

**MERCED COUNTY PLANNING COMMISSION**  
**MINUTES FOR MEETING OF FEBRUARY 10, 2010**

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The agenda, original minutes, video, and all supporting documentation (for reference purposes only) of the Merced County Planning Commission meeting of February 10, 2010, are available online at [www.co.merced.ca.us/planning/plancomarchive.html](http://www.co.merced.ca.us/planning/plancomarchive.html).

**I. CALL MEETING TO ORDER**

The regularly scheduled meeting of the Merced County Planning Commission was called to order at 9:08 a.m., on February 10, 2010, in the Board Chambers located at 2222 "M" Street, Third Floor, Merced, California.

**II. ROLL CALL OF COMMISSIONERS**

Commissioners Present:       Commissioner Lynn Tanner - Chairman  
  Commissioner Jack Mobley - Vice Chairman  
  Commissioner Mark Erreca  
  Commissioner Cindy Lashbrook

Staff Present:                    Robert Lewis, Development Services Director  
  William Nicholson, Assistant Development Services Director  
  Oksana Newmen, Planner III  
  James Holland, Senior Planner  
  Robert King, Senior Planner  
  Kim Anderson, Recording Secretary  
  Evie Gassaway, Recording Secretary

Legal Staff:                      Marianne Greene, Deputy County Counsel

Commissioners Absent:        Commissioner Rudy Buendia

**III. APPROVAL OF MINUTES**

**M/S LASHBROOK - ERRECA, AND CARRIED BY A VOTE OF 4 - 0, THE PLANNING COMMISSION APPROVED THE MINUTES OF JANUARY 13, 2010.**

**IV. CITIZEN COMMUNICATIONS**

None

**V. PUBLIC HEARINGS**

**A. CONDITIONAL USE PERMIT APPLICATION No. CUP06-008 – Central Valley Concrete -**  
To establish a mining operation for the extraction of sand from a 42 acre portion of a 321 acre site. Annual production is estimated to be 220,000 cubic yards with a total production of 2.2 million cubic yards for 10 years. The project is located on the east side of Highway 59, 1850 feet north of Youd Road in the Merced area. The property is designated Agricultural land use in the General Plan and zoned A-2 (Exclusive Agricultural). **ON**

**Recommendation:** The actions requested are to:

- 1) Adopt the Mitigated Negative Declaration, and
- 2) Approve, disapprove, or modify the application based on the project findings, and subject to the conditions of approval and mitigation measures.

Planner Oksana Newmen presented the Staff Report and recommendations of approval dated February 10, 2010.

The public hearing opened at 9:18 a.m.

Des Johnston, Santa Fe Land Planning, on behalf of Central Valley Concrete said this reclamation plan has been several years in the making. He states he was assisted in preparation of the reclamation plan by Environmine Incorporated from San Diego. There

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were two seasons of biological surveys plus a third summer for peer review of those surveys by the County's consultant PBS & J. Everything that could be found was found and inventoried. The three elderberry shrubs found on site will be moved off site to an adjacent area where additional elderberries will be planted also as mitigation. This project is near the river but is not proposed to go below the water level of the river. The floor of the excavation will be above the river and above the FEMA flood plain. He requests the Commission's approval and states he is available for questions.

The public hearing closed at 9:21 a.m.

Commissioner Lashbrook asked if the land on back side of this project is owned by the Robinson's. Mr. Johnston confirmed that it is owned by the Robinson's.

County Counsel Marianne Greene requests that the term in Condition No. 24 be modified to eliminate the first clause where it states "the applicant shall enter into the following agreement with the County within 30 days of the Planning Commission hearing". Instead, simply state as a term and condition of the project that you adopt, "the applicant has the duty," removing the word contracted; insert the name of the applicant which is Central Valley Concrete, then going down to where it says "name of project (hereinafter project)" insert instead "Conditional Use Permit Application No. CUP06-008 – Central Valley Concrete". She says by doing it this way, it is a term and condition in the project to indemnify the County in case there is a law suit upon approval of the project. If anyone has any questions she will be happy to answer them.

Robert Lewis, Development Services Director, asks Planner Oksana Newmen to go over her memorandum to the Commission for clarification for the Planning Commission on Condition No.'s 2, 22, 29-30, and the adding of Condition No. 33.

Planner Oksana Newmen says Condition No. 2 should be modified just to clarify that no Sunday operations are permitted. Condition No. 22 should be revised to read the following:

Topsoil shall be applied at a depth of three inches within the Revegetation Strip.  
Topsoil shall be applied at a depth of three inches over the remaining mining area.

Planner Oksana Newmen explains the numbering of the Conditions of Approval should be revised after Condition No. 29 to continue to Condition No. 30 (as opposed to Condition No. 23). Also we will be adding Condition No. 33 to address comments submitted by the US Fish and Wildlife Service which states:

Elderberry bush transplantation shall be overseen by a qualified biologist, and according to the "Conservation Guidelines for the Valley Elderberry Longhorn Beetle" (Guidelines) dated July 9, 1999. A written report must be prepared by a qualified biologist in each of the years in which a monitoring survey is required. Copies of the report must be submitted by December 31 of the same year to the Service and the Department of Fish and Game. The report must explicitly address the status and progress of the transplanted and planted elderberry and associated native plants and trees, as well as any failings of the conservation plan and the steps taken to correct them. Reports to the Service should include the following file references number: 81420-2008-TA-1335.

