

Memorandum

To: CHAIR AND COMMISSIONERS

CTC Meeting: July 19-20, 2006

Reference No.: 2.4d.(2)
Action

From: CINDY McKIM
Chief Financial Officer

Prepared by: Bimla G. Rhinehart
Division Chief
Right of Way and Land Surveys

Subject: **DIRECTOR'S DEEDS**

RECOMMENDATION:

The Department of Transportation (Department) recommends the California Transportation Commission authorize the execution of the Director's Deeds summarized below. The conveyances of excess Department-owned real property, including exchanges, are pursuant to Section 118 of the Streets and Highways Code. The items described below involve an estimated current value of \$3,065,521. The Department will receive a return of \$3,065,521 from the sale of these properties. A recapitulation of the items presented and corresponding maps are attached.

01-4-Mrn-101 PM 10.3/10.4
Disposal Unit DD 030304 01 01
DD 032876 01 01

Convey to R.A.B. Motors, Inc., a California corporation

San Rafael
43,774 sf
45,241 sf
\$3,065,521 (Appraisal \$3,065,521)

BACKGROUND:

The Department is acquiring Parcel 54602-1 containing 13,078 square feet in fee, Parcel 54602-2, a permanent utility easement containing 2,712 square feet, and Parcel 54602-3, a temporary construction easement containing 2,712 square feet, from R.A.B. Motors, Inc., a California corporation, hereinafter "R.A.B.", for the U.S. Route 101 High Occupancy Vehicle (HOV) lane project in the city of San Rafael (City). The automobile dealership was established by the current owner 46 years ago and has consistently maintained the highest customer satisfaction scores in its region, the western United States. The acquired area was the sole area used by the dealership for pre-owned automobile display and customer parking.

In the before condition, R.A.B. has 4.4± acres in its current facility used as a solo new and used Mercedes dealership. It has housed other franchises over the years but has moved them to other sites as the demands of the Mercedes dealership grew. To remain in compliance with its Mercedes Benz passenger car dealership agreement ("Agreement"), R.A.B. must continue to meet the numerous standards set by Mercedes Benz USA ("MBUSA"), such as capitalization requirements, year end profitability, new vehicle sales, certified pre-owned sales, customer pay labor sales, total parts purchased from MBUSA, dealer loyalty (repeat sales), and service satisfaction. Unless the impacts of the Department's taking are mitigated, as proposed in this exchange, R.A.B. contends it will sustain substantial severance and business goodwill losses. Additionally, R.A.B. maintains it will

suffer the loss of the franchise due to its inability to maintain previous performance levels and consequent non-compliance with the Agreement.¹

Based on the opinion of District legal counsel and the Department's appraiser, the best solution to mitigate the loss of business goodwill and severance damages resulting from the post acquisition non-conforming status of the dealership would be to convey Parcels DD 030304-01-01 and DD 032876-01-01 to R.A.B as an exchange, and as a part of the global settlement for Department's requirements from Parcel 54602. Under the proposed exchange, the Department will convey Parcel DD 030304-01-01, which contains 43,774 square feet, including 5,717 square feet encumbered with a storm drainage easement. The Department will also convey Parcel DD 032876-01-01, which is comprised of 45,241 square feet.

The following key points summarize the extensive and compelling support for this exchange:

- Pre-owned automobile sales contribute approximately 26 percent of R.A.B.'s gross revenue.
- R.A.B. asserts that the Department's taking without the exchange leaves R.A.B. in non-compliance with the new franchise standards which will be triggered by the State's taking and contends it will lose its franchise. In a manner similar to the requirements of the Americans with Disabilities Act (ADA), a change in the status of the operation allows the franchiser to require additional customer parking and car storage for used and new cars. Without the exchange of both State parcels, RAB asserts that they will be in non-compliance.
- The estimated cost to cure the loss of the front display space to meet the new requirements of the franchiser is \$4,500,000. The negotiated exchange of Parcel DD 032876-01-01 saves the State \$2.7 million.
- Without the exchange of these two parcels, the Department will be subject to extensive, costly claims for severance damages and loss of business goodwill. R.A.B. is claiming in excess of \$11,000,000 for such losses. This figure does not include the loss of business goodwill for its new car sales, which could lead to much higher claims should the matter proceed to trial.
- Pre-trial litigation costs are estimated to range from \$300,000 to \$600,000 for each party. If the matter goes to trial and the Department is unsuccessful in defending the action, it could be subject to an estimated additional \$1,000,000 for R.A.B.'s attorney's fees.

