

RESOLUTION NO. 2009- 68

**A RESOLUTION OF THE CITY COUNCIL OF
THE CITY OF MERCED, CALIFORNIA,
DENYING THE APPEAL OF THE MERCED
ALLIANCE FOR RESPONSIBLE GROWTH OF
THE PLANNING COMMISSION'S ACTIONS ON
THE SITE PLAN REVIEW APPLICATION AND
THE GENERAL PLAN FINDING FOR THE
WAL-MART REGIONAL DISTRIBUTION
CENTER**

WHEREAS, The Planning Commission held a duly noticed public hearing on August 24, 2009, and thereafter continued to August 26, 2009, to consider the Wal-Mart Regional Distribution Center project, including the Final Environmental Impact Report, General Plan Amendment, Site Plan application, General Plan conformity, and the abandonment/vacation of the Kibby Road right-of-way between Gerard and Childs Avenues; and,

WHEREAS, At the conclusion of the public hearing, the Planning Commission adopted Resolution #2959 in which it recommended that the City Council certify the Final Environmental Impact Report (including adopting a Statement of Overriding Considerations and related actions), approve General Plan Amendment #06-01, vacate/abandon the Kibby Road right-of-way between Gerard and Childs Avenues, and found the same to be consistent with and conform to the City's General Plan contingent upon the City Council's approval of the Kibby Road right-of-way abandonment; and,

WHEREAS, On September 3, 2009, the City Clerk received an appeal of certain Planning Commission actions filed by attorney Thomas Lippe representing the Merced Alliance for Responsible Growth (M.A.R.G.) pursuant to Merced Municipal Code Section 20.68.090 and Chapter 20.96; and,

WHEREAS, M.A.R.G. alleges there are two grounds to appeal the actions of the Planning Commission as follows:

a. Ground One. That the Planning Commission failed to follow the requirements of Merced Municipal Code Section 20.68.040 relative to the Site Plan Review because the Planning Commission did not take a final action, but simply referred the matter to the City Council for action. If the Planning Commission did approve the Site Plan application, such approval would violate CEQA because the Site Plan is a discretionary decision subject to CEQA, and the EIR has not yet been certified; and,

b. Ground Two. That the Planning Commission's action on the General Plan's conformity pursuant to Government Code Section 65402 was incorrect because M.A.R.G. contends that Government Code Section 65402 requires the Planning Commission to make a "report" to the City Council and not to make a "final finding"; and,

WHEREAS, The City Council in accordance with Chapters 20.68 and 20.96 of the Merced Municipal Code held a duly noticed public hearing on the appeal filed on behalf of M.A.R.G. on September 21, 2009, which was continued to September 23, 26, and 28, 2009, during which representatives of M.A.R.G. and all others interested in the appeal were permitted to present testimony and evidence to support the appeal; and,

WHEREAS, The appeal was consolidated with the public hearing on the underlying development project; and,

WHEREAS, At the conclusion of the presentation of testimony and evidence, the City Council considered all evidence and testimony before it in reaching its decision on the appeal.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MERCED DOES HEREBY RESOLVE, DETERMINE, FIND, AND ORDER AS FOLLOWS:

SECTION 1. As to Ground One of the appeal filed on behalf of M.A.R.G., the City Council hereby denies the appeal for the reasons set forth below:

- a. The Planning Commission's action in adopting Resolution #2959 recommending that the City Council approve the Site Plan application was a "decision," i.e., decision to recommend approval of the Site

Plan along with the balance of the entitlements and the decisions pursuant to the California Environmental Quality Act.

- b. The Planning Commission's decision to adopt Resolution #2959 recommending that the City Council approve the Site Plan application was not "final action" to approve the Site Plan application and was appropriate because:
 - (1) A Final Environmental Impact Report had not been certified;
 - (2) The General Plan Amendment had not been approved;
 - (3) The Kibby Road right of way abandonment had not been approved by the City Council; and,
 - (4) It has been the long standing practice of the City in such circumstances to essentially bundle the various applications and have the City Council render the ultimate decision whether or not to approve the applications, rather than having some applications approved by the Planning Commission and others approved by the City Council.
- c. Planning Commission Resolution #2959 expressly states: ". . . The Planning Commission of the City of Merced does hereby resolve, determine, find, and order. . ."
- d. In adopting Planning Commission Resolution #2959 recommending that the City Council approve the Site Plan application, the Planning Commission considered both the draft and the Final Environmental Impact Report.
- e. The City Council has jurisdiction to act on the Site Plan application based on the Planning Commission's decision in adopting Planning Commission Resolution #2959 and based on the appeal filed by M.A.R.G.

SECTION 2. As to Ground Two of the appeal filed on behalf of M.A.R.G., the City Council hereby denies the appeal for the reasons set forth below:

- a. The Planning Commission made the “report” required by Government Code Section 65402 in the form of a finding contained in an official Resolution.
- b. The specific language of the Planning Commission’s finding is located in Section 5 of Planning Commission Resolution #2959. Section 5 provides as follows:

“The Planning Commission finds that
Vacation/Abandonment of Kibby Road Right of
Way between Gerard and Childs Avenue
(contingent upon General Plan Amendment #06-01
being approved by City Council) is consistent with
the General Plan, based upon the reasons and
findings set forth in Staff Report #09-18 in Exhibit
1, attached hereto and incorporated herein by this
reference as if set forth in full herein.”
- c. The City Council received the report required by Government Code Section 65402 when Planning Commission Resolution #2959 was attached to the City Council’s Administrative Report.
- d. Planning Commission Resolution #2959 expressly states: “. . . The Planning Commission of the City of Merced does hereby resolve, determine, find, and order. . .”
- e. Section 5 of Resolution #2959 incorporates by reference the Staff Report to the Planning Commission discussing the conformity and consistency issue, and the Report’s conclusions and recommendations on the conformity issue are contingent upon the City Council approving the General Plan Amendment making the abandonment conform with the General Plan.
- f. Section 7 of Planning Commission Resolution #2959 directed the Secretary to the Planning Commission to cause the Resolution “. . . to be transmitted to the City Council for further proceedings in accordance with state law” and such Planning Commission Resolution #2959 was, in fact, attached to the City Council’s Administrative Report and thus received by the City Council.

PASSED AND ADOPTED by the City Council of the City of Merced at a regular meeting held on the 28th day of September, 2009, by the following vote:

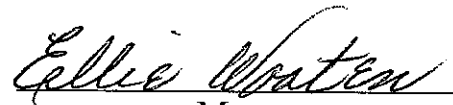
AYES: Council Members: SANDERS, CORTEZ, CARLISLE, GABRIALT-ACOSTA, LOR, SPRIGGS, WOOTEN

NOES: Council Members: NONE

ABSENT: Council Members: NONE

ABSTAIN: Council Members: NONE

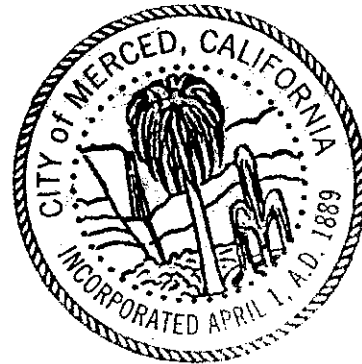
APPROVED:


Mayor


ATTEST:
JOHN M. BRAMBLE, CITY CLERK

BY: 
Assistant/Deputy City Clerk

(SEAL)



APPROVED AS TO FORM:

 9/14/2009
City Attorney Date