**MOTION: M/S MOBLEY - ERRECA, AND CARRIED BY A VOTE OF 4 - 0, THE PLANNING COMMISSION ADOPTS THE MITIGATED NEGATIVE DECLARATION FOR CONDITIONAL USE PERMIT APPLICATION No. CUP06-008 ACCORDING TO CEQA GUIDELINES BASED UPON THE THREE FINDINGS.**

**MOTION: M/S MOBLEY - ERRECA, CARRIED BY A VOTE OF 4 - 0, THE PLANNING COMMISSION CONCURS WITH THE STAFF REPORT AND RECOMMENDATIONS DATED FEBRUARY 10, 2010, AND APPROVES CONDITIONAL USE PERMIT APPLICATION No. CUP06-008 AND THE RECLAMATION PLAN BASED ON THE 10 FINDINGS AND RECOMMENDED 33 CONDITIONS OF APPROVAL SET FORTH IN THE**

**STAFF REPORT WITH THE RECOMMENDED CHANGES BY COUNTY COUNSEL TO  
CONDITION No. 24 AND THE CHANGES AS LISTED IN PLANNER OKSANA NEWMEN'S  
MEMORANDUM AS FOLLOWS:**

**Conditions:**

**Planning and Community Development Department**

1. Conditional Use Permit No. CUP06-008 is granted to excavate and remove sand mining material for the following:
  - Maximum production – 2.2 million cubic yards of sand material.
  - Life of Permit: 10 years (until 2/20/2020).
  - Maximum Area to be excavated: 42 acres.
  - Maximum depth of excavation: Shall be at an elevation at least one foot above the 100 year floodplain, or 187 feet msl, whichever is higher
  - All mining and related uses shall be located, developed, and operated in a manner described on the approved plot plan, cross sections, elevations, and the conditions of this permit.
2. Hours of Business Operations shall be limited to the following:
  - Excavation operations shall be limited to 6:00 AM to 6:00 PM, Monday through Saturday.
  - Any expanded volume operations would be of a temporary nature, and not to exceed two weeks at a time, no more than two times per year.
  - No Sunday operations permitted.
3. Reclamation of the site shall conform to the Reclamation Plan approved by the County and the Office of Mine Reclamation. Reclamation shall commence at the end of mining of each phase, with final reclamation completed within one year of the completion of mining.
4. The project shall comply with standard conditions listed in Planning Commission Resolution No. 97-1 and 97-2.
5. The applicant shall comply with all Federal, State and County Requirements including, but not limited to the San Joaquin Valley Air Pollution Control District, Office of Mine Reclamation, and Merced County Public Works – Roads Division.
6. Prior to exercising the permit, the applicant shall submit the financial assurance of \$20,821.20. The financial assurance may be in the form of a surety bond, certificate of deposit, letter of credit, or Trust Fund.
7. Upon completion of the project, all the machinery and equipment associated with the mining operation shall be removed from the property, unless it will be used for the planned reclaimed use of the site.
8. The applicant shall furnish the Planning and Community Development Director with a report describing compliance with the reclamation plan by July 1st of each year. With each report, the permittee shall provide a map to scale, showing current mining progress and reclamation.
9. The Planning and Community Development Director or his designee shall review the reclamation plan status report and inspect the mining operation to determine and assure continuing compliance with the approved reclamation plan and the Conditions of Approval. The applicant shall pay the County the actual cost of conducting inspections, annually or at other times, and shall make available to the Planning and Community Development Director such information necessary for determining

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compliance. The applicant shall be required to pay an initial condition monitoring fee and mitigation measures monitoring fee of **\$304**. Additional fees may be assessed for subsequent inspections as deemed necessary by the County, and shall be billed on a time and materials basis.

10. If the Conditional Use Permit is not used within one year, it shall become automatically void without further action. The Planning Commission may extend the Conditional Use Permit if a request is filed by the applicant prior to its expiration. (Zoning Code Section 18.50.09B). However, as identified in Condition No. 1, the permit has a maximum life of ten (10) years.
11. If the use authorized by the Conditional Use Permit is abandoned or discontinued for a period of one year the applicant must file an Interim Management Plan application with the County.
12. Prior to the sale/transfer/lease of the project site and/or operations, the applicant shall notify the Planning Department of said transaction. The intent of this condition is solely to keep the County apprised of the owner and operator of the site.
13. Any revisions and clarifications required by the State Office of Mine Reclamation in regards to the reclamation plan or financial assurance shall be adhered to, and considered as part of the Reclamation Plan.
14. Applicant/property owner shall comply with all Federal, State, and Local agency regulations.

### **Publics Works – Roads Division**

15. The applicant shall enter into a Roadway Impact Agreement with the County of Merced prior to removal of material from the site. The Roadway Impact Agreement will stipulate that the project applicant shall keep accurate records of loaded heavy trucks leaving the site. Once every year the applicant shall contribute \$2.50 into the Merced County Road Fund for every loaded heavy truck leaving the site (empty trucks will not be counted). The fee for processing a Roadway Impact Agreement is \$200.00.

### **Merced Irrigation District**

16. The applicant shall protect the Merced River from any potential contamination generated on the site that could flow by either surface or subsurface means to the Merced River.

### **San Joaquin Valley Air Pollution Control District**

17. Trucks shall be prohibited from idling within 330 feet of the nearest sensitive receptor (the house across Highway 59). Trucks and/or equipment between 330 feet and 660 feet of the sensitive receptor shall be limited to 5 minutes of idling time at all times. Trucks and/or equipment greater than 660 feet from the nearest sensitive receptor shall not have prescribed idling limits, though should not idle any longer than is necessary.

### **Office of Mine Reclamation**

18. Prior to earthmoving activities at the site, a Stormwater Pollution Prevention Plan shall be completed in accordance with National Pollutant Discharge Elimination System General Permit for Industrial Activities and a Notice of Intent shall be provided to the State Water Resources Control Board.
19. As described in the Reclamation Plan, silt fencing shall be installed prior to earthmoving activities at the site.

