



CITY OF MARTINEZ

**CITY COUNCIL AGENDA
February 6, 2008**

TO: Mayor and City Council

FROM: Veronica Nebb, Assistant City Attorney

SUBJECT: Continued consideration of Freitas General Plan Amendment including resolutions approving a) Mitigated Negative Declaration with 2 substitute mitigation measures, and Mitigation Monitoring and Reporting Program and b) General Plan Amendment to re-designate approximately 3 acres of a 5 ½ acre site located at 635 Vine Hill Way from “Open Space” to “Residential.”

DATE: January 30, 2008

RECOMMENDATION:

Continue consideration of draft resolutions after consideration of communication from the applicant’s and the opponent’s legal counsel.

BACKGROUND:

The City Council held a public hearing on October 3, 2007 and on a 4-0 vote indicated to staff their intent to approve a General Plan Amendment to re-designate approximately 3 acres of a 5 ½ acre site, located at 635 Vine Hill Way from “Open Space” to “Residential” and directed staff to prepare the necessary resolutions, with findings, for City Council action. This item was brought back to the City Council on December 5th, 2007. Opponents of the project retained the services of an attorney, Thomas Lippe, and presented 2 letters (included as attachments to this staff report) to the City Council. At that meeting, the City Council continued the item to December 19th to allow the applicant’s attorney additional time to review legal arguments presented at the December 5th public hearing. On December 11th the applicant’s attorney submitted a letter requesting that the hearing be continued to after the holidays to allow time for a more thorough review, and because the attorney was out of town until January 16th, 2008. The applicant’s attorney, Dana Dean, has provided 2 letters presenting the applicant’s response to the opponent’s letters. These 2 letters dated January 24th and 30th, 2008 are also included as attachments.

The City Attorney office has reviewed these letters and will be prepared to respond to questions and/or provide clarifications.

FISCAL IMPACT:

None at this time.

ACTION:

Motion to continue consideration of Freitas General Plan Amendment including resolutions approving a) Mitigated Negative Declaration with 2 substitute mitigation measures, and Mitigation Monitoring and Reporting Program and b) General Plan Amendment to re-designate approximately 3 acres of a 5 ½ acre site located at 635 Vine Hill Way from “Open Space” to “Residential”.

ATTACHMENTS:

- 1) Letter from Thomas Lippe (opponent’s legal counsel) dated November 28, 2007
- 2) Letter from Thomas Lippe (opponent’s legal counsel) dated December 4, 2007
- 3) Letter from Dana Dean (applicant’s legal counsel) dated January 24, 2008
- 4) Letter from Dana Dean (applicant’s legal counsel) dated January 31, 2008

APPROVED BY:



City Manager



Law Offices of
THOMAS N. LIPPE, APC

329 Bryant Street
Suite 3D
San Francisco, California 94107

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Facsimile: 415-777-9809
Email: Lippelaw@sonic.net

November 28, 2007

Mayor and City Council
City of Martinez – City Hall
525 Henrietta Street
Martinez, CA 94553

Re: Freitas Development at 635 Vine Hill Way – Subdivision 9120, proposing General Plan Amendment and later Rezoning of portion of Private Permanent "Pine Meadows" Open Space

Dear Mayor Schroder and City Council,

This office represents Keep Our Open Space, an association of citizens who live in the area of this project, as well as Mark and Lorna Thomson, who reside at 918 Meadowvale Court in the City of Martinez, on property directly adjacent to the open space sought to be developed by this project. I am writing to submit additional public comment on this project for the Council's consideration at its public hearing on December 5, 2007.

As you know, property owner Gary Freitas has applied to amend the City's General Plan to change the land use designation of approximately three acres at 635 Vine Hill Way (Assessor's Parcel No. 162-420-009) from "Open Space" to "Residential." This project would require rezoning the property from "OS" to "R-10", and would require approval of a Major Subdivision Map to allow for five single family lots.

Approval of this General Plan Amendment will violate the California Environmental Quality Act, at Public Resources Code §§ 21000 *et seq.*, in a number of respects.

1. Deleting the Open Space Mitigation Measure Required by the 1976 Subdivision Approval Would Violate CEQA.

Deleting the Open Space mitigation measure required by the 1976 Pine Meadows subdivision approval would violate the California Environmental Quality Act ("CEQA"), which governs whether, when, and how agencies may eliminate mitigation measures previously adopted under CEQA. See *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342. In the *Napa Citizens* case, the court announced several rules that agencies must observe when deciding whether to delete a previously adopted mitigation measure.

