

## **Rebuttal to the Appeal Regarding Applicability of the RTMF to Figarden Drive Apartment Complex**

**SUMMARY:** The main issue in this case is whether a map that was vested for commercial development, with residential development specifically prohibited, retains its vested status after the developer has the property re-zoned for residential development. According to RTMF policy, and backed by state law, it does not. When the developer sought and obtained his re-zone he forfeited his previous vesting rights. COG staff informed the developer of this before the re-zone was approved and before he purchased the property. The developer ignored this advice and is now trying to have the benefit of both the re-zone and vesting rights associated with the old zoning.

This report provides a timeline of the main events in the case, followed by a discussion of the key issues. A point-by-point rebuttal of the issues raised in the appeal is attached that can be read in conjunction with the appeal.

### **TIMELINE OF MAJOR EVENTS:**

- Jun 2006 – Vesting tentative map approved for John Allen Company to build a Community Shopping Center.
- Jan 2010 – RTMF comes into effect
- Feb 2012 – Spenser Enterprises applies for a re-zone on behalf of John Allen Company
- Mar 2012 – Spenser Enterprises contacts COG and is informed that the RTMF will apply if rezone is authorized by the City.
- May 2012 – The re-zone (a new entitlement) is approved
- Aug 2012 – Spenser Enterprises purchases property from John Allen Company.
- Oct 2012 – Spenser Enterprises is again informed by COG that the re-zone ended the parcel's vesting rights pertaining to the RTMF.
- July 2013 – Spenser Enterprises pays the RTMF
- Oct 2013 - Spenser Enterprises initiates appeal

### **KEY ISSUES IN THE CASE:**

Both the appellant and COG staff agree that the property involved in this case had a vested map pre-dating the establishment of the RTMF. Both sides agree that the tentative vesting map, approved prior to the formation of the RTMF, was zoned for a Community Shopping Center while the final map, recorded subsequent to the formation of the RTMF, was zoned for an apartment complex.

Section 66498.1 of the Map Act provides that approval of a vested map shall confer a vested right to proceed with development in substantial compliance with the **ordinances, polices, and standards in effect at the time** the vested map is approved (emphasis

added). Vested Parcel Map 2006-20 was approved by the City of Fresno June 26, 2007. The approved map stated “proposed parcels “A”, “B”, “C”, & “D” are consistent with the C-2/BA-20/UGM zone district” (See Appendix B of this report). In the City’s zoning ordinance “C-2” indicates Community Shopping Center, “BA-20” denotes a 20-foot boulevard overlay, and “UGM” indicates it is in the Urban Growth Management Area where certain fees apply. New residential development is prohibited under C-2 zoning. Clearly, building apartments is not consistent with the **ordinances, polices, and standards** (specifically, Fresno’s zoning ordinance) in effect when Vested Parcel Map 2006-20 was approved. Therefore when the RTMF was implemented January 1, 2010, Parcel Map 2006-20 was vested for commercial development, not apartments.

The map act provides a method for developers to preserve vesting on maps that are inconsistent with the zoning ordinance at the time of approval.

### **Section 66498.3. – Effect of inconsistent zoning on vesting tentative maps**

*(a) Whenever a subdivider files a vesting tentative map for a subdivision whose intended development is inconsistent with the zoning ordinance in existence at that time, that inconsistency shall be noted on the map. The local agency may deny a vesting tentative map or approve it conditioned on the subdivider, or his or her designee, obtaining the necessary change in the zoning ordinance to eliminate the inconsistency. If the change in zoning ordinance is obtained, the approved, or conditionally approved vesting tentative map shall, notwithstanding (b) Section 66498.1, confer the vested right to proceed with the development in substantial compliance with the change in the zoning ordinance and the map, as approved.*

There were no conditions attached to the approval of Vesting Parcel Map 2006-20 indicating an inconsistent use requiring rezone for apartments per 66498.3.

Several years later, and after the RTMF came into effect, Spenser Enterprises became interested in the site as a location for apartments. This would require a re-zone because an apartment project would not be **in substantial compliance with the ordinances, polices, and standards in effect at the time the map was accepted** (specifically, Fresno’s zoning ordinance). In February 2012 the developer requested an amendment to the general plan, A-11-011, and a rezone R-11-017 in order to build 160 apartments on the parcel.