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20. In conjunction with other existing and proposed stormwater and erosion control measures at the site, the settling basin proposed for the project shall be designed to handle runoff from not less than the 20 year/1 hour intensity storm event.
21. Product stockpiles shall be covered or sufficiently watered to minimize the potential for water and wind erosion.
22. Topsoil shall be applied at a depth of three inches within the Revegetation Strip. Topsoil shall be applied at a depth of three inches over the remainder of the site.
23. Reclaimed areas shall be monitored at least once per year until performance standards have been met for two consecutive years without supplemental irrigation or other intervention.

**County Counsel**

24. ~~The applicant shall enter into the following agreement with the County within 30 days of the Planning Commission Hearing:~~

Central Valley Concrete (hereinafter "Applicant") has the ~~contracted~~ duty (hereinafter "duty") to indemnify, defend and hold harmless, the County of Merced, its Board of Supervisors, commissions, officers, employees, agents and assigns (hereinafter "County") from and against any and all claims, petitions, demands, liability, judgments, awards, interest, attorney's fees, expert witness and consultant fees and other costs and expenses of whatsoever kind or nature, at any time arising out of or in any way connected with the approval, modification, denial, or the exhaustion of administrative appeals associated with Conditional Use Permit Application No. CUP06-008 – Central Valley Concrete (hereinafter "Project") whether in tort, contract, writ of mandamus, or otherwise. This duty shall include, but not be limited to, claims, petitions, or the like for bodily injury, property damage, personal injury, contractual damages, writ of mandamus, or otherwise alleged to be caused to any person or entity including, but not limited to employees, agents, commissions, boards, and officers of Applicant. Applicant's liability for indemnity under this term and condition shall apply, regardless of fault, to any acts or omissions, willful misconduct, or negligent conduct of any kind, on the part of the Applicant, its employees, subcontractors, agents, and officers. The duty shall extend to any allegation or claim of liability, or petition, except in circumstances found by a jury or judge to be the sole and legal result of the willful misconduct of County. This duty shall arise at the first notice of filing a lawsuit, claim, petition, or allegation of liability against County. Applicant will on request and at its expense, defend any action suit or proceeding arising hereunder. This term and condition shall not be limited to any claim, petition, demand, liability, judgment, award, interest, attorney's fees, expert or consultant witness fees, legal research fees, staff and administrative costs, administrative record costs, materials, and costs and expenses of whatsoever kind or nature, that may arise at the time of project approval, modification, or denial, but shall also apply to all such claims and the like, after Project approval, modification, denial, or the exercise or exhaustion of administrative appeals, including but not limited to actions arising from public interest, land use and environmental legal actions. Attorneys' fees shall include any and all attorneys' fees but not be limited to attorneys' fees and staff time incurred by the offices of County Counsel. County shall have full discretion to select legal counsel of its own choosing to represent County, at a cost not exceeding the prevailing and reasonable rates for counsel practicing environmental and land use law in the State of California, or practicing any other area of law that the County determines the claim may reasonably require. This term and condition for indemnification shall be interpreted to the broadest extent permitted by law.

**Mitigation Measures**

25. **AES-1** Prior to project approval, the proposed design of the constructed slopes presented in the project reclamation plan will be modified to create a more natural appearance. This shall be accomplished by reducing slope uniformity and by softening the transition between natural and constructed slopes to better reflect the surrounding topography. In addition, the project revegetation plan will be revised to include planting of a minimum of ten (10) isolated valley oak trees on and/or at the tops of constructed slopes. Measures presented in the reclamation plan to establish and monitor oak planting will apply to plantings required under Measure AES-1, as will the reclamation plan's performance criteria for such plantings. (MM)
26. **AES-2** Phase 2 mining activities will be carried in a way to preserve the visual screen currently provided by the hillside in the center of Phase 2 mining operations for as long as practicable. This shall be accomplished by extracting all saleable materials east of the hill prior to commencing operation on top or to the west of the hill. In addition, vegetation removal on Phase 2 lands that are visible from Highway 59 will be delayed until immediately prior to the start of mining operations on those lands. (MM)
27. **BIO-1** (a) The project applicant shall conduct Worker Environmental Awareness Program (WEAP) training for construction crews before construction activities begin. The WEAP shall include a brief review of the special-status species and other sensitive resources that could occur in the proposed project site (including their life history and habitat requirements and what portions of the proposed project site they may be found in) and their legal status and protection. The program shall also cover all mitigation measures, environmental permits and proposed project plans, such as the Stormwater Pollution Prevention Plan (SWPPP), Best Management Practices (BMPs), erosion control and sediment plan, and any other required plans. During WEAP training, construction personnel shall be informed of the importance of avoiding ground-disturbing activities outside of the designated work area.
- (b) Pursuant to the July 9, 1999 USFWS Conservation Guidelines for the Valley Elderberry Longhorn Beetle, the project applicant shall establish a 20 foot buffer zone around each of the potentially affected elderberry shrubs within which, no mining or excavation or other activities that could result in the damage to or loss of the elderberry shrubs shall occur. This buffer shall be marked with high visibility fencing during excavation so excavation crews can easily avoid them during the excavation of the site. This buffer zone shall remain in place throughout the life of the project.
- OR
- (c) Prior to any ground disturbing activities within 20 feet of the dripline of any elderberry shrub, the applicant or their representative shall initiate consultation pursuant to the Federal Endangered Species Act with the USFWS. Section 10 Consultation will be required if there is no ACOE involvement with this project. Specific mitigation measures for project related impacts on VELB will be developed during this process, but will generally include the following mitigation measures.
- (d) If the elderberry shrubs cannot be avoided then those elderberry shrubs shall be transplanted to a USFWS approved location following the guidelines set forth in the July 9, 1999 USFWS Conservation Guidelines for the Valley Elderberry Longhorn Beetle. This location may be established on site, or at an approved mitigation bank.
- (e) In addition to transplanting the affected shrubs, the project applicant shall plant 42 additional seedlings or cuttings in the established mitigation area following the guidelines set forth in the July 9, 1999 USFWS Conservation Guidelines for the Valley Elderberry Longhorn Beetle (Table 3.2). (MM)