First, as a general rule governing the court's consideration of a challenge to an agency decision to delete a previously adopted mitigation measure, the court stated that "the deference provided to governing bodies with respect to land use planning decisions must be tempered by the presumption that the governing body adopted the mitigation measure in the first place only after due investigation and consideration." *Id.* at 359.

Second, the court identified two specific requirements that must be followed if an agency is to legally delete a previously adopted mitigation measure, stating that "a governing body must state a *legitimate reason* for deleting an earlier adopted mitigation measure, and must support that statement of reason with substantial evidence." *Id.* (emphasis added).

Third, in fleshing out what it meant by the term "legitimate reason," the court stated: "The modified EIR also must address the decision to delete a mitigation measure. In other words, the measure cannot be deleted without a showing that it is *infeasible*." *Id.* (emphasis added).

Fourth, the court concluded its decision on this issue by stating, "If no legitimate reason for the deletion has been stated, or if the evidence does not support the governing body's finding, the land use plan, as modified by the deletion or deletions, is invalid and cannot be enforced." *Id.*

Here, the City clearly adopted a prior mitigation measure pursuant to CEQA – preserving the property in question as "permanent private open space" – to reduce significant impacts related to the 1976 Pine Meadows Subdivision. On July 6, 1976, the City of Martinez Planning Commission certified the Environmental Impact Report ("EIR") for Tract 4744, Pine Meadows. Tract 4744 includes the subject property located at 635 Vine Hill Way (Assessor's Parcel No. 162-420-00, hereinafter referred to as the "Freitas Property"). The EIR identified a potentially significant visual impact near Vine Hill Way and found that a change to the project to provide a "minimum 250-300 foot wide scenic and open space easement" was a mitigation measure that would reduce this impact. (See EIR for Tract 4744 Pine Meadows and Tract 4774 Muir Heights, dated April 1976 (hereinafter "1976 EIR"), pp. 5, 9, and 36, attached hereto as Exhibit 1.)

The City thus conditioned approval of the subdivision on preservation of several lots as "permanent private open space" with scenic easements granted to the City. These lots included Lots 26 and 27 shown on the tentative map,¹ which constitute the portion of the Freitas Property that is the subject of the current General Plan Amendment proposal. (See letter from City of Martinez Planning Commission Secretary Barry E. Whittaker to property owner James Busby, dated July 9, 1976, pp. 1 and 3, attached hereto as Exhibit 3; and the tentative subdivision map appearing as

¹These lots were ultimately combined with Lot 25 and collectively designated "Lot 22" on the final subdivision map. (See Final Subdivision Map for Tract 4744, Sheet 2 of 14, attached hereto as Exhibit 2.) Lot 22 is now commonly known as 635 Vine Hill Way.

Figure 7 to the 1976 EIR, attached hereto as Exhibit 4.)

The City thereafter adopted Resolution 108-76, which amended the General Plan to change the zoning on that portion of the Freitas Property from "planned public open space" to "Private open space." (See Resolution No. 108-76, dated August 18, 1976, and map of "Proposed General Plan Amendments," attached hereto as Exhibit 5.) This private open space was intended to be "incorporated into a 'horse set-up' lot, restricted by a 'scenic easement' prohibiting the erection of structures, obscure fencing, or grading." (See Planning Commission Staff Report dated July 6, 1976, attached hereto as Exhibit 6.)

While the Negative Declaration prepared for the current General Plan Amendment proposal, as well as the staff reports for the Planning Commission and the City Council, discuss the deletion of this mitigation measure, nowhere do they state a "reason" for deleting it other than to allow the owner to develop the land. This is not a "legitimate" reason to delete this mitigation measure. As stated in *Napa Citizens*, the question is whether continued implementation of this mitigation measure is "infeasible." There is no suggestion by the City that maintaining this open space is infeasible or that doing so is no longer effective in reducing the previously identified visual impact.

2. The Mitigation Measures Necessary To Reduce the Visual/Open Space/Aesthetic, Hydrology, and Water Quality Impacts to Less Than Significant Violate CEQA.

It is generally unlawful under CEQA to defer until after project approval the development of mitigation measures needed to substantially reduce potentially significant impacts. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307. The *Sundstrom* court held that an agency may not rely on mitigation measures of unknown efficacy to conclude that a project's potentially significant impacts will be reduced to a "less-than-significant" level. *Id.*; see also *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1606 ("[T]he City cannot rely upon post approval mitigation measures adopted during the subsequent design review process. Such measures will not validate a negative declaration."); *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 884 ("There cannot be meaningful scrutiny of a mitigated negative declaration when the mitigation measures are not set forth at the time of project approval.").

