



TO: Honorable Mayor and City Council Members
Attention: Aaron M. Busch, City Manager

FROM: Aaron M. Busch, City Manager
(Staff contact: Aaron Busch (707) 449-5100)

SUBJECT: RESOLUTION OF THE CITY COUNCIL OF THE CITY OF VACAVILLE APPROVING AN EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT BETWEEN THE CITY OF VACAVILLE AND MENARD ENERGY STORAGE LLC TO NEGOTIATE A DISPOSITION AND DEVELOPMENT AGREEMENT FOR A BATTERY ENERGY STORAGE FACILITY AND COMMUNITY SPORTS COMPLEX ON A 52.40 ACRE CITY OWNED PARCEL AT 7050 LEISURE TOWN ROAD (SOLANO COUNTY APN 0106-280-020)

ACTION FOR CONSIDERATION:

Consider adopting an Exclusive Negotiating Rights Agreement (ENRA) between the City of Vacaville and Menard Energy Storage, LLC. for the development of a utility-scale battery energy storage facility(ies) as well as a community sports complex on City owned property.

RECOMMENDATION:

By simple motion, adopt the subject resolution.

BACKGROUND:

The City of Vacaville (City) owns the site of the former Gibson Canyon Creek Wastewater Treatment Plant (Gibson Plant) which is shown on Attachment 1. Albertson's Distribution Center and Mariani Packing Company were the sole users of the Gibson Plant, and the City operated the facility on their behalf. Operation of the Gibson Plant resulted in groundwater contamination from unlined ponds, and a groundwater remediation system was constructed in 2005/2006. Wastewater flows to the Gibson Plant ceased in December 2006 as ordered by the Regional Water Quality Control Board. Mariani Packing Company ("Mariani") constructed a pretreatment facility on their site and began discharging effluent from that facility into the City's sewer system for treatment at the Easterly Wastewater Treatment Plant. The final closure of the Gibson Plant was completed and approved by the Regional Water Quality Control Board on January 20, 2009. City staff had evaluated the property for "other" public uses and determined that there is no public use for the City on this property.

Pursuant to an agreement between the City and Mariani (06/25/2006), the City agreed to use good faith and diligent efforts to maximize the proceeds from the reuse (sale, transfer, or exchange) of the Gibson Canyon property. The agreement contains provisions for the distribution of the net proceeds of the reuse between Mariani and the City. All previous attempts to reuse the property had been unsuccessful until early 2020, when the City received an inquiry from Dale Fredericks of Menard Energy Storage LLC, ("Menard Energy") to purchase the property for the development of a battery energy storage facility.

Given the obligations in the Mariani agreement and the lack of a City use for the property, staff recommended to the City Council that the property be considered "Surplus Land". This would allow the City to sell the property to an interested buyer.

Under the Surplus Land Act, Government Code Section 54200- 54232, surplus property is defined as "land owned by any agency of the state, or any local agency, that is determined to be no longer necessary for the agency's use, except property being held by the agency for the purpose of exchange."

On February 25, 2020, the City Council approved Resolution 2020-030 which authorized the City Manager to initiate the marketing of the subject property through the Surplus Land Act (SLA) process. The City then submitted notification to HCD that the property had been designated surplus local land. Notifications to all local public entities and special districts and HCD's list of developers were also submitted. The City received no letters of interest for the property. Shortly thereafter, the City received formal approval from HCD that all requirements related to the SLA process were met and the City could sell the property to an end-user of its choosing.

In August, 2020, City staff received a formal proposal from Menard Energy to develop a utility-scale battery storage facility on the subject property. The proposed battery storage facility was proposed to be housed in containerized units or multiple warehouse style buildings on the property, together with an electric switchyard and high voltage connection line necessary to interconnect to the Pacific Gas & Electric Company ("PG&E") transmission system at the adjacent PG&E Vaca-Dixon Substation. A preliminary site plan for this first project concept is provided in Attachment 2.

At that time, Menard Energy was seeking the Council's approval of an Exclusive Negotiating Rights Agreement (ENRA) with the City to allow Menard Energy the right to begin the City's process for the development of the proposed use. The formal process would involve various elements including: public outreach; design review; CEQA analysis; emergency response; and zoning/land use compatibility. In November 2020, the City Council directed staff not to proceed with the proposed battery storage facility project on the subject property and not to enter into the requested ENRA.- Council further directed staff to advise Menard Energy to explore alternative sites that were located in more industrial zoned areas.

Since that time, Menard Energy has been exploring alternative sites, revising the design of their original proposal, and providing the City with more insight about the operations and safety of the proposed use. Menard Energy did evaluate other sites within the city but still believes that the Gibson Canyon property is the optimum site for such a battery storage facility due to its close proximity to the PG&E Vaca-Dixon Substation and its power source. With all of the new and recent efforts completed resulting in a revised project, Menard Energy is again seeking the City's approval of an ENRA for the Gibson Canyon property.

DISCUSSION:

Menard Energy's revised proposal includes: the addition of a new national partner that has an extensive background with this type of facility; revisions to the site plan to make the battery storage component of the project less visible and more compatible with the nearby residential uses; and, the incorporation of a "community recreation" element.

Vistra Energy is the owner/operator of the similar Moss Landing battery storage plant and has been brought into partner on this project. Vistra Energy, is a national company that will take the lead with the Gibson Creek project (if approved) and become the long-term owner-operator for PG&E.

The revised site plan (Attachment 4) shows all equipment would be located east of Gibson Creek so that the battery facility will not be visible from the nearby residences to the south. In

addition, the revised site plan incorporates a proposed community sports complex as a community benefit feature. The final details of all components proposed with this project must still be evaluated through the City's development approval process which will include significant public outreach efforts and the appropriate level of CEQA analysis.

To ensure the ability to exclusively work with the City to negotiate a new agreement, Menard Energy has requested that the City enter into an Exclusive Negotiating Rights Agreement (see Attachment 3- ENRA). As a reminder, the approval of an ENRA does not ensure that the property is sold and/or that the proposed project is approved. Menard will provide a \$100,000 good faith deposit for the exclusive negotiating rights, which will be applied to the purchase price if the negotiations result in a sale of the property. The deposit is refundable in its entirety if it is determined that the geographical, physical, or environmental conditions of the property or title restrictions make it unsuitable for the proposed development; or if the City breaches the ENRA. 50% of the deposit is refundable if Menard cannot secure required regulatory approvals from outside agencies.

If approved, the ENRA will allow for a limited, 12 month negotiating period with the City Manager having authority to grant an extension for up to an additional 90 days if progress is being made towards reaching an agreement, and a nine-month extension if necessary to secure authorization from the California Energy Commission. During the negotiating period, Menard Energy would: determine the physical and land title conditions of the property and land use entitlements required, conduct feasibility studies and other due diligence; and, conduct significant public outreach. In addition, items to be negotiated would include, but not be limited to: property purchase terms (including an updated property appraisal); development review process and project schedule (including performance measures); and final details of the proposed community benefit.

If negotiations are successful, a Disposition and Development Agreement (or similar agreement) will be brought to a future City Council meeting for consideration.

ENVIRONMENTAL IMPACT:

This action is exempt from the California Environmental Quality Act (CEQA) because it is not a project which has a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment, pursuant to CEQA Guideline Section 15378.

FISCAL IMPACT:

Amount Requested: There are no funds requested for this item.

Funding Source: Not applicable

Budget Distribution: Not applicable

ALTERNATIVES:

The City Council may decide not to approve the Exclusive Negotiating Rights Agreement with Menard Energy Storage, LLC, resulting in the subject property not being sold to Menard Energy Storage, LLC.

The City Council may decide not to approve the Exclusive Negotiating Rights Agreement with Menard Energy Storage, LLC, and instruct staff to develop a request for proposal for alternative uses of the subject property.

The City Council may decide not to approve the Exclusive Negotiating Rights Agreement with Menard Energy Storage, LLC, and instruct staff to cease all activities related to the sale of the subject property.

STRATEGIC PLAN GOALS/INITIATIVE:

Goal # 2 – Strengthen the Local Economy

Initiative 2A: Articulate a current Economic Development Program

ATTACHMENTS:

Resolution – Action Item

Attachment 1: Vicinity Map

Attachment 2: 2020 Conceptual Site Plan

Attachment 3: Exclusive Negotiating Rights Agreement (ENRA)

Attachment 4: 2022 Conceptual Site Plan

Attachment 5: Battery Storage Facility Details

Attachment 6: Sports Complex Conceptual Site Plan

RESOLUTION NO. 2023-053

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF VACAVILLE APPROVING AN EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT BETWEEN THE CITY OF VACAVILLE AND MENARD ENERGY STORAGE LLC. TO NEGOTIATE A DISPOSITION AND DEVELOPMENT AGREEMENT FOR A BATTERY ENERGY STORAGE FACILITY AND COMMUNITY SPORTS COMPLEX ON A 52.40 ACRE CITY OWNED PARCEL AT 7050 LEISURE TOWN ROAD (SOLANO COUNTY APN 0106-280-020)

WHEREAS, the City of Vacaville's (the "City") prior use of certain real property located on Leisure Town Road within the City of Vacaville, APN # 0106-280-020 (the "Property") for the Gibson Canyon Creek Water Treatment Plant ("Gibson Plant") ceased operations in December 2006; and

WHEREAS, the final closure of the Gibson Plant was completed and approved by the Regional Water Quality Control Board on January 20, 2009; and

WHEREAS, pursuant to an agreement between the City and Mariani Packing Company entered into on 06/25/2006, the City agreed to use good faith and diligent efforts to maximize the proceeds from the reuse (sale, transfer, or exchange) of the Gibson Canyon property; and

WHEREAS, pursuant to Government Code Section 54222, City staff sent a written offer to sell the surplus property to the entities and agencies identified in Government Code Section 54222 *et seq.* No agencies/entities desired to purchase the property after having received notice within the required 60-day period of the notice; and

WHEREAS, the City received approval in 2020, from the California Department of Housing and Community Development as meeting the criteria associated with the Surplus Land Act (SLA) process; and

WHEREAS, the City desires to enter into an exclusive negotiating rights agreement (the "ENRA") with Menard Energy Storage, LLC ("the Developer") for a period of twelve months with the option for the City Manager to extend for an additional 90 days (or nine months if to obtain California Energy Commission approval) for the development of a a battery storage facility and a sports complex or similar community benefit; and

WHEREAS, pursuant to the ENRA, the City desires to seek to negotiate the terms of the Disposition and Development Agreement or similar agreement ("DDA") with the Developer; and

WHEREAS, the ENRA is exempt from the California Environmental Quality Act ("CEQA") pursuant to Section 15378. of the CEQA Guidelines as the ENRA only involves feasibility and planning for the possible development of the proposed development pursuant to a subsequent DDA, which shall only be approved in accordance with the requirements of CEQA, and any other applicable law.

NOW, THEREFORE, BE IT RESOLVED, that the City Council hereby authorizes and directs the City Manager, or his designee, to finalize and execute an ENRA with the Developer on behalf of the City, substantially in the form attached hereto, with such modifications (if any) as the City Manager determines appropriate to effectuate the purposes of this Resolution, and to take all actions necessary to implement the terms of the ENRA.