TABLE							3.2
ELDERBERRY MITIGATION <sup>1</sup>							
Elderberry Shrub	Stems 1-3 inches diameter at ground level	Stems 3-5 inches diameter at ground level	Stems 5 inches or greater diameter at ground level	Elderberry Seedling Ratio	Associated Native Plant Ratio	Number of Elderberry Seedlings to be Planted	Number of Associated Native Plants to be Planted
ES-01	17	0	0	1:1	1:1	17	17
ES-02	7	0	0	1:1	1:1	7	7
ES-03	18	0	0	1:1	1:1	18	18
<b>Total</b>						<b>42</b>	<b>42</b>

28. **BIO-2** (a) If mining activities are planned to occur during the nesting season for nesting migratory birds (February 1 - September 15), including Swainson's hawk, and other raptors, pre-construction surveys for active nests shall be conducted with 250 feet of the project site. If an active nest is located, CDFG shall be consulted to determine if mining activities may proceed during the nesting season. Surveys must be conducted within two weeks of the start of mining activities. Survey results must be provided to Merced County and CDFG.

(b) If the above survey does not identify any nesting species within 250 feet of the project site, no additional mitigation would be required to offset impacts on nesting birds. However, should any active bird nests be located within 250 feet of the project site, the following mitigation measures shall be implemented. If bird nests occur on the adjacent properties and mining is scheduled to occur during the breeding season (approximately February 1 through September 15, avoidance shall include the establishment of a non-disturbance buffer zone around the nest site. The size of the buffer zone will be determined in consultation with CDFG, but will likely be 200 feet. The buffer zone shall be delineated by highly visible temporary construction fencing.

If mining related activities cause nest abandonment or forced fledging is necessary within the buffer zone, monitoring of the nest site (funded by the project proponent) by a qualified biologist will be required to determine if the nest is abandoned. If the nest is abandoned and if the nestlings are still alive, the project proponent shall fund the recovery and hacking (controlled release of captive reared young) of the nestling(s).

Routine disturbances, such as routine maintenance activities within 200 feet of an active nest, shall not be prohibited. (MM)

29. **BIO-3** (a) Pre-construction surveys for burrowing owls shall be conducted by an experienced biologist within 30-days prior to the start of work activities where mining is planned in known or suitable habitat areas. If construction activities are delayed for more than 30 days after the pre-construction surveys, then a new preconstruction survey shall be required. All surveys shall be conducted in accordance with the CDFG/California Burrowing Owl Consortium survey protocols.

(b) If burrowing owls are discovered in the project site, CDFG shall be notified. Where construction activities could directly affect burrowing owl survival or reproductive behavior, or where maintenance of a minimum 250-foot buffer zone around active burrowing owls nests (160 feet when owls are not nesting) is not practical, the applicant shall retain an experienced burrowing owl biologist to recommend project/site-specific mitigation measures to avoid violating California

Fish and Game Codes Section 3503 and Section 3503.5 and the MBTA, which could include the following or equally effective measures:

- A site-specific plan to complete sand extraction and reclamation when adult owls are in burrows attending to young nestlings (and thus not disturbed by the presence of construction equipment);
- Modification of construction procedures so construction tasks could be completed in as short a time as possible; and
- Close monitoring of the owls' behavior before, during and after construction so any significant changes in the owls' behavior would be apparent. (MM)

30. **BIO-4** To avoid substantial adverse effects on badgers, a qualified biologist shall conduct pre-construction surveys for active burrows within 30 days of ground disturbance activities associated with mining activities to confirm presence or absence of badger in the project vicinity (at least 300 feet around the development area). If no individual badgers or evidence of badger are encountered, no further mitigation would be required.

However, if badger or evidence of badger use is encountered, site-specific measures (e.g., exclusionary fencing, burrow monitoring) shall be prepared by the qualified biologist in coordination with the CDFG and other appropriate agencies and implemented to prevent direct loss of active burrows and/or individuals. If vacated dens are identified during the pre-construction survey, the vacated dens shall be collapsed to discourage badgers from returning to the project site during construction. Mining activities will occur in two phases. If more than two months of inactivity occurring between the two phases, then additional pre-construction surveys shall be conducted for American badger within 30 days of ground disturbance activities associated with mining activities. A pre-construction survey report verifying the absence of active burrows in the development area shall be prepared and provided to the County of Merced for review and approval prior to the initiation of mining activities. The survey report shall also be provided to the CDFG, if requested. (MM)

31. **CUL-1** If any cultural resources, such as unusual amounts of bone or shell, artifacts, or human remains, are encountered during any mining and/or reclamation activities, work shall be suspended within 100 feet of the find. The County of Merced shall be notified immediately of the discovery, and the project proponent shall retain the services of an archaeologist who meets the Secretary of the Interior's Standards for Archaeology to evaluate the find and provide recommendations for treatment of any significant archaeological resources. The archaeologist's recommendations shall be submitted for approval to the County of Merced. The project proponent shall implement approved mitigation, to be verified by the County of Merced.

If human remains are discovered during any reclamation activities, work within 100 feet of the remains shall be suspended immediately and the Merced County Coroner shall be immediately notified. If the remains are determined by the county coroner to be Native American, the Native American Heritage Commission (NAHC) shall be notified within 24 hours. The project proponent shall also retain a professional archaeologist with Native American burial experience to conduct a field investigation of the specific site and consult with the Most Likely Descendant, if any, identified by the NAHC. As necessary, the archaeologist may provide professional assistance to the Most Likely Descendant, including the excavation and removal of the human remains. The County of Merced will be responsible for the approval of recommended mitigation, taking account of the provisions of state law, as set forth in CEQA Guidelines Section 15064.5(e) and Public Resources Code Section 5097.98. The project proponent shall implement the approved mitigation, to be verified by the County of Merced, before the resumption of activities at the site where the remains were discovered. (MM)



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32. **CUL-2** To minimize potential adverse impacts on unique, scientifically important paleontological resources, the project applicant implement the following: Before the start of mining/excavation activities, the project applicant shall retain a qualified paleontologist or archaeologist to train all mining personnel involved with earthmoving activities, including the site superintendent, regarding the possibility of encountering fossils, the appearance and types of fossils likely to be seen during construction, and proper notification procedures should fossils be encountered.