There are limited exceptions to this general rule in circumstances (1) where developing the mitigation measures for the kinds of impacts at issue is infeasible, or (2) where developing the measures is feasible but practical considerations prohibit the formulation of those measures before approval and achievable performance standards are specified. *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1029.

Here, the Negative Declaration for the current General Plan Amendment proposal identifies Mitigation Measure "AES-2" for potentially significant visual/open space/aesthetic impacts as follows:

The visual height the units ultimately be built on the proposed lots (Design Review approval entitlements not requested at this time) be reduced by either lowering the average elevation of the homesite be [sic] off-haul grading and/or imposition of a more restrictive height limit (e.g. single story 18' maximum) than the 2 story 25' maximum typically allowed in the proposed R-10 Zoning District.

(See Draft Negative Declaration for Freitas Development, signed June 29, 2007, p 5, attached hereto as Exhibit 7.) The staff report for the October 3, 2007 City Council meeting (at page 5) restates the same mitigation measure. This mitigation measure is not fully developed or specific, yet there is no reason to think it is not feasible to be specific.

The Negative Declaration also identifies hydrology and water quality impacts as "less than significant with mitigation incorporation." (See Exhibit 7, pp. 11-12.) Thus, without the mitigation measures identified in the Negative Declaration, these impacts would be potentially significant, requiring that the City prepare an EIR before approving the project. The Negative Declaration relies, for its measures to mitigate hydrology and water quality impacts, on several mitigation measures that will not be fully developed until after project approval. (*Id.* at pp. 13-14.)

Mitigation Measures "Hyd-1" and "Hyd-3" require the project's future application for, obtaining of, and compliance with the City's National Pollution Discharge Eliminating System ("NPDES") permit (known as the "C-3 Permit"), issued by the Regional Water Quality Control Board pursuant to the federal Clean Water Act and the state Porter-Cologne Water Quality Act. (*Id.*) But there is no particular reason that applying for and obtaining the permit before project approval is "infeasible." The only reason it is not being done now is the applicant's desire to split the General Plan Amendment approval from the rezoning, subdivision map, and site plan approvals. The desire to split the approval process appears to be more a matter of convenience than "feasibility."

Likewise, Mitigation Measure "Hyd-2" requires the applicant to prepare and implement a Storm Water Pollution Prevention Plan ("SWPPP") to reduce potential impacts to surface water quality through the construction period of the project, to be submitted to the City prior to approval of the grading plan. (*Id.*) The City is required to approve the final design for operational period best management practices ("BMPs"). Again, there is no particular reason that preparing, submitting, and approving the SWPPP prior to project approval is "infeasible."

Similarly, Mitigation Measure "Hyd-4" requires landscaping proposed as part of the project to utilize Integrated Pest Management ("IPM") practices to reduce the potential sources of pollution on the site, and requires that the applicant designate an IPM certified applicator in the Operations and Maintenance Plan submitted to the City prior to issuance of a Certificate of Occupancy. (*Id.* at p. 14.) There is no reason that designating an IPM certified applicator and incorporating IPM practices before project approval is "infeasible."

Therefore, approval of this project based on these undeveloped mitigation measures without preparing and certifying an EIR would violate CEQA.

3. Segmentation of the Project Approvals Violates CEQA.

CEQA generally prohibits the segmentation of a "project" for purposes of environmental review. What constitutes the "project" for purposes of CEQA is not determined by individual permits or approvals; rather, it is the activity having an effect on the environment, in this case the proposed rezoning and development of approximately three acres of land currently protected as open space.²

Here, the City has segmented the approval process by allowing the applicant to first apply for the General Plan Amendment, then separately apply for the subdivision and rezoning at a later date, and then again separately apply for the site plan approvals. For example, the whole of this project includes Mitigation Measures "AES-2" and "Hyd-1" through "Hyd-4," discussed above. But the impact of adopting these measures cannot be evaluated now, nor can their efficacy in reducing aesthetic, hydrology, and water quality impacts to a less than significant level, because they are general requirements (or in the case of AES-2, just suggestions and examples) with the details to be provided after General Plan Amendment approval in the course of subsequent permit proceedings.

As a result, the Negative Declaration does not assess the environmental impact of the entire project, leaving more detailed review of the site plans to a later date. This segmentation of environmental review violates CEQA.

