

CITY COUNCIL MEETING MINUTES

August 22, 2011

Mayor Cannella called the August 22, 2011 meeting to order at 5:30 p.m. with the following in attendance:

ROLL CALL Council Members Durossette, Lane, Ochoa, Mayor Vierra

INVOCATION by Mike Brinton, City of Ceres

PLEDGE OF ALLEGIANCE to the flag led by Mayor Vierra

PRESENTATIONS

A. Recognition of service to Enrique Perez.

Acting City Manager Art de Werk presented Enrique with a plaque to commemorate his years of service to the City.

Jose representing La Cascada Restaurant also presented Enrique with a plaque and thanked him for his service.

APPROVAL OF THE MINUTES of the regular meeting of June 27, 2011. (all present)

MOTION: Approve the minutes of the regular meeting of June 27, 2011.

MOVED: Moved by Lane/seconded by Durossette

VOTE: **Motion passed unanimously. (4/0)**

CITIZEN COMMUNICATIONS

- Don Donaldson, talked about the lights that were put in place 25 years ago. Mr. Donaldson expressed his concern that the City spends money on Costa Fields but not on the Youth Basketball Program.
- Charles Teval, Ceres Branch Library Manager highlighted upcoming activities at the library.

APPROVAL OF AGENDA AS POSTED (OR AMENDED) AND CERTIFICATION OF POSTING

MOTION: Approval of the Agenda as posted (or amended) and certification of posting.

MOVED: Moved by Ochoa/seconded by Durossette

VOTE: **Motion passed unanimously. (4/0)**

APPOINTMENTS TO BOARDS/COMMISSIONS – None.

CONFLICT OF INTEREST DECLARATION – Mayor Vierra declared a conflict with Item #8. His employer, Stantec Consulting, has done work for the applicant in the past and is currently in discussion for new projects. While Mayor Vierra has not been directly involved in any of the past projects, in the future there is a likelihood that this may change. Mayor Vierra consulted both with City Attorney Lyons and with the FPPC on this matter and while they have not indicated that he has a conflict, they have recommended that it is prudent to err on the side of caution and suggested that the best course of action would be to remove himself from the vote on that item.

CONSENT CALENDAR

1. General Correspondence – **Information Only**
 - a. Clean Sweep Environmental Third Quarter Performance Report.
 - b. Building Division Monthly Report for July 2011.
2. Register of Audited Demands for period covering July 29–August 22, 2011.
3. Open Public Review period and Set a Public Hearing for September 12, 2011 recommending the Stanislaus County Board of Supervisors Approve the FY 2010/11, Community Development Block Grant (CDBG) and Emergency Shelter Grant (ESG) Consolidated Annual Performance and Evaluation Report (CAPER).
4. **Resolution No. 2011-114** changing the metered water billing start date from September 2011 to December 2011 with the first bill using metered rates to be received in January 2012.
5. Recommendation to forward the Stanislaus County Mayors Group Boundaries Map, when created, to the Planning Commission to hold a public hearing and to provide a recommendation to the City Council on any possible revisions.
6. **Resolution No. 2011-115** accepting the Whitmore Avenue Miscellaneous Water Improvement Projects as Complete, approving the Balancing Contract Change Order, authorizing the filing of the Notice of Completion and retention release to the Contractor. PULLED FOR FURTHER DISCUSSION.
7. **Resolution No. 2011-116** setting the fees for persons who tamper with water meters. PULLED FOR FURTHER DISCUSSION.

MOTION: Approve Consent Calendar items 1a, 1b, 2-5 as recommended by staff.

MOVED: Moved by Durossette/seconded by Lane

VOTE: Motion passed unanimously. (4/0)

CONSIDERATION OF ITEM(S) REMOVED FROM THE CONSENT CALENDAR

6. **Resolution No. 2011-115** accepting the Whitmore Avenue Miscellaneous Water Improvement Projects as Complete, approving the Balancing Contract Change Order, authorizing the filing of the Notice of Completion and retention release to the Contractor.

- Don Donaldson, resident, asked for a total dollar amount on the project.

Mayor Vierra responded that the total for this project was \$235,715.00.

MOTION: Approve Resolution No. 2011-115 as recommended by staff.

MOVED: Moved by Ochoa/seconded by Durossette

VOTE: Motion passed unanimously. (4/0)

7. **Resolution No. 2011-116** setting the fees for persons who tamper with water meters.