If paleontological resources are discovered during mining, the construction crew shall immediately cease work in the vicinity of the find and notify the Merced County Department of Planning and Community Development. The project applicant shall retain a qualified paleontologist to evaluate the resource and prepare a recovery plan in accordance with Society of Vertebrate Paleontologists (SVP) guidelines (1996). The recovery plan may include a field survey, construction monitoring, sampling and data recovery procedures, museum storage coordination for any specimen recovered, and a report of findings. Recommendations determined by the county to be necessary and feasible shall be implemented before mining activities can resume at the site where the paleontological resources were discovered. (MM)

33. Elderberry bush transplantation shall be overseen by a qualified biologist and according to the "Conservation Guidelines for the Valley Elderberry Longhorn Beetle" (Guidelines) dated July 9, 1999. A written report must be prepared by a qualified biologist in each of the years in which a monitoring survey is required. Copies of the report must be submitted by December 31 of the same year to the Service and the Department of Fish and Game. The report must explicitly address the status and the progress of the transplanted and planted elderberry and associated native plants and trees, as well as any failings of the conservation plan and the steps taken to correct them. Reports to the Service should include the following file references number: 81420-2008-TA-1335.

**The Planning Commissioners took a 10 minute break.**

- B. RESCIND APPROVAL OF MINOR SUBDIVISION APPLICATION No. MS07-030 – William Morris** - To divide three parcels totaling 380.45 acres into nine parcels, ranging from 40.00 acres to 54.72 acres in size. The project site is located at the southwest corner of American Avenue and Mitchell Road in the Hilmar area. The property is designated Agricultural land use in the General Plan and zoned A- 1 (General Agricultural). **JH**

**Recommendation:** The actions requested are to:

- 1) Rescind adoption of the Mitigated Negative Declaration, and
- 2) Rescind approval of Minor Subdivision Application No. MS07-030 by the Planning Commission on October 14, 2009, that included ten project findings, six conditions of approval, and six mitigation measures, based on policy direction from the Board of Supervisors on January 26, 2010.

Planner James Holland presented the Staff Report and recommendations of approval dated February 10, 2010.

The public hearing opened at 9:43 a.m.

Duane Andrews, Golden Valley Engineering, said he hopes the Commission will approve this project and he is available for questions.

The public hearing closed at 9:44 a.m.

**MOTION: M/S MOBLEY - ERRECA, AND CARRIED BY A VOTE OF 4 - 0, THE PLANNING COMMISSION APPROVES TO RESCIND THE ADOPTION OF THE MITIGATED NEGATIVE DECLARATION AND RELATED FINDINGS OF MINOR SUBDIVISION APPLICATION No. MS07-030 BY THE PLANNING COMMISSION ON**

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**OCTOBER 14, 2009, BASED ON POLICY DIRECTION FROM THE BOARD OF SUPERVISORS ON JANUARY 26, 2010.**

**MOTION: M/S MOBLEY – ERRECA, AND CARRIED BY A VOTE OF 4 - 0, THE PLANNING COMMISSION APPROVES TO RESCIND APPROVAL OF MINOR SUBDIVISION APPLICATION No. MS07-030 BY THE PLANNING COMMISSION ON OCTOBER 14, 2009. THAT INCLUDED 10 PROJECT FINDINGS, 6 CONDITIONS OF APPROVAL, AND 6 MITIGATION MEASURES, BASED ON POLICY DIRECTION FROM THE BOARD OF SUPERVISORS ON JANUARY 26, 2010.**

- C. MINOR SUBDIVISION APPLICATION No. MS07-030 – William Morris** - To divide three parcels totaling 380.45 acres into nine parcels, ranging from 40.00 acres to 54.72 acres in size. The project site is located at the southwest corner of American Avenue and Mitchell Road in the Hilmar area. The property is designated Agricultural land use in the General Plan and zoned A-1 (General Agricultural). **JH**

**Recommendation:** The actions requested are to:

- 1) Adopt the Mitigated Negative Declaration, and
- 2) Approve, disapprove, or modify the application based on the project findings, and subject to the conditions of approval and mitigation measures.

Planner James Holland presented the Staff Report and recommendations of approval dated February 10, 2010.

The public hearing opened at 9:58 a.m.

Duane Andrews, Golden Valley Engineering, said he hopes the Commission will approve this project and he is available for questions.

The public hearing closed at 9:59 a.m.

Commissioner Lashbrook asks if everything about the project is the same as when they heard it the first time.

Planner James Holland says everything is the same with the exception of an additional condition which can be found on page 13 of the Staff Report. Condition No. 7 was requested by County Counsel. It will require the applicant to enter an indemnification agreement with the County. There was also a revision to Mitigation Measure AG-1 to address limiting the total number of future residences that can be constructed across all nine proposed parcels to a maximum of 12 dwellings.

County Counsel Marianne Greene recommends that on Condition No. 7, we strike that introductory clause starting with “The applicant” and ending with “hearing”. It should read “Applicant has the duty to indemnify, defend, and hold harmless” then going down to where it says “name of project (hereinafter project)” insert instead “Minor Subdivision Application No. MS07-030”. The effect of these changes is simply to incorporate the indemnification clause into the term and condition of the project.