I HEREBY CERTIFY that the foregoing resolution was introduced and passed at the meeting of the City Council of the City of Vacaville held on the 10th day of January 2023 by the following vote:

AYES:

NOES: None

ABSENT: None

ATTEST:

Michelle Thornbrugh, City Clerk

Attachment 1 – Exclusive Negotiating Rights Agreement

Attachment 1:
Vicinity Map



Attachment 2:

2020 Conceptual Site Plan



**EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT
MENARD ENERGY STORAGE LLC
APN 0106-208-020**

This Exclusive Negotiating Rights Agreement (this "Agreement") is entered into as of this ____ day of _____, 2023 (the "Effective Date"), by and among the City of Vacaville, a municipal corporation (the "City"), and Menard Energy Storage LLC, a Delaware limited liability company (the "Developer"), on the basis of the following facts:

RECITALS

WHEREAS, City is the sole owner of certain undeveloped real property situated in the City of Vacaville, Solano County, California, identified as Assessor's Parcel Number 0106-208-020 and consisting of approximately fifty-two point forty (52.40) acres (collectively, the "Property" or "Site"), including access easements. The Property is more particularly described in the attached **Exhibit A**, which is attached hereto and incorporated by reference herein; and

WHEREAS, Developer is engaged in the business of developing, engineering, constructing, owning, and operating electric facilities including battery storage plants, and desires to construct new energy storage facilities necessary to integrate renewable energy supplies and support California's renewable and greenhouse gas reduction goals, which City understands will require substantial time and financial expenditures by Developer; and

WHEREAS, City has expressed a desire to sell, and Developer has expressed a desire to acquire the exclusive right to purchase the Property, and Developer (directly and/or through an affiliate(s)) desires to develop, construct, own and operate a utility-scale battery energy storage facility(ies) housed in containerized units or multiple warehouse style buildings (collectively, "**BSF**") on the Property, together with an electric switchyard and high voltage connection line necessary to interconnect to the Pacific Gas & Electric Company ("**PG&E**") transmission system at the adjacent PG&E Vaca-Dixon Substation, as well as a community sports complex or other similar community benefit ("**Sports Complex**") on a portion of the Property or another property as mutually agreed to between City and Developer (collectively, the "**Project**"). For context purposes only, preliminary site plans related to the Project are attached hereto as **Exhibits B1 and B2**; and

WHEREAS, City desires to cause the development of the Property as contemplated by Developer's development proposal; and

WHEREAS, the purpose of this Agreement is to establish the procedures and standards for the negotiation by and between City and Developer of a disposition and development agreement, master development agreement, option agreement, or similar document (the "DDA"), between City and Developer to govern the development of the Site.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein and for other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, City and Developer, (each a "Party" and collectively the "Parties") mutually agree as follows:

ARTICLE 1. EXCLUSIVE NEGOTIATING RIGHTS

Section 1.1 Good Faith Negotiations. The Parties shall negotiate diligently and in good faith, during the Negotiating Period described in Section 1.2, the terms of a DDA for the development of the Project on the Property (the terms of the DDA shall be subject to the limitations set forth in the agreement entered between the City and Mariani Packing Co., Inc., dated on or about April 10, 2001), as has been amended from time to time. During the Negotiating Period, the Parties shall use good faith efforts to accomplish the respective tasks outlined in Article 2 to facilitate the negotiation of a mutually satisfactory DDA.

Among the issues to be addressed in the negotiations are: (i) the physical and land title conditions of the Site and remediation of any adverse conditions by the Developer, (ii) the type of entitlements necessary for the Project and each independent part thereof (e.g. the BSF and the Sports Complex), (iii) the development schedule for each part of the Project, (iv) commitments related to the timing of completion of the Sports Complex, (v) financing, including any proposed City financial assistance, (vi) marketing and management of the Project, and (vii) sales price for the Property.

Section 1.2 Negotiating Period. The negotiating period (the "Negotiating Period") under this Agreement shall be one (1) year, commencing on the Effective Date. The Negotiating Period may be extended (a) by Developer pursuant to Section 2.6 below, or (b) either following a written request from Developer or on the City's behalf, for up to an additional ninety (90) days by the City Manager, if, in the City Manager's judgment, sufficient progress toward a mutually acceptable DDA has been made during the initial one (1) year negotiating period to merit such extension.

If a DDA has not been executed by the City and the Developer by the expiration of the Negotiating Period (as the Negotiating Period may be extended by operation of the paragraph above), then this Agreement shall automatically terminate, without further action of the Parties, and neither Party shall have any further rights or obligations under this Agreement. If a DDA is executed by the City and the Developer then, upon such execution, this Agreement shall terminate, and all rights and obligations of the Parties shall be as set forth in the executed DDA.

Section 1.3 Exclusive Negotiations; Deposit.

(a) During the Negotiating Period (as may be extended by operation of Section 1.2), the City shall not negotiate with any person or entity, other than Developer, regarding the development of the Property, or solicit or entertain bids or proposals to do so, provided that Developer is not in default of its obligations under this Agreement. In consideration for the City's obligation to exclusively negotiate with the Developer for the Property, within ten (10) calendar

days following the Effective Date, the Developer shall deliver to the City a good faith deposit in the amount of One Hundred Thousand Dollars (\$100,000) (the "Deposit").

(b) In the event the Parties enter into a DDA, then the Deposit shall be credited towards any purchase price, or other consideration, to be paid by Developer to City.

(c) In the event the Parties do not enter into a DDA, then City shall retain the Deposit, subject to Section 1.3(d) below, unless failure to enter into the DDA is due to:

(i) geographical, physical, or environmental constraints on the Property which Developer determines, after a good faith due diligence process pursuant to section 2.5(a) make the Property physically unsuitable for the contemplated development or make such development financially infeasible;

(ii) termination of this Agreement pursuant to Section 2.5(b); or

(iii) expiration or termination of this Agreement due to failure to receive outside agency approvals pursuant to Section 2.6, in which case only fifty percent (50%) of the deposit shall be retained by City; or

(iv) an uncured default by City pursuant to Section 3.7.

(d) Developer shall have a period of no more than the first ninety (90) days from the Effective Date of this Agreement to determine if the development is financially feasible. If the Developer determines within the ninety (90) day period that the development is financially infeasible, the City shall return and reimburse the Deposit within thirty (30) days in full without interest or penalty. If the Developer fails for any reason to determine within the ninety (90) day period that the development is financially infeasible, the Deposit shall be forfeited in the City's favor unequivocally and without any objection by Developer, except to the extent that if the Parties thereafter enter into a DDA, the Deposit shall be credited towards any purchase price, or other consideration pursuant to Section 1.3(b) above.

Section 1.4 **Identification of Developer's Representatives.** Within ten (10) calendar days after the Effective Date, the Developer shall notify the City, in writing, of the Developer's designated representative(s) to negotiate the DDA with the City. Such designated representative(s) shall be an authorized representative from the manager or the managing member of the Developer.

ARTICLE 2. **NEGOTIATION TASKS**

Section 2.1 **Overview.** To facilitate negotiation of the DDA, the Parties shall use reasonable good faith efforts to accomplish the tasks set forth in this Article 2 in a timeframe that will support negotiation and execution of a mutually acceptable DDA prior to the expiration of the Negotiating Period.

Section 2.2 **Financing and Costs of Project.** Within ninety (90) days after the Effective Date, the Developer shall provide the City, for its review and approval, with (a) a form of commitment letter from an equity investor and/or financial institution acceptable to the City Manager setting forth the terms of financing necessary to construct, own and operate the BSF, or (b) a detailed financial analysis for the Project containing, among other matters, a development budget and operating *pro forma* (the "Financing Proposal"). The financial analysis shall be refined by the Parties during the Negotiating Period, as appropriate, for each phase or part of the Project, and will be used to evaluate the financial feasibility of the Project and to assist in the negotiation of terms regarding payment of costs of land and development for each part of the Project. Developer acknowledges and agrees that the City has not agreed to fund, subsidize, or otherwise financially contribute in any manner toward the development of the Project.

Section 2.3 **Planning Approvals; CEQA.** The Developer acknowledges that the Project requires approvals and entitlements from the City (collectively, the "Planning Approvals"). Prior to execution of a DDA, the City and the Developer will agree on the type of Planning Approvals necessary for development of the Project, or, as applicable each phase, based on the proposed scope of development for the overall Project. During the Negotiating Period, Developer shall submit conceptual site plans and preliminary designs for the Project and pay applicable fees to the City for a "preliminary review" by City staff. The Developer understands that, in addition to any preliminary review by City staff, a formal application for the Planning Approvals for the Project and/or any phase thereof would not be required until after the execution of a DDA, and that applying for and obtaining the Planning Approvals will be a pre-disposition condition for conveyance of the Property under any DDA. Developer shall be required to apply for the Planning Approvals for the Project in accordance with the City's standard application process and shall be subject to all of the City's normal fees for any required Planning Approvals. Upon receipt of the necessary applications for the required Planning Approvals, the City shall initiate the preparation of any environmental documentation required by the California Environmental Quality Act ("CEQA"); provided, however, that nothing in this Agreement or the DDA shall be construed to compel the City to approve or make any particular findings with respect to such CEQA documentation or the Planning Approvals. The Developer shall pay the City for all costs associated with the preparation of the CEQA document(s). The Developer shall provide such information about the Project as may be required to enable the City to prepare or cause preparation and consideration of any CEQA-required document(s) and shall otherwise generally cooperate with the City to complete this task. In addition, the Developer shall pay to the City, as applicable, the standard City CEQA processing fee.

Section 2.4 **Schedule of Performance.** Within ninety (90) days after the Effective Date, the Developer shall provide the City with a proposed detailed schedule of performance for the Project and shall include, but not be limited to: the estimated dates for submitting and obtaining approvals from the California Energy Commission and other federal, state and local regulatory bodies, City Planning Approvals, various financing commitments for the Project, the date for the submittal of construction plans for the Project and each distinct part thereof to the City, the date for anticipated close of escrow for the Site, and the dates for the commencement and completion of construction of each phase of the Project.

Section 2.5 Due Diligence. During the Negotiating Period the Developer shall conduct due diligence activities, including but not limited to tests and surveys, planning, soils report, noise study, hazardous materials report, financial feasibility study, and survey of the Property to determine actual property lines, and title adequacy.

(a) Physical Adequacy Determination. The Developer shall determine whether the Property is suitable for development of the Project, taking into account the geotechnical and soils conditions, the presence or absence of toxic or other hazardous materials, and the other environmental and regulatory factors that the Developer deems relevant. If, in the Developer's judgment based on such investigations and analyses, any portion of the Property is not suitable for development, the Developer shall notify the City in writing at the earliest possible time prior to the expiration of the Negotiating Period of its determination (an "Unsuitability Notice").

For purposes of these investigations and analyses, the City shall provide to Developer, its agents, and representatives, the right to enter onto the Site and to conduct such tests, surveys, and other procedures desired by Developer ("Tests"), provided the Developer requests access at least two (2) business days prior to entry, the entry and tests do not unduly infringe on the operational needs of the City, and that the entry is conducted during normal staffed operating hours of the City. Any such tests or surveys that involve earth disturbance shall first be approved in writing by the City, and Developer and the City, at Developer's expense, shall comply with any requirements under CEQA that may apply to such tests or surveys. In the event that additional steps are required to be taken to comply with CEQA, it is understood that the City may require more than two (2) days' notice. Upon conclusion of all such tests, surveys, and other analyses Developer shall return the Property to its condition prior to such tests or surveys. Developer shall provide copies of all studies, test results, and surveys to the City once completed. City shall own such copies without any reservation by Developer or limitation of use in any manner.

Upon delivery of an Unsuitability Notice by the Developer, this Agreement shall be terminated without further action of any Party, the Deposit shall be released to the Developer, and thereafter no Party shall have any further duties, obligations, rights, or liabilities under this Agreement, except as set forth in Section 3.3, Section 3.6, and Section 3.15. If the Developer does not deliver an Unsuitability Notice during the Negotiating Period, then the Property shall be deemed physically suitable for development of the Project and any executed DDA shall not provide for an additional opportunity for the Developer to determine the physical suitability of the Property or for the Developer to terminate the DDA as a result of the purported physical unsuitability of the Property. Among other things, any DDA shall provide that the Site is conveyed to the Developer in its then current "as-is" condition and shall include the Developer's waiver of claims set forth in Civil Code Section 1542.

(b) Title Adequacy Determination. Within sixty (60) days following the Effective Date, the Developer shall cause a reputable title company to issue a preliminary title report or reports (collectively, the "Report") for the Property to the Developer and the City. If the Developer objects to any exception appearing on the Report or should any title exception arise after the date of the Report, the Developer may object to such exception, provided such objection is made to the City in writing on or before 5 P.M. on the thirtieth (30th) day following the date the Developer receives the Report (or the date Developer receives a copy of such new exception, as applicable).

If the Developer objects to any exception to title, the City, within fifteen (15) days of receipt of Developer's objection shall notify Developer in writing whether City elects to: (1) cause the exception to be removed of record, (2) obtain a commitment from the title company for an appropriate endorsement to the policy of title insurance to be issued to the Developer, insuring against the objectionable exception, or (3) terminate this Agreement unless the Developer elects to take title subject to such exception. If any Party elects to terminate this Agreement pursuant to this Section, then the Deposit shall be released to the Developer, and no Party shall thereafter have any obligations to or rights against the other Party hereunder, except as set forth in Sections 3.3, 3.6 and 3.15. If the Developer fails to provide any notification to the City regarding this matter prior to expiration of the time period set forth herein, the condition set forth in this Section 2.5(b) shall be deemed satisfied, this Agreement shall continue in effect, the condition of title at closing under any executed DDA shall be as set forth in the Report, and any executed DDA shall not provide for an additional opportunity for the Developer to determine title to the Property or for the Developer to terminate the DDA as a result of title to the Property.