Mayor Vierra asked for clarification on the penalties charged for tampering with the water meters questioning whether this also included the cost of the parts to repair the damages.

City Attorney, Mike Lyons, responded that the cost to repair all damages is included in the Ordinance. This charges an additional fine for tampering with the water meters.

- Dave Pratt, resident, commented that he was worried that the homeowner would be charged when vandalism has occurred.

Staff responded that it is usually the bill payer that causes the damage. The decision will be based on past history of the bill payer and the type of damage that has occurred.

- Jennifer Hagan, resident, asked if there were any materials in the meters that vandals would want to steal.

Staff responded that they are not made from materials that vandals would want to steal to resell.

- Ms. Hagan also recommended that the fees be increased to help deter anyone from tampering with the meters.

After further discussion, Councilmembers Lane and Durossette felt that since the meters are state of the art, high quality meters, the fines should be placed at level high enough to deter vandalism.

Councilmember Ochoa felt that the fines were sufficient at the \$50.00/\$100.00 level.

MOTION: Approve **Resolution No. 2011-116** as recommended by staff

MOVED: Moved by Ochoa/seconded by _____

VOTE: **Motion Dies for Lack of a Second**

MOTION: Approve **Resolution No. 2011-116** with the charge of \$100.00 for the first offense and \$200.00 for each subsequent offense

MOVED: Moved by Durossette/seconded by Lane

VOTE: **Motion passed with Councilmember Ochoa Voting No. (3/0/1)**

UNFINISHED BUSINESS – None.

6:00 p.m. Mayor Vierra recused himself from the dais and left the meeting.

PUBLIC HEARING

8. Public Hearing – to consider an appeal from Citizens for Ceres regarding the Planning Commission approval of a Conditional Use Permit (07-31 CUP) and Vesting Tentative Subdivision Map (VTSM 07-32) for the Mitchell Ranch Center project located at the northwest corner of Mitchell and Service Roads. (T. Westbrook)

Vice Mayor Lane explained the process for the Public Hearing and requested any additional materials.

Mr. Brett Jolly representing the Citizens for Ceres presented additional materials to Council.

Sherri Jacobson, resident, presented an article from the Huffington Post for Council to reference during her comments.

6:10 p.m. Vice Mayor Lane recessed the meeting for 15 minutes to review the new materials that were presented.

6:25 p.m. Vice Mayor Lane reconvened the meeting.

Tom Westbrook, Planning/Building/Housing Manager, presented the staff report to Council briefly updating them on events that have taken place since the July 11, 2011 Council Meeting. The first being the reuse plan which was submitted by the applicant. The reuse plan regards and regulates the building being vacated at Hatch and Mitchell Roads. That Plan has some ideas for marketing and also provides some timelines for getting a new tenant into the building. I am confident that Wal-Mart, during its time to address Council will discuss its strategy for the reuse plan in great detail. The second included the elevation of the building. Architectural Enhancements to the Wal-Mart building, noting that “the Planning Commission imposed a condition that would require Wal-Mart to add stone-like material to the elevations of the store to the satisfaction of staff. Wal-Mart’s architect has now provided a set of drawings including these changes and this condition can be finalized. Approval C (7) is recommended to read as follows:

“The developer shall provide elevations for Major 1, 2, 3 and 4 and all Shops buildings consistent with the plans submitted by BRR Architects dated July 15, 2011 as to Major 1, and the plans submitted by Greenberg Farrow dated November 22, 2010 for Majors 2, 3 and 4 and all Shops.”

Mr. Westbrook addressed several questions and concerns Council had at the conclusion of the May 23, 2011 Public Hearing including traffic mitigation; the effect of the new elementary school; economics of the project; new jobs created; phasing of the project; maintenance of the vacated building while vacant; truck access on Don Pedro Road; landscaping; solid waste and outdoor storage.

Mr. Westbrook read the following into the record with regard to outdoor storage:

G - Operational Requirements - New #7 – “The placement of storage or shipping containers on the exterior of the site for more than 24 hours is expressly prohibited except as necessary for building construction.”

Mark Tieg, PMC, addressed concerns raised with the EIR presented to Council in the letter dated August 22, 2011 from Mr. Bret Jolly.