**MOTION: M/S MOBLEY – ERRECA AND CARRIED BY A VOTE OF 4 - 0, THE PLANNING COMMISSION APPROVES TO ADOPT THE MITIGATED NEGATIVE DECLARATION PREPARED FOR MINOR SUBDIVISION APPLICATION No. MS07-030 ACCORDING TO THE CEQA GUIDELINES AND BASED UPON THE 3 FINDINGS.**

**MOTION: M/S MOBLEY – ERRECA, AND CARRIED BY A VOTE OF 4 – 0, THE PLANNING COMMISSION CONCURS WITH THE STAFF REPORT AND RECOMMENDATIONS DATED OCTOBER 14, 2009, AND MAKES THE 10 FINDINGS SET FORTH IN THE STAFF REPORT AND, BASED ON THOSE 10 FINDINGS, APPROVES MINOR SUBDIVISION APPLICATION No. MS07-030 SUBJECT TO THE 7 CONDITIONS OF APPROVAL AND 6 MITIGATION MEASURES WITH THE CHANGES TO AG-1 AND**

**CONDITION NO. 7 AS STATED BY COUNTY COUNSEL SET FORTH IN THE STAFF REPORT AS FOLLOWS:**

**Conditions:**

Planning & Community Development Department

1. A parcel map, including all parcels involved, shall be recorded within two (2) years of the approval date, as required by the Subdivision Map Act and Merced County Subdivision Code.
2. The applicant shall comply with all applicable County, State and Federal regulations.
3. A Right-to-Farm Certificate shall be recorded prior to issuance of any building permits to notify subsequent occupants of the inconveniences of farming operations and the priority to which Merced County places on such operations.

Turlock Irrigation District

4. The final map should acknowledge the 80-foot strip of land for the Turlock Irrigation District's Lateral 6 right-of-way.
5. The District's electric utility maps show existing 12KV overhead facilities throughout the subject parcels. If these facilities are to remain, the District will require electrical easement dedications. Easement descriptions may be done by separate instrument at a later date.
6. The owner/developer must apply for a facility change for any pole or electrical facility relocation. Facility changes are performed at developer's expense.

County Counsel

7. ~~The applicant shall enter into the following agreement with the County within 30 days of the Planning Commission Hearing:~~

William Morris (hereinafter "Applicant") has the ~~contracted~~ duty (hereinafter "duty") to indemnify, defend and hold harmless, the County of Merced, its Board of Supervisors, commissions, officers, employees, agents and assigns (hereinafter "County") from and against any and all claims, petitions, demands, liability, judgments, awards, interest, attorney's fees, expert witness and consultant fees and other costs and expenses of whatsoever kind or nature, at any time arising out of or in any way connected with the approval, modification, denial, or the exhaustion of administrative appeals associated with Minor Subdivision Application No. MS07-030 – William Morris (hereinafter "Project"), whether in tort, contract, writ of mandamus, or otherwise. This duty shall include, but not be limited to, claims, petitions, or the like for bodily injury, property damage, personal injury, contractual damages, writ of mandamus, or otherwise alleged to be caused to any person or entity including, but not limited to employees, agents, commissions, boards, and officers of Applicant. Applicant's liability for indemnity under this term and condition shall apply, regardless of fault, to any acts or omissions, willful misconduct, or negligent conduct of any kind, on the part of the Applicant, its employees, subcontractors, agents, and officers. The duty shall extend to any allegation or claim of liability, or petition, except in circumstances found by a jury or judge to be the sole and legal result of the willful misconduct of County. This duty shall arise at the first notice of filing a lawsuit, claim, petition, or allegation of liability against County. Applicant will on request and at its expense, defend any action suit or proceeding arising hereunder. This term and condition shall not be limited to any claim, petition, demand, liability, judgment, award, interest, attorney's fees, expert or consultant witness fees, legal research fees, staff and administrative costs, administrative record costs, materials, and costs and expenses of whatsoever kind or nature, that may arise at the time of project approval, modification, or denial, but shall also apply to all such claims and the like,

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after Project approval, modification, denial, or the exercise or exhaustion of administrative appeals, including but not limited to actions arising from public interest, land use and environmental legal actions. Attorneys' fees shall include any and all attorneys' fees but not be limited to attorneys' fees and staff time incurred by the offices of County Counsel. County shall have full discretion to select legal counsel of its own choosing to represent County, at a cost not exceeding the prevailing and reasonable rates for counsel practicing environmental and land use law in the State of California, or practicing any other area of law that the County determines the claim may reasonably require. This term and condition for indemnification shall be interpreted to the broadest extent permitted by law.

### Mitigation Measures

- AG-1:** The potential loss of productive farmland to non-agricultural use due to residential development shall be mitigated by the applicant agreeing to restrict the number of potential residences to a maximum of 12 dwelling units for the entire project (9 parcels). The allocation of these residential development rights across the 9 parcels shall be determined by the property owner, placed on the face of the final subdivision map and recorded on the title of each of the 9 parcels.
- AG-2:** In order to preserve and encourage the economic stability of agriculture, the applicant shall provide accessibility to the existing Turlock Irrigation District facilities for irrigation water through easements to the proposed parcels. The easements shall be reviewed and approved by the Public Works Director. The easements shall be recorded with the Final Map.
- AG-3:** In order to provide for the continued commercial agricultural viability of each of the 9 parcels proposed by Minor Subdivision Application No. MS07-030, no further subdivision of any of these parcels shall be allowed. A notice restricting future redivision of these parcels shall be placed on the face of the final subdivision map and recorded on the title of each of the 9 parcels.
- CULT-1:** If archeological materials or paleontological materials are identified, work on that portion of the project shall cease until a resources protection plan conforming to CEQA Section 15064.5 is prepared by a qualified archeologist and/or paleontologist and approved by the County of Merced Community Development Director or authorized representative. Project work may resume in compliance with such plan. If human remains are encountered, the County Coroner shall be contracted immediately and the provisions of State Law carried out.
- BIO-1:** To ensure there is no take of any Swainson's hawk that may move in to the site between the time the initial study was completed and the initiation of ground/breaking construction activities, a pre-construction survey within 0.25 miles of the project site shall be conducted by a qualified biological consultant to determine the presence of nesting Swainson hawk's prior to any construction occurring on the project site between March 1 and September 15. The survey shall take place no more than thirty days prior to the start of ground breaking/construction activities, and a copy of the survey shall be provided to the Merced County Planning and Community Development Department no less than 20 days prior to the proposed construction start date. Should a nest be discovered within .25 miles of the project site, temporal construction restrictions may be necessary to eliminate the potential for noise disturbance to the nesting hawks. The consultant, who shall consult with appropriate regulatory agencies on possible mitigation, shall base the necessity for restrictions on the location of the nest in relation to construction activities.