For the forgoing reasons, Keep Our Open Space and Mark and Lorna Thomson request that the City Council deny this application for a General Plan Amendment.

²The CEQA Guidelines define "project" as "the whole of an action, 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..." 14 California Code of Regulations ("CCR") § 15378(a). "The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval." 14 CCR § 15378(c). Guidelines § 15378, subd. (d) further states, "Where the Lead Agency could describe the project as ... a development proposal which will be subject to several governmental approvals under subdivision (a)(2) or (a)(3), the lead agency shall describe the project as the development proposal for the purpose of environmental analysis." 14 CCR § 15378(d).

City of Martinez Mayor and City Council
November 28, 2007
Page 6

Thank you for your attention to this matter.

Very truly yours,



Thomas N. Lippe

Enclosures

City of Martinez

525 HENRIETTA STREET • MARTINEZ
CALIFORNIA 94653 • (415) 228-4400

FILED

JUL 22 1976

J. R. OLSSON, County Clerk
CONTRA COSTA COUNTY

By J. PUGH Deputy

ENVIRONMENTAL IMPACT REPORT

TRACT 4744 PINE MEADOWS
and
TRACT 4774 MUIR HEIGHTS

Prepared by: Barry E. Whittaker
Planning Director
City of Martinez

April 1976

EXHIBIT

1



8. Kaiser Foundation Hospital--occupancy and use of the existing (formerly Martinez Health Center) facilities
9. U.A. Craftsmen-Plumbers Union Hall and training center under construction
10. Farmers Market at Center and Glacier: 31,000 sq.ft.
retail space approved

For the purposes of this EIR, the "neighborhood" in which these projects are occurring is bounded by Alhambra Avenue at Vine Hill Way; the V.A. Hospital at Muir Road; State Route 4 at Morello Avenue and the Glacier Drive/Milano Way overcrossing, and at the City limits on Center Avenue. All traffic in, out, or through this "neighborhood" must use the above-noted streets. In addition, this "neighborhood" is defined for some purposes as including a few lots in the Muir Oaks subdivision which overlook portions of the subject sites, or which must overlook one of the subject sites in routine trips to and from home. (See Fig. 1 for "neighborhood" boundaries, location of subject sites and other project sites discussed herein.)

B. SUMMARY SIGNIFICANT IMPACTS: MITIGATION

Potential Substantially Adverse Environmental Impacts: Three general areas of significant adverse environmental impacts have been identified as potentially arising from implementation of the subject projects. One of these areas, traffic impacts on Center Avenue in Pacheco arising from the subject projects together with other projects already approved, has been identified as a potential substantially adverse environmental impact, necessitating the preparation of this EIR. Other areas of potentially significant adverse impact include traffic impacts generally school load generation, and visual impacts of the subject projects.

1. Traffic Impacts: Adverse impacts are projected for major access routes to the subject sites and related development projects, and within the neighborhood.

a. Center Avenue at the City limits (entering Pacheco): A substantially adverse environmental impact of the projects discussed herein is the estimated increase in traffic volume at this location. From the City limits easterly to Aspen Drive in Pacheco, Center Avenue can best be described as a narrow, rough, bumpy, marginally improved street. An elementary (Pacheco Elementary, Mt. Diablo Unified School District) is located on this portion of Center Avenue. The absence of any graded or otherwise improved walkways alongside Center Avenue means that the school children must walk alongside the road, perilously close to passing traffic. Existing homes are generally quite close to the paved street. The rough texture of the pavement and bumpy nature of the road means that an unusually high noise level is generated from traffic along this street. The opening of the Route 4 freeway (and more particularly, the closing of the Glacier Drive connection to Route 4) was the principal cause of an increase in the traffic volume on Center Avenue immediately east of the City limits from 7,058 vehicles per day in January, 1975 to 8,102 vehicles per day in February, 1976. This traffic level was achieved with a total of 1,664 occupied living units in the subject "neighborhood", exclusive of the few lots in Muir Oaks. A County



as beneficial to the school districts, which have been experiencing financial difficulties from declining enrollment (and hence, declining State aid, but more or less fixed facility and overhead expenses).