DEPARTMENT'S ACQUISITION

The property being acquired from R.A.B. by the Department is as follows:

- 13,078 square feet in fee from the front of the automobile dealership.
- 2,712 square foot permanent easement for utility purposes across the front of the remaining property.

¹ Because this matter will proceed to litigation if the conveyances are not approved, the issues are presented in the context of RAB's claims and allegations and by this document the Department does not concede or acknowledge the validity thereof. The issues are presented so that the Commission may assess the potential legal and monetary exposure relative to the exchange and assignment of the subject excess parcels.

- 2,712 square foot temporary construction easement for a term of one year in the same area as the permanent utility easement.

The Department's fee acquisition of the 13,078 square foot area from the front of the automobile dealership consists of a paved and landscaped area. This area served as the dealership's entire pre-owned car display and customer parking area. Because the Department's acquisition is essentially up to the face of the building, it results in the elimination of the dealership's entire pre-owned vehicle display and customer parking area.

The Department's appraiser confirmed with MBUSA that R.A.B.'s volume of pre-owned vehicle sales in 2002 was 390 automobiles; in 2003 it sold 418 cars, an increase of seven percent. The anticipated growth between 2002 and 2008, absent the Department's acquisition, is expected to be 40 percent. MBUSA also confirmed that there is strong pressure on under-producing franchisees to relinquish their franchise. R.A.B. contends they will lose their franchise without the conveyance of the Department's two excess parcels. Without these two parcels they will not be able to meet the franchiser's requirements in the number of pre-owned and new cars sold, nor will they have the required areas for customer parking.

Annual pre-owned sales for 2004 and 2005 averaged 26 percent of the total sales. Based on these figures, the impact on gross revenue and business goodwill from the loss of the space housing the pre-owned vehicle inventory is clearly significant. Aside from the financial costs, the loss of the pre-owned automobile display area impacts R.A.B. in two other ways. It jeopardizes R.A.B.'s compliance with the Agreement that requires the automobile dealer to have a property of sufficient size to sell pre-owned automobiles. In addition, it impacts new automobile sales in that the Agreement bases the number of new automobiles provided to a dealership on the number of pre-owned automobiles sold and the size of the display area. The Agreement also requires adequate customer parking, the loss of which is also a result of the Department's acquisition.

In addition, R.A.B. contends that the impacted configuration of the dealership as a result of the Department's acquisition, if left unmitigated, will significantly affect the non-physical, intangible requirements of the Agreement. These requirements, such as customer satisfaction, dealer loyalty, service satisfaction, etc. are essential components of R.A.B.'s compliance with the Agreement and its ranking as a leading dealership in good standing with the franchiser. R.A.B. contends, with MBUSA and industry support, that the highly competitive nature of high-end car dealerships such as Mercedes Benz requires compliance with all aspects of the dealership agreement.

ELEMENTS OF COMPENSATION

A partial acquisition of property on which an ongoing, profitable business is being conducted entails various elements of compensation. The Department is facing claims of compensation for the real property interests being acquired, severance damage to the remaining land and buildings, and loss of business goodwill. The estimated total value of these claims from the Department's appraiser's estimate of compensation for the property to be taken and severance damages is \$3,027,500 plus \$5,000,000 for loss of business goodwill. R.A.B.'s appraiser's current estimated monetary claim, if the case were to proceed to trial, is \$5,405,595 for the property to be taken and severance damages, plus \$6,032,316 for loss of business goodwill resulting from the elimination of the pre-owned