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- BIO-2:** Prior to any site disturbance, including commencement of any site improvements necessary for recordation of final subdivision map, or, the issuance of any building permit, a qualified biological consultant approved by the County shall be retained by the project proponent to identify any trees that can be used by nesting raptors and/or other birds. These trees shall be clearly marked on-site and the maximum possible number shall be retained during the construction of the project. The retention effort may require the redesign of the site plan. Should it be necessary to remove any trees that could be used by nesting raptors/or other birds to accommodate development and site redesign is not feasible do to site characteristics, the trees shall be felled between September 15 and January 31, outside of the nesting season. The proposed tree retention or removal plan recommended by biological consultant shall be reviewed and approved by the Merced County Planning and Community Development Department no less than 20 days prior to implementation the project proponent shall state in writing to the Merced County Planning and Community Development Department as to why it is necessary to remove any identified tree. The Planning Community Department shall determine the replacement ratio for any identified raptor (or other bird) nesting tree removed from project site.

### VI. COMMISSION ACTION ITEM

- A.** To consider as a matter of policy a new format of Planning Commission agenda item project descriptions, including consideration of adding CEQA environmental document information, project recommendations and actions. *(This item was previously presented to the Planning Commission on October 28, 2009, "Agenda Item VIII - Director's Report" and has been scheduled at the request of the Planning Commission at their January 13, 2010 meeting and by policy direction of the Board of Supervisors on January 26, 2010.) BK*

**Recommendation:** The actions requested are to:

- 1) Approve, disapprove, or modify a new Planning Commission agenda item format for project descriptions, including adding CEQA environmental project information, findings, recommendations and actions.

Planner Bob King presented the Staff Report and recommendations of approval dated February 10, 2010.

County Counsel Marianne Greene says she wants to make it clear that the Board of Supervisors directed this as a matter of policy not as a matter of law.

**MOTION: MOBLEY – ERRECA, AND CARRIED BY A VOTE OF 4 – 0, THE PLANNING COMMISSION APPROVES THE NEW PLANNING COMMISSION AGENDA ITEM FORMAT FOR PROJECT DESCRIPTIONS, INCLUDING ADDING CEQA ENVIRONMENTAL PROJECT INFORMATION, FINDINGS, RECOMMENDATIONS AND ACTIONS AS DIRECTED BY THE BOARD OF SUPERVISORS.**

### VI. CORRESPONDENCE

None

### VII. GENERAL BUSINESS

- A. ROSENBERG'S RULES OF ORDER** – Rules of Parliamentary procedure for the 21<sup>st</sup> Century by Dave Rosenberg. (Adopted by the Merced County Board of Supervisors on January 27, 2009).

County Counsel Marianne Greene explains that the Planning Commission needs clear rules to follow; the Board of Supervisors has already adopted the Rosenberg Rules of Order. If we look at the Merced County Code Section 232070 which governs the Planning Commission's transactions of business, it says that the "The actions of the Commission shall require a quorum or three votes because there are five members". As far as the transaction of

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business, that rule doesn't apply. She says when you review the Rosenberg Rules of Order today; keep in mind that the quorum does not apply to motions. There is a distinction between a quorum required for an action and how many votes it takes to pass a motion. An action is when you're taking a quasi judicial action on a project that requires a quorum, but the Planning Commission has the authority to adopt rules of the transactions of its business meaning the motions that it makes during the course of its meetings. The code exactly states "A quorum of the Planning Commission shall consist of three members. Actions of the Commission shall require majority vote by the total membership of the Commission which is three since the membership is five. The Planning Commission shall adopt rules for the transaction of its business." Ms. Greene says that this is the part in the Merced County Code when Rosenberg Rules of Order come up. She asks the Commissioners if they have any questions after reviewing the Rosenberg Rules of Order in August.

Ms. Greene continues by reminding the Commission of the issue regarding the counting of votes during sticky motions she touched on back in August. Ms. Greene states that the Commission will be deciding today whether to follow the Default Rule or the Alternative Rule with regard to abstentions. In the default rule, when there is someone who is abstaining is to count the votes of those who are present and voting so it doesn't count the abstainees because they are not voting. This rule makes it easier to pass motions because there are fewer no votes. Under the Alternative Rule, since the abstentions are counted as a no votes; it makes it harder to pass motions. The Alternative Rule is called the Present Rule or Present Only Rule. To explain further she says the rules state that 2/3 vote is required for motions to limit debate, motions to close nominations, motions to object to consideration, and motions to suspend rules. The motion to suspend rules which comes up when a motion to reconsider an item has been made in an untimely manner. The General Rule for reconsidering items is that the motion to reconsider has to be made at the same meeting or at the very next meeting. But suppose someone wants to reconsider an item at the second meeting beyond when it was decided? If there is a motion to reconsider, you can pretty much guarantee it's going to be a controversial project, and there are going to be division of opinions so let's look at how the abstention rules would play out in a situation where you have one person absent, and one person abstaining. She says that leaves three votes left. Under the Default Rule, a motion would pass on a 2-1-1-1 meaning two yes votes, one no vote, one abstaining, and one absent. The motion passes because it only counts the three members present and voting. The motion to reconsider would pass on those two votes. Under the Alternative Rule, the motion would fail because it counts the abstention as a no vote making it a 2-2 tie. She says that tie votes fail. The Default Rule makes it easier to pass a motion with two votes. There's no right and wrong about what you choose, but it is presented in these Rosenberg Rules of Order as something for the Commission to consider for transacting business.