3. Visual Impact: Adverse visual impacts are expected to occur in two locations--along Vine Hill Way (and from some of the Vine Hill Townhouses which overlook a portion of the site) adjoining the projects and from several lots within Muir Oaks overlooking the subject projects.

a. Vine Hill Way: Since originally submitted, the project plans have been extensively modified to reduce the visual impact along Vine Hill Way. As now proposed, no lots front Vine Hill Way; hence, none but minor improvements are proposed for Vine Hill Way. From Morello Avenue westerly severn lots back onto Vine Hill Way. However, these lots are planned to be developed at near natural grade. In addition, the rear 50 feet adjoining Vine Hill Way, is planned to be dedicated as a scenic easement, and planted with trees, to act as a buffer between Vine Hill Way and the fenced-in padded lots. From Morello Avenue easterly a minimum of 250 - 300 foot wide scenic and open space easement is planned adjoining Vine Hill Way, between the street grade and the lots at the top of the knoll.

Most obtrusive from Vine Hill Way will be the new houses at the top of the "Coward Knoll". Although cutting of this knoll has been reduced to about 10 feet on the latest plans, the houses on top of this knoll will be quite visible from Vine Hill Way. The greatest impact would be at the crest of the hill on Vine Hill Way. A second area of impact is on several of the knoll top units in the Vine Hill townhouse project, who have an excellent view of the present knoll, and to whome the knoll top houses will be most visible. (See Fig. 2.)

Mitigation: In addition to the mitigation already incorporated into the plans (in the nature of moving lots away from Vine Hill Way, reducing cuts and saving an oak tree), a requirement that lots on the knoll-top be restricted to a single-story construction above street grade would minimize their impact on the scene.

b. Muir Oaks: Six lots on Mildren Road (4919 to 5014 Mildren Road) immediately adjoin and overlook the 140-lot tract. Their view is of the central county area, from Buchanan Airfield northerly, with natural terrain, open hillsides and knoll in the immediate foreground. The foreground view would be replaced instead by houses on graded pads. The extension of Snow Drive in particular would result in new houses on padded R-10 lots (10,000 square feet minimum area) adjacent and very visible to 4919, 4927, and 4941 Mildren Road. The other impacted lots would have either R-40 minimum lots adjacent or somewhat longer range views of the R-10 lots.

Mitigation: Extensive mitigation in the nature of reducing the number of lots in this area, increasing their minimum and average size, and reducing the grading has already been incorporated into the plan. The addition of a requirement that the knoll-top lots be restricted to one-story construction (above the street) would further



schools for pedestrian and bicycle traffic.

6. VISUAL IMPACTS: The development of the subject projects is expected to result in adverse visual impacts in several locations.

A. VINE HILL WAY: Adverse visual impacts are expected to occur along the portion of Vine Hill Way abutting the project (Tract 4744). Currently the scene along this portion of Vine Hill Way is largely rural with open hillsides adjoining the road, and fairly long vistas available. Some views of developed residential tracts are seen from a variety of places, but the predominant "flavor" of the view is rural.

The subject project would introduce a number of new residential tract dwellings into this scene. The impacts from these units has been greatly reduced by plan modification since the original Tentative Map was submitted. Presently houses back onto Vine Hill Way, buffered by a planned 50-foot scenic (and landscaped) setback from Morello Avenue southwesterly. Houses will occupy the minor knoll ("Coward Knoll") adjoining Vine Hill Way, but grading has been reduced, and the setback to the padded lots increased to 250-300 feet from Vine Hill Way. The intervening acreage is a part of one large "acreage" lot on which the owner would presumably graze horses.

Earlier plans called for substantial grading on the knoll top (55 feet of cut versus the 10-15 feet now planned), and houses fronting and backing close onto Vine Hill Way. Nevertheless, new residences will replace existing hillside as the skyline throughout this area.

MITIGATION: Restriction of knoll top-lots to one-story (above street level) houses would mitigate some of the adverse impacts. Requirements for rear and side yard tree screening would further mitigate the impacts.

B. MUIR OAKS: Six lots on Mildren Road (4919 to 5014 Mildren Road) immediately adjoin and overlook the 140-lot tract. Their view is of the central county area, from Buchanan Air Field northerly, with natural terrain, open hillsides and knolls in the immediate foreground the views would be replaced instead by houses on graded pads. The extension of Snow Drive in particular would result in new houses on padded R-10 lots (10,000 square feet minimum area) adjacent and very visible to 4919, 4927, and 4941 Mildren Road. The other impacted lots would have either R-40 minimum lots adjacent or somewhat longer range views of the R-10 lots.