The following month, while the re-zone was under consideration by the City, Spenser Enterprises contacted COG staff and was informed that “*If your project is not a component of the tentative map or **requires additional entitlement authorization from the City, the fee would be applicable** (appeal Exhibit 14).” The term “additional entitlement” includes re-zones, as can be seen from the appellant’s own documents. For example, point B of the appeal itself reads, “*The Agency Lacks Jurisdiction To Impose the RTMF After **the City Issued the New Entitlements and Granted Vested Rights to Appellant’s Project** (emphasis added)”*. The appellant himself is calling the re-zone a new entitlement.*

Spenser chose not to withdraw their request for a re-zone, which was duly approved two months later (May 2012). Three months later (August 2012) Spenser Enterprises purchased the property from John Allen Company for development into apartments.

To clarify staff's position, had Spenser Enterprises proceeded with a commercial development then we would agree that their project would have been exempt from the RTMF. This is based on Resolution 2009-01 as amended by Resolution 2010-01 which states that all tentative subdivision maps, tentative parcel maps, vesting tentative subdivision maps, and vesting tentative parcel maps accepted prior to January 1, 2010, will be considered to have limited vesting rights and the provisions of the California Government Code Section 66410 et. seq. will apply with respect only to the RTMF in determining when vesting rights have expired. The reference to 66410 et. seq. incorporates sections 66498.1 and 66498.3 therefore the treatment of vesting rights in regard to inconsistent zoning is also incorporated by reference into the Agency's governing documents.

The appeal raises two other arguments, one concerning whether the RTMF-JPA has jurisdiction over the application of its own policies (it does) and the other a claim that the developer was not informed that the RTMF applies (they were). These are covered in the point-by-point rebuttal.

ATTACHMENT A  
Point-by-Point Discussion  
(based on the points raised in the appeal)

**A. The Agency's Governing Documents Do Not State That Vest Rights Are Lost Based on New Entitlements Obtained after January 1, 2010**

**1. The RTMF Resolutions Do Not State That Vested Rights Will Be Lost If a Rezone Is Approved**

Rebuttal: The Appellant is correct that the RTMF resolutions do not explicitly discuss re-zones, or a dozen other possible circumstances when vesting rights might be lost. There is no need for it to do so when the matter is already covered by state law. Specifically, CGC 66498.1b which states that, "*When a local agency approves or conditionally approves a vesting tentative map, that approval shall confer a vested right to proceed with development in substantial compliance with the ordinances, policies, and standards described in Section 66474.2.*" Since this project did not proceed in accordance with the ordinances in effect at the time the vesting tentative map was approved (specifically, it could not proceed without being re-zoned first) the developer forfeited their vesting rights as a matter of state law. There was no need for the RTMF resolution to mention it.

**2. The RTMF Administrative Manual State the Exemption Is Lost If the Vesting Tentative Map Expires or Is Renewed, But Does Not State that the Exemption Is Lost If New Entitlements Are Issued**

Rebuttal: As with the previous point, the RTMF Administrative Manual does not and need not explicitly discuss every possible circumstance in which vesting could be lost, since this is already covered under state law.

**3. The Denial of an Exemption Violates Appellant's Due Process Rights to Notice of Applicability of the RTMF**

Rebuttal: The Appellant states that he was advised by the City (see appeal Exhibit 13) and by his own attorney (appeal Exhibit 14) that re-zones would not affect his vesting rights, and apparently acted based on that advice. In contrast, the advice the appellant received from the JPA was, "*If your project is not a component of the tentative map or requires additional entitlement authorization from the City, the fee would be applicable* (appeal Exhibit 14)." This is the notice of applicability that the Appellant claims not to have received. The key term in this is "additional entitlement authorization from the City". The appellant is aware that re-zoning constitutes an additional entitlement as can be seen in the wording of point B in the appeal itself, "*The Agency Lacks Jurisdiction To Impose the RTMF After the City Issued the New Entitlements and Granted Vested Rights to Appellant's Project* (emphasis added)".

The appellant claims to have understood a later email from the JPA (also in Exhibit 13) that read, “*We will not second guess how the City is treating your development and do not get in front of their entitlement process*” to mean that whatever the City decides about its own fees would apply to the RTMF as well. In fact, the sentence simply means that the JPA does not interfere with how City processes development applications.

In short, the appellant correctly received from the JPA notice that the RTMF would apply if new entitlements authorizations were needed from the City. The wording of this information followed the wording of the resolution. The appellant chose to disregard this information and instead, acting upon the faulty advice of others (not the JPA), went on to purchase the property. He is now attempting to claim that he was misled by the JPA based on his own tortured interpretation of one sentence from a JPA email while ignoring the more obviously applicable sentence.

