City of Banning

PLANNING COMMISSION
Special Meeting – Monday, January 28, 2008 - 6:30 p.m.
Council Chambers, 99 E. Ramsey Street
Banning, CA 92220

I. CALL TO ORDER

Pledge of Allegiance

Roll Call: Chairperson De Santis, Commissioner Barsh,
Commissioner Dickson, Commissioner Escandell,
Commissioner Hawkins

II. REVIEW / APPROVAL OF MINUTES (December 4, 2007)

III. PUBLIC COMMENT

IV. PUBLIC HEARING:

A. New Item:

1. Unclassified Use Permit #01-47501: Revocation of said permit to establish a
professional drag racing facility on property generally located approximately 1300
feet east of the northeast corner of Hathaway Street and Westward Avenue.
APN's 532-130-008 & 018.

V. PLANNING COMMISSIONER COMMENTS

VI. ADJOURNMENT

In compliance with the Americans with Disabilities Act, if you need special assistance to participate
in this meeting, please contact the Planning Department (951) 922-3125. Notification 48 hours
prior to the meeting will enable the City to make reasonable arrangements to ensure accessibility to
this meeting. [28 CFR 35.102-35.104 ADA Title II].

PLANNING COMMISSION
Meeting –01/28/08
City of Banning

PLANNING COMMISSION MINUTES

December 4, 2007

A regular meeting of the City of Banning Planning Commission was held on Tuesday, December 4, 2007, at 6:30 p.m., in the Council Chambers, City Hall, 99 East Ramsey Street, Banning, CA, 92220.

Commissioners Present:  Chairperson DeSantis
                           Commissioner Barsh
                           Commissioner Dickson
                           Commissioner Escandel
                           Commissioner Hawkins

Staff Present:          Community Development Director Orci
                        Deputy City Attorney Murphy
                        Captain Yarbrough, Fire Marshal
                        Recording Secretary Sorenson

I.  CALL TO ORDER

The meeting was called to order at 6:30 p.m. by Chairperson DeSantis.

II. REVIEW OF MINUTES

ACTION (DICKSON / BARSH): A motion was moved, seconded and carried that the minutes of October 2, 2007 be approved as presented.

(Motion carried 4 – 1) (Commissioner Escandel abstained as he was excused from that meeting)

ACTION (BARSH / DICKSON): A motion was moved, seconded and carried that the minutes of November 7, 2007 be approved as presented.

(Motion carried 4 – 1) (Chairperson DeSantis abstained as she was excused from that meeting)
III. PUBLIC COMMENT

No one came forward.

IV. PUBLIC HEARING:

A. New Items:

1. Resolution No. 2007-31: A Resolution recommending to the City Council the adoption of code provisions pertaining to murals.

Community Development Director Orci presented the staff report, discussed the options presented tonight and discussed the meaning of “mural expert”. He stated that Option No. 1 establishes a ministerial process with basic mural regulations that would require the Community Development Department and Chamber of Commerce Mural Council approvals.

Option No. 2 establishes a ministerial process with basic mural regulations that would require the Community Development Department approval. Please note that this Option requires that the applicant consult with and receive approval from “mural experts”; the Mural Council would be considered a “mural expert”. This option does not specifically designate the Mural Council; rather, it will allow the Chamber via the “non-exclusive list of mural experts” requirement the ability to review the murals without transferring the authority directly to the Chamber and thus addressing the Attorney’s concerns.

Charlene Sakurai, 43000 Dillon Road, Banning CA, came forward to speak on behalf of the mural ordinance and expressed confidence in the Chamber Mural Council.

Don Smith, 1681 W. Westward Avenue, Banning CA, came forward to state that he would like to see some structure in the mural process and wants to know who will decide mural content.

Deputy City Attorney Greg Murphy discussed First Amendment rights and content. Mr. Murphy stated that the City Attorney’s office prefers Option #2.

Commissioner Dickson stated he preferred Option #1 and wants to keep the process simple. Commissioner Hawkins stated he was on the Chamber Mural Council, he checked with the City Attorney and was told he did not have to recuse himself. He stated there have been no problems so far with the way the Mural Council has been doing things. Commissioner Barsh stated he would prefer Option #2 and Chairperson DeSantis stated that she liked Option #1.
ACTION (DICKSON / HAWKINS): A motion was moved, seconded and carried that the Planning Commission approve Resolution No. 2007-31 (Option 1), recommending to the City Council approval of Zone Text Amendment #07-97502.

(Motion carried 3 - 2) (Commissioners Barsh and Escandel voted “no”)

2. Conditional Use Permit #07-808 and Design Review #07-7016: A Request to allow the operation of a dental office in a 4,001 square foot building located at 877 & 895 W. Ramsey Street. APN 540-125-017 & 018.

Community Development Director Orci presented the staff report and stated that the project site is the northwest corner of 8th and Ramsey and west of the Chevron Station. The site is approximately 2500 square feet in size with a utility easement running up the rear of the property, outside the project boundary. The site is zoned Highway Serving Commercial and a conditional use permit is required for the operation of a dental office. The Design Review is requested for the elevations, landscaping, building materials, etc. Director Orci discussed the site plan, parking, grading and stated that the nuisance water will be absorbed by the landscaping. This project is exempt from CEQA, via Section 15332, In-fill Projects. Staff finds that the project meets or exceeds the City’s development standards and that the architecture is compatible with the surrounding properties. Staff was able to make the findings necessary to approve this project and recommends approval.

Jim Frager, from Cornerstone CMS, 9340 Hazard Way, #B2, San Diego CA 92123, representative of the developer, True South, came forward to discuss the project. Mr. Frager stated that Western Dental will be the tenant and he does not know how many dentists or employees will work there, but he thinks it will be more than ten.

Fred Sakurai, 43000 Dillon Road, Banning CA, came forward to request that the Planning Commission encourage use of solar panels on the flat roof.

Don Smith, 1681 W. Westward Avenue, Banning CA, came forward to state that he had questions regarding design as he does not like compact parking spaces and feels they never work. Mr. Smith stated that there probably should be an easement to Ramsey Street where the plan says “existing alley” in case the commercial property to the west is eventually developed.

ACTION (BARSH / HAWKINS): A motion was moved, seconded and carried that the Planning Commission Approve Resolution No. 2007-39 approving the CUP #07-808, based on the findings and conditions of approval (attached hereto as Attachment “1” and incorporated by reference).

(Motion carried 5 - 0)
ACTION (BARSH / DICKSON): A motion was moved, seconded and carried that the Planning Commission Approve Resolution No. 2007-40, approving Design Review #07-7016, based on the findings and conditions of approval (Attachment “1” and incorporated by reference).