1. Land Fill Capacity: In the letter Mr. Jolly states that “all evidence shows that the Fink Road Landfill does not have sufficient permitted capacity to accommodate the project’s waste and therefore, under the EIR’s threshold for significance, this impact is significant.” Mr. Tieg state that given the remaining 10-year capacity of the current landfill and the County’s expansion plan of the additional site, staff has concluded that the impacts of the project are less than significant.
2. PLA Plastics: The letter’s reference to “Wal-Mart’s introduction of PLA (corn) plastics into the waste stream.” Mr. Tieg explained that the County is already recycling these plastics. Wal-Mart is not introducing these plastics as part of the project, as is suggested in the letter presented this evening. As a result of that, staff concluded that there is nothing new or unusual about the plastics and any issue on the part consumer was too speculative to consider in the EIR.
3. Economics: This is very difficult to predict as it is a constantly moving target, regardless, there is a mitigation measure in place that strengthens the City’s existing Ordinance that deals with Urban decay and the treatment of vacant buildings. That mitigation measure would apply whether it is one building or two building. Based on the EIR and based on the Ordinance that the City has in place, staff feels that the mitigations measure and the conclusions provided in the report remain as accurate as they can be.

Amelia Newfeld, Senior Manager, Wal-Mart Public Affairs, addressed Council. Ms. Newfeld stated that Wal-Mart has been working with City Staff and the community for the last five years to make this project the best it could be. They have made numerous changes and improvements. In a recent poll conducted

by Wal-Mart, over 66% of Ceres registered voters support the project. There is no question that Wal-Mart provides a great service to the community by offering a large selection at unbeatable prices.

In conclusion Ms. Newfeld stated that this plan is consistent with the City's General Plan, Specific Plan and zoning for this site and it achieves the City's long standing goal of developing this site as a regional shopping center in order to create jobs, generate tax revenue and serve the needs of Ceres residents and those of surrounding communities.

Liz Anderson, representing Sheppard Mullin, attorneys for Wal-Mart addressed Council regarding the reuse plan. Ms. Mullin highlighted the following points:

- The Plan includes enforceable obligations regarding marketing the store.
- Although it is common retail industry practice to restrict competitors, the Plan only restricts direct competitors for a limited time.
- The Plan ensures the site will be well-maintained while vacant.

Sherry Jacobson, representing Citizen's for Ceres addressed Council, stating that she is insulted by the reuse plan that Wal-Mart has presented to Council. Ms. Jacobson quoted an article which recently appeared in the Huffington Post stating that "Wal-Mart Realty currently has 145 empty buildings on its hands – what they call 'excess property', totaling a staggering 12.6 million square feet to dead stores. That's the equivalent of 217 empty football fields. Based on new store openings in 2011, if Wal-Mart retrofitted the 145 stores it has for sale or lease, it would have enough room to grow in the United States for the next three years – without having to do any new building or engage in ugly site fights with angry neighbors." Ms. Jacobson concluded by urging Council to uphold the appeal and deny the project.

Bret Jolly, representing Citizen's for Wal-Mart, discussed the lack of enforceability of reuse plan. Mr. Jolly stated that there was very little in the plan that would allow the Council to enforce the plan or have any control over whether or not the old building remains vacant for a number of years. Wal-Mart has also not provided any proof that the marketing plan will be effective. Mr. Jolly also discussed Wal-Mart's refusal to sign a Development Agreement, which would be enforceable by law. Mr. Jolly urged Council to refuse to adopt the EIR, refuse to adopt the Statement of Overriding Conditions and refuse the project.

Lee Bertell, representing the Citizens for Ceres and the Don Pedro Rd. neighborhood, addressed Council to discuss the traffic congestion that will be created by the project. There will now be five stop lights between the 99 Freeway and Don Pedro Rd. Mr. Bertell urged Council to deny the project.

6:30 p.m. Vice Mayor Lane opened the Public Hearing

Those speaking in favor of approving the Mitchell Ranch Project.

Among the reasons cited were an increase in sales tax revenue, increased employment opportunities, very economical way to shop, attraction of even more businesses to Ceres.