Commissioner Lashbrook asks how the Board of Supervisors would proceed in this kind of situation.

Ms. Greene apologizes because she put in a question about this yesterday but have not heard back as of yet. She says that the Commission could wait to decide until she finds out what procedures they follow if they'd like.

Commissioner Lashbrook feels that as a Commission, we all need to be here when something is really important. She says it seems like the Alternative Rule does that.

Ms. Greene explains that she doesn't want to take this issue and blow it up into something it's not or put it out of proportion. The main objective here is to review the Rosenberg Rules of Order and understand the basic objectives such as the rules establish order, the rules are clear, and whether they are user friendly. She says the goal is to figure out what would be best for the Commission and whether it would be wise for the Commission to adopt these rules.

Commissioner Lashbrook thinks that the Commission should wait to find out what the Board of Supervisors does; she also would appreciate the opportunity to do some research and see how other areas proceed. She says the information could be brought here for discussion.

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Chairman Tanner asks if this has anything to do with the public portion when we go through a public hearing because according to the County requirements, we still have to have a majority of the five members. He asks if this is just to change the dialogue and the rules of the Commission. He wants to know if we have three present with one abstaining and one absent; do we still have to have three votes to pass the project?

Ms. Greene says yes, which is the point she was trying to make at the beginning. There is a distinction because the code reads that "Actions shall require the majority." She states the rules of how we operate are not an action. A motion to reconsider is not an action by the Planning Commission.

Chairman Tanner says that this kind of situation does not happen very often.

Ms. Greene agrees but says when it does happen, it matters. She says to also think about future Commissions.

Commissioner Lashbrook feels she needs a little more time.

Commissioner Mobley thinks that it would be a good idea to coordinate with the Board of Supervisors so we are not operating on two sets of rules. He says his preference would probably be for the Default Rule. If somebody is going to abstain, they are basically taking themselves out of play. He feels they are saying they don't want to be a part of the decision making process. With the Alternative Rule they essentially are still a part of the decision making process by default. He says he would opt for the Default Rule over the Alternative Rule.

Commissioner Erreca feels that he would also lean toward the Default Rule.

Chairman Tanner agrees but says that the Commission will wait to decide until they find out the direction the Board of Supervisors take.

Ms. Greene states that the Commission can still adopt the Rosenberg Rules of Order today, and just hold off on the abstention issue if they would like.

Chairman Tanner asks if anyone wants to discuss the Rosenberg Rules of Order. If not, he will entertain a motion to either except those rules or not.

**MOTION: M/S MOBLEY – ERRECA, AND CARRIED BY A VOTE OF 4 – 0, THE PLANNING COMMISSION AGREES TO ADOPT THE ROSENBERG RULES OF ORDER AS THE RULES OF ORDER FOR CONDUCTING THE PLANNING COMMISSION MEETINGS WITH THE OPPORTUNITY TO COME BACK TO DISCUSS THE ABSTENTION OPTIONS ONCE THE COMMISSION GETS DIRECTION FROM THE BOARD OF SUPERVISORS.**

### VIII. DIRECTOR'S REPORT

Robert Lewis, Development Services Director says he has nothing to report.

Commissioner Lashbrook asks if the Commission is going to be attending Ethics Training. She thought they had to do it every year.

Bill Nicholson, Assistant Development Services Director says the Ethics Training is run through the Human Resources Department in consultation with County Counsel. He believes it is held in the Board Chambers for all County employees periodically every two years.

Commissioner Lashbrook says she wanted to make sure the Commission is up to date in getting the information we need, and she hasn't heard about it in awhile. She feels it is important that everyone on the Commission is on the same page and thinks some rules need to be set in regard to how many absences are excusable. She asks if this kind of rule is at the discretion of those that appointed them.

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Commissioner Lashbrook says that it is important to her to find out what other governing bodies do and how they handle things.

Mr. Nicholson explains that in regards to the absences of the Commissioners, the governance of the Planning Commission is under the County Municipal Code, which is Chapter 2.32 Section 2.32.051. It is titled "Commission membership meeting attendance" which states that a Commissioner must give at least a 24 hour notice before the meeting if they are unable to attend so the Commission knows if they will have a quorum or not. We have the ability to decide whether it's excusable or not. He says in next section 2.32.052 which is titled "Commission membership meeting attendance" states the Planning Commission shall consider excusing the absence of a Commissioner at the first regular meeting the Commissioner attends following his/her absence. The Commission shall excuse the absence of the Commissioner if it can be found that there was good cause for the absence. Three unexcused absences by a Commissioner within a 12 month period shall be considered the resignation of the Commissioner. He states that if the Commission feels an absence is inexcusable, this rule can be enforced at the meeting following the absence.

Commissioner Lashbrook feels that the appointees should be people who can put in the time and be here a great majority of the time. She thinks it hurts our action when there are too many absences. She feels like we need a little more involved Planning Commissioners especially in regards to the General Plan. She believes this Commission is the least involved for a Planning Commission; we should be actively involved in the General Plan so we are able to make a recommendation to the Board of Supervisors. It just seems like we are not important or necessary to the General Plan Update process. She says she is looking for a more actively involved Planning Commission.

### **IX. ADJOURNMENT**

There being no further business, the meeting adjourned at 10:40 am