**B. The Agency Lacks Jurisdiction To Impose the RTMF After the City Issued the New Entitlements and Granted Vested Rights to Appellant’s Project**

Rebuttal: The appeal is correct in stating that the City, not the JPA, has authority to issue development entitlements. However, that is not the issue in this case. The issue is whether new entitlements granted by the City affect vesting rights regarding the RTMF specifically.

The Fresno County Regional Transportation Mitigation Fee Agency was duly incorporated as a joint powers agency per California government code section 6500. In becoming a founding member of the Agency, the City of Fresno delegated the power to implement and collect the fee. Therefore the Agency does have jurisdiction over RTMF. Furthermore, there is no statute in 66410 or 6500 to prevent the Agency and City from having differing interpretations of the Map Act.

**B. Appellant states the Agency’s position is based on a faulty interpretation of the Subdivision Map Act.**

Rebuttal: In order to prove the Agency’s interpretation of the Map Act faulty, Appellant must prove that their residential apartment complex is in substantial compliance with the ordinances, policies, and standards in effect on the date that the vesting tentative map was approved.. It obviously is not (see Appendix B of this report) or the rezone would not have been required. The Appellant has not provided any evidence to the contrary.

The appeal cites the case of *Kaufman & Broad Central Valley, Inc. v. City of Modesto* which was about whether a vested map offers protection from fee increases. This case is irrelevant because it does not touch on the issue of whether

or not a map is vested; vesting was not in dispute in that case, as it is in the current case.

The appeal also cites *Bright Development v. City of Tracy*, which is about the requirements on a city to give notice of ordinances, policies, and standards with which a developer is expected to comply. The appeal specifically cites this quote from the case, “*Quite obviously one cannot rely on what one does not know or cannot reasonably discover*”. In the current case the appellant certainly knew prior to purchasing the parcel that the RTMF existed, as evidenced by the fact that they enquired about the RTMF with the City and JPA in March 2012 (Exhibits 13 and 14, respectively) and were specifically told by the JPA that the fee would apply if additional entitlement authorizations were required by the City. The appellant did not purchase the property until several months later (August 2012). So their claim that they were not given notice of the RTMF is baseless.

**ATTACHMENT B**

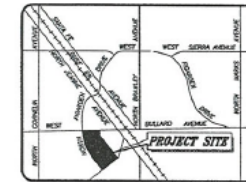
# VESTING TENTATIVE PARCEL MAP NO. 2006-20 IN THE CITY OF FRESNO

**RECALLED**  
FEB 14 2027

CITY OF FRESNO  
PLANNING & DEVELOPMENT DEPT

**PREPARED BY:**  
RABE ENGINEERING, INC.  
2021 N. GATEWAY BOULEVARD  
FRESNO, CA 93727  
(559) 268-7223

**RECORD OWNER:**  
RANCHO RIVINGTON,  
RANCHO AMBURY AND JOEY ALLEN CO., LLC  
P.O. BOX 8548  
CALABASAS, CA 91372  
(559) 268-6072



**VICINITY MAP**  
NO SCALE

**LEGAL DESCRIPTION**

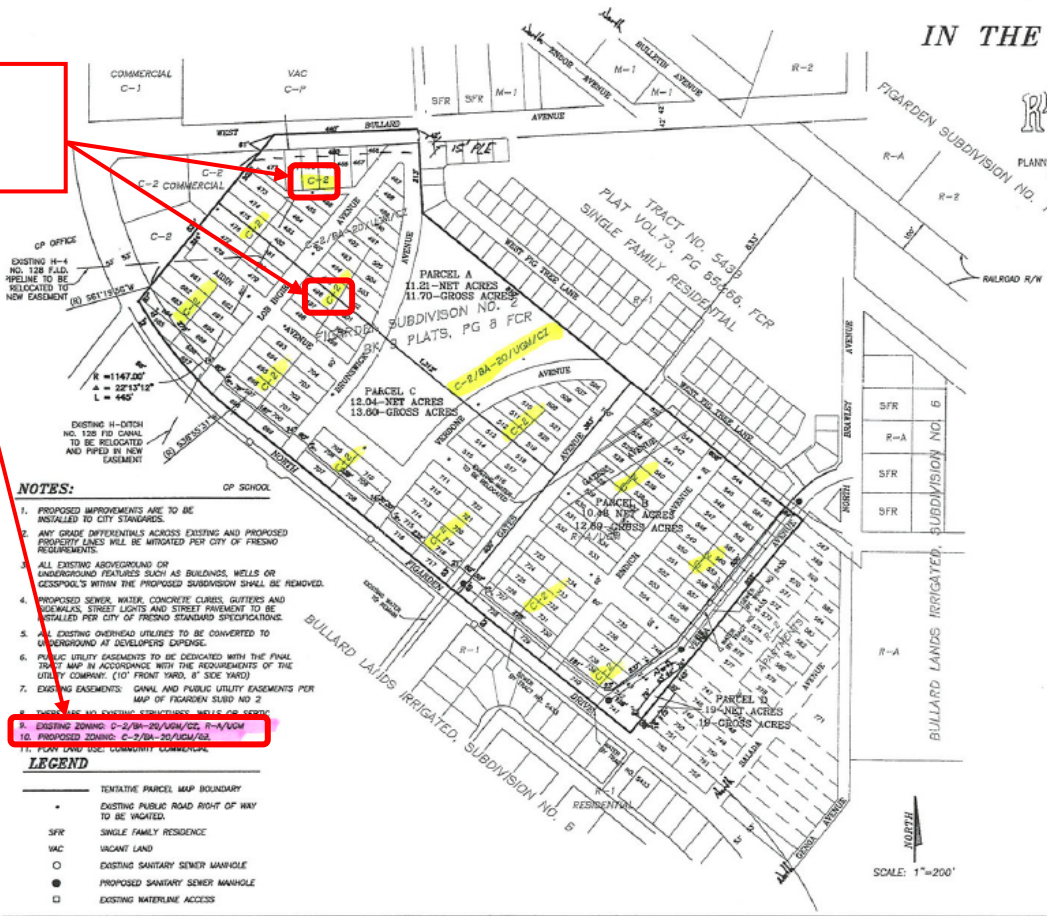
LOT 355, LOTS 466 THROUGH 565 AND LOTS 601 THROUGH 746 ALL OF FIGARDEN SUBDIVISION NO. 2, ACCORDING TO THE MAP THEREOF RECORDED IN BOOK 9 OF PLATS, PAGE 8, FRESNO COUNTY RECORDS.

TOGETHER WITH THAT PORTION OF SALINAS AVENUE AS ABANDONED BY ORDER OF VACATION RECORDED MARCH 9, 1998, DOCUMENT NO. 98-032640, O.R.F.C.

**SOURCE OF DATA**

FIGARDEN SUBDIVISION NO. 2, ACCORDING TO THE MAP THEREOF RECORDED IN BOOK 9 OF PLATS, PAGE 8, FRESNO COUNTY RECORDS.

Both previous and proposed zoning is C-2.



- NOTES:**
1. PROPOSED IMPROVEMENTS ARE TO BE INSTALLED TO CITY STANDARDS.
  2. ANY GRADE DIFFERENTIALS ACROSS EXISTING AND PROPOSED PRIORITY LINES WILL BE MITIGATED PER CITY OF FRESNO REQUIREMENTS.
  3. ALL EXISTING ABOVEGROUND OR UNDERGROUND FEATURES SUCH AS BUILDINGS, WELLS OR CESSPOOLS WITHIN THE PROPOSED SUBDIVISION SHALL BE REMOVED.
  4. PROPOSED SEWER, WATER, CONCRETE CURBS, GUTTERS AND SIDEWALKS, STREET LIGHTS AND STREET PAVEMENT TO BE INSTALLED PER CITY OF FRESNO STANDARD SPECIFICATIONS.
  5. ALL EXISTING OVERHEAD UTILITIES TO BE CONVERTED TO UNDERGROUND AT DEVELOPER'S EXPENSE.
  6. PUBLIC UTILITY EASEMENTS TO BE DEDICATED WITH THE FINAL TRACT MAP IN ACCORDANCE WITH THE REQUIREMENTS OF THE UTILITY COMPANY. (10' FRONT YARD, 8' SIDE YARD)
  7. EXISTING EASEMENTS: CANAL AND PUBLIC UTILITY EASEMENTS PER MAP OF FIGARDEN SUBD NO 2
  8. THERE ARE NO EXISTING SUBSTANCES, WELLS OR SEPTIC TANKS ON THE PROJECT SITES.
  9. EXISTING ZONING: C-2/99-20/024/02, R-1/024
  10. PROPOSED ZONING: C-2/99-20/024/02
  11. PLAN ONLY 100% COMMUNITY COMMERCIAL

**LEGEND**

—	TENTATIVE PARCEL MAP BOUNDARY
—	EXISTING PUBLIC ROAD RIGHT OF WAY TO BE VACATED
SFR	SINGLE FAMILY RESIDENCE
VAC	VACANT LAND
○	EXISTING SANITARY SEWER MANHOLE
●	PROPOSED SANITARY SEWER MANHOLE
◐	EXISTING WATERLINE ACCESS

**RABE ENGINEERING, INC.**  
CIVIL ENGINEERS / LAND SURVEYORS  
2021 N. GATEWAY BLVD., FRESNO, CA 93727  
(559) 268-7223 FAX (559) 268-1100



DATE	BY	CHKD	APP'D

VESTING TENTATIVE PARCEL  
MAP NO. 2006-20  
CITY OF FRESNO

DATE	BY	CHKD	APP'D

Job No: 06-098

The Vesting Tentative Map





# ZONING INFORMATION

Please note that this handout is not an exhaustive list of standards for all situations. It is advised to consult with a City Planner to verify any information provided below.

PLANNING AND DEVELOPMENT DEPARTMENT  
 Planning Division  
 2600 Fresno Street  
 Fresno, CA 93721-3604  
 (559) 621-8277 FAX (559) 488-1020

DISTRICT SECTION	DISTRICT NAME	DWELLINGS PERMITTED PER LOT	MINIMUM LOT AREA	MAXIMUM LOT COVERAGE	NEW DISTRICT SIZE	MINIMUM LOT DIMENSIONS <sup>1</sup>		BUILDING HEIGHT <sup>2</sup>	MINIMUM SETBACKS <sup>3</sup>				DISTRICT SECTION
						FRONTAGE	DEPTH		FRONT	SIDE	STREET SIDE	REAR	
		Area											
R-4 12-214	High Density Multiple Family Residential	One Unit Per 1,000 SF of Lot Area	10,000 SF	60%	-	65'	110'	50' (4)	15'	5'	10'/10'	15'	R-4 12-214
R-P 12-215	Residential and Professional Office	Subject to 12-306-N-51	7,500 SF	50%	-	65'	110'	30' (1)	15'	10'/5'	10'/15'	10'	R-P 12-215
RP-L 12-215.10	Residential and Professional Office Limited	Existing Residential Only	7,500 SF	80%	-	65'	110'	20' (1)	15'	10'/5'	10'/15'	10'	RP-L 12-215.10
C-P 12-216	Administrative and Professional Office	Subject to 12-306-N-51	10,000 SF	-	-	65'	110'	35' (2)	10'	0'/10'	10'/10'	10'	C-P 12-216
C-1 12-217	Neighborhood Shopping Center	Prohibited	-	33%	1 Acre - 15 Acres	-	150'	30' (1)	10'	0'/10'	10'/10'	0'/10'	C-1 12-217
C-2 12-218	Community Shopping Center	Prohibited	-	33%	10 Acres - 40 Acres	-	-	35' (2)	10'	0'/10'	10'/10'	0'/10'	C-2 12-218
C-3 12-219	Regional Shopping Center	Prohibited	-	33%	15 Acres or more	-	-	50' (4)	10'	0'/10'	10'/10'	0'/10'	C-3 12-219
C-4 12-220	Central Trading	Allowed/ No Specific Requirement	-	-	-	-	-	75' (4)	10'	0'/10'	10'/10'	0'/10'	C-4 12-220
C-5 12-221	General Commercial	Prohibited	-	-	-	-	150'	35' (2)	10'	0'/10'	10'/10'	0'/10'	C-5 12-221
C-6 12-222	Heavy Commercial	Prohibited	-	-	-	-	150'	35' (2)	10'	0'/10'	10'/10'	0'/10'	C-6 12-222
C-R 12-223	Commercial Recreation	Prohibited	-	33%	4 Acres or more	-	-	35' (2)	10'	0'/10'	10'/10'	0'/10'	C-R 12-223
C-M 12-224	Commercial and Light Manufacturing	Caretakers Residence Only	-	-	-	75'	120'	75'	10'/15'	-	-	-	C-M 12-224
M-1-P 12-225	Industrial Park Manufacturing	Prohibited	-	-	40 Acres or more	150'	200'	50' (4)	15'/50'	75'	10'/50'	75'	M-1-P 12-225

Residential development is prohibited in C-2 zones.