- Shirley McRoberts, resident
- Pat Jones, resident
- Charlie Gross, resident
- Albert Avila, resident – approves project but feels the Re-use plan is not effective
- John Tomlin, resident
- Mary Alton, resident
- Jennifer Hagan, resident – in favor of project but feels the Re-use plan is not effective

- Rosemary Corjin, resident
- Jerry Mello, resident
- Barbara Cunningham, resident
- Gary Rambaran, Ceres Business Owner

Those Not Wishing to Speak but in favor of approving the Mitchell Ranch Project:

- David Paz, resident
- Amber Schneider, resident
- Maria Guilar, resident
- William Rossi, Jr. , resident
- Maria Mondragon, resident
- Susan Pena, resident
- Wanda Loveland, resident
- Berniece Hickman, resident
- E. D'Askquith, resident
- Louisa Castellanos, resident
- Diane T. Schneider, resident
- Germenda Verdugo, resident
- Karen Mosser, resident

Those speaking in opposition to the Mitchell Ranch Project.

Among the reasons cited were the blight that will be caused by the abandoned building, economic damage caused to existing grocery stores and other small businesses, traffic congestion.

- Geri Ottersbach, resident
- Dave Pratt, resident
- Domingo Rozary, resident
- Joshua Kane, resident
- Rick Rushing, resident

Those not wishing to speak but not in favor of the Mitchell Ranch Project:

- Albert Puentes, resident

Also Speaking:

- Don Donaldson recommended that the old Wal-Mart building be turned into a sports arena for Ceres youth.
- Kathy Roudebush asked if the City had an ordinance on the re-use of a vacated building. *Council responded that the City does not have an Ordinance regulating the re-use of vacated buildings.*

7:48 p.m. There being no one else wishing to speak, Vice Mayor Lane Closed the Public Hearing.

REBUTTALS:

Miriam Montesinos, Sheppard Mullin, representing Wal-Mart, spoke to the reuse plan stating that they based the reuse plan on the City's strategic plan. Wal-Mart does not protest any of the conditions. They are asking for two changes:

1. A change in the delivery hour restrictions be reduced from 10:00 p.m. – 6:00 a.m. to 11:00 p.m. – 5:00 a.m.

2. Change the condition of approval that now says that Wal-Mart will work with you on a reuse plan, to: the plan that has been presented tonight will be adopted.

These are just requests, not protests. Wal-Mart has been in Ceres a long time and proven that they are a good neighbor. We have worked on this project for five years to come up with something that will work for both Wal-Mart and the City of Ceres. This is a site that is zoned for a shopping center. You have an anchor tenant willing to build that has agreed to all the conditions you have imposed on them.

Vice Mayor Lane commented that the re-use plan does not apply if the property is sold. The new owner will not be bound by any of the conditions of the agreement. He asked if Wal-Mart would consider a Development Agreement just in terms of the strategic reuse plan.

Ms. Montesinos stated that she cannot commit Wal-Mart to a Development Agreement. She stated it would delay the project since the re-use was not addressed in the environmental review.

City Attorney Lyons stated that if the parties wanted to move forward with a Development Agreement, that is a special statutory procedure, it has to be enacted by an ordinance and would require the following: Planning Commission public hearing and action; City Council public hearing and approval of an Ordinance. So, it is a process that is going to take a number of months to get to fruition. City Attorney Lyons further stated that it was his judgment that Council would need to continue final determination on this hearing pending approval of the Development Agreement.

Brett Jolley, representing the Citizens of Ceres, commented on the following items:

1. Mr. Jolley commended Council for being proactive with the reuse plan. Wal-Mart has a history of keeping properties vacant and this store is very large.
2. With respect to tax revenue, Wal-Mart is already in Ceres. They are already generating tax revenue for the City. The EIR says that the new project site will have lower sales per square foot than the existing site and when the existing site closes Ceres will see a sales leakage to the City of Modesto. There will be a very small if any increase in taxes.
3. Why did Wal-Mart back out of the Development Agreement process? That should raise a red flag.
4. The property is zoned for commercial use, however, this project itself is not permitted by right on that property. The project is subject to a conditional use permit, a subdivision map and environmental review, which are all discretionary actions based on Council's determination.
5. In regards to the concept of the reuse plan not running with the land. If you entered into Development Agreement negotiations with Wal-Mart it does not necessarily mean you will have to go through the EIR process again.

Wal-Mart stated that the goal is to sell the property. It doesn't matter if they sell it or transfer title, the issue is if it is going to sit vacant and blighted. The goal is to reuse the property, not just change the name on the title.