vehicle sales business, for a total current claim of \$11,437,911. In addition, R.A.B. will make an additional, as yet unquantified but likely significant, claim at trial for the impact of the loss of the pre-owned vehicle sales business on R.A.B.'s new vehicle sales as per the provisions of the Agreement linking the two aspects of the business. The configuration of R.A.B.'s property in the before condition made it possible to conduct a highly profitable pre-owned vehicle sales business while devoting only a small amount of land to that use. It strategically allowed for the prominent display of pre-owned vehicles in front of the new car showroom, next to Francisco Boulevard West and the freeway. It provided convenient customer parking and also allowed the dealership to keep its sales and supporting staff for both pre-owned and new vehicle sales, service and parts under one roof. Now that the display area is being taken by the Department, the pre-owned vehicle sales business can no longer be conducted on the remaining R.A.B. property and there is no longer space for on-site customer parking.

The proposed settlement involves the exchange of the two excess parcels to mitigate the severance damages and loss of business goodwill claims. In brief, the settlement provides that R.A.B. will be compensated \$1,259,046 in a global settlement for the Department's acquisition inclusive of all claims of severance damage, loss of business goodwill, costs, fees and interest. Settlement at this amount is dependent on R.A.B. acquiring the excess parcels from the Department and being able to remain in business at this location. R.A.B. will pay \$1,255,881 for the acquisition of Department's excess Parcel DD 030304-01-01 and \$1,809,640 for Parcel DD 032876-01-01 for a total of \$3,065,521. Settlement on this basis avoids costly and time-consuming litigation and exposure to a jury verdict, which could minimally be in the \$8 million range on the Department's own testimony to an upward exposure of over \$15 million based on R.A.B.'s current valuation. The Department's appraiser agreed that because the front display area generates 26 percent of R.A.B.'s gross income, the total loss of the pre-owned display space and customer parking spaces would cause a total loss of business goodwill.

THE EXCHANGE PARCELS

Parcel DD 030304-01-01

The Department acquired this parcel, which is contiguous to R.A.B. on the southwesterly side, in 1972 with the intent to use it to mitigate a portion of the severance damage and loss of business goodwill claims of adjoining owners. This parcel and the R.A.B parcel are encumbered by an open drainage easement between the properties, each party owning to the centerline. Under the terms of the proposed settlement, 43,774 square feet are being conveyed to R.A.B., which includes 5,717 square feet in the drainage easement. Allowing for city-imposed setbacks, there remains a developable area of approximately 27,900 square feet. The square footage in the drainage easement has been assigned a nominal value. The Department will receive \$33 per square foot on the 38,057 square foot balance, for a total of \$1,255,881. This value takes into consideration the fact that the parcel is approximately four feet below the grade level of realigned Francisco Boulevard West and will require significant fill. Under the proposed settlement, the Department will convey this parcel to R.A.B. in partial mitigation of severance damage and loss of business goodwill claims.

This parcel is approximately 181 linear feet wide including the area in the drainage easement. It is part of a larger parcel that was divided into two parcels (Parcels DD 030304-01-01 and DD 030304-

01-02) in order to mitigate the severance damage and loss of business goodwill claims of R.A.B. and the other adjoining owner.

Parcel DD 032876-01-01 (54604-01-02, 54605-01-01, 54606-01-01)

This parcel is the result of joining four parcels, which were acquired by the Department in 1969, 2002, and 2003. It consists of Parcels 32876 and a portion of 54604, 54605, and 54606. Parcel 32876 was the remainder portion of a parcel acquired for the realignment of Rice Drive and the intersection of Rice Drive and Francisco Boulevard West. Parcels 54604, 54605, and 54606 were acquired as full takes by the Department in order to mitigate severance damages and loss of business goodwill claims from the adjoining owners. Under the terms of the proposed settlement, the properties are being conveyed to R.A.B. as one parcel for \$40 per square foot for 45,241 square feet, for a total of \$1,809,640. This parcel is contiguous to R.A.B.'s existing property and will be used to accommodate the effects of shifting and reconfiguring the operation as a result of the Department's acquisition. Parcel 54604 was divided into Parcels 54604-01-01 and 54604-01-02. As noted above, the latter parcel was incorporated into Parcel DD 032876-01-01. Parcel 54604-01-01 is part of a future exchange, subject to the approval of the California Transportation Commission (Commission), for a taking from Parcel 54603. This owner does not have an interest in acquiring additional property other than that which is necessary for the mitigation of the Department's acquisition.