Section 2.6 California Energy Commission Approval; Outside Agency Approvals. Developer shall diligently initiate and pursue any and all federal, state and local regulatory approvals to construct and/or operate a BSF and any other part of the Project on the Property from the California Energy Commission ("CEC") and other applicable regulatory bodies. The City shall cooperate with Developer as reasonably required in the CEC process. If, despite good faith efforts, it reasonably appears that such approvals will not be secured prior to expiration of this Agreement, but are reasonably to be expected to be granted within an additional nine month period, then, upon written consent of City, which consent will not be unreasonably withheld, the term of this Agreement shall be extended for an additional nine month period. If such approvals are not secured within the term, as may be extended, Developer shall be refunded fifty percent (50%) of the Deposit upon expiration or earlier termination of this Agreement, with the remaining 50% retained by City as consideration for foregoing other marketing of the Property.

Section 2.7 Reports. Unless otherwise waived by the City, the Developer shall provide the City with copies of all reports, studies, analyses, official correspondence, and similar documents, but excluding confidential or proprietary information, prepared or commissioned by the Developer with respect to this Agreement and the Project, promptly upon their completion.

While desiring to preserve its rights with respect to treatment of certain information on a confidential or proprietary basis, the Developer acknowledges that the City will need sufficient, detailed information about the proposed Project (including, without limitation the financial information described in Section 2.2) to make informed decisions about the content and approval of the DDA. The City will work with the Developer to maintain the confidentiality of proprietary information subject to the requirements imposed on the City by the Public Records Act (Government Code section 7920.000 et seq.). The Developer acknowledges that the City may share information provided by the Developer of a financial and potential proprietary nature with third party consultants and city council members as part of the negotiation and decision-making process. If this Agreement is terminated without the execution of a DDA, in conjunction with the return of the Deposit, the City shall return to the Developer any information submitted by the Developer under this Agreement.

The City shall provide the Developer with copies of all existing reports, studies, analyses, official correspondence, and similar documents (collectively, "Documents"), including detailed property appraisals, prepared or commissioned by the City with respect to Property, promptly following execution of this Agreement with respect to Documents then in its possession or under its reasonable control, and promptly upon their completion with respect to any subsequently prepared Documents.

Section 2.8 Organizational Documents. The Developer shall provide the City with copies of its organizational documents evidencing that the Developer exists and is in good standing to perform its obligations under the proposed DDA no later than ninety (90) days after the effective date of this Agreement and subsequently immediately prior to the date of execution of a DDA.

Section 2.9 Progress Reports. From time to time as reasonably agreed upon by the Parties, each Party shall make oral or written progress reports to the other Party on studies being made and matters being evaluated with respect to this Agreement and the Project.

ARTICLE 3. **GENERAL PROVISIONS**

Section 3.1 Limitation on Effect of Agreement. This Agreement shall not obligate either City or Developer to enter into a DDA or to enter into any particular agreement. By execution of this Agreement City is not committing to the disposition of the Property (any site, or any portion thereof). Execution of this Agreement by City is merely an agreement to conduct a period of exclusive negotiations in accordance with the terms hereof, reserving for subsequent City Council action the final discretion and approval regarding the execution of a DDA and all proceedings and decisions in connection therewith, including, but not limited to consideration of the Planning Approvals and compliance with the applicable requirements of CEQA. Any DDA resulting from negotiations pursuant to this Agreement shall become effective only if, and after, such DDA has been considered and approved by the City Council following conduct of all legally required procedures, including, but not limited to all applicable requirements of CEQA, and executed by duly authorized representatives of the City and the Developer. Unless and until a DDA is executed by the Developer, approved by the City Council, and executed by the City, no agreement drafts, actions, deliverables, or communications arising from the performance of this Agreement shall impose any legally binding obligation on either Party to enter into or support entering into a DDA or be used as evidence of any oral or implied agreement by either Party to enter into any other legally binding document. In the event of any conflict between the terms of this Section, and any other term of this Agreement, then the terms of this Section shall control.

Section 3.2 Notices. Formal notices, demands and communications between the City and the Developer shall be sufficiently given if, and shall not be deemed given unless, dispatched by certified mail, postage prepaid, return receipt requested, or sent by express delivery or overnight courier service, to the office of the Parties shown as follows, or such other address as the Parties may designate in writing from time to time:

City: City of Vacaville
650 Merchant Street
Vacaville, CA 95688
Attn: City Manager
Email: aaron.busch@cityofvacaville.com

Developer: Menard Energy Storage, LLC
1990 N. California Blvd., Ste. 20
Walnut Creek, CA 94596
Attn: Dale E. Fredericks, Managing Director
Email: dfredericks@dgpowers.com

Such written notices, demands and communications shall be effective on the date shown on the delivery receipt as the date delivered or the date on which delivery was refused.

Section 3.3 Waiver of Lis Pendens. It is expressly understood and agreed by the Parties that no Lis Pendens shall be filed against any portion of the Property with respect to this Agreement or any dispute or act arising from it.

Section 3.4 Right of Entry. The City shall cooperate with the Developer to provide the Developer the right to enter upon the Property, as necessary, for purposes of conducting investigations to further the objectives of this Agreement pursuant to a written right of entry agreement, to be prepared by the City, and executed by the Parties. Among other things, such right of entry agreement shall require the Developer to: (i) provide evidence of insurance, in form and amount reasonably acceptable to the City, prior to the Developer's entry onto the Property, (ii) restore any damage to the Property caused by the Developer (or its agents), and (iii) indemnify the City for any claim related to such entry.

Section 3.5 Costs and Expenses. Except as specifically provided in this Agreement, each Party shall be responsible for its own costs and expenses in connection with any activities and negotiations undertaken in connection with this Agreement, and the performance of each Party's obligations under this Agreement.

Section 3.6 No Commissions. The City shall not be liable for any real estate commissions or brokerage fees that may arise from this Agreement or any DDA resulting from this Agreement. Each Party represents that it has not engaged any broker, agent, or finder in connection with this transaction, and each Party shall indemnify, defend, and hold harmless the other Party from any claim by any broker, agent, or finder retained by the other Party.

Section 3.7 Defaults and Remedies.

(a) Default. Failure by any Party to negotiate in good faith as provided in this Agreement shall constitute an event of default hereunder. The non-defaulting Party shall give written notice of a default to the defaulting Party, specifying the nature of the default and the required action to cure the default. If a default remains uncured fifteen (15) days after receipt by

the defaulting Party of such notice, the non-defaulting Party may exercise the remedies set forth in subsection (b).

(b) **Remedies.** In the event of an uncured default by the City, the Developer's only remedy is to terminate this Agreement. In the event of an uncured default by the Developer, the City's sole remedy shall be to terminate this Agreement and retain the Deposit. Following such termination, no Party shall have any right, remedy, or obligation under this Agreement, except that Section 3.3, Section 3.6, and Section 3.15 shall survive such termination.

Except as expressly provided above, no Party shall have any liability to any other Party for damages or otherwise for any default, nor shall any Party have any other claims with respect to performance under this Agreement. Each Party specifically waives and releases any such rights or claims it may otherwise have at law or in equity.

Section 3.8 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

Section 3.9 Entire Agreement. This Agreement constitutes the entire agreement of the Parties regarding the subject matters of this Agreement. This Agreement may not be amended except in writing signed by both Parties. This Agreement shall not be construed as if it had been prepared by one of the Parties, but rather as if both Parties had prepared it. The Parties to this Agreement have read and reviewed this Agreement and agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply to the interpretation of this Agreement (including but not limited to Civil Code Section 1654 as may be amended from time to time).

Section 3.10 Attorney's Fees. If any Party brings an action or files a proceeding in connection with the enforcement of its respective rights or as a consequence of any breach by the other Party of its obligations hereunder, then the prevailing Party in such action or proceeding shall be entitled to have its reasonable attorney's fees and costs paid by the non-prevailing Party, including, but not limited to the fees and costs related to use of in-house counsel.

Section 3.11 Assignment. The Developer may not transfer or assign, in whole or in part, its rights or obligations hereunder to any other entity except with the prior written consent of the City, which consent shall be granted or withheld in the City's sole discretion, and any such attempted transfer or assignment without the prior written consent of City shall be void. Developer shall be required to make full disclosure to the City of the proposed assignee's principals, officers, stockholders, partners, etc., and all other pertinent information concerning the assignee and its associates. The City shall not assess a fee for its approval of any assignment.

Section 3.12 No Third-Party Beneficiaries. This Agreement is made and entered into solely for the benefit of the City and the Developer and no other person shall have any right of action under or by reason of this Agreement.

Section 3.13 Actions by the City. Whenever this Agreement calls for or permits the approval, consent, authorization or waiver of the City, the approval, consent, authorization, or waiver of the

City Manager shall constitute the approval, consent, authorization, or waiver of the City without further action of the City Council. The Developer acknowledges that nothing in this Agreement (including any approval by the City Manager in accordance with this Agreement), or a DDA (if approved by the City Council) shall limit, waive, or otherwise impair the authority and discretion of: (i) the City's Planning Department, in connection with the review and approval of the proposed construction plans for the Project, or any use, or proposed use, of the Site, (ii) the City's review of the Planning Approvals, or compliance with all applicable requirements of CEQA, or (iii) any other office or department of the City acting in its capacity as a governmental regulatory authority.

Section 3.14 Time of the Essence. Time is of the essence in this Agreement and every provision contained herein.

Section 3.15 Indemnification. Developer hereby covenants, on behalf of itself and its permitted successors and assigns, to indemnify, defend and hold harmless the City, its council members, officials, agents, and employees (collectively, the "Indemnitees"), from and against all claims arising out of or in connection with this Agreement or the activities contemplated hereby; provided, however, Developer shall have no indemnification obligation with respect to the active negligence or willful misconduct of any Indemnitee. Developer's indemnification obligations shall survive the termination or expiration of this Agreement and shall be effective regardless of any insurance Developer may have, or that may otherwise be available to the Developer. Without limiting the provisions set forth herein, no city council member, official, director, attorney, agent, or employee of the City shall be personally liable to Developer or any of Developer's assignee or successor in interest, in the event of any default or breach by the City of any obligations under the terms of this Agreement, or of any amount which may become due to Developer or to its assignee or successor under the terms of this Agreement.

Section 3.16 Operation of Property During the Agreement Term. During the term of this Agreement, City may continue to maintain and operate the Property in the normal course of business and in compliance in all material respects with all applicable laws, rules, regulations and orders of any governmental authority having jurisdiction over the Property (including, without limitation, those relating to the protection of the environment), and will observe and perform City's obligations under existing agreements binding upon the Property. Except as pursuant to legal obligations, City shall not affirmatively contaminate or damage the Property in any manner, including but not limited to, depositing hazardous substances on the Property. No contracts, leases or other agreements affecting the Parcel may be entered into after the execution of this Agreement without Developer's prior written approval, which approval may not be unreasonably withheld. After the execution of this Agreement, and during the term of this Agreement, City shall refrain from taking any action which could diminish the value or use of the Property for Developer's intended use thereof without first receiving Developer's written consent or, in the alternative, terminating this Agreement.

Section 3.17 Counterpart and Electronic Signature. As permitted under the U.S. Electronic Signatures in Global and National Commerce (ESIGN) Act of 2000, and the Uniform Electronic Transactions Act (UETA), the parties hereby agree to conduct this transaction by electronic means. This Agreement may be executed through an electronic signature and may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall

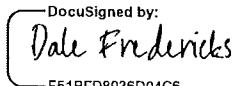
constitute one and the same instrument. The parties agree that the electronic signatures appearing on this Agreement are intended by each party using it to have the same force and effect as the use of a manual signature for the purposes of validity, enforceability, and admissibility.

END OF DOCUMENT - SIGNATURE PAGE AND EXHIBITS A AND B FOLLOW

IN WITNESS WHEREOF, this Agreement has been executed by the Parties as of the Effective Date.