Bret Jolly, representing Citizen's for Wal-Mart, discussed the lack of enforceability of reuse plan. Mr. Jolly stated that there was very little in the plan that would allow the Council to enforce the plan or have any control over whether or not the old building remains vacant for a number of years. Wal-Mart has also not provided any proof that the marketing plan will be effective. Mr. Jolley further stated that the Reuse Plan is vague regarding competitor restricts, speculative and incomplete regarding reuse efforts, and Wal-Mart's withdrawal from the Development Agreement Negotiations demonstrates their likely intent to challenge objectionable conditions including the reuse plan.

Mr. Jolley stated that the Citizens for Ceres feel that the reuse plan is insufficient and requested Council deny the project.

8:05 p.m. Vice Mayor Lane called for a 5 minute recess.

8:17 p.m. Vice Mayor Lane reconvened the meeting stating that City Staff has had some dialogue with the applicant and directed the City Attorney Lyons to report out what has been discussed so that there is no violation of the Brown Act.

City Attorney Lyons reported that it has been suggested by Wal-Mart Counsel that City Attorney Lyons mischaracterized the need to have a continuance in order to work on a Development Agreement. There is another possible course of action for Council to take. If Council wishes to approve the project, they could approve the project with the existing condition that was forwarded to the Council by the Planning Commission, which condition says "there will be a re-tenanting agreement and that Wal-Mart would not be able to pull a building permit to construct their store until such time that the Council approve a re-tenanting and or sales agreement." So, Wal-Mart Counsel and Wal-Mart wanted to clarify that possible course of action this Council could take this evening if they wish to. There is some level of concern from Council for the City that approving the project on that basis may create some risk that would open the door for Wal-Mart to challenge re-tenanting condition. However Wal-Mart has said unconditionally that it has no intention and will not protest having a re-tenanting agreement. "That is exactly and precisely the nature of the conversation I was having with Council before we reopened the meeting."

Council considered the remarks given and discussed the pros and cons of the project and the Reuse Strategic Plan. Councilmembers Durossette and Ochoa supported the project and the Reuse Strategic Plan and felt that the project should move forward. Vice Mayor Lane had concerns with the Reuse Strategic Plan and requested

MOTION: Continue Public Hearing to continue until after the November election to look at the Reuse Strategic Plan as proposed. (Lane)

The Applicant requested clear direction from Council as to what it is they are looking for in the Reuse Strategic Plan so they do not bring back an incomplete document again.

The suggestion was made that a Councilmember meet along with staff and the Applicant to discuss the changes for the Reuse Strategic Plan.

MOTION: Continue Public Hearing to continue until after the November election to look at the Reuse Strategic Plan as proposed. (Lane)

MOVED: Moved by Lane/seconded by _____

VOTE: Motion Dies for Lack of a Second

Council took some time to discuss their options concerning various motions that could be made to approve, deny or continue the project.

MOTION: approve **Resolution No. 2011-117** denying an appeal by the "Citizen's of Ceres" to the action of the Planning Commission certifying an Environmental Impact Report and approving a Conditional Use Permit and Vesting Tentative Subdivision Map for the Mitchell Ranch Center located on the west side of Mitchell Road from Service Road to Don Pedro Road with the following changes: a) change the date on the first page and the second page from May 23, 2011 to August 22, 2011 and **Resolution No. 2011-118** certifying an EIR and adopting findings concerning mitigation measures, findings concerning alternatives, a statement of overriding considerations and a mitigation monitoring and reporting program for the Mitchell Ranch Center Project with the following changes: a) change the date on page 2 from May 23,

2011 to August 22, 2011; revised elevations, revision to storage containers and change to the limitation on delivery hours from 10 p.m. – 6:00 a.m. to 11:00 p.m. – 5:00 a.m.

MOVED: Moved by Ochoa/seconded by Durossette

VOTE: Motion Fails for Lack of a Majority Vote and with Mayor Vierra abstaining. (2/1/1)

MOTION: Continue Public Hearing to the meeting of September 12, 2011 at 7:00 p.m. to further meet and discuss the Reuse Plan.

MOVED: Moved by Durossette/seconded by Lane

VOTE: Motion passed with Mayor Vierra abstaining. (3/0/1)

NEW BUSINESS - None

COUNCILMEMBER REFERRALS - None

REPORTS – None.

9:37 p.m. There being no further business, Vice Mayor Lane adjourned the meeting.

/s/ Chris Vierra, Mayor

/s/ Cindy Heidorn, City Clerk