a front-and-center occlusion down the very middle of the proposed digital facing. There is no economically viable advertising sign in the City that shares this challenge, and statements that a majority of them are thus affected is disingenuous.</p> <p>Furthermore, as stated in the previous section, it is inappropriate to compare freeway signs to City street signs. Each type of sign has different audiences, and displays ad copy in very different urban contexts.</p> <p>Finally, the assertion that the proposed sign would be 33 feet taller than the largest allowed CalTrans directional sign is irrelevant, as would a statement comparing the billboard to a City stop sign. Different types of signs have different height limitations for a great number of reasons, and the fact that the proposed billboard is taller than another species of sign is meaningless. If a meaningful comparison is to be made, it would be to other outdoor advertising displays in the City. To this end, the Department fails to note that a great many on- and off-premise advertising signs exceed 53 feet (which represents the height that is 33 feet below the proposed 86-foot-tall billboard). For instance, an off-premise, digital sign located a short distance south of the project site on Highway 41, which was approved in 2016 at a height of <u>85 feet</u>.</p>
--	--	--

EXHIBIT 1: Table of Development and Resource Management Department's Findings for Denial of Variance and Applicant's Responses

<p><i>Finding c. The granting of the application will not be detrimental or injurious to property or improvements in the vicinity, and will not be detrimental to the public health, safety, general welfare, or convenience, nor the preservation and conservation of open space lands; and</i></p>	<p>Department Finding: The digital billboard will be required to comply with the California Building Code, all CalTrans requirements, and has been found to be consistent with the Fresno County Airport Land Use Compatibility Plan, subject to approval by the FAA, and up to a height of 86 feet.</p>	<p>The applicant agrees with this finding.</p>
<p><i>Finding d. The granting of the Variance will be consistent with the general purposes and objectives of this Code, any applicable operative plan, and of the General Plan.</i></p>	<p>Department Finding: The approval of the Variance would be inconsistent with the Development Code's Purpose, FMC Section 15-102-J, "To safeguard and enhance the appearance of the city." The approval of the Variance would create an overheight billboard which would not safeguard nor enhance the appearance of the city, as it would overwhelm its surroundings by its large scale and form. The approval of a Variance due to existing light poles and trees that could be trimmed would create precedence, thereby preventing the</p>	<div data-bbox="680 727 1381 1230" data-label="Image"> </div> <p>The Department asserts an 86-foot-tall digital display would fail "to safeguard or enhance the appearance of the city." However, this statement does not take into account that (1) the construction of a functioning, digital display will entail the removal of ten billboards from City streets, resulting in an overall aesthetic benefit citywide; and (2) the City approved an <u>85-foot-tall</u> digital display that posts off-premise advertising at 2055 East Shields Avenue just two years ago (the "Manchester Sign").</p> <p>As with Outfront's proposed sign, the location of the 85-foot Manchester Sign is adjacent to Highway 41, and located on a property that is topographically lower than the highway's main travelled way. Under these same circumstances, the City allowed for its construction and operation and, at that time, never concluded the display was inconsistent with Development Code section 15-102-J or any other ordinance.</p> <p>The Department also asserts that Outfront's 86-foot-tall sign "would overwhelm its surroundings by its large scale and form." The analysis ignores the fact that there are 72- and 112-foot</p>

EXHIBIT 1: Table of Development and Resource Management Department's Findings for Denial of Variance and Applicant's Responses

	<p>Development Code from safeguarding the appearance of the City.</p>	<p>communications towers directly adjacent to the proposed sign, and the fact that, after accounting for topography, the sign would only be about 60 feet above the highway's main traveled way. The Department's analysis also ignores the visual simulations that Outfront prepared, which depict how an 86-foot-tall sign would look when set amid the existing landscaping and improvements. This simulation, reproduced below, demonstrates the sign does not dwarf the surrounding, urban development, and that neither its scale nor form are any different in terms of compatibility than the 85-foot-tall digital Manchester Sign.</p> <p>The following comparison, incorporating a visual simulation of Outfront's 86-foot proposal and a photograph of the 85-foot Manchester Sign,¹ illustrates the similarities.</p> <div data-bbox="680 529 1318 956">A visual simulation of a proposed 86-foot-tall billboard. The sign is a large, rectangular, light-colored panel mounted on a tall, slender metal pole. To the left of the sign, a tall, lattice-structured telecommunications tower stands prominently against a cloudy sky. In the background, there are some commercial buildings, including one with a 'WALK-IN' sign, and a few cars are visible on a road in the foreground.</div> <div data-bbox="680 956 1150 984"><p>Visual simulation of 86-foot Outfront sign</p></div> <div data-bbox="1339 529 1969 956">A photograph of an existing 85-foot-tall digital billboard, known as the Manchester Sign. The sign is a large, rectangular panel mounted on a tall, slender metal pole. It is surrounded by trees and other vegetation. In the background, there are some commercial buildings and a few cars are visible on a road in the foreground.</div> <div data-bbox="1339 956 1829 984"><p>Photo of existing, 85-foot Manchester Sign</p></div> <p>Finally, the Department indicates that approval of Outfront's 86-foot-tall sign would create precedence that would prevent the City from safeguarding the City's aesthetic environment. We wish to remind the Planning Commission that the circumstances justifying this variance are very peculiar and not easily "reproducible" elsewhere within municipal boundaries. Again, the proposed sign location is unique because of its topography and the existence of extremely tall telecommunication infrastructure in the immediate vicinity (as shown above). The proposed sign location is also occluded by trees. The peculiarity of various circumstances at issue here, indeed, is something the Department has acknowledged.</p>
--	---	---

¹ Please note, we filed a Public Records Act request for more information on the Manchester Sign, and the deadline for the City's response, June 14, 2019, expired without the transmission of the documents we sought. Outfront therefore reserves the right to raise further arguments once the City provides this information.