DEVELOPER:

Menard Energy Storage, LLC,
a Delaware limited liability company

By: 
F51BFD8936D04C6...

Name: Dale E. Fredericks

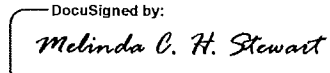
Its: Managing Director

CITY:

CITY OF VACAVILLE, a municipal corporation

By: Aaron Busch, City Manager

APPROVED AS TO FORM:


CCF8BF1C1FB0407...

Melinda C. H. Stewart, City Attorney

EXHIBIT A

SITE MAP AND PROPERTY DESCRIPTION

Site #1	APNS				
52.40± acres	0106-280-020				

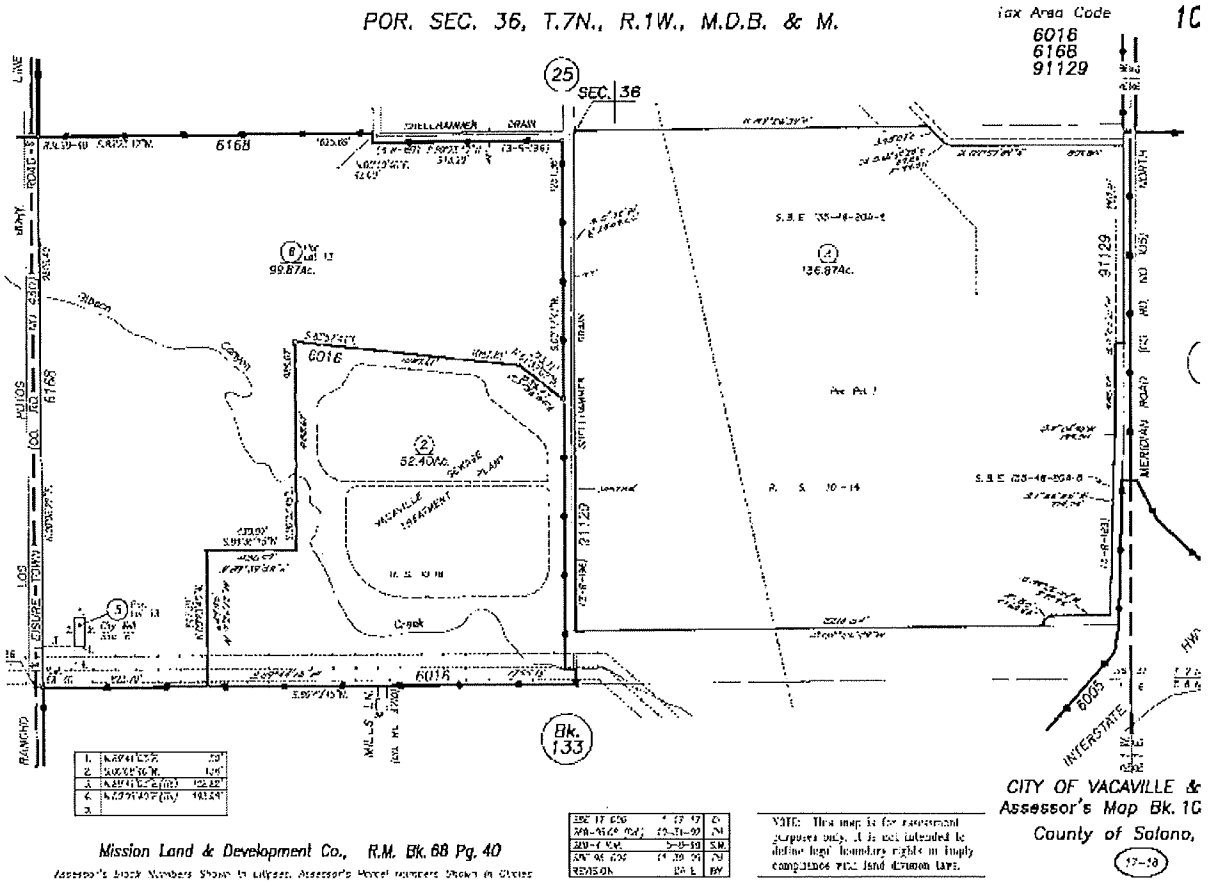


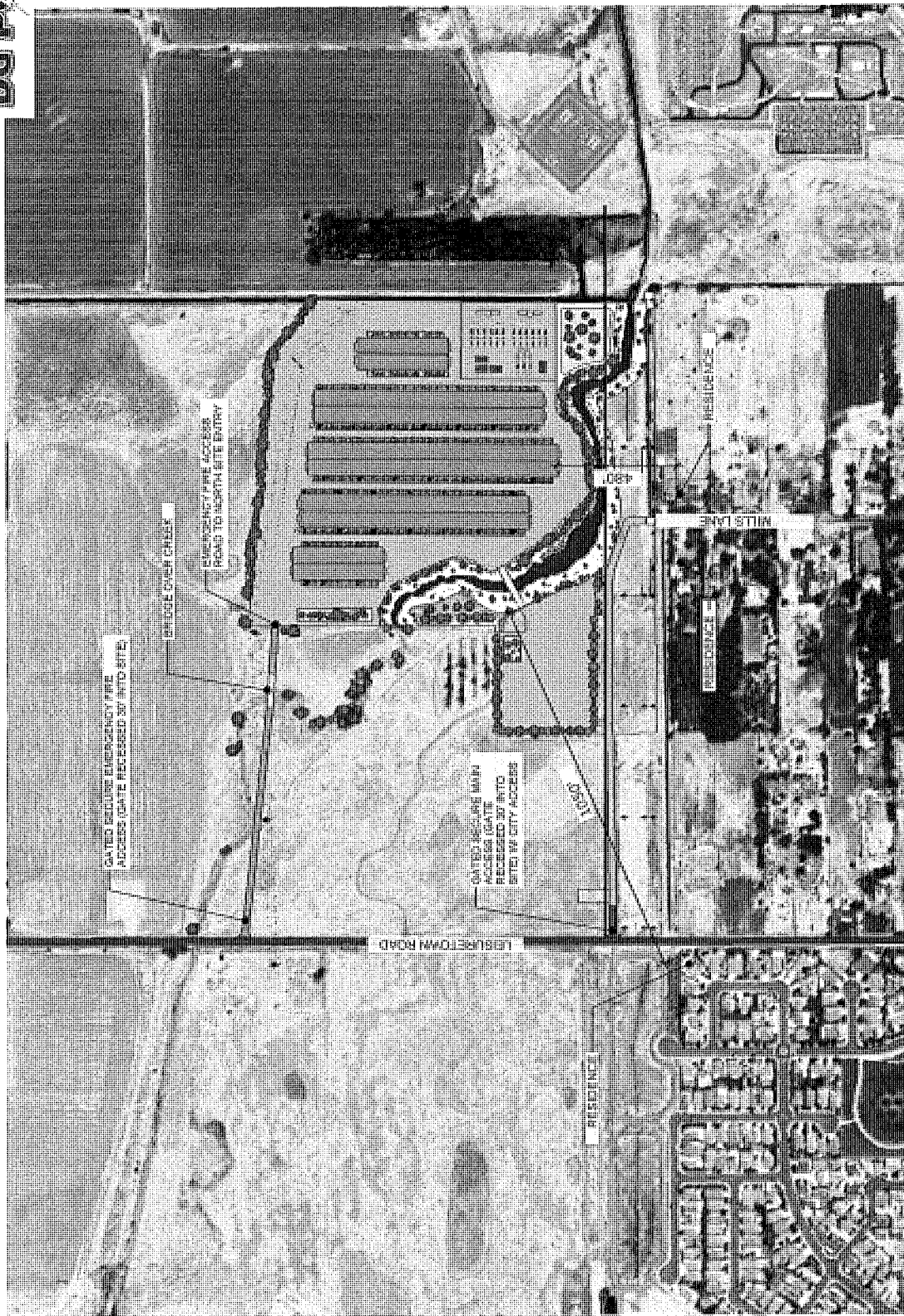
Exhibit B1 on Following Page
Property Description
and
Preliminary Site Layout

August 24, 2022

Exhibit B2 on Following Page
Sports Complex
Preliminary Site Plan

October 23, 2022

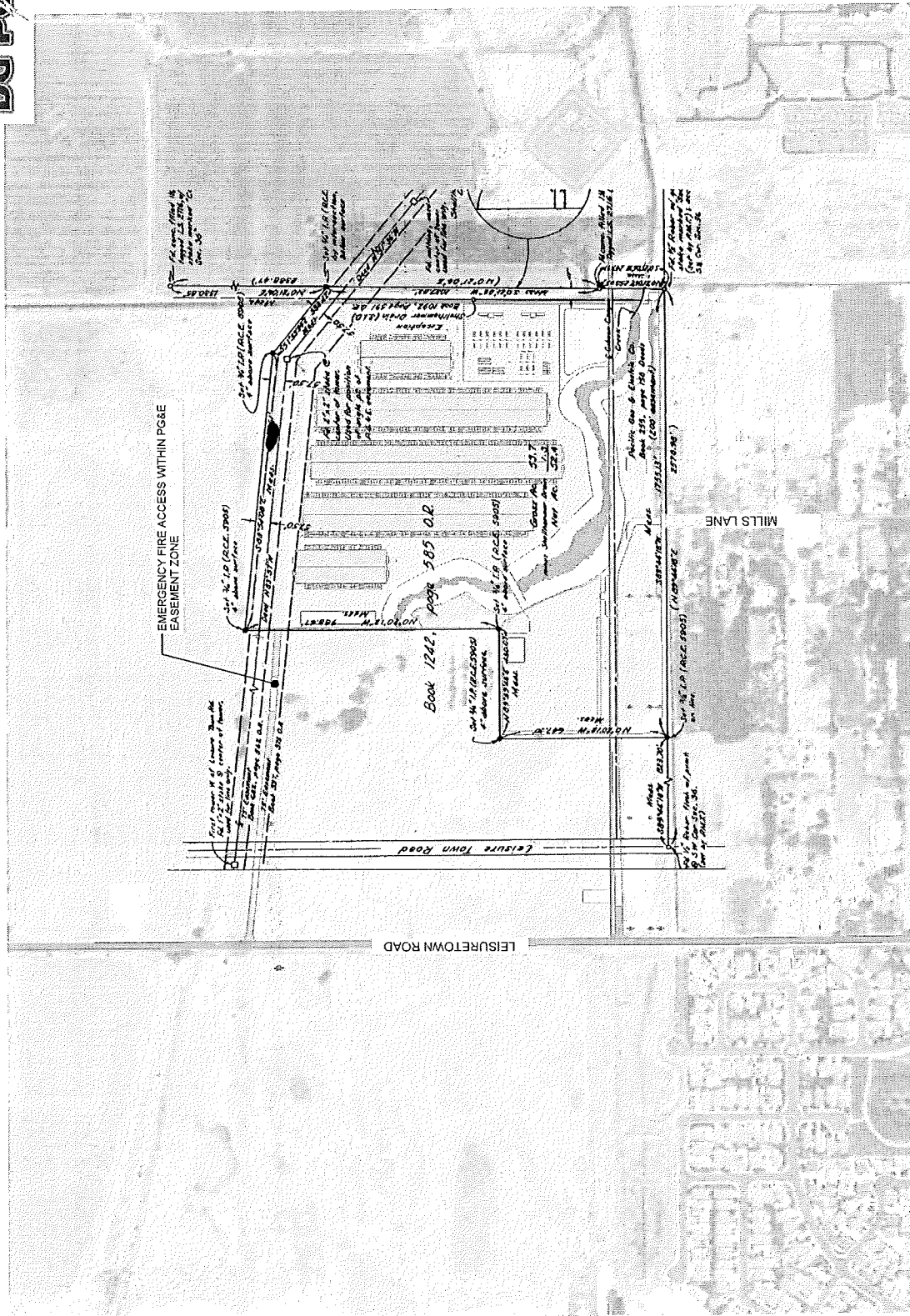
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PRELIMINARY SITE LAYOUT - LOCATION MAP
August 24, 2022



0 400' 800'
SCALE: 1"=400'

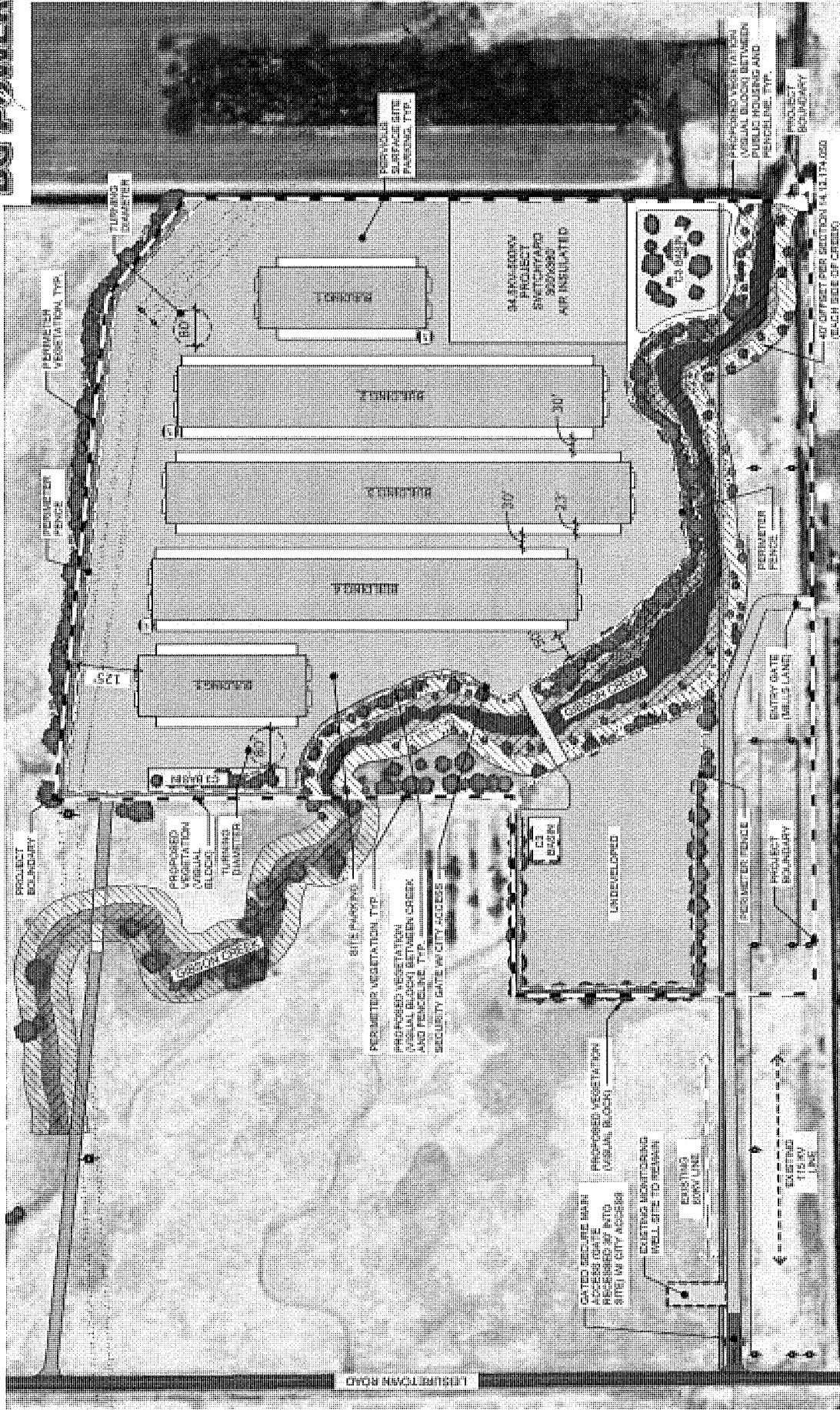


PRELIMINARY SITE LAYOUT - PG&E EASEMENT OVERLAY WITH NORTHERN ACCESS ROADWAY

August 24, 2022



0 200' 400'
SCALE: 1"=200'



PRELIMINARY SITE LAYOUT - TRAFFIC PATTERN PLAN

August 24, 2022

0 200' 400'
SCALE: 1"=200'

DC POWER

TOTAL SITE USABLE AREA: 38.88 ACRES

USABLE AREA
32.59 ACRES

PROJECT
BOUNDARY

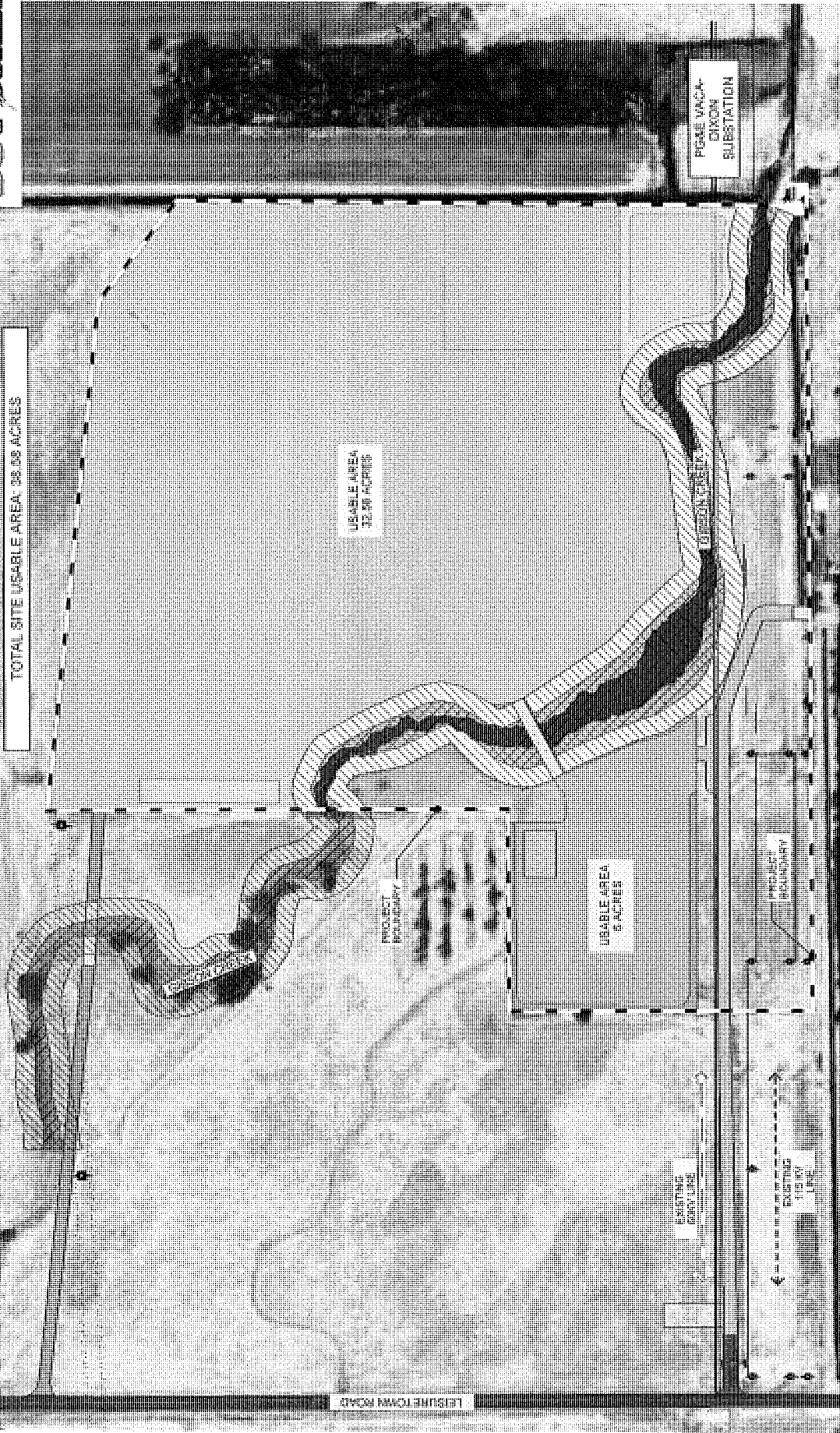
USABLE AREA
6 ACRES

EXISTING
GRAY LINE

EXISTING
TURKEY
LINE

PROJECT
BOUNDARY

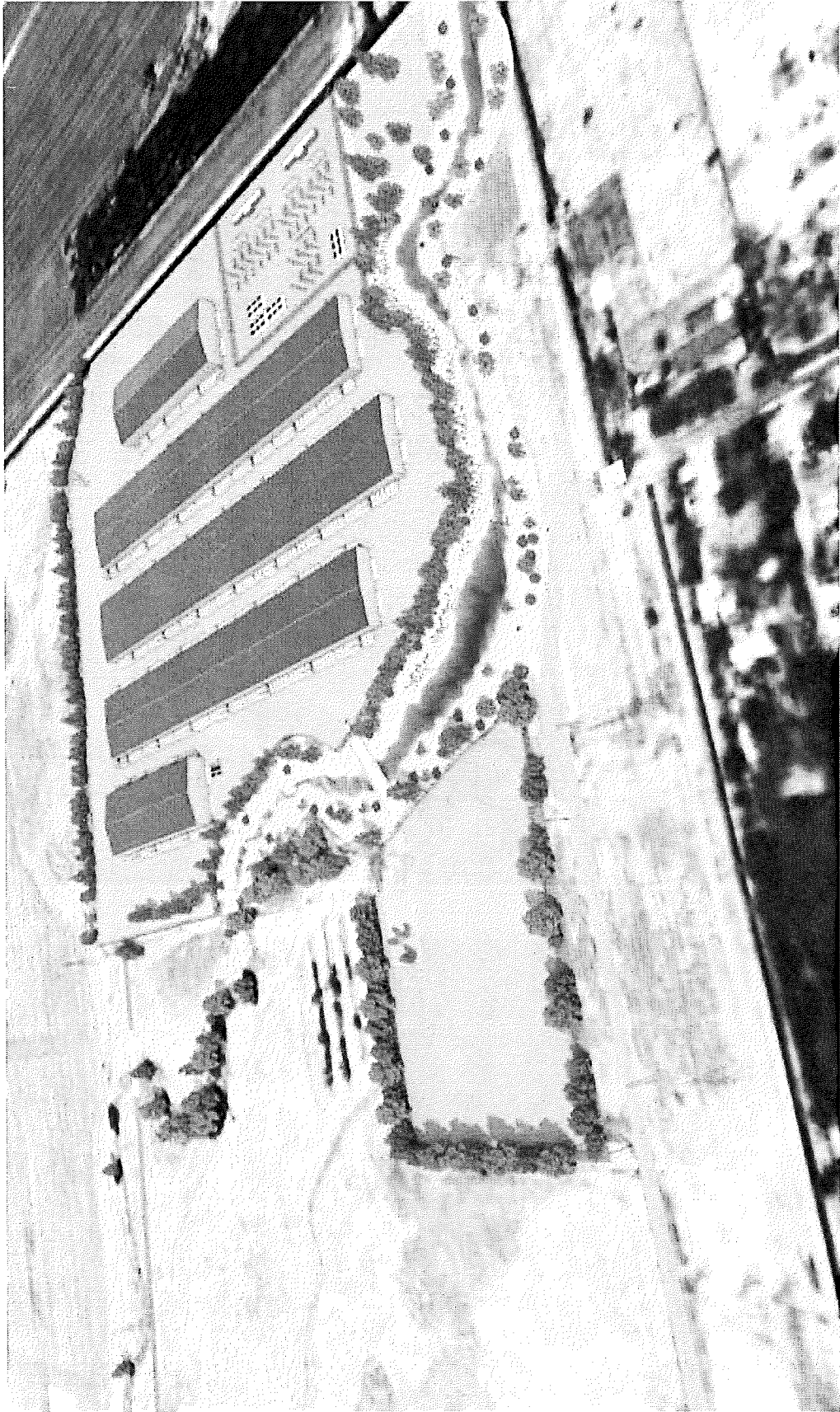
FGM VAC-
EXCISE
STATION



PRELIMINARY SITE LAYOUT - AREA TAKEOFFS

August 24, 2022

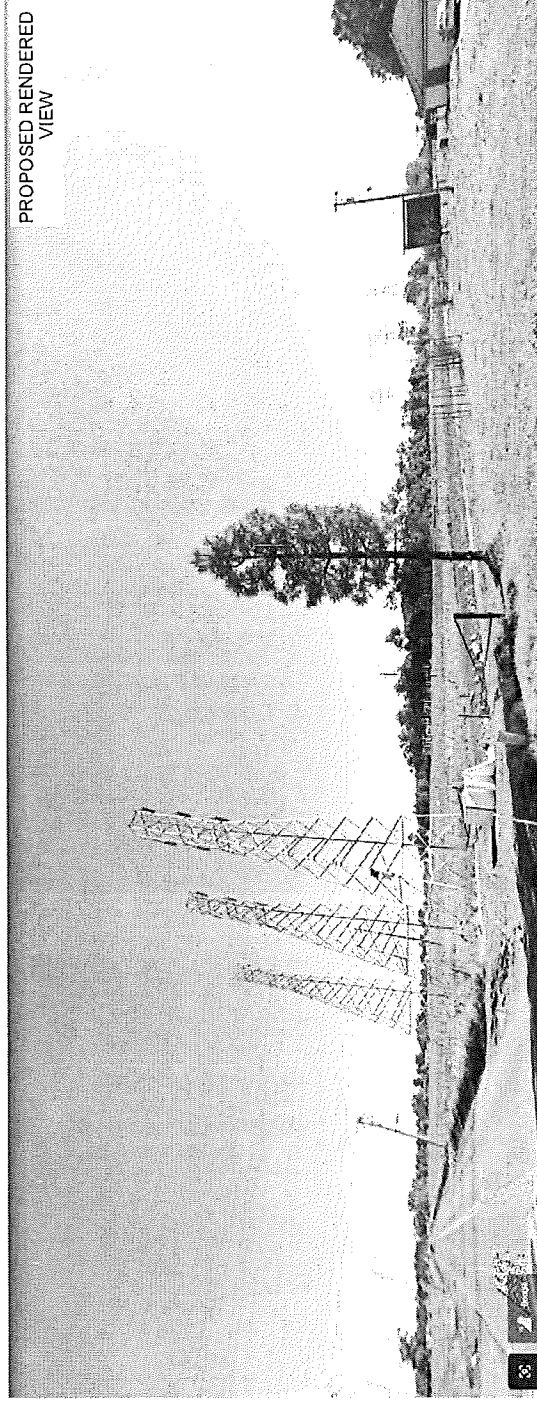
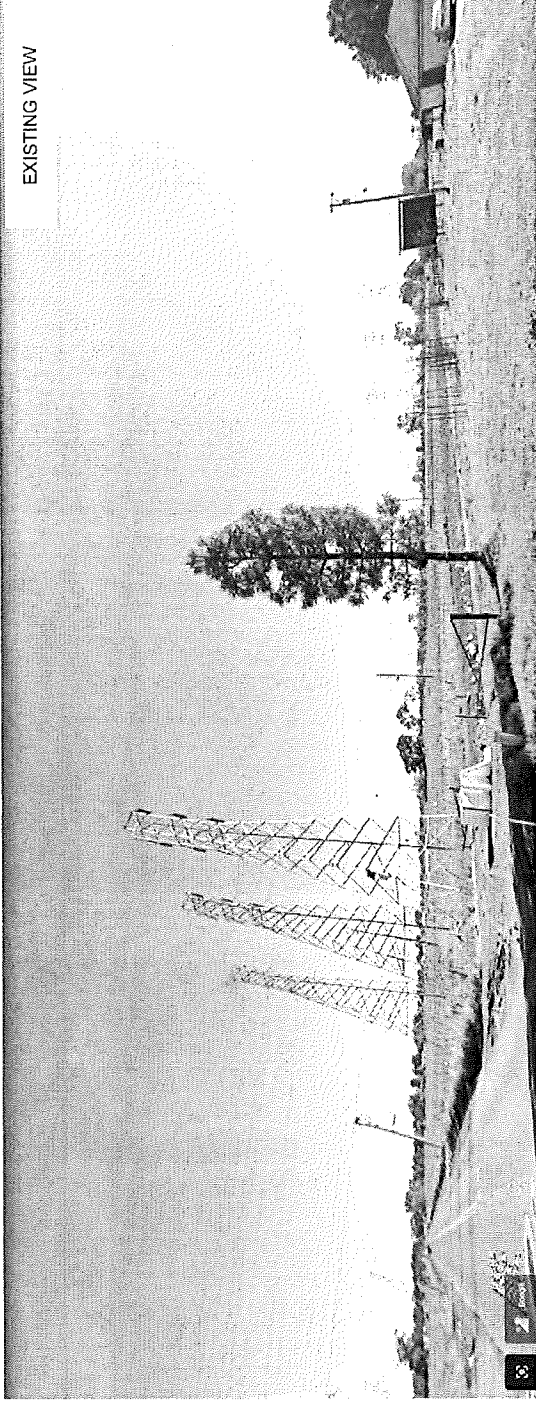
Exhibit B1



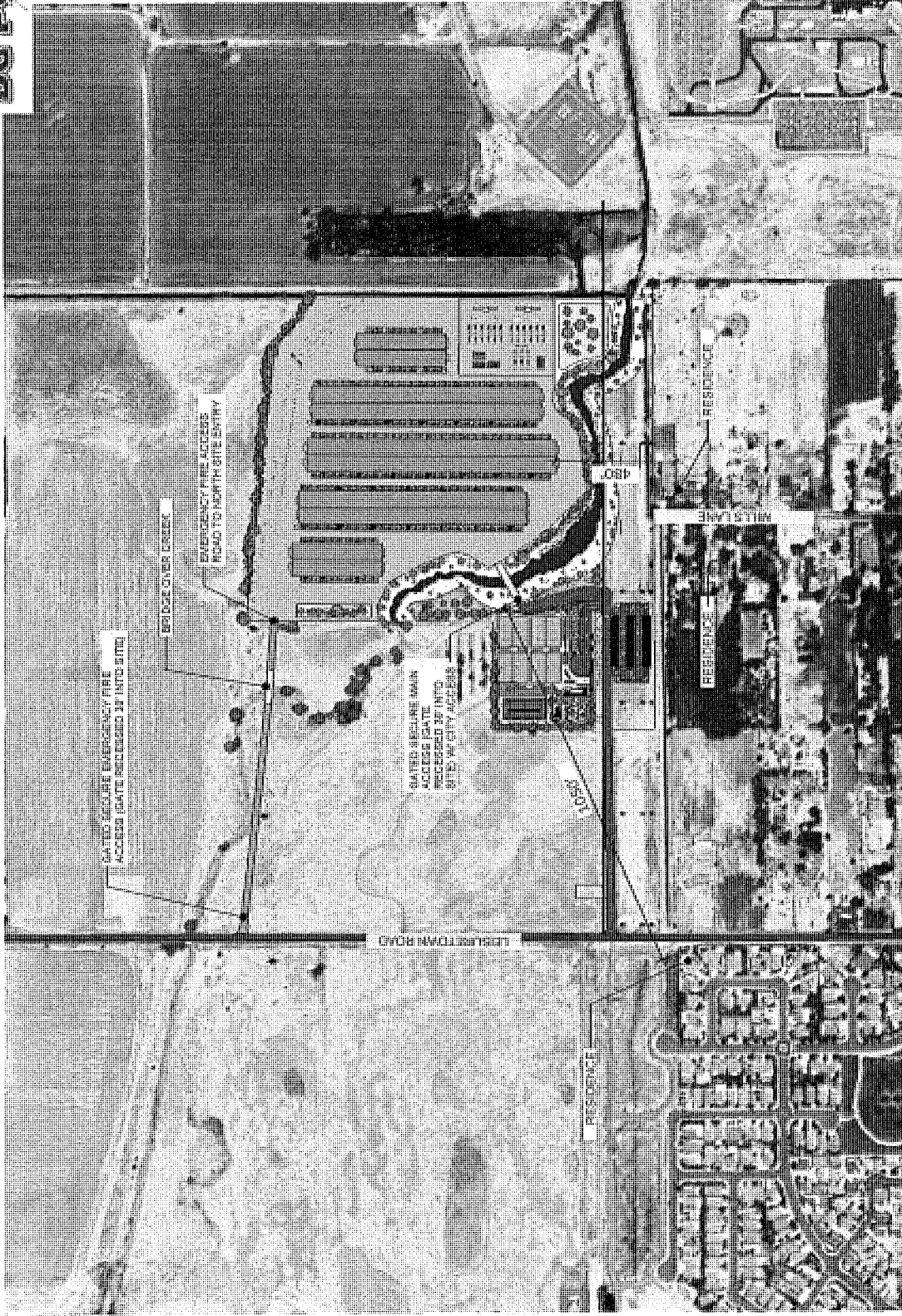
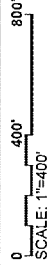
RENDERED AERIAL PERSPECTIVE - LOOKING NORTH
August 24, 2022



RENDERED AERIAL PERSPECTIVE - LOOKING SOUTH
August 24, 2022



SITE PERSPECTIVES - LEISURE TOWN ROAD LOOKING NORTHEAST
August 24, 2022

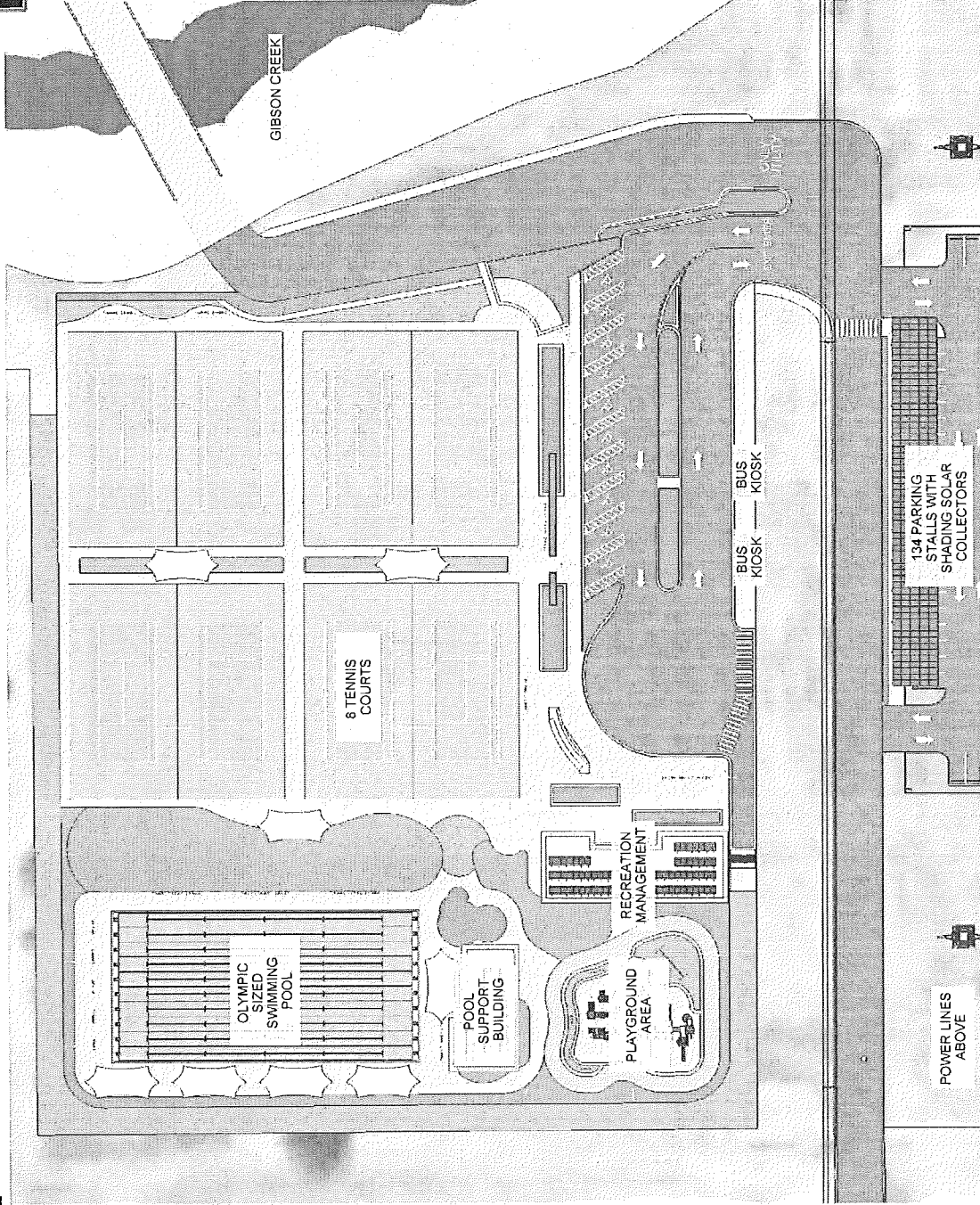


PRELIMINARY SITE LAYOUT - LOCATION MAP

October 23, 2022

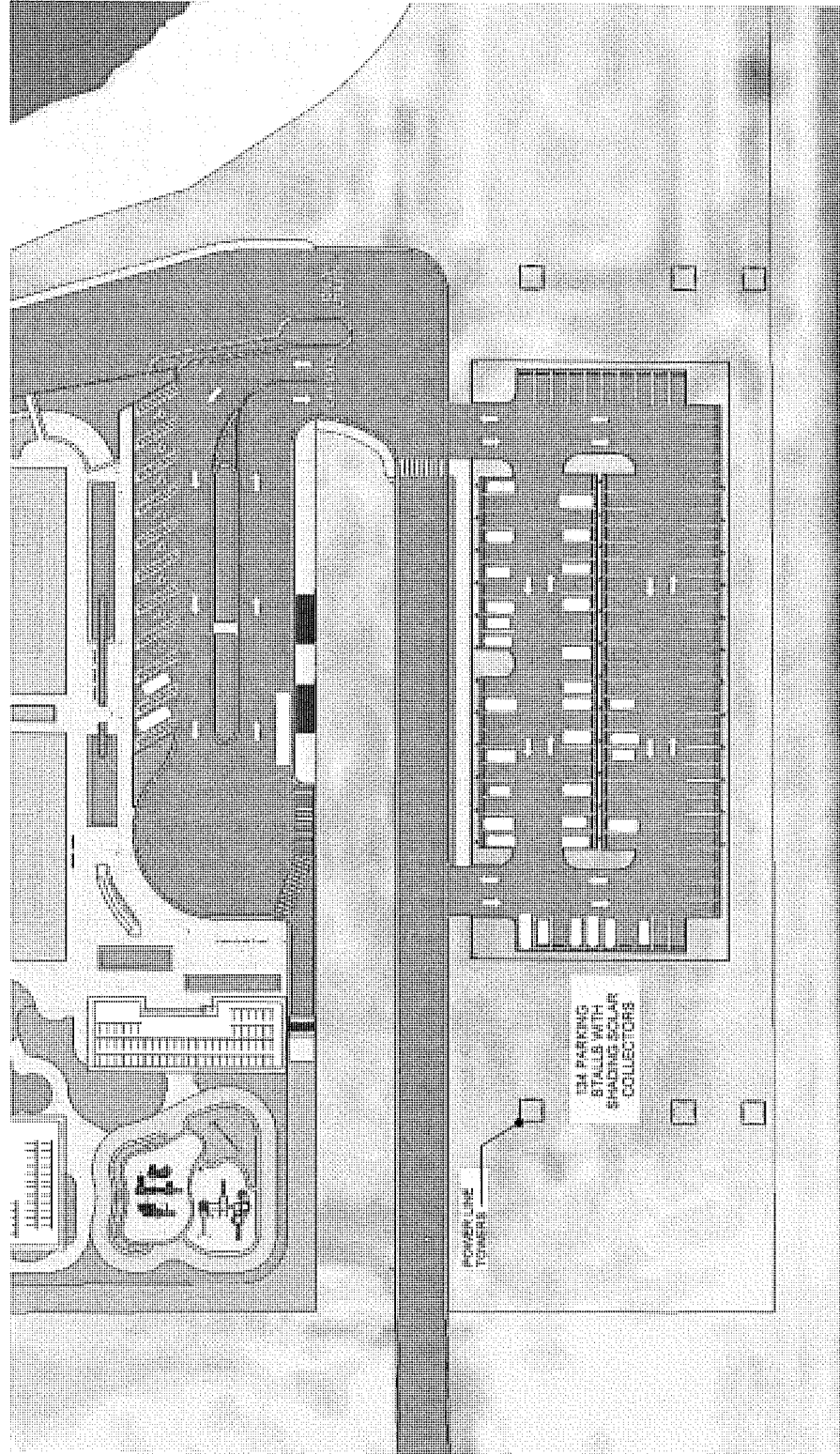
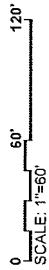


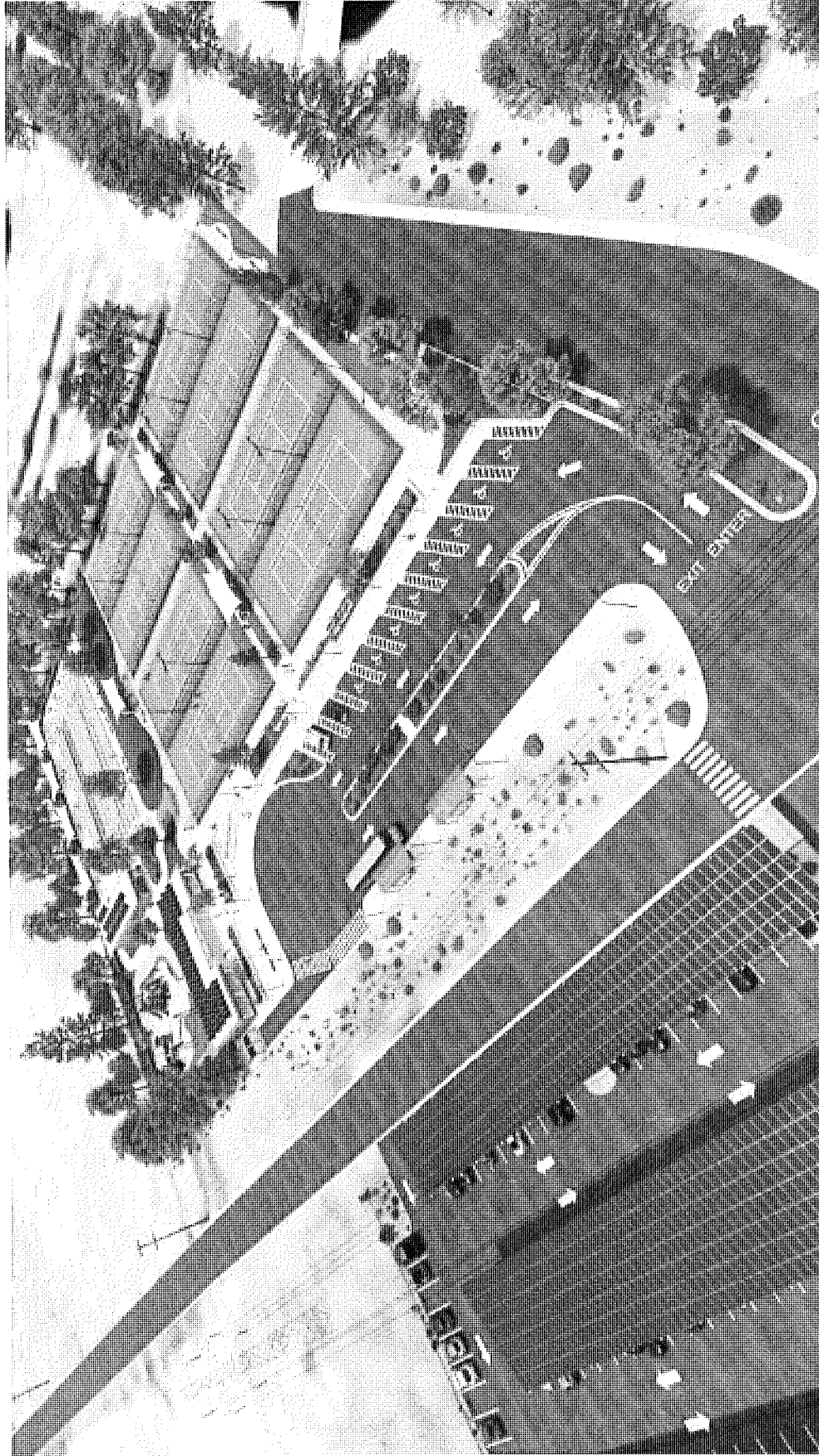
0 200' 400'
SCALE: 1"=200'



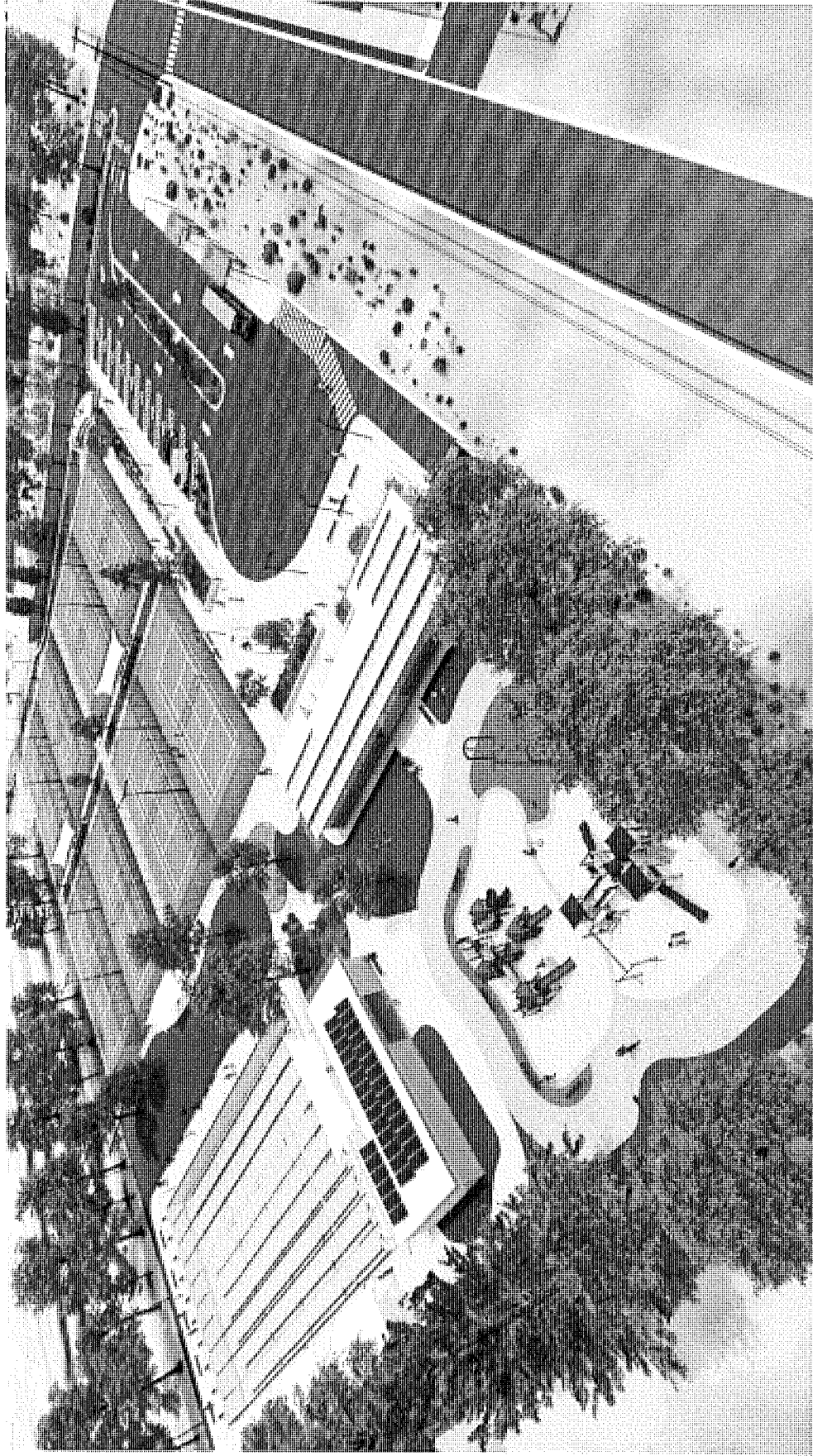
PRELIMINARY RECREATION FACILITY LAYOUT

October 23, 2022

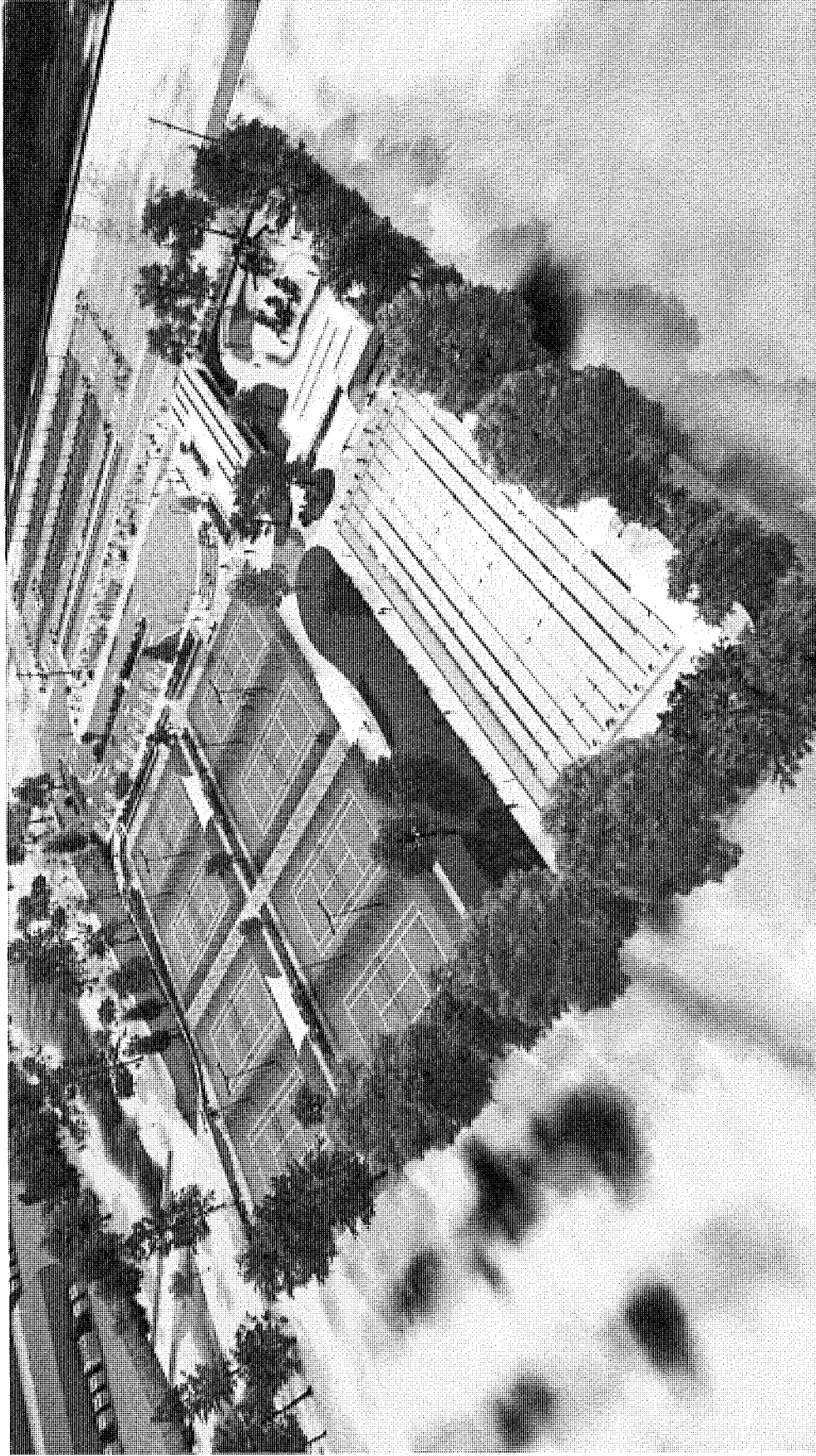




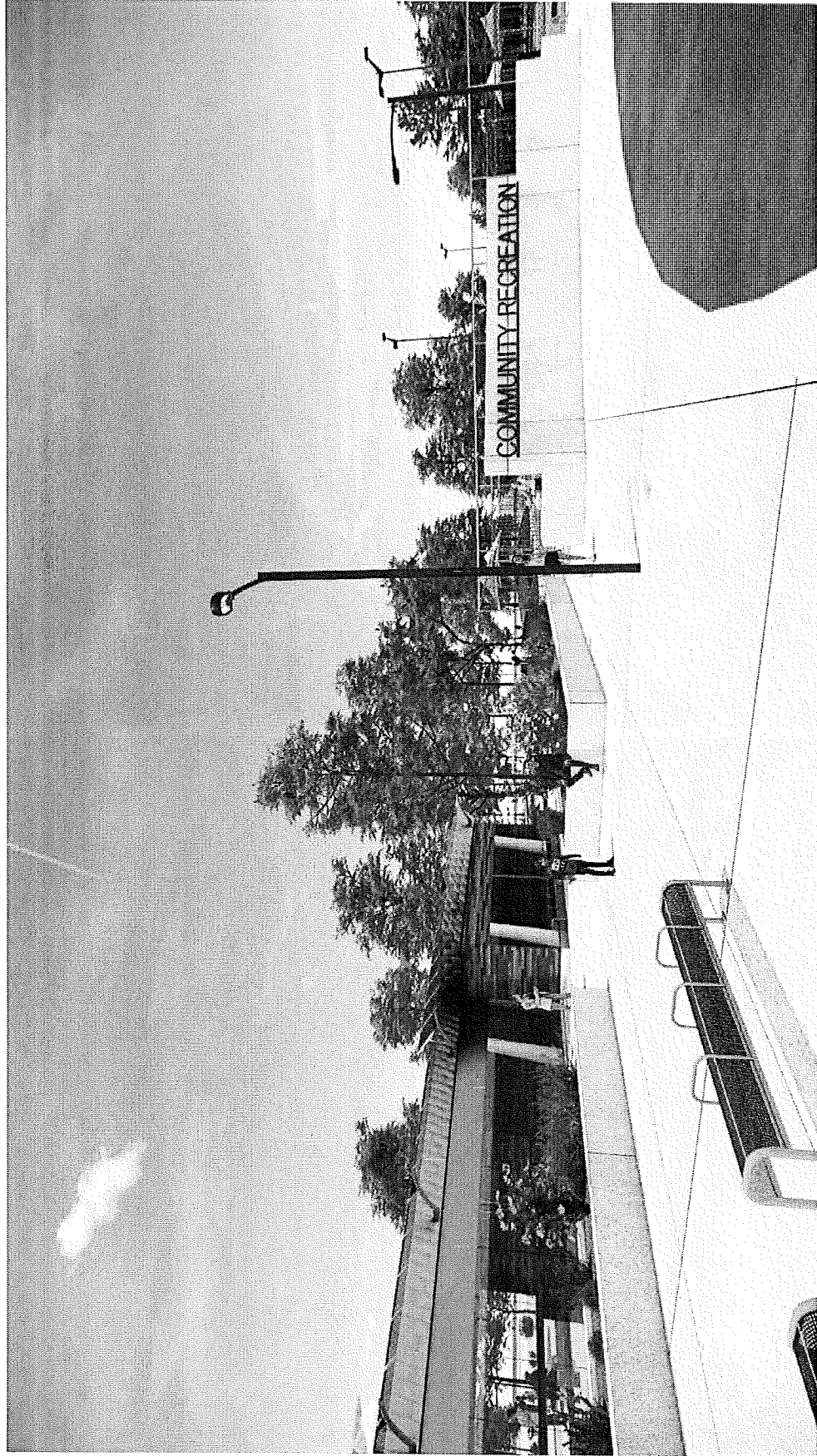
RENDERED AERIAL PERSPECTIVE 1 - RECREATION CENTER
October 23, 2022



RENDERED AERIAL PERSPECTIVE 2 - RECREATION CENTER
October 23, 2022

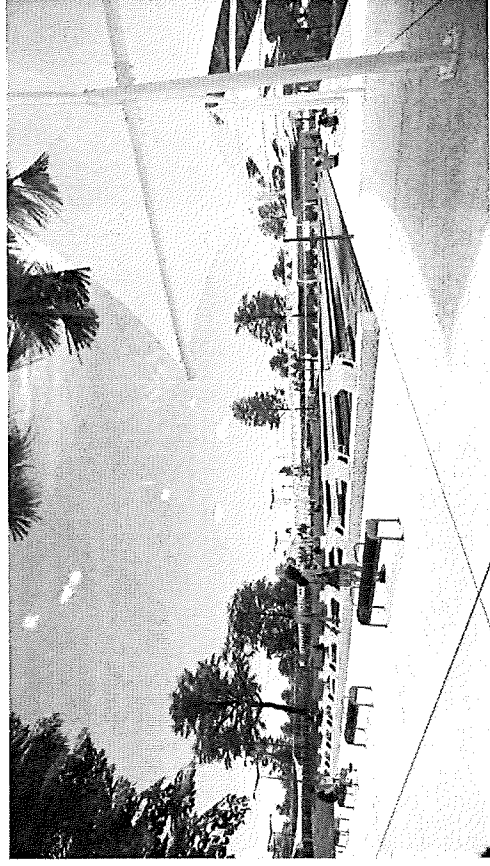
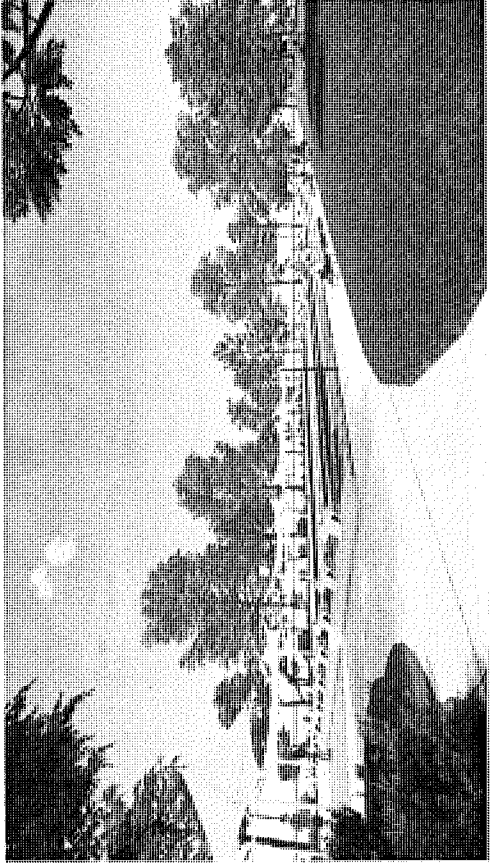
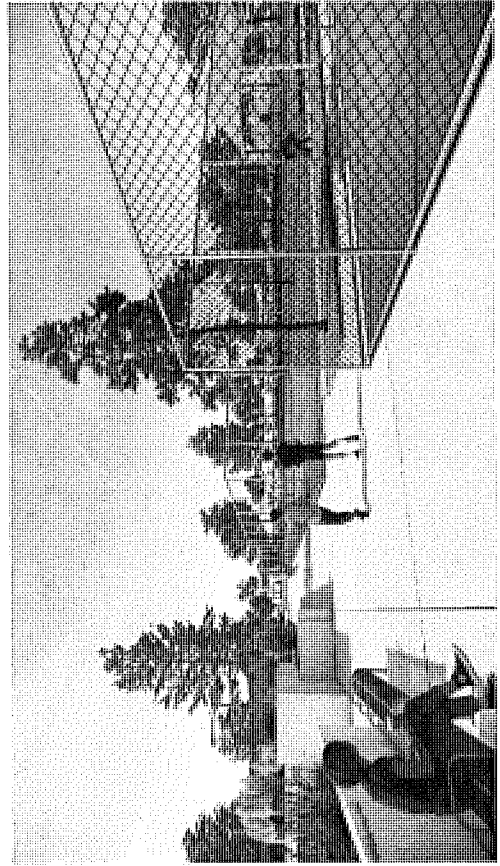


RENDERED AERIAL PERSPECTIVE 3 - RECREATION CENTER
October 23, 2022



RENDERED AERIAL PERSPECTIVE 4 - RECREATION CENTER
October 23, 2022

Exhibit B2



RENDERED AERIAL PERSPECTIVE 5 - RECREATION CENTER
October 23, 2022

Attachment 4:
2022 Conceptual Site Plan



Attachment 5:
Battery Storage Facility Details



Attachment 6:
Sports Complex Conceptual Site Plan