MITIGATION: Extensive mitigation in the nature of reducing the number of lots in this area, increasing their minimum and average size, and reducing the grading has already been incorporated into the plan. The addition of a requirement that the knoll-top lots be restricted to one-story construction (above the street) would further mitigate the impact. Additionally, the lots backing onto the California Riding and Hiking Trail could be developed at 10-15 feet below the natural grade, with private yard fences installed at the toe of the cut bank (hence, visually below the view of the Muir Oaks homes). These mitigation devices would combine to minimize the intrusion of the new homes into the views from the existing Muir Oaks homes.

C. PLEASANT VIEW: A number of the houses in the Pleasant View tracts have nice views overlooking the site of Tract 4744. These houses were constructed



*Scan Easement
omitted from
final subdivision
plan*

SUBDIVISION 4744 PINE MEADOWS

BASIS OF BEARINGS

MONUMENT LINE OF CENTER AVENUE
BETWEEN SNOW DRIVE AND ROLLING HILL WAY,
5N R5 N39°00'53" W R5 SHOWN ON
CT 3579 (116 M 51).

A PORTION OF THE RANCHO LAS JUNTRAS
CITY OF MARTINEZ
FERGUSON & WOLLMAN, CONSULTING ENGINEERS
200 GREGORY LANE, PLEASANT HILL CALIFORNIA
SEPT. 1976

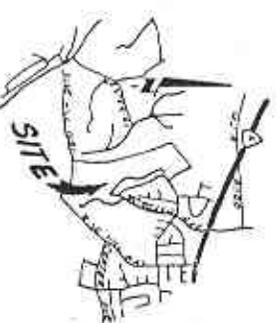
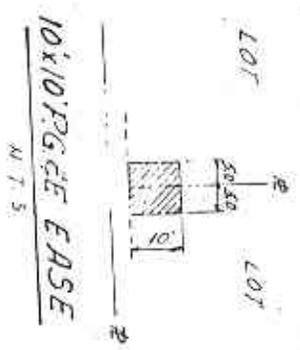
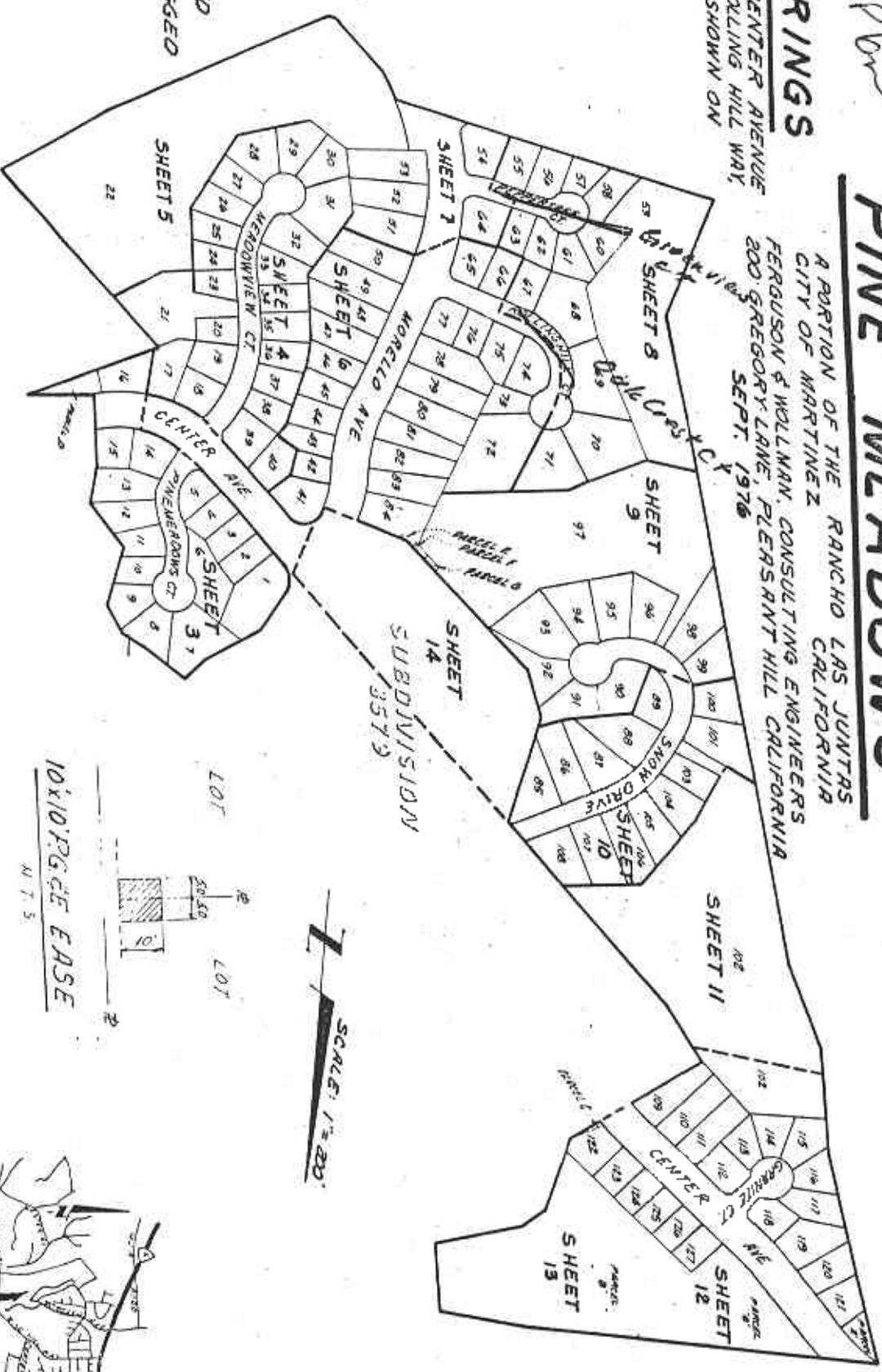