EXHIBIT 1: Table of Development and Resource Management Department’s Findings for Denial of Variance and Applicant’s Responses

		<p>Another special circumstance here is the significant blockage that would occur with shorter signs, as a result of the cell phone tower adjacent to the proposed sign, and the Planning Commission could decide that this front-and-center obstruction is material to any decision to approve the variance. Therefore, the suggestion that approval of an 86-foot-sign would open the proverbial floodgates to taller signs is not supportable.</p> <p>Finally, it bears mention that the construction of Outfront’s sign would entail the removal of numerous billboards on City streets. Again, the project at issue here is not a simple sign construction, but the relocation <i>and consolidation</i> of billboard inventory, whereby many existing billboards will be removed from City streets in exchange for the right to construct a single, highway-oriented sign. As such, there is a considerable, net aesthetic benefit that would result if Outfront constructs the proposed display, which would “safeguard and enhance” the City’s appearance.</p>
--	--	---

DPU 41		at 60 feet high		
Year	Projected Revenue	Projected Revenue Share Payment at 35%	Rent	Total
1	\$336,000.00	\$0.00	\$130,000.00	\$130,000.00
2	\$336,000.00	\$0.00	\$130,000.00	\$130,000.00
3	\$336,000.00	\$0.00	\$130,000.00	\$130,000.00
4	\$336,000.00	\$0.00	\$130,000.00	\$130,000.00
5	\$336,000.00	\$0.00	\$130,000.00	\$130,000.00
6	\$352,800.00	\$0.00	\$130,000.00	\$130,000.00
7	\$352,800.00	\$0.00	\$130,000.00	\$130,000.00
8	\$352,800.00	\$0.00	\$130,000.00	\$130,000.00
9	\$352,800.00	\$0.00	\$130,000.00	\$130,000.00
10	\$352,800.00	\$0.00	\$130,000.00	\$130,000.00
11	\$370,440.00	\$0.00	\$135,850.00	\$135,850.00
12	\$370,440.00	\$0.00	\$135,850.00	\$135,850.00
13	\$370,440.00	\$0.00	\$135,850.00	\$135,850.00
14	\$370,440.00	\$0.00	\$135,850.00	\$135,850.00
15	\$370,440.00	\$0.00	\$142,642.50	\$142,642.50
16	\$388,962.24	\$6,136.78	\$142,642.50	\$148,779.28
17	\$388,962.24	\$6,136.78	\$142,642.50	\$148,779.28
18	\$388,962.24	\$6,136.78	\$142,642.50	\$148,779.28
19	\$388,962.24	\$6,136.78	\$142,642.50	\$148,779.28
20	\$388,962.24	\$6,136.78	\$149,774.62	\$155,911.40
21	\$408,409.92	\$12,943.47	\$149,774.62	\$162,718.09
22	\$408,409.92	\$12,943.47	\$149,774.62	\$162,718.09
23	\$408,409.92	\$12,943.47	\$149,774.62	\$162,718.09
24	\$408,409.92	\$12,943.47	\$149,774.62	\$162,718.09
25	\$408,409.92	\$12,943.47	\$149,774.62	\$162,718.09
Total		\$95,401.28	\$3,455,260.22	\$3,550,661.50

DPU 41		at 86 feet high		
Year	Projected Revenue	Projected Revenue Share Payment at 35%	Rent	Total
1	\$672,000.00	\$105,200.00	\$130,000.00	\$235,200.00
2	\$672,000.00	\$105,200.00	\$130,000.00	\$235,200.00
3	\$672,000.00	\$105,200.00	\$130,000.00	\$235,200.00
4	\$672,000.00	\$105,200.00	\$130,000.00	\$235,200.00
5	\$672,000.00	\$105,200.00	\$130,000.00	\$235,200.00
6	\$705,600.00	\$116,960.00	\$130,000.00	\$246,960.00
7	\$705,600.00	\$116,960.00	\$130,000.00	\$246,960.00
8	\$705,600.00	\$116,960.00	\$130,000.00	\$246,960.00
9	\$705,600.00	\$116,960.00	\$130,000.00	\$246,960.00
10	\$705,600.00	\$116,960.00	\$130,000.00	\$246,960.00
11	\$740,880.00	\$123,458.00	\$135,850.00	\$259,308.00
12	\$740,880.00	\$123,458.00	\$135,850.00	\$259,308.00
13	\$740,880.00	\$123,458.00	\$135,850.00	\$259,308.00
14	\$740,880.00	\$123,458.00	\$135,850.00	\$259,308.00
15	\$740,880.00	\$123,458.00	\$142,642.50	\$266,100.50
16	\$777,924.48	\$129,631.57	\$142,642.50	\$272,274.07
17	\$777,924.48	\$129,631.57	\$142,642.50	\$272,274.07
18	\$777,924.48	\$129,631.57	\$142,642.50	\$272,274.07
19	\$777,924.48	\$129,631.57	\$142,642.50	\$272,274.07
20	\$777,924.48	\$129,631.57	\$149,774.62	\$279,406.19
21	\$816,819.84	\$136,112.94	\$149,774.62	\$285,887.56
22	\$816,819.84	\$136,112.94	\$149,774.62	\$285,887.56
23	\$816,819.84	\$136,112.94	\$149,774.62	\$285,887.56
24	\$816,819.84	\$136,112.94	\$149,774.62	\$285,887.56
25	\$816,819.84	\$136,112.94	\$149,774.62	\$285,887.56
Total		\$3,056,812.56	\$3,455,260.22	\$6,512,072.78