

1E
11/18/08

**INTERIM AGREEMENT FOR THE IDENTIFICATION OF MEASURES TO
MITIGATE IMPACTS TO THE STATE HIGHWAY SYSTEM RESULTING
FROM CITY APPROVED PROJECTS**

FIRST AMENDMENT

The CALIFORNIA DEPARTMENT OF TRANSPORTATION ("Department"), and the CITY OF FRESNO, a municipal corporation ("City"), collectively "Parties", hereby make this FIRST AMENDMENT to the Interim Agreement for the Identification of Measures to Mitigate Impacts to the State Highway System Resulting From City Approved Projects ("Interim Agreement").

RECITALS

1. WHEREAS, the Parties on February 21, 2006, entered into the Interim Agreement as a collaborative effort to ensure appropriate mitigation of impacts to the State Highway System arising from City-approved development projects;
2. WHEREAS, the Interim Agreement by its terms expires no later than February 21, 2009;
3. WHEREAS, the Interim Agreement provides that its expiration date may be extended by amendment of the Interim Agreement mutually agreed upon by the Parties;
4. WHEREAS, the Parties desire to extend the expiration date of the Interim Agreement;

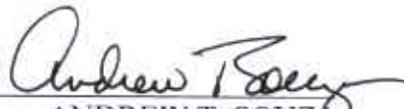
NOW, THEREFORE, in consideration of the foregoing Recitals and mutual covenants set forth in the Interim Agreement, the Parties agree to this First Amendment to the Interim Agreement.

FIRST AMENDMENT

Paragraph 4.6 of the Interim Agreement is amended to read as follows:

This Agreement is intended to be an interim solution to the subject matter addressed, and it expires upon implementation of the Program, or on the fifth anniversary of the effective date of this Agreement, whichever occurs first. One-hundred and twenty days prior to that fifth anniversary, if the Program has not been implemented, the Parties may extend this Agreement an additional period beyond the term at which it would otherwise expire. Said extension must be mutually agreed upon and in writing.

CITY OF FRESNO

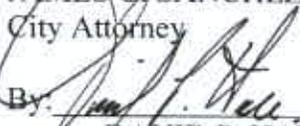
By: 
ANDREW T. SOUZA
City Manager

CALIFORNIA DEPARTMENT OF
TRANSPORATION

By: 

APPROVED AS TO FORM

JAMES C. SANCHEZ
City Attorney

By: 
DAVID P. HALE 1-26-09
Chief Assistant City Attorney

CALIFORNIA DEPARTMENT OF
TRANSPORTATION, LEGAL DIVISION

By:  02/10/2009
MARTIN W. KECK



REPORT TO THE CITY COUNCIL

AGENDA ITEM NO. 1E
COUNCIL MEETING 11/18/08
APPROVED BY _____

November 18, 2008

DEPARTMENT DIRECTOR _____

CITY MANAGER _____

FROM: BRUCE A. RUDD, Assistant City Manager
Office of the City Manager

SUBJECT: CONSIDERATION OF GRANTING AUTHORITY TO THE CITY MANAGER TO PREPARE AND ENTER INTO AN EXTENSION OF THE INTERIM AGREEMENT FOR THE IDENTIFICATION OF MEASURES TO MITIGATE IMPACTS TO THE STATE HIGHWAY SYSTEM RESULTING FROM CITY APPROVED PROJECTS ("INTERIM AGREEMENT") THAT THE CITY PREVIOUSLY ENTERED INTO WITH THE CALIFORNIA DEPARTMENT OF TRANSPORTATION ("CALTRANS").

KEY RESULT AREA

One Fresno

RECOMMENDATION

The Council approved the Interim Agreement with Caltrans on January 24, 2006. The agreement is set to expire on February 23, 2009. Staff is recommending that the City Council authorize the City Manager to prepare enter into a two-year extension of the Interim Agreement. Pursuant to the terms of the agreement, the extension must be entered into at least 90 days prior to its expiration date (November 24, 2008). Staff understands that Caltrans is agreeable to extending the Interim Agreement. Council's Authorization to the City Manager is limited to an extension of the Interim Agreement. Council is not authorizing the City Manager to amend any other terms of the Interim Agreement.

EXECUTIVE SUMMARY

The purpose of the Interim Agreement is to provide a process to assess state highway impacts from future City projects and administer a fee to mitigate the impact. The Interim Agreement is a key component for the overall settlement of the Caltrans v. City of Fresno (Wathen) lawsuit (see terms below). The Council approved the Interim Agreement with Caltrans on January 24, 2006. The agreement is set to expire on February 23, 2009. Staff is recommending an amendment to provide a two-year extension and pursuant to the terms of the agreement it must be done at least 90 days prior to its expiration date (November 24, 2008). The extension is mutually agreed to by both parties.

Presented to City Council

Date 11/18/08

Disposition Spec. approved

BACKGROUND

On November 9, 2004, Council approved Spalding G. Wathen's project to develop a 468 unit apartment complex on west Ashlan adjacent to State Route 99.

On December 13, 2004, Caltrans filed a Petition for Writ of Mandate challenging Council's approval of the project on the grounds that the City failed to comply with CEQA.

City staff and Caltrans agreed on terms of a settlement, thus the approval of the interim agreement by Council on January 24, 2006. The settlement also included Caltrans dismissing the litigation within 10 days of the effective date of the settlement and waives future rights to challenge the project (Wathen). As you know, the agreement with Caltrans was to identify measures to mitigate the impacts to the State Highway System resulting from City-approved projects. This agreement is set to expire on or about February 23, 2009, but allows for an extension of up to two years if mutually agreed to by both parties. The deadline to extend the agreement is 90 days prior to the expiration (November 24, 2008).

Staff has been working closely with Caltrans and has been advised that Caltrans is agreeable to an extension. Since 2006, new development projects have been paying their pro-rata share to mitigate impacts to Caltrans facilities. Staff has also participated in two phases of the Fresno-Madera Interchange Deficiency Study through the Council of Fresno County Governments (COG). Seven of the interchanges in the City of Fresno are included in the Measure C Regional Traffic Mitigation Fee (RTMF) that has been approved by the boards of the COG and Fresno County Transportation Authority (FCTA). Staff is working closely with Caltrans on the remaining interchanges to determine how best to handle interchanges which may be impacted by new development but are not currently included in the RTMF as approved by the COG and FCTA. Staff will return to the Council within 60 days with the Measure C RTMF to be considered for adoption by the Council. Extension of the Interim Agreement for a period up to two years will allow time for the City and Caltrans to deal with any remaining issues that are not fully addressed by the RTMF.

Council's Authorization to the City Manager is limited to preparing and executing a document to extend the Interim Agreement. Council is not authorizing the City Manager to amend any other terms of the Interim Agreement.

FISCAL IMPACT

There is no fiscal impact.

Attachments: Interim Agreement

**INTERIM AGREEMENT FOR THE IDENTIFICATION OF MEASURES TO
MITIGATE IMPACTS TO THE STATE HIGHWAY SYSTEM RESULTING
FROM CITY APPROVED PROJECTS**

The CALIFORNIA DEPARTMENT OF TRANSPORTATION ("Department"), and the CITY OF FRESNO, a municipal corporation ("City"), collectively "Parties", hereby enter into this Interim Agreement for the Identification of Measures to Mitigate Impacts to the State Highway System Resulting From City Approved Projects:

ARTICLE 1: RECITALS

- 1.1 WHEREAS, the City is a public agency which from time to time approves projects, as defined in Public Resources Code Section 21065, which may have significant impacts on the state highway system.
- 1.2 WHEREAS, the Department is responsible for the design, construction, operation and maintenance of the State Highway System, and in the ordinary course of business reviews projects to be approved by the City and identifies significant impacts to the State Highway System caused by such projects.
- 1.3 WHEREAS, there has been an ongoing dispute between the Parties whether the City has the legal obligation, authority, and appropriate mechanism to provide mitigation for significant impacts to the State Highway System arising from City-approved projects.
- 1.4 WHEREAS, the Parties to this agreement recognize a mutual need to resolve this ongoing dispute.
- 1.5 WHEREAS, the City, with the assistance of the Department, is involved in a 1-2 year process intended to provide a deficiency study of the Fresno region's State Highway System. The City intends, possibly in concert with other local jurisdictions in the region, to utilize this study, in part, in an effort to develop a regional or Citywide

traffic impact fee assessment program (the "Program"), but such Program is not expected to be operational for several years.

1.6 WHEREAS, the Parties recognize an immediate need to reach an interim resolution of this matter and thus, the Parties have agreed upon an interim process and "fair share" formulas for use in determining the monetary value of mitigation for impacts to the State Highway System until the Program is operational;

NOW, THEREFORE, in consideration of the foregoing Recitals and mutual covenants set forth below, the Parties hereto further agree as follows:

ARTICLE 2: CITY OBLIGATIONS

2.1 City shall make available to the Department for review, at the beginning of the City's environmental review process, information on all projects with potential traffic impacts, including but not limited to:

- (a) All residential subdivisions (tentative tract maps) proposing to create lots to accommodate development of 50 or more residences;
- (b) All Conditional Use Permits;
- (c) All amendments to the 2025 Fresno General Plan;
- (d) All rezones;
- (e) All projects adjacent to a State Highway Facility or right-of-way; and
- (f) All projects potentially generating 100 or more peak hour vehicle trips.

2.2 Whenever the Department identifies the potential for significant impacts to the State Highway System and identifies mitigation for those identified impacts specific and germane to the City approved project, and the monetary value of any required mitigation, the City shall utilize the Traffic Review Process Flow Charts, End Notes, and Associated Formulas included in this Agreement as Attachment A, incorporated herein by this reference.

2.3 Whenever the City imposes a mitigation fee contemplated by this agreement, the City will provide the Department a copy of the mitigation monitoring program adopted by the City for the specific project, and satisfy the requirements of Public Resources Code section 21081.7.

2.4 Mitigation fees imposed by the City in accordance with this agreement shall be collected by the City. City shall retain those fees collected in a separate account, interest bearing if possible, subject to review and oversight by the Department. City shall not commingle said money with any other funds. City shall provide the Department an annual accounting of the deposits, withdrawals and balance. City shall not withdraw or transfer said money without the express written consent of the Department. The Department, on reasonable notice, shall have the right to audit the account and verify the security of the funds in the account. Said money shall be released to the Department upon submittal of proof of an award of a contract for improvements to the State Highway System which will mitigate the identified impacts from the City approved project. If this Agreement terminates in accordance with Paragraph 4.6 below, any money collected pursuant to this Agreement shall continue to be retained by City and released to the Department subject to the terms and conditions set forth in this Paragraph 2.4. The preceding requirement shall survive expiration or termination of this Agreement.

2.5 The City shall participate in the development of a regional traffic impact fee Program, and pursue its enactment by each local jurisdiction in the Fresno region.

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ARTICLE 3: DEPARTMENT OBLIGATIONS

3.1 If the Department identifies impacts attributable to those projects listed in paragraph 2.1 above, the Department shall also identify, with specificity, necessary and feasible improvements to the State Highway System, e.g., freeway interchange access ramps and/or access ramp intersections with public streets, to mitigate those impacts identified.

3.2 In determining whether mitigation for traffic impacts to the State Highway System is required, and the monetary value of any required mitigation, the Department shall utilize the Traffic Review Process Flow Charts, end Notes, and Associated Formulas included in this Agreement as Attachment A, incorporated herein by this reference

3.2 The Department will conduct its CEQA review function, including the enforcement of its rights, in an equitable manner across all local jurisdictions, but nothing in this Agreement is intended to restrict the ability of the Department to exercise its discretion in accordance with law.

3.3 The Department shall participate in the development of a regional traffic impact fee Program, and pursue its enactment by each local jurisdiction in the Fresno region, with the understanding that enactment is a local responsibility.

ARTICLE 4: MISCELLANEOUS

4.1 The Parties shall use their best efforts to promptly share all information, and reviews, regarding proposed development projects for which City approval is required.

4.2 In the event of a dispute between the Parties arising from the implementation of this Agreement, the Parties will utilize the Dispute Resolution Process included in this Agreement as Attachment B, incorporated herein by this reference.

4.3 For purposes of this Agreement, the Parties agree that consistency with the 2025 Fresno General Plan does not in and of itself eliminate the requirement for additional CEQA analysis where significant impacts are identified. However, where a project is consistent with the 2025 Fresno General Plan, is a subsequent project identified in the MEIR and within the scope of the MEIR (1) no additional CEQA analysis is required; and (2) no mitigation to the State Highway System is required, unless the project generates 100 peak hour vehicle trips and significant impacts are identified or the Department identifies safety impacts or operational concerns relating to the State Highway System.

4.4 This Agreement contains the complete expression of the whole agreement between the Parties hereto, and there are no promises, representations, agreements, warranties, or inducements, either express or implied, except as are fully set forth herein. This Agreement cannot be enlarged, modified, or changed in any respect except by written agreement between the Parties.

4.5 In entering into this Agreement, the Parties represent that they have relied upon the legal advice of their attorneys, who are the attorneys of their own choice, and that these terms are fully undertaken and voluntarily accepted by them. The Parties further represent that they have no question with regard to the legal import of any term, word, phrase, or portion of this Agreement, or the Agreement in its entirety, and accept the terms of this Agreement as written.

4.6 This Agreement is intended to be an interim solution to the subject matter addressed, and it expires upon implementation of the Program, or on the third anniversary of the effective date of this Agreement, whichever occurs first. Ninety days

prior to that third anniversary, if the Program has not been implemented, the Parties may extend this Agreement an additional two years beyond the term at which it would otherwise expire. Said extension must be mutually agreed upon and in writing.

4.7 This Agreement is enforceable in an action brought in a court of competent jurisdiction. If litigation to enforce this Agreement is commenced between the Parties to this Agreement concerning the rights and duties of either in relation to this Agreement, the prevailing party shall be entitled to, in addition to any other relief that may be granted in that litigation, reasonable attorney fees as determined by the court presiding over the dispute.

4.8 Each and all of the provisions of this Agreement shall be binding upon the Parties, and their employees, agents, contractors, consultants, assignees, and representatives.

4.9 No provision of this Agreement is intended, or shall be construed, to create rights, remedies, benefits, or obligations in third parties not signatory to this Agreement.

4.10 The Parties hereto represent and warrant to each other that they have the full authority to execute this Agreement.

4.11 Each Party warrants and represents to the other Party that the execution and delivery of this Agreement by the Party will not (i) violate any judgment, order, injunction, decree, regulation, or ruling of any court or governmental entity or (ii) conflict with, result in a breach of, or constitute a default under any material agreement or instrument to which the Party is a party or by which the Party may be bound.

4.12 No provision of this Agreement, or the Agreement as a whole, is intended or shall be construed to require either Party to indemnify the other Party.

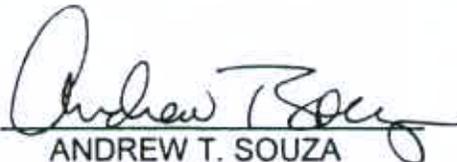
4.13 The headings employed to identify the provisions contained herein are solely for the convenience of the Parties to this Agreement. If any ambiguity appears in either the headings or the provisions thereunder, such ambiguity shall not be construed against any Party to the Agreement on the grounds that such Party drafted this Agreement.

5.14 This Agreement may be executed in counterparts, each of which shall be deemed to be an original and all of which together shall constitute one and the same instrument.

4.15 This Agreement becomes effective on the date of execution by the last Party to sign the Agreement.

4.16 The Parties may amend the terms of this Agreement, including its expiration date, at any time by the execution of an amendment to this Agreement.

CITY OF FRESNO

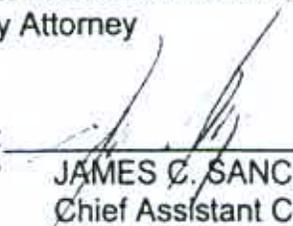
By: 
ANDREW T. SOUZA
City Manager

CALIFORNIA DEPARTMENT OF
TRANSPORTATION

By: 

APPROVED AS TO FORM

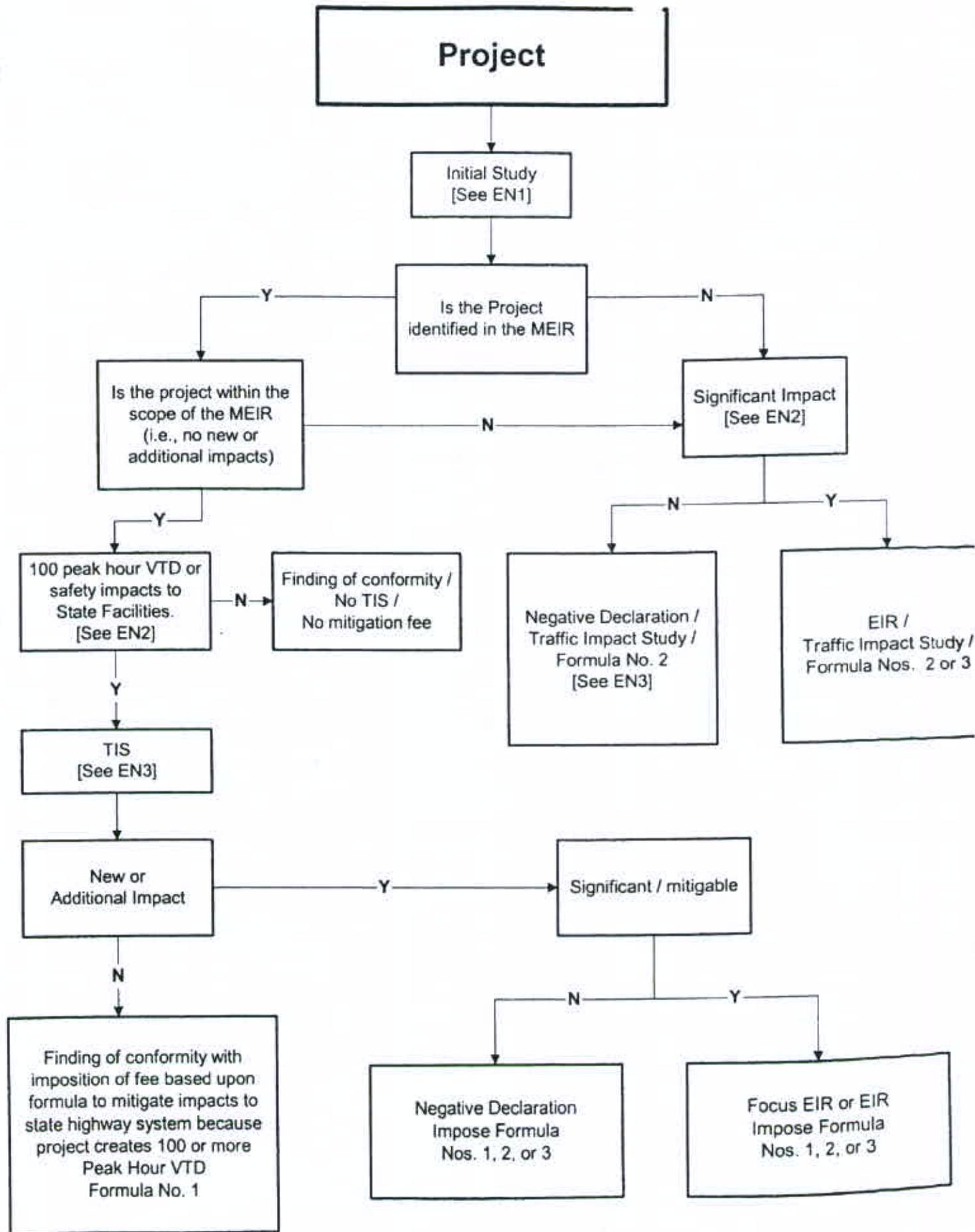
HILDA CANTU MONTROY
City Attorney

By: 
JAMES C. SANCHEZ
Chief Assistant City Attorney

CALIFORNIA DEPARTMENT OF
TRANSPORTATION, LEGAL DIVISION

By:  02/02/2006
MARTIN W. KECK

Attachments: A - Flowchart
B - Dispute Resolution Process



- * Consistency with the General Plan does not in and of itself eliminate the requirement for additional CEQA analysis and mitigation where significant impacts are identified. However, where a project is consistent with the 2025 Fresno General Plan, is a subsequent project identified in the MEIR and within the scope of the MEIR (1) no additional CEQA analysis is required; and (2) no mitigation to the state highway facilities is required, unless, the project generates 100 peak hour VTD and impacts are identified, or Caltrans identifies safety impacts or operational concerns relating to the state highway system.

Flow Chart End Notes ("EN")

EN1. Applications to be routed to Caltrans:

- All subdivisions over 50 units.
- All CUP's
- All General Plan Amendments.
- All Rezones
- All projects adjacent to a state facility or right of way.
- All projects that generate 100 or more peak hour vehicle trips.

EN2. Determine need for Traffic Impact Study

- All projects generating 100 or more peak hour trips.
- All projects wherein safety and/or operational concerns are identified, including but not limited to, sight distance, geometrics, driveway/intersection spacing, intersection spacing, warrants, and queing.

EN3. Draft Traffic Impact Study

- City will provide a draft traffic impact study in order to give Caltrans a reasonable opportunity to comment on the draft TIS.

EXHIBIT 3

Formula No. 1: $P = P_1/F_1$

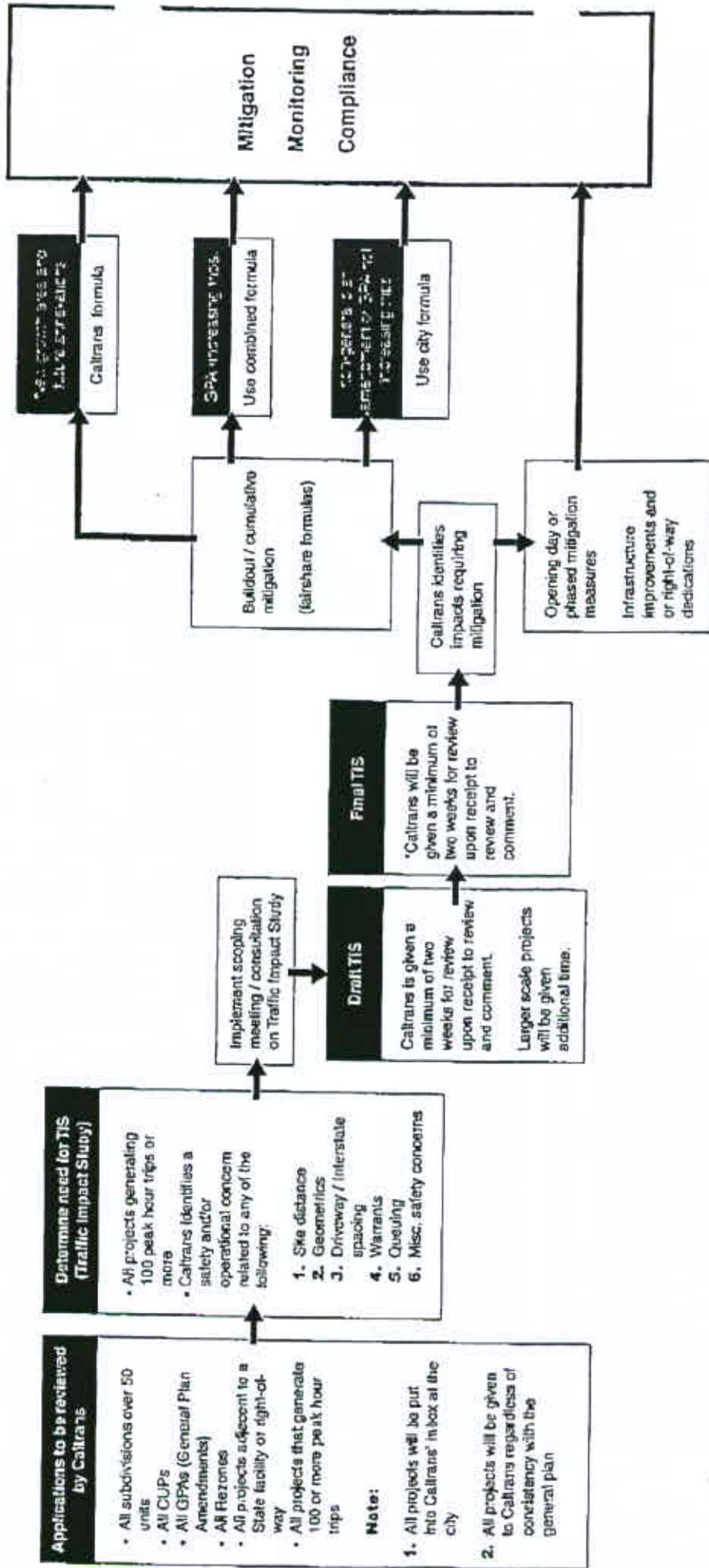
EXHIBIT 4

Formula No. 2: $P = (P_1/F_1) + (P_2 - P_1/F_2)$

Exhibit 5

Formula No. 3.: $P=p/F$

TRAFFIC REVIEW PROCESS



Determines need for TIS (Traffic Impact Study)

- All projects generating 100 peak hour trips or more
- Calltrans identifies a safety and/or operational concern related to any of the following:
 - Site distance
 - Geometrics
 - Driveway / Interstate spacing
 - Warranting
 - Queueing
 - Misc. safety concerns

Applications to be reviewed by Caltrans

- All subdivisions over 50 units
- All CUPs
- All GPPs (General Plan Amendments)
- All Rezones
- All projects adjacent to a State facility or right-of-way
- All projects that generate 100 or more peak hour trips

Note:

- All projects will be put into Calltrans' in box at the city
- All projects will be given to Calltrans regardless of consistency with the general plan

* It is agreed that consistency with the general plan is not a reason to avoid mitigating impacts to State facilities.

Attachment B

DISPUTE RESOLUTION PROCESS

1. This Process may be utilized for the resolution of disagreements between the California Department of Transportation (Department) and the city of Fresno (City), with respect to issues arising pursuant to the Interim Agreement for the Identification of Measures to Mitigate Impacts to the State Highway System Resulting from City Approved Projects. Before resort to this Process, the parties shall make every reasonable effort to resolve the disagreement at the staff level.

2. Either party may initiate this Process by providing written notice to the other party, in accordance with paragraph 11, below.

3. Within one week of receipt of the notice, the parties' respective staff shall meet to begin developing a collaboratively prepared briefing paper. The briefing paper constitutes a key component of the Process. The briefing paper should offer salient information precisely framing the issues requiring resolution. The briefing paper:

- Encourages neutral presentation of issues, rather than polarizing;
- Maximizes the likelihood of resolution of at least some of the issues as staff prepare for the elevation to the first level of resolution;
- Ensures that the problem statement is robust, clear, and focused; and
- Fosters improved communication.

The briefing paper shall be completed within two weeks from the point at which the staff first meet to begin its development.

4. Within three days of completion of the briefing paper, it shall be provided to the representatives for the First Level of Resolution. These representatives shall be: for the City, the Assistant City Manager, and for the Department, the Deputy District Director for Transportation Planning.

5. Within one week from receipt of the briefing paper, the First Level representatives shall meet in an effort to resolve the dispute. If the dispute, or part of it, is resolved, such resolution shall be reduced to writing and signed by both representatives. If issues remain for resolution, either party may elect to proceed to Final Level Resolution.

6. Before elevation to Final Level Resolution, the parties shall have two weeks to collaboratively refine, if necessary, the briefing paper. Resolution of any

issues agreed upon at First Level Resolution shall be incorporated into the revised briefing paper. The briefing paper shall then be provided to the representatives for Final Level Resolution. These representatives shall be, for the City, the City Manager, and for the Department, the District Director.

7. Within two weeks of receipt of the briefing paper, the Final Level Representatives shall meet in an effort to resolve the dispute. If the dispute, or part of it, is resolved, such resolution shall be reduced to writing and signed by both representatives.

8. If any issue remains unresolved, the parties may then resort to any other available remedies.

9. The time limits established in this Process may be adjusted with the consent of both parties.

10. Nothing in this Process shall be construed as preventing use by the parties of other available dispute resolution mechanisms. In no event shall either party be required to forego a legal remedy if the time required for resolution pursuant to this Process would cause expiration of an applicable statute of limitations.

11. Notices pursuant to this Process shall be sent to:

For the Department: Deputy District Director for Transportation Planning
1352 West Olive Avenue
Fresno, CA 93778-2616

For the City: Assistant City Manager
2600 Fresno Street
Fresno, CA 93721