EXHIBIT 2

204 M 10

LEGEND

- FND. STANDARD MON.
- SET. STANDARD MON.
- FND. IRON PIPE AS NOTED
- SET 3/4" IRON PIPE TAGGED
- RCE 9267

KEY MAP

SHEET 2 OF 14 SHEETS

City of Martinez

Planning Dept.

525 HENRIETTA STREET • MARTINEZ
CALIFORNIA 94553 • (415) 228-4400

July 9, 1976

Mr. James Busby
P.O. 430
Martinez, CA 94553

Dear Mr. Busby:

At its meeting of July 6, 1976 the Planning Commission certified an EIR and Addendum for Pine Meadows subdivision, voted to recommend to the City Council that the property be rezoned to R-6.0, R-10, R-40 and Open Space, and approved a tentative map for the subdivision.

Conditions of Approval for the tentative map are as follows:

1. Approval is conditioned upon the necessary General Plan amendment and rezonings being adopted by the City Council.
2. LOTS: Revisions shall be made to the lotting as follows:
 - a. Lots #26 and 27 shall be eliminated and combined with Lot #25.
 - b. Lot #59 shall be eliminated and combined with Lot #26.
 - c. Lots #77 and 78 shall be eliminated and combined, along with a rear portion of Lot #67, with Lot #66, making Lot #66 a minimum size of two acres.
 - d. Lot #135 shall be eliminated and combined with Lot #134.

The net result is 132 residential lots plus Lot #134 (+135) planned for park dedication.

3. STREETS: Revisions shall be made to street plans as follows:
 - a. Center Avenue shall be extended as an 84 foot right-of-way and half-width street (curb and gutter on one side, plus street paving for a 32 ft. half street) from the subdivision boundary to Vine Hill Way, skirting the golf course. (Relocation of the 9th tee appears to be necessary but readily accomplishable) The need for screening along Center Avenue should be studied and screening included in the required work if determined as necessary by the City Engineer. In the event this section of Center Avenue is complete prior to County improvements in