(Motion carried 5 - 0)

3. General Plan Amendment #07-2502: A Request by VicSeth Construction to change the General Plan / Zoning Map designation from Low Density Residential (LDR) to Professional Office (PO) on a vacant 4.62 acre parcel located at 935 E. Williams Street, APN 541-121-022. Pursuant to the California Environmental Quality Act, a Negative Declaration of Environmental Impact is recommended for this project.

Senior Planner Clinton presented the staff report and stated staff approved of the change from Low Density Residential to Professional Office, as Professional Office can be a good neighbor close to residential. It is usually a good transitional use as it relates to noise and emissions, etc. This use would bring some services within walking distance into the neighborhood and would reduce vehicle trips. The success of the rezone will depend on low key architectural design and careful screening of uses through the CUP process. Staff recommended approval of the General Plan Amendment and the Negative Declaration.

The Commissioners discussed what the actual uses were in the Professional Office zone. Some of the uses include markets, liquor stores, banks, as well as offices. The commissioners also discussed design and if any studies have been done to determine if these offices would be successful.

Marisela Labastida, representative of VicSeth Construction and HLCD, 897 Via Lata, Colton CA, came forward to discuss her project. She also stated that banks and lenders are not interested in funding a condo / residential project with today’s mortgage market. Mrs. Labastida also felt this use would benefit the neighborhood by bringing in jobs and cleaning up this blighted area. That is why she is requesting the change to the Professional Office designation. She has also been talking to several entities and feels that her property would be able to provide offices that would compliment the Social Services Department project going in to the south.

There was much discussion among the commissioners regarding the various uses that could possibly be placed on that property and they felt from the GPAC committee’s comments and from the many General Plan update meetings the general point of view was that that neighborhood be Low Density Residential and the commission wanted to stay with that designation.
ACTION ( ESCANDEL / DICKSON): A motion was moved, seconded and carried that the Planning Commission direct staff to prepare the necessary resolution to recommend denial of the application to the City Council and to bring this resolution back to the Planning Commission at the next meeting.

(Motion carried 5 – 0)

4. Lot Split #07-4504 and Design Review #07-7015: A request to approve Tentative Tract Map (TTM 35694) to subdivide a 3.59 acre site into 12 residential lots (Triplex Lots) and request to approve six facades on W. Barbour Street approximately 250 feet west of San Gorgonio Avenue. APN 540-250-006.

Community Development Director Orci presented the staff report and stated that the subject site is located between Barbour and Lincoln. The request is to subdivide the property into 15 parcels, 12 residential lots and 3 remnant lots (with nothing proposed for them at this time). Access would be from Barbour Street, project would be gated with a private drive. The lots would be landscaped and fenced and the units would have porches, barbeques and Cape Code architecture with six various facades. The project meets and / or exceeds the Code requirements with the exception of the rear yards, which need to comply with the 10 foot setbacks.

Darwin Manuel, 539 S. Brea Blvd, Brea CA, came forward to discuss his project. Mr. Manuel stated this is a very unique kind of development in that it contains separate lots with a duplex and a single family dwelling. There will be a Homeowner’s Association for the interior properties and the exteriors of the buildings.

Frank Burgess, 2021 W. Wilson Street and the owner of 300 W. Lincoln Street, came forward to speak about this proposed project. Mr. Burgess owns the property adjacent to this project and he stated that the residents of the apartment complex next to him cause a great deal of problems. Mr. Burgess stated that he does not feel residential next to industrial makes for a good neighborhood situation; he feels the street should be the divider between different zones. Mr. Burgess offered the suggestion that this project would be better served on the VicSeth property on Williams Street mentioned in the previous case. He also stated he would like to see a study done about low income housing next to industrial uses.

Don Smith, 1681 W. Westward Avenue, Banning CA, came forward to speak. Mr. Smith stated that staff was wonderful to him when he came into City Hall to look at the packet. He stated that he felt this project would in essence be a 36 unit apartment complex with no manager. He felt that 36 individual lots with a Homeowner’s Association would be a better idea.
Darwin Manuel came forward to emphasize that this is not a low income apartment complex. This project will have individual owners with an investment interest. Frank Burgess came forward to ask if there will be an age category for this project and he reminded the commissioners that homeowner associations need teeth to be successful.

Darwin Manuel responded that there will be no age limitation and they are providing 1,000 -1,700 square feet of private yard for each unit.

**ACTION (HAWKINS / ESCANDEL):** A motion was moved, seconded and carried that the Planning Commission approve Resolution No. 2007-43 recommending to the City Council approval of Lot Split #07-4504 (Tentative Tract Map 35694), based on the findings and conditions of approval (attached hereto as Attachment “1” and incorporated by reference).

*(Motion carried 5 – 0)*

**ACTION (HAWKINS / DICKSON):** A motion was moved, seconded and carried that the Planning Commission approve Resolution No. 2007-44, recommending to the City Council approval of Design Review #07-7015, based on the findings and conditions of approval (Attachment “1” and incorporated by reference).

*(Motion carried 5 – 0)*

5. **Specific Plan #06-202, Lot Split #06-404, Lot Split #06-4502 and Zone Change #06-3502:** A request to introduce and discuss the Lariat Specific Plan, Tentative Tract Map (TTM 33384) to subdivide the 63-acre property into 129 lots and 14 open space lots, Tentative Parcel Map (TPM 35072, for conveyance purpose only) for a 63 acre (gross) residential development located on the north east corner of the intersection of Sunset Avenue and Bobcat Road. A total of 410 residential units are proposed on 46.0 acres. The project area also includes approximately 7.05 acres of active and passive open space including recreational facilities, parks, trails, common landscape areas and 13.2 acres consisting of the Pershing Wash / Creek Resource Area are proposed as open space. A Zone Change application is included to create a Specific Plan Overlay Zone on the site. Pursuant to the California Environmental Quality Act, A Mitigated Negative Declaration of Environmental Impact is recommended for this project.

Director Orci stated that the applicant has requested that we continue this item to allow them the opportunity to discuss the content of the staff report with them and bring this item back at a future date. We are asking the commission to open the public hearing and continue this matter to the January 2nd meeting.
Don Smith, 1681 W. Westward Avenue, Banning CA, came forward to state that he had been at other meetings concerning this matter and that the developer had been asked to make certain modifications that do not appear to have been made. There is no longer the trail next to the roadway by the wash because the Flood Control District says that they need the whole road for them and therefore, the horses cannot use it. Mr. Smith feels they should make it a little wider and still build the trail. He said he hopes someone will remember his comments as he probably will not be able to attend the January meeting.

Jack Bullock, 4037 W. Ramsey Street, Banning CA, came forward to state that he opposes the project as it is too dense, the trail should be left, the wash should be left in a natural condition and this many units should not be approved until we actually get water to take care of them as there is a severe water shortage in the state of California.

**ACTION (BARSH / HAWKINS):** A motion was moved, seconded and carried that the Planning Commission continue the public hearing to its January 2, 2008 meeting.

**(Motion carried 5 – 0)**

6. General Plan Amendment #07-2503: A Request to remove Porter Street from the street system plan between Sunset Avenue and 22nd Street. Pursuant to the California Environmental Quality Act, A Mitigated Negative Declaration of Environmental Impact is recommended for this project.

Senior Planner Clinton presented the staff report and stated this is a clean-up item. She stated that Porter Street is essentially a paper street and does not exist in reality. The request tonight is to delete a segment of it. The proposed Five Bridges, Lariat, Rolling Hills Estates and the Tefft project do not intend to use Porter Street. At this time we are requesting that the section between 22nd Street and Sunset Avenue be removed.

**ACTION (ESCANDEL / HAWKINS):** A motion was moved, seconded and carried that the Planning Commission approve Resolution No. 2007-45 recommending to the City Council approval of a Negative Declaration for the project.

**(Motion carried 5 – 0)**

**ACTION (ESCANDEL / HAWKINS):** A motion was moved, seconded and carried that the Planning Commission approve Resolution No. 2007-46, recommending to the City Council approval of General Plan Amendment #07-2503.

**(Motion carried 5 – 0)**
V. STAFF REPORT / INFORMATION ITEMS

Director Orci mentioned that we will have a rather involved meeting on January 2nd and a meeting on January 10th regarding the substation.

VI. COMMISSIONER'S COMMENTS

Chairperson De Santis reported that Commissioner Hawkins has received a letter from the San Gorgonio Pass Water Agency stating that they are willing to give us a presentation on the status of our water.

Mrs. De Santis and Commissioner Dickson reported that the Phinneus Festival will be on Saturday and the Christmas Tree Lighting ceremony will follow.

VII. ADJOURNMENT

There being no further business to come before the Planning Commission, the meeting was adjourned at 9:01 p.m.

Respectfully submitted,

\[Signature\]
Gini Sorensen
Recording Secretary
STAFF REPORT
PLANNING COMMISSION

DATE: JANUARY 28, 2008

CASE NO'S: UNCLASSIFIED USE PERMIT #01-47501

REQUESTS: EXPIRATION/REVOCATION OF UNCLASSIFIED USE PERMIT #01-47501 FOR A PROFESSIONAL DRAG RACING FACILITY ON APN NOS. 532-130-008 AND 532-130-018

APPLICANT: CITY OF BANNING

SURROUNDING USES/ZONES: NORTH: BANNING AIRPORT/PUBLIC FACILITIES
WEST: INDUSTRIAL USE (DEUTSCH)/INDUSTRIAL
SOUTH: VACANT & WATER WELL/INDUSTRIAL
EAST: SINGLE FAMILY STRUCTURE/INDUSTRIAL

ENVIRONMENTAL CONSIDERATION: THE CITY ATTORNEY AND COMMUNITY DEVELOPMENT DIRECTOR HAVE DETERMINED THAT REVOCATION IS CATEGORICALLY EXEMPT FROM THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) AS STIPULATED UNDER SECTION 15321 AND SECTION 15270 OF THE GUIDELINES FOR THE IMPLEMENTATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.

BACKGROUND:

Staff and the City Attorney’s office have concluded that the Unclassified Use Permit (“Permit”) has already expired and revocation by the Planning Commission simply serves to confirm this conclusion and finally and fully terminate any interest or right granted by the Permit. Because the language of certain Permit conditions is somewhat ambiguous, formal revocation by the Planning Commission serves to meet the theoretical requirement that there be a revocation hearing even after expiration, and so the Commission is asked to hear the matter and formally revoke the Permit.

The revocation is being sought because the developer failed to perform construction or other appropriate evidence of use pursuant to the Permit. Even though the developer performed some clearing and grubbing, that work was insufficient to support continued validity of the Permit. Revocation of the Permit will also recognize and confirm termination of the Development Agreement entered into for the same parcels, as the Development Agreement states that it will expire at the same time as the Permit.
Revocation does not preclude use of the site for a drag racing facility or other use. It merely reiterates that the Permit, issued in 2001, is of no further force and effect and requires any party wishing to establish a drag racing facility or other use on the site to do so by applying for appropriate permits and approvals; complying with current environmental review standards; and abiding by the City’s General Plan provisions.

**CHRONOLOGY OF EVENTS:**

On July 3, 2001, the Planning Commission approved Permit 01-47501, with Conditions of Approval, to allow a professional drag racing facility and associated improvements on Assessor's Parcel Numbers 532-130-008 and 532-130-018. The project to be built pursuant to the Permit was known as “Drag City” and was granted to All-American Racing (“AAR”).

Drag City, as anticipated by the Permit, consisted of an at-grade drag strip running west-to-east. At its westernmost portion, the strip was to be bordered on the north and south by grandstands, concession stands, and restrooms creating a racing stadium. The strip was to run across two parcels of land, with a return roadway to the north of the strip that served to get cars back to the garages that were to be built north of the stadium. There was to be parking to the south of the stadium. Finally, the Permit required Barbour Street, which at that time terminated at the entrance to the Municipal Airport, to be extended to the property on which Drag City was to be built. The development of Drag City was to take place in three stages, with the at-grade drag strip, southern portion of the stadium, and approximately 1300 parking spaces to be built in the first phase. Additional grandstands and more parking would be built in the second phase. The final phase included completion of overflow parking and development of an additional pit/garage area.

The Permit contains two conditions of approval that are relevant at this time, Planning Condition 1 and Planning Condition 2. Condition 1 reads:

“All conditions of approval attached to Unclassified Use Permit No. 01-47501 must be met within the time frames stipulated in each condition for each phase of development. In the event the subject Unclassified Use Permit is not exercised consistent with the time frame identified for each condition, the permit shall become subject to revocation.

If no time frame is specified, the approval shall be for a period of one (1) year from the date of the Planning Commission's approval (expiration date to be July 2, 2002). All conditions of approval for each phase of development must be met on or before their respective expiration date, or the project proponent

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1 All-American Racing later assigned its interest to Banning Airport Associates, as described below.
2 The old Photosonics parcel purchased by the developer and the City parcel that ultimately was not transferred to BAA due to BAA’s inability to finance the purchase and the project.
3 There are actually two conditions titled “Planning Condition 2.” The first of the two is cited here and implicated in the matter before the Commission.
may request an amendment to the conditions at least thirty (30) days prior to
the expiration date; otherwise, the approval shall expire and become null and
void."

Condition 2 reads in pertinent part:
"Non-compliance to provisions of Unclassified Use Permit 01-47501 may result
in the City initiating procedures to revoke the subject Unclassified Use Permit...."

On August 1, 2002, the Planning Commission adopted a resolution supporting the
determination of staff that the Permit should be extended for one year. In accordance
with Section 9112 of the Code that was in effect at the time of the Permit, UUP's were to
be processed in the manner specified for conditional use permits. Therefore, pursuant to
Section 9116.10 of the Municipal Code in effect at the time the Permit was approved,
three such extensions were permissible, each good for one year. Specifically, that section
stated:

"The Community Development Director may, upon an application being filed
thirty days prior to expiration and for good cause, grant preliminary extension
of the time within which the C.U.P. is to be exercised pursuant to Section
9116.8 above. Such period shall not exceed twelve months from the date the
extension is approved. In no instance shall more than three extensions be
granted...."

On July 23, 2003, the City adopted Resolution No. 2003-34, which granted a grading
permit to AAR, which complied with the terms of the Permit. AAR performed some
preliminary clearing and grubbing of the site, but did not perform any grading pursuant to
the grading permit.

On August 5, 2003, the City extended the Permit for an additional year and made some
amendments to the conditions of the Permit. This was the second extension of the Permit
and meant that the Permit was due to expire on August 14, 2004.

On October 28, 2003, the City Council approved Ordinance No. 1308, establishing a
Development Agreement that served to govern the development of the drag racing
facility and other improvements. Pursuant to Section 4.2 of the Development Agreement,
its term would expire at the same time the Permit expired, if at all.

In early 2004 and concluding in May 2004, Barbour Street was extended from Hathaway
east to the entrance of the site. This work was performed entirely off-site, and included
the construction of the street, pipes under the street, and curbs and gutters. This was in
compliance with one of the engineering conditions for the Permit. This also was done
with Redevelopment Agency funds. While AAR oversaw the construction of the road
and associated improvements, the funding for the construction came from the Agency.

In May 2004, AAR sought a third extension of the Permit. On July 30, 2004, this
extension was granted based on the off-site improvements and AAR's assertion that the
preparation of building plans was under way. In the letter granting the extension, the
then-Interim Community Development Director wrongly informed AAR that this was the second extension of the Permit. While the Barbour Street improvements had been completed, that work was not construction or other appropriate evidence of use sufficient to validate the Permit. Had it been so, the City would not have had to grant an additional extension.

On January 21, 2005, the City was informed by Searles Company, LLC, that it was taking over the Drag City project. At approximately the same time, AAR was in the process of assigning all of its interest in the project and all related approvals -- including the Permit -- to Banning Airport Associates, LLC, ("BAA"), an entity formed by Searles Company to develop the project.

On August 9, 2005, the City Council and Redevelopment Agency approved an assignment and assumption agreement between AAR and BAA under which BAA took over the project. At the same time, AAR released all rights, obligations, and claims it had against the City.

On August 14, 2005, the City granted to BAA what at the time was called the third and final extension of the Permit. The Permit was due to expire on August 14, 2006, and pursuant to Section 9116.10, no further extensions were allowable by law.\(^4\)

On September 22, 2005, a second grading permit was issued for the site, this time to BAA. This grading permit was for work that went beyond the scope of the Permit. First, the Permit anticipated grading on two parcels; this grading permit allowed grading on those two parcels but anticipated a project that would extend eastward onto a third parcel.\(^5\) Second, the Permit anticipated an at-grade drag strip and a drag racing stadium that rose up from the ground; this grading permit called for the creation of a below-grade "bowl" around which the drag racing stadium would be built and from which cars would set off on their west-to-east course. These modifications would necessarily require an amendment of the Permit, both to include the third parcel and to provide for the below-grade creation of the "bowl."

On December 13, 2005, the City, the Redevelopment Agency, and BAA entered into a Master Agreement that did two things: (1) set forth the general terms for the sale of the City parcel to BAA so that BAA could move forward with the Drag City project; and (2) set forth the conditions for site assembly to be performed by the City in order that a business park be developed by BAA adjacent to Drag City. Other than the sale of the City parcel, the Master Agreement did not concern the development of Drag City at all. The Master Agreement terminated a number of project-related agreements that had previously been entered into by the City and AAR (and assigned by AAR to BAA), including the following: a Memorandum of Understanding in 2002; a lease dated November 26, 2002, by which the City leased the City's parcel to AAR; a license agreement dated November 26, 2002, by which AAR granted the City a license over

\(^4\) In actual fact, this extension was the fourth and was itself not allowable by law.

\(^5\) This is sometimes called the "Scharff property" after the then-owners of the parcel. The Agency has completed the purchase of the parcel.
project-related parking spaces to be developed; a reimbursement agreement dated November 26, 2002, under which the Agency paid for the Barbour Street improvements; and a cost support agreement dated June 25, 2004, under which the Agency further agreed to fund the Barbour Street improvements. All of these agreements were terminated and their provisions incorporated into the Master Agreement.

On June 2, 2006, the City Attorney’s office sent a letter discussing BAA’s obligations to be met before the City would engage in site assembly under the Master Agreement — this included purchase of the City parcel.

On July 25, 2006, the City and BAA entered into a Purchase and Sale Agreement under which the City would sell to BAA the parcel owned by the City adjacent to the Photosonics site and the Municipal Airport.

In August 2006, BAA and the Banning Chamber of Commerce held a groundbreaking at the Photosonics site to celebrate the commencement of construction on the Drag City project. The City was not involved in the planning of the groundbreaking but did provide a public address system and seating for the event.

Thereafter, BAA commenced clearing and grubbing pursuant to the grading permit issued in September 2005. This consisted of scraping the top level of the soil on the parcel to remove vegetation, rubbish, and rocks. The removed debris was left in large piles on the site. The site was left generally flat, but was not graded so as to be ready for development.

On November 30, 2006, the Federal Aviation Administration approved the release of the City parcel to BAA. At that time, the City was in the process of completing the removal of burrowing owls from the City parcel, a removal that was complete by February 2007. The owls were not on the Photosonics parcel and so their presence on the City parcel could not impede BAA from proceeding with grading or other work.

In February and March of 2007, the City’s Public Works Department inspected the Photosonics site and the City parcel and found that BAA had performed clearing and grubbing work but had not graded the site; had ceased implementing grading-related dust control measures; and had not implemented stormwater control measures.

In Spring and early Summer 2007, the City attempted to get BAA to complete the purchase of the City Parcel. Specifically, the City and BAA met on March 5th to discuss the project and on March 8, 2007, the City Attorney’s office sent a letter memorializing the agreement reached on March 5th that extended the escrow for the City parcel until April 13, 2007.

On April 16, 2007, the City Attorney’s office sent another letter to BAA extending the close of escrow until May 14, 2007.

On July 27, 2007, the City Attorney’s office sent a letter notifying BAA that BAA had failed to make the deposit required by the Purchase and Sale Agreement, that BAA was therefore in default of the Purchase and Sale Agreement, and that the City would only
continue that agreement upon the satisfaction of three conditions -- provision of evidence of sufficient funding for the project, commencement of construction on the drag strip within 90 days of the sale of the parcel, and the City's right to repurchase the parcel if BAA failed in its construction obligation. This letter extended the close of escrow until July 31, 2007.

On August 2, 2007, the City sent a letter to BAA reiterating its support for the project as envisioned by BAA and informing BAA that the City was completing the purchase of the Scharff parcel.

On September 10, 2007, BAA having not even made the deposit necessary to keep the transaction alive, the City Council voted to terminate the Master Agreement and the Purchase and Sale Agreement.

In September 2007, BAA, which had been established by Searles Company, was purchased in whole by Andy Marocco and Ron Marocco. Messrs. Marocco were the owners of AAR, which had assigned its interest in the project to BAA, and were the original recipients of the Permit and the entitlements thereunder.

On October 11, 2007, the City was informed that Andy and Ron Marocco, the owners of AAR, had wholly acquired BAA, the entity to whom that had assigned all of AAR's interest in the Permit back in 2005.

On October 23, 2007, the City and the Agency adopted resolutions formally terminating the Master Agreement and the Purchase and Sale Agreement.

On November 2, 2007, Andy Marocco wrote a letter to the City regarding the continued existence of the Permit. Mr. Marocco, having been the original recipient of the Permit, correctly presumed that the termination of the Master Agreement and the Purchase and Sale Agreement did not affect the Permit.

Thereafter, the City Attorney's office, in consultation with City Staff, determined that the Permit had expired due to the lack of work performed thereunder. A notification of this expiration was sent to Mr. Marocco at BAA. The City Attorney's office, noting that Condition 2 created a theoretical need to also revoke the Permit, determined that a hearing on the matter was necessary.
That determination having been made, this hearing was scheduled. Prior to this hearing, the Public Works Department again reviewed the site and found no new work being performed.

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9 BAA was responsible to make both an initial deposit of $163,750, and a second deposit of $491,250, the total of which represented the full price of the parcel. BAA failed to make the initial deposit of $163,750. The City allowed BAA several attempts to fund the deposit, but BAA was unable to do so. BAA never demonstrated an ability to financially satisfy the Purchase and Sale Agreement.
7 Cited above.
ANALYSIS:

As a preliminary matter, the Permit pre-existed the Master Agreement and the Purchase and Sale Agreement. And while the execution of the Master Agreement served to terminate several other agreements, it did not terminate or subsume the Permit. Thus, the Permit (and the Development Agreement) theoretically had continued force and effect even after the City and the Agency terminated the Master Agreement and Purchase and Sale Agreement.

1. The Permit Has Expired by Force of Law and by Its Own Terms.

BAA’s\(^8\) failure to exercise its rights under the Permit and begin construction or other appropriate evidence of use resulted in the Permit expiring of its own accord. BAA was given not one year, but 4 years to exercise its rights under the Permit.

The final extension of the Permit was not authorized under the Municipal Code because the Code only provided for three (3) twelve-month extensions of the Permit. Even assuming for the sake of argument the validity of the final extension, the Permit expired on August 14, 2005. BAA’s failure to commence construction or other appropriate evidence of use in reliance on the Permit by August 14, 2006, means that the Permit expired. Section 9116.8 of the Municipal Code in effect at the time read:

"A Conditional Use Permit\(^9\) shall be exercised by the commencement of construction or other appropriate evidence of use, as determined by the Planning Commission or its designee, within one year from the date of approval unless otherwise specified within the C.U.P. Upon the expiration of one year without such commencement of use, the Conditional Use Permit shall become null and void and of no further force or effect without further action by the City."

What is at issue, therefore is whether the work done by BAA constituted construction or other appropriate evidence of use. It did not. The extension of Barbour Street was not construction or other appropriate evidence of use because it was performed offsite, was funded by the Agency, and was a precursor to construction as opposed to actual construction. At the time the work was done, AAR and the City recognized that it was not construction or other appropriate evidence of use and therefore the City granted an extension of the Permit. Had the road work been construction or other appropriate evidence of use, it alone would have validated the permit and no extension would have been necessary. The official “groundbreaking” ceremony was not construction or other appropriate evidence of use, because it was a ceremonial event and the only work that followed it was the clearing and grubbing. With respect to clearing and grubbing, it consisted of scraping the top level of the soil on the parcel to remove vegetation, rubbish,

\(^8\) For purposes of the analysis, we will treat BAA and AAR as a single entity.

\(^9\) The City has always treated the Permit as a CUP for purposes of processing and Code Compliance, and we analyze it as such.
and rocks, piling the debris, and leaving the site generally flat, but not graded so as to be ready for development.

It has long been held in California that granting of a land use approval does not in and of itself confer an unlimited vested right to develop.\textsuperscript{10} Instead, a vested right to develop arises where actual building permits for identifiable work have been issued and substantial work has been done and substantial costs have been incurred in reliance on those permits.\textsuperscript{11} This requires not “soft costs” or other preconstruction work, but actual grading or construction of the project anticipated by the land use approval.

Under this test, the only work done was the extension of Barbour Street in 2004 and clearing and grubbing in 2006. The former is clearly preconstruction work, and neither AAR nor the City considered it to be construction or other appropriate evidence of use, because the City granted a Permit extension soon after the work was complete. Clearing and grubbing likewise is preconstruction work and considered “soft cost” work that precedes actual reliance on a permit. No ground was broken, no grading done, no work that substantially advanced the Drag City project was performed on the site.

In addition, the 2005 grading permits approved by the City required below-grade grading to create a “bowl” on the parcels. This was a change from the work anticipated by the Permit, which only required at-grade work and no substantial digging and off-haul of soil. In addition, BAA’s plans for the site required that the parking at the site would be changed, the drag strip would extend onto the Scharff parcel, the drag strip would start in the below-grade bowl instead of at grade, and the business park to be developed would be integrated into the plans for Drag City. BAA at the time acknowledged that the Permit would have to be substantially modified or reissued in light of BAA’s proposed changes to the drag strip and to the rest of the Site.

Because BAA failed to commence construction or other appropriate evidence of use on the project anticipated by the Permit, failed to propose the Permit modifications required to make the terms of the Permit comply with BAA’s plans for the site, and otherwise showed no appropriate evidence of use under the Permit, the Permit became “null and void and of no further force or effect” per Section 9116.8 as of August 14, 2006.

2. \textbf{Notwithstanding Expiration of the Permit, a Hearing is Proper.}

As discussed above, Condition 2 creates ambiguity. Theoretically non-occurrence of construction or other appropriate evidence of use required by the Permit would be “non-compliance to provisions” of the Permit requiring a revocation process. Thus, while the Permit has expired, the language of Condition 2 makes it arguable that revocation procedures are still necessary.

\textsuperscript{10} See Avco Community Developers, Inc. v. South Coast Reg’l Comm’n (1976) 17 Cal.3d 785.
\textsuperscript{11} Avco, 17 Cal.3d at 791, see also Hafen v. County of Orange (2005) 128 Cal.App.4th 133.
It was therefore determined that this revocation hearing should be held in accordance with Section 9116.11 of the Municipal Code (as in effect at the time the Permit was entered into). Section 9116.11 read:

"The commission may revoke or modify a Conditional Use Permit.... Prior to any modification or revocation of a conditional use permit the Planning Commission shall first hold a public hearing on the matter. A revocable Conditional Use Permit may be revoked or modified and an irrevocable Conditional Use Permit may be modified by the commission if any one (1) of the following findings can be made:

... (c) That the use for which the Conditional Use Permit was granted had ceased or was suspended for six (6) or more consecutive calendar months; 
(d) That one or more of the conditions of the Conditional Use Permit have not been met; 
..." \(^{12}\)

BAA’s failure to act on the site for a period of more than 6 months is sufficient grounds for revocation. BAA can be viewed to have failed in two ways: (1) BAA failed to perform construction or other appropriate evidence of use pursuant to the Permit; or (2) the Barbour Street extension or BAA’s clearing and grubbing was construction or other appropriate evidence of use, but because that work terminated in Autumn 2006 and no further work has been done, BAA has ceased or suspended work for more than 6 months.

3. Issues Before the Commission.

At this hearing, the Planning Commission is called on to support and affirm Staff’s determination that BAA failed to perform construction or other appropriate evidence of use so as to continue the validity of the permit. As a preliminary matter, the final extension of the Permit was not authorized under the Municipal Code because the Code only provided for three (3) twelve-month extensions of the Permit, and so the Permit expired on August 14, 2005. Even if the final extension is deemed to be valid, the work performed by BAA does not constitute construction or other appropriate evidence of use for the reasons cited above. The Commission is therefore asked to revoke the Permit and to base its revocation on the lack of construction or other appropriate evidence of use.

There are no other issues before the Commission. The potential economic impacts of a drag strip project are irrelevant, as is any community support for the project. The Municipal Code allowed three extensions; they were given and have all expired. The Code required construction or other appropriate evidence of use for the Permit to remain valid; no such work has occurred. The Commission should therefore revoke the Permit.

4. Result of Revocation.

\(^{12}\) Additional grounds existed but were not relevant to the matter before the Commission and have been omitted from this discussion.
Revocation of the Permit will fully and finally terminate any potential or theoretical rights still held by BAA. It remains the position of the City Attorney's office that expiration served to terminate those rights, but in an abundance of caution the Planning Commission is asked to formally revoke any interest remaining in the Permit.

Revocation will terminate the Development Agreement pursuant to the terms of the Development Agreement.

Revocation will not foreclose the possibility of a drag racing facility or other use on the site, but will simply require that BAA apply for a new permit and go through environmental review and conditioning of the project that will require the project to be consistent with the current General Plan and the current standards for development in the City.

**RECOMMENDATION:**
Staff respectfully recommends that the Planning Commission adopt Resolution No. 2008-05 formally revoking Unclassified Use Permit ("Permit") 01-47501 for a professional drag racing facility and associated improvements on Assessors Parcel Numbers 532-130-008 and 532-130-018.

Respectfully submitted,

[Signature]

Eric Vail, Assistant City Attorney

Exhibits:
1. Resolution No. 2008-05
2. Evidence Information, (Under separate cover) including the following documents
   1. Portions of the Code of the City of Banning, California (1965)
   2. Unclassified Use Permit No. 01-47501
   3. Notice of Determination filed with the County Clerk for the County of Riverside in support of Unclassified Use Permit No. 01-47501
   4. Ordinance No. 1308, adopted by the City Council on October 28, 2003, and approving Development Agreement No. 03-1504
   5. Master Agreement, dated December 13, 2005
   7. Resolution No. 2007-115
   8. Resolution No. 2007-117
   9. Staff Report of August 6, 2002, time extension for UUP 01-47501
   10. Letter of August 12, 2002, confirming extension for UUP 01-47501
   11. Letter of April 20, 2003, regarding work under UUP 01-47501
   12. Staff Report of April 22, 2003, regarding work under UUP 01-47501
   13. Staff Report of April 26, 2003, regarding granting of a grading permit under UUP 01-47501
   15. Staff Report of August 5, 2003, regarding extension of UUP 01-47501
16. Letter of October 9, 2003, regarding extension of UUP 01-47501
17. Letter of May 21, 2004, regarding extension of UUP 01-47501
19. Letter of January 21, 2005, regarding BAA beginning to take over the project from AAR
20. Letter of August 5, 2005, regarding extension of UUP 01-47501
21. Staff Report of August 9, 2005, regarding assignment and assumption by BAA of AAR rights, duties, and liabilities for Drag City project
22. Grading Permit No. 2005-06
23. Grading Permit No. 2003-07
24. Letter of October 23, 2006, regarding burrowing owl
25. Letter of March 8, 2007, regarding extension of escrow for BAA purchase of City parcel
26. Letter of April 10, 2007, regarding funding of BAA development of Drag City and business park
27. Letter of April 16, 2007, regarding extension of escrow for BAA purchase of City parcel
28. Staff Report of April 24, 2007, regarding status of Drag City project
29. Letter of May 17, 2007, regarding remediation of dust at site
30. Letter of July 9, 2007, regarding funding of BAA development of Drag City and business park
31. Letter of July 24, 2007, regarding funding of BAA purchase of City parcel
32. Letter of July 27, 2007, regarding BAA's default of the Purchase and Sale Agreement
33. Letter of August 2, 2007, regarding City's continued support of BAA's vision for the Drag City and business park projects
34. Letter of September 14, 2007, terminating Master Agreement and Purchase and Sale Agreement
35. Letter of September 14, 2007, terminating escrow under the Purchase and Sale Agreement
36. Letter of October 11, 2007, regarding sale of BAA to Andy and Ron Marocco
37. Letter of November 2, 2007, regarding continued viability of UUP 01-47501
UUP #01-47501
REVOCATION
DRAG CITY

RESOLUTION
NO. 2008-05

EXHIBIT "1"
RESOLUTION NO. 2008-05

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF BANNING, CALIFORNIA REVOKING UNCLASSIFIED USE PERMIT 01-47501.

WHEREAS, the purpose of this Resolution is to formally revoke the expired Unclassified Use Permit 01-47501 (the "Permit") which was granted by the Planning Commission on July 3, 2001 to All-American Racing ("AAR"), as more explicitly detailed below; and

WHEREAS, the purpose of the Permit was to allow a project known as "Drag City" and consisting of a professional drag racing facility and associated improvements on Assessors Parcel Numbers 532-130-008 and 532-130-018; and

WHEREAS, the Planning Commission has the authority per Section 9116.11 of the version of the Banning Municipal Code in effect at the time the expired Permit was granted and per Section 17.52.100 of the current version of the Municipal Code to revoke conditional use permits (including unclassified use permits); and

WHEREAS, in accordance with Government Code § 65854, on January 18, 2008, the City gave public notice by advertising in the Record Gazette Newspaper and by mailing to all property owners within 300 feet of the subject parcels of the holding of a public hearing at which the revocation of the Permit would be considered by the Planning Commission; and

WHEREAS, the Community Development Director has reviewed the revocation's potential effects on the environment and has recommended that the revocation is exempt from the California Environmental Quality Act ("CEQA") under CEQA Guidelines Sections 15270 and 15321; and

WHEREAS, on January 28, 2008, the Planning Commission held the noticed public hearing at which interested persons had an opportunity to testify in support of, or opposition to, the revocation of the Permit.

NOW THEREFORE, the Planning Commission does resolve, determine, find, and order, and recommend as follows:

Section 1: Environmental Findings under CEQA

1. The Planning Commission, in light of the whole record before it, including but not limited to the recommendation of the City Attorney and Community Development Director as provided in the Staff Report dated January 28, 2008, and documents incorporated therein by reference, and any other evidence within the record or provided at the public hearing of this matter, concludes that the revocation of the Permit is exempt from CEQA under CEQA Guidelines Sections 15270 and 15321 in that the revocation meets the criteria for application of a Class 21 Categorical Exemption and a Section 15270 Statutory Exemption.
Section 2: Findings of Fact.

The Planning Commission, in light of the whole record before it, including but not limited to the recommendation of the City Attorney and Community Development Director as provided in the Staff Report dated January 28, 2008, and documents incorporated therein by reference, and any other evidence within the record or provided at the public hearing of this matter, hereby makes the following findings of fact:

1. On July 3, 2001, the Planning Commission conditionally approved the Permit.

2. The Permit holder, Banning Airport Associates, LLP ("BAA"), is the successor-in-interest to All-American Racing, to whom the Permit was originally granted.

3. The Permit contained the following two conditions, which were, respectively, Planning Condition 1 and Planning Condition 2:

1. All conditions of approval attached to Unclassified Use Permit No. 01-47501 must be met within the time frames stipulated in each condition for each phase of development. In the event the subject Unclassified Use Permit is not exercised consistent with the time frame identified for each condition, the permit shall become subject to revocation.

   If no time frame is specified, the approval shall be for a period of one (1) year from the date of the Planning Commission’s approval (expiration date to be July 3, 2002). All conditions of approval for each phase of development must be met on or before their respective expiration date, or, the project proponent may request an amendment to the conditions at least thirty (30) days prior to the expiration date; otherwise, the approval shall expire and become null and void.

2. Non-compliance to provisions of Unclassified Use Permit 01-47501 may result in the City initiating procedures to revoke the subject Unclassified Use Permit. Further, if during the term of the permit the City determines based upon substantial evidence that permit activity is exercised as to be detrimental to the public health or safety, or so as to be a nuisance to other businesses in the general area, the permit shall be subject to revocation as outlined in Article 21 (Revocation of Permits) of the Banning Ordinance Code. [sic]

4. The Permit is governed by the version of the Municipal Code in existence at the time the Permit was granted in 2001. Subsequent changes to the Municipal Code may not be used to detract from the rights granted BAA under the Permit. The Planning Commission will therefore apply the version of the Municipal Code in existence at the time the Permit was granted to the facts of this case.

5. In accordance with Section 9112 of the Code that was in effect at the time of the
 Permit, unclassified use permits were to be processed in the manner specified for
conditional use permits.

6. Section 9116.8 of that version of the Municipal Code addressed the time period
for the commencement of construction or use under a permit and read:

A Conditional Use Permit\(^1\) shall be exercised by the commencement of
construction or other appropriate evidence of use, as determined by the
Planning Commission or its designee, within one year from the date of
approval unless otherwise specified within the C.U.P. Upon the
expiration of one year without such commencement of use, the
Conditional Use Permit shall become null and void and of no further
force or effect without further action by the City.

If after commencement of any related construction, work is
discontinued, before completion, for a period of one year, then the
Conditional Use Permit shall become null and void and of no further
force or effect without further action by the City.

7. Section 9116.10 of that version of the Municipal Code addressed extensions of
permits and read in relevant part:

The Community Development Director may, upon an application
being filed thirty days prior to expiration and for good cause, grant
preliminary extension of the time within which the C.U.P. is to be
exercised pursuant to Section 9116.8 above. Such period shall not
exceed twelve months from the date the extension is approved. In no
instance shall more than three extensions be granted.... The
Community Development Director shall advise the Planning
Commission of his/her approvals hereunder by report at the Planning
Commission meeting immediately following such date of approval.
Any approval granted hereunder shall become final five (5) days
following date of such Planning Commission meeting unless modified
or rejected by the Planning Commission.

8. Section 9116.11 of that version of the Municipal Code addressed extensions of
permits and read in relevant part:

The commission may revoke or modify a Conditional Use Permit as
hereinafter provided. Prior to any modification or revocation of a
conditional use permit the Planning Commission shall first hold a
public hearing on the matter....

\(^1\) The City and the developer have, from the time the Permit was sought treated the Permit as a CUP for
purposes of processing and Code Compliance.
A revocable Conditional Use Permit may be revoked or modified and an irrevocable Conditional Use Permit may be modified by the commission if any one (1) of the following findings can be made:

(a) That circumstances have changed so that one (1) or more of the findings contained in Section 9116.6 (Findings) can no longer be made;
(b) That the Conditional Use Permit was obtained by misrepresentation or fraud;
(c) That the use for which the Conditional Use Permit was granted had ceased or was suspended for six (6) or more consecutive calendar months;
(d) That one or more of the conditions of the Conditional Use Permit have not been met;
(e) That the use is in violation of any statute, ordinance, law, or regulation; or
(f) That the use permitted by the Conditional Use Permit is detrimental to the public health, safety or welfare or constitutes a nuisance.

9. On August 1, 2002, the Planning Commission adopted a resolution supporting the determination of staff that the Permit should be extended for one year, thus extending the life of the Permit for a second year.

10. On November 26, 2002, the Redevelopment Agency of the City of Banning ("Agency") and AAR entered into a Reimbursement Agreement under which AAR would construct certain improvements to Barbour Street and the Agency would fund the construction.

11. On July 23, 2003, the City through Resolution No. 2003-34 granted to AAR a grading permit consistent with the grading required by the Permit. AAR performed some preliminary clearing and grubbing of the site, but did not perform any grading pursuant to the grading permit. The clearing and grubbing that was done consisted solely of scraping the top level of the soil on the parcel to remove vegetation, rubbish, and rocks.

12. On August 5, 2003, the City extended the Permit for an additional year and made some amendments to the conditions of the Permit. This was the second extension of the Permit and it stated that the Permit was due to expire on August 14, 2004.

13. On October 28, 2003, the City Council approved Ordinance No. 1308, establishing a development agreement that served to govern the development of the Drag City. Pursuant to Section 4.2 of the Development Agreement, its term would expire at the same time the Permit expired.

14. In early 2004 and concluding in May 2004, Barbour Street was extended from Hathaway east to the entrance of the site. This work was performed entirely off-site, and included the construction of the street, pipes under the street, and curbs and gutters.
While this work complied with Engineering Condition B.1 of the Permit, it was also done to satisfy AAR’s obligations to the Agency under the Reimbursement Agreement.

15. Subsequent to the improvement of Barbour Street, on June 25, 2004, the Agency and AAR entered into a Cost Support Agreement under which the Agency committed additional funds to fully cover the costs of the Barbour Street improvements.

16. On July 30, 2004, a third extension (mistakenly identified as the second extension) was granted based on the off-site improvements and AAR’s assertion that the preparation of building plans was under way. Based on this third extension, the Permit was due to expire on or about August 14, 2005.

17. In the Spring of 2005, AAR assigned all of its interest in the project and all related approvals — including the Permit — to Banning Airport Associates, LLC, (“BAA”).

18. On August 9, 2005, the City Council and Redevelopment Agency approved an assignment and assumption agreement between AAR and BAA under which BAA took over the project and at the same time, AAR released all rights, obligations, and claims it had against the City.

19. On August 14, 2005, the City granted to BAA a fourth and final extension (mistakenly called the third and final extension) of the then-expired Permit. Based on this fourth extension, the Permit was due to expire on or about August 14, 2006.

20. On September 22, 2005, a second grading permit was issued for the site, this time to BAA, which grading permit was for work that went beyond the scope of the Permit and anticipated modification to the Permit or the issuance of a new use permit.

21. Upon receipt of this grading permit, BAA commenced clearing and grubbing pursuant to the grading permit issued in September 2005. This consisted of scraping the top level of the soil on the parcel to remove vegetation, rubbish, and rocks. The removed debris was left in large piles on the site. The site was left generally flat, but was not graded so as to be ready for development.

22. In August 2006, BAA and the Banning Chamber of Commerce held a groundbreaking at the site of the Drag City project to celebrate the commencement of construction on the Drag City project. The City was not involved in the planning of the groundbreaking but did provide a public address system and seating for the event.

23. Prior to the groundbreaking ceremony, BAA brought grading equipment onto the site. Some minor grading of the site had been performed for the ceremony, but the site remained substantially ungraded.

24. Subsequent to the groundbreaking, BAA performed some dust remediation work on the site. BAA at no time performed substantial grading of the site, and the site was not maintained in cleared and grubbed state.
25. In March 2007, BAA ceased performing dust remediation work on the site and has performed no further work on the site, although some grading equipment remains on the site.

Section 3: Determinations and Conclusions.

The Planning Commission, in light of the whole record before it, including but not limited to the foregoing findings of fact, the recommendation of the City Attorney and Community Development Director as provided in the Staff Report dated January 28, 2008, and documents incorporated therein by reference, and any other evidence within the record or provided at the public hearing of this matter, hereby makes the following determinations and conclusions:

1. No further extensions of the expired Permit may be made, pursuant to Section 9116.8 of the version of the Municipal Code in existence at the time the expired Permit was granted. That provision provided that only three (3) extensions were allowed by law, and the Permit has already been extended four (4) times.

2. Expiration of the Permit served to extinguish on its own terms the development agreement adopted pursuant to Ordinance No. 1308, because the Permit has terminated and is of no further force.

3. Issuance of a grading permit and the moving of equipment onto the site was not “construction or other appropriate evidence of use” sufficient to validate the Permit pursuant to Section 9116.8 of the version of the Municipal Code in existence at the time the Permit was granted. Without commencement of actual grading, mere preparatory actions do not constitute evidence of use or construction.

4. The clearing and grubbing work performed pursuant to the July 23, 2003 grading permit was not “construction or other appropriate evidence of use” sufficient to validate the Permit pursuant to Section 9116.8 of the version of the Municipal Code in existence at the time the Permit was granted. The work was mere site preparation and did not constitute the “commencement of construction.”

5. The clearing and grubbing work performed pursuant to the September 22, 2005 grading permit was not “construction or other appropriate evidence of use” sufficient to validate the Permit pursuant to Section 9116.8 of the version of the Municipal Code in existence at the time the Permit was granted. The work was mere site preparation and did not constitute the “commencement of construction.”

6. The extension of Barbour Street was not “construction or other appropriate evidence of use” sufficient to validate the Permit pursuant to Section 9116.8 of the version of the Municipal Code in existence at the time the Permit was granted. The work was done completely off-site and was paid for with Redevelopment Agency funds. The actions of AAR in seeking a permit extension and the City in granting that extension
subsequent to completion of the Barbour Street improvements serve as evidence that at the time the improvements were made the parties knew that they were insufficient to validate the permit.

7. In addition to the extension of Barbour Street and the clearing and grubbing work being insufficient to validate the Permit pursuant to Section 9116.8, BAA ceased work in March 2007 and abandoned the project as of that date.

8. Both BAA’s failure to commence construction or other appropriate evidence of use and BAA’s cessation or abandonment for more than six months of that limited work that it actually undertook are grounds to revoke the Permit and in doing so to affirm the fact that the Permit has expired.

Section 4: Revocation of Unclassified Use Permit 01-47501.

The Planning Commission, in light of the whole record before it, including but not limited to the foregoing findings of fact, determinations and conclusions, the recommendation of the City Attorney and Community Development Director as provided in the Staff Report dated January 28, 2008, and documents incorporated therein by reference, and any other evidence within the record or provided at the public hearing of this matter, hereby revokes Unclassified Use Permit 01-47501 and by so doing terminates any right or interest claimed by BAA or any of its principals, subsidiaries, agents, successors-in-interest, or anyone claiming any assignment of interest under the Permit.

PASSED, APPROVED AND ADOPTED this 28th day of January, 2008.

____________________________________________
Betty DeSantis, Chairperson
Banning Planning Commission

APPROVED AS TO FORM AND LEGAL CONTENT:

____________________________________________
Burke, Williams & Sorensen, LLP
City Attorney
City of Banning, California
CERTIFICATION:

I, Virginia Sorenson, Recording Secretary of the Planning Commission of the City of Banning, California, do hereby certify that the foregoing Resolution No. 2008-05, was duly adopted by the Planning Commission of the City of Banning, California, at a special meeting thereof held on the 28th day of January, 2008 by the following vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

Virginia Sorenson, Recording Secretary
City of Banning, California