- These four parcels will not be salable as individual parcels since they lack the required width as set forth in city ordinances.
- The assembled parcel is approximately 165 linear feet deep at the southwesterly corner and tapers down to approximately 65 linear feet at the northwesterly corner adjacent to Rice Drive limiting the choices for building sites. Allowing for city setback requirements, 30,600± square feet remain available for development. Any development of the site will be restricted by the existing four foot sewer easement running from north to south across the rear third of the parcel. The City will require that the easement be expanded to 10 feet at the time of any development
- This parcel is located in the Francisco Boulevard West Commercial District (FBWCD). The designation was specifically designed to subject developments along Francisco Boulevard West to an initial use permit review by the Planning Commission. No development is permitted by right; all development is subject to conditional use permit and must go through the Project Selection Process.
- The Project Selection Process would grant approval only to those projects that are determined to be 'High Priority' i.e., those projects that would produce limited additional traffic on the already load-strained city streets. The criteria for determining 'High Priority' are defined as high tax-generating uses, affordable housing projects, and valued community service or public benefit projects. The subject site would be most suited to a high tax-generating user in this location.
- The City's highest tax revenue generators are Home Depot, R.A.B. Motors, Inc. and Sonnen Motorcars II, LLC. Interviews with brokers, buyers, sellers, and City Planning Department staff confirmed the City's preference for automobile dealerships in this area. The likely requirement

that a business generate over \$300,000 in annual sales tax revenue to the City restricts smaller retail businesses and favors those businesses with a regional draw such as franchise automobile dealerships.

- The most recent developments on Francisco Boulevard West are big-box retail or automobile-related sales. A buyer would most probably try to option the property while attempting to obtain development permits or would expect a heavily discounted sales price to reflect the high risk of development. While enjoying good visibility, the size of the parcel would likely preclude high tax-generating businesses from considering this site.
- This parcel is far below average size for this area and encumbered by a poorly situated utility easement. Under the current FBWCD plan, a buyer in the open market would be unable to obtain development permits. For these reasons, if offered on the open market, the parcel likely may bring less than \$20 per square foot given the above listed limiting conditions the highest and best use is as plottage to the parcel on the westerly side owned by R.A.B. at the proposed settlement of \$40 per square foot.

SUMMARY

The owners of R.A.B. contend that the only way that the Mercedes Benz dealership can continue and remain in compliance with the Agreement is to relocate the dealership's pre-owned vehicles sales facility on Parcel DD 030304-01-01 and shift other operational needs, such as loss of storage and parking resulting from such a relocation to Parcel DD 032876-01-01. In the before condition, R.A.B. leased a significant portion of Parcel DD 030304-01-01 from the Department and used it primarily to store approximately 75 vehicles. In the after condition, because the pre-owned vehicles will no longer be on-site, RAB will need to improve this parcel with a building as well as with a pedestrian footbridge to connect it to the existing facility in order to use it as a pre-owned sales facility. Thus, as a result of the Department's acquisition, R.A.B. will need replacement vehicle storage spaces to operate its business and be in compliance with the minimum new/pre-owned vehicle storage spaces required by the Agreement.

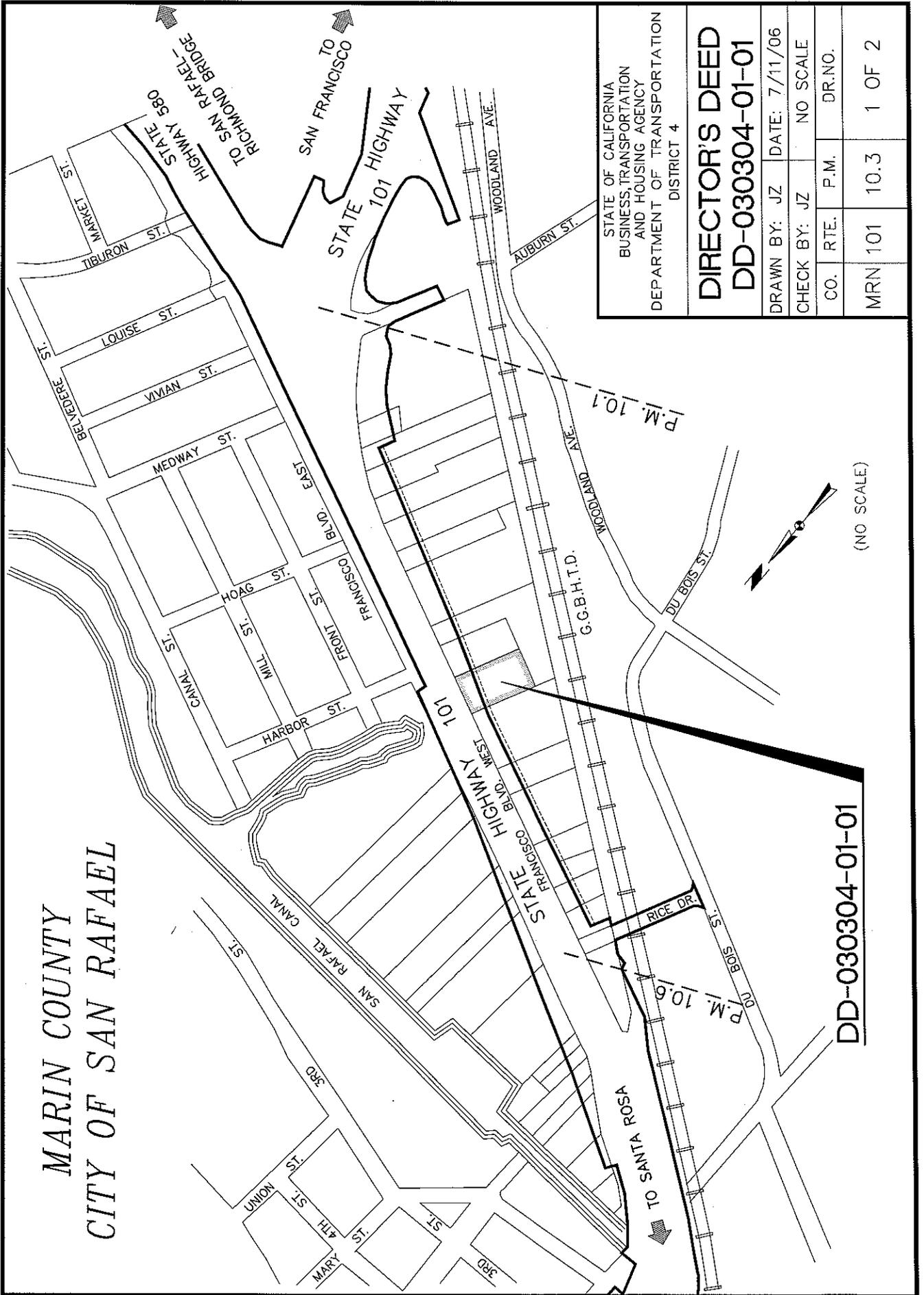
R.A.B. estimates that during the construction of the pre-owned vehicle sales facility on Parcel DD 030304-01-01 they will lose approximately 129 of their current 503 spaces. It is estimated that the construction of the sales facility will take at least three years from the time the exchange is approved by the Commission. Once the new facility is in place, there will only be 449 total spaces, resulting in a permanent loss of 54 spaces. The spaces lost will primarily be new and pre-owned vehicle storage spaces. R.A.B contends it will use Parcel DD 032876-01-01 to mitigate the temporary and permanent loss of new and pre-owned vehicle storage and to cure the effects of reconfiguration of the business necessitated by the Department's acquisition, and as required for the Mercedes dealership to remain in compliance with the Agreement. In addition, because of the higher plottage value, exchange of Parcel DD 032876-01-01 at \$40 per square foot will bring the highest return to the Department.

There is no dispute that the Department's acquisition of the entire front display space from the R.A.B. property will have a significant adverse impact on the operation of the business as currently conducted. The only argument is the extent of the loss that could be found by a jury. A review of

eminent domain verdicts over the past ten years shows that juries have rendered numerous verdicts for businesses in similar factual situations in the eight to ten million-dollar range. Without the exchange of the excess parcels, which mitigates R.A.B.'s damages, losses resulting from severance damages and loss of business goodwill in excess of \$11,000,000, not including loss of business goodwill attributable to new car sales, will likely be claimed in the event of trial. Approval of the exchange of these parcels by the Commission will save the Department potential pre-trial litigation costs in the range of \$300,000 to \$600,000 for the eminent domain action. In addition to these costs, if this matter proceeds to a jury trial and R.A.B. is successful in establishing its claimed damages, the Department could be required to pay attorney's fees to R.A.B. Given the magnitude and complexity of the valuation issues and anticipated duration of litigation and trial, these fees are estimated to be in the range of \$1,000,000. It is in the best interest of the Department to move forward with the proposed global settlement and exchange as settlement on this basis eliminates the Department's exposure to claims of severance damage, loss of business goodwill from pre-owned and new car sales and attorney's fees.

Attachments

MARIN COUNTY
CITY OF SAN RAFAEL



STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION
AND HOUSING AGENCY
DEPARTMENT OF TRANSPORTATION
DISTRICT 4

DIRECTOR'S DEED
DD-030304-01-01

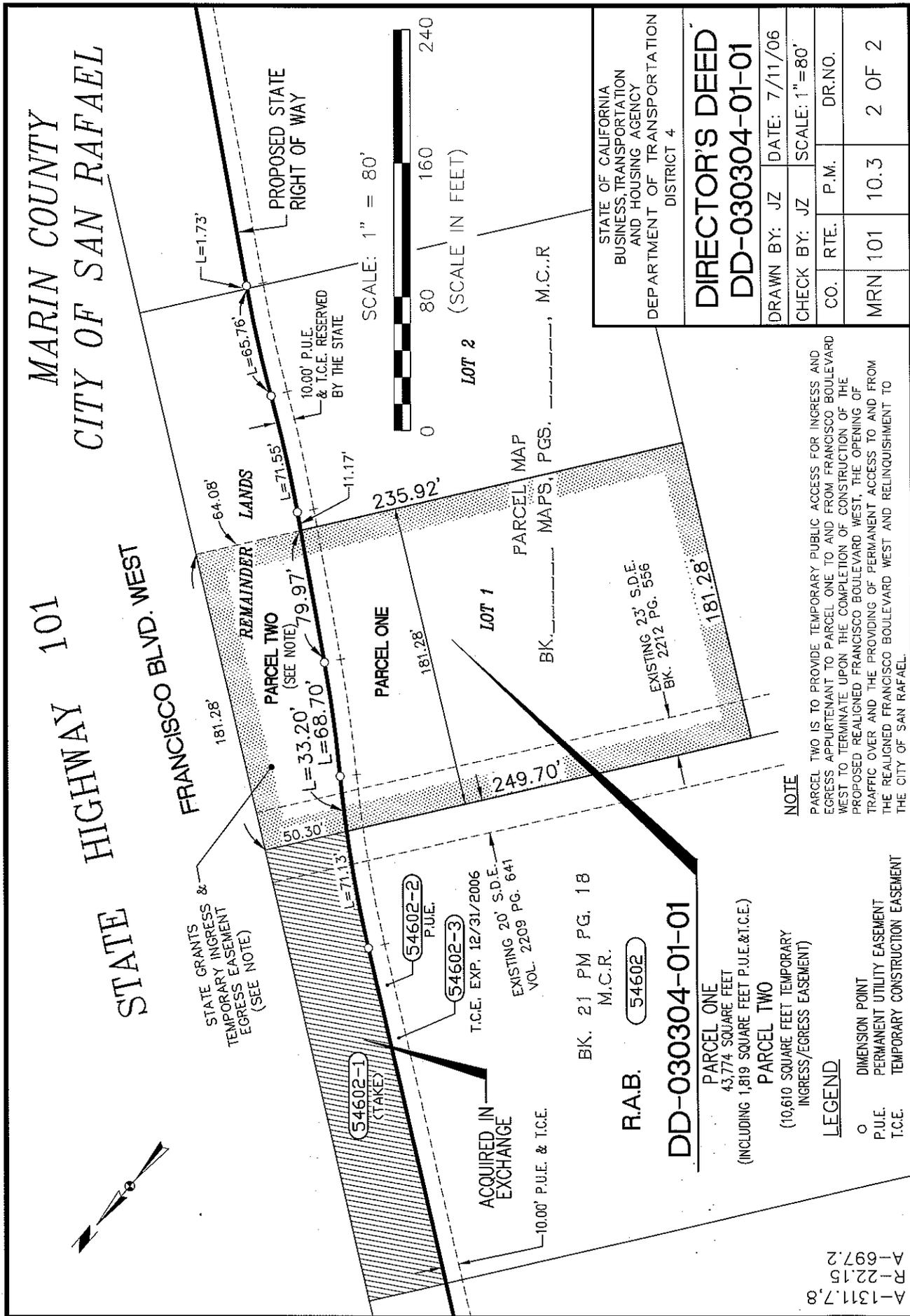
DRAWN BY: JZ	DATE: 7/11/06	
CHECK BY: JZ	NO SCALE	
CO. RTE.	P.M.	DR.NO.
MRN 101	10.3	1 OF 2

DD-030304-01-01

(NO SCALE)

MARIN COUNTY
CITY OF SAN RAFAEL

STATE HIGHWAY 101
FRANCISCO BLVD. WEST



STATE OF CALIFORNIA BUSINESS, TRANSPORTATION AND HOUSING AGENCY DEPARTMENT OF TRANSPORTATION DISTRICT 4			
DIRECTOR'S DEED			
DD-030304-01-01			
DRAWN BY: JZ	DATE: 7/11/06		
CHECK BY: JZ	SCALE: 1"=80'		
CO.	RTE.	P.M.	DR.NO.
MRN 101	10.3		2 OF 2

NOTE
PARCEL TWO IS TO PROVIDE TEMPORARY PUBLIC ACCESS FOR INGRESS AND EGRESS APPURTENANT TO PARCEL ONE TO AND FROM FRANCISCO BOULEVARD WEST TO TERMINATE UPON THE COMPLETION OF CONSTRUCTION OF THE PROPOSED REALIGNED FRANCISCO BOULEVARD WEST, THE OPENING OF TRAFFIC OVER AND THE PROVIDING OF PERMANENT ACCESS TO AND FROM THE REALIGNED FRANCISCO BOULEVARD WEST AND RELINQUISHMENT TO THE CITY OF SAN RAFAEL.

R.A.B. (54602)
BK. 21 PM PG. 18
M.C.R.
DD-030304-01-01

PARCEL ONE
43,774 SQUARE FEET
(INCLUDING 1,819 SQUARE FEET P.U.E.&T.C.E.)
PARCEL TWO
(10,610 SQUARE FEET TEMPORARY INGRESS/EGRESS EASEMENT)

LEGEND
O DIMENSION POINT
P.U.E. PERMANENT UTILITY EASEMENT
T.C.E. TEMPORARY CONSTRUCTION EASEMENT

A-1311.2,8
P-22215
A-697.2