EXHIBIT 3



- Pacheco have been completed, this section shall be barricaded and kept closed at both ends until the Pacheco section is opened. (Removal and repairs of temporary barricades shall be by City forces.)
- b. Center Avenue alignment (horizontal and vertical) shall be studied from the project boundaries to the Route 4 interchange at Pine Street to insure that the portion within this tract is properly designed to work with future improvements in this direction. Study plans shall be included with improvement drawings submitted to the City Engineer for checking. Center Avenue within the subdivision shall be a 64 foot street within an 84 foot right-of-way. Sidewalks shall be at the property line with 5.5 foot planter strips between the curb and sidewalk.
 - c. Morello Avenue at Vine Hill Way: The existing eucalyptus trees are to remain in a center median, with existing Vine Hill Way improvements forming the east bound traffic lanes and new construction of Morello Avenue forming the west bound traffic lanes; two intersections with Vine Hill Way, including left-turn refuge and right-turn tapers shall be designed and constructed with the subject subdivision. (An existing water line along Morello Avenue alignment may be required to be relocated at the determination of the City Engineer; any relocation shall be at the expense of the subdivider.) Morello Avenue alignment may be required to be relocated at the determination of the City Engineer; any relocation shall be at the expense of the subdivider.) Morello Avenue within the subdivision, except at Vine Hill Way and at any necessary transition section thereto shall be a 64 foot street in an 84 foot right-of-way, with sidewalks at the right-of-way line and a 5.5 foot planter between the curb and sidewalk.
 - d. Vine Hill Way: The developer shall install a structural overlay on the existing pavement, plus perform minor widening (to 24 foot maximum width pavement) as can be accommodated without significant grading.
 - e. Minor streets may be 32' wide in a 50' right-of-way.
 - f. Stop signs shall be installed by the developer as follows: Morello at Center (4); all connections to Morello (including Snow Drive) and Center Avenues (6); Vine Hill Way at Morello (2); and Center Avenue at Vine Hill Way (1).
 - g. Street names shall be reviewed later; some changes are required.
4. Grading: Grading revisions shall be required as follows:
- a. Change pad types as follows:



- (1) from 1/2 story side split to full story side splits:
Lots 21, 22, 28, 38, 39, 97, 98
 - (2) from flat to 1/2 story side splits: Lots 37, 130
 - (3) from flat to full story split: Lot 45
 - b. Daylight Lot #1 pad into Morello Avenue right-of-way
 - c. Contour grading required along Lots 57-59 and Morello Avenue:
#66-67; 76-79; 88-94; 95-98; 113-119, and 135-139.
 - d. Lots #108-111 should be lowered as much as feasible below the
grade of the California Riding and Hiking Trail adjoining these
lots (up to 15 feet below trail grade).
5. Scenic Easements: Scenic easements prohibiting grading, tree removal, construction of obscure fencing and structures of any type except barns and/or sheds associated with and incidental to the keeping of animals on the site shall be dedicated to the City of Martinez over all of Lots #26, 27, 59, 77 and 78, and all of Lots #25, 66, 67, 102-106, 107 and 112 except reasonable area for residences and associated buildings and yards therefor (all lots as shown on the proposed Tentative Map).
6. Park Dedication: Lots #134-135 (not less than 1.65 acres) shall be dedicated to the City of Martinez as neighborhood park land. As a result of this requirement there shall be no land purchase based park dedication fee (\$125 per dwelling unit) on this subdivision.

The developer shall construct curb and gutter and one half street section of Center Avenue adjoining the lots to be dedicated. The costs of curb and gutter and paving half the street across the dedicated lots shall be credited against park development based park dedication fees (normally \$300 per dwelling unit). In addition, the costs of providing required utility service (water, sewer, power, gas, telephone, etc.) to the dedicated lots shall be credited against the required fees. Resultant fee requirement is estimated as follows:

a. Land purchase base:	None
b. Development base:	\$300/du x 132 du = \$39,600
c. Less estimated improvements:	14,000
Estimated Net Fee:	\$25,600

In addition, and without further credit, the developer shall dedicate the underlying fee title for the land now covered by an Open Space and



Mr. James Busby

July 9, 1976

Page 4

Park Use Easement to the City of Martinez; the land is generally bounded by Lots #134-139 Tract 4744 and the Pleasant View Units 3 and 4 tracts.

7. TRAILS: The developer shall dedicate as road right-of-way the land on the northerly side of Vine Hill Way and Morello Avenue (from lot 58 southerly) between the present right-of-way line and a line at least 50 feet northerly of the final edge of pavements of these two streets. The developer shall grade a 12-foot trail near the middle of this area and plant a row of trees at 25-40 feet on centers on each side of the trail. Trail construction and tree placement shall conform generally to construction standards as used by the East Bay Regional Park District.

The developer shall construct a specially marked (exposed aggregate concrete, Bomanite, or equivalent) and signed (Ped and Equestrian X-ing) crosswalk where this trail crosses Morello Avenue in the vicinity of Lots #59 and 60.

(This trail will provide a link from the California Riding and Hiking Trail on Lot #66 to an existing trail in the Vine Hill Townhouse project (and hence to Hidden Lakes, etc.)

Developer shall dedicate 40 ft. of roadway right-of-way along Vine Hill Way between Morello and A.P. 162-400-02. There shall be 10 ft. roadway right-of-way dedicated along Vine Hill Way between the Center Avenue connection to Vine Hill Way and the northerly property line of A.P. 162-400-03. (This provides space for a pathway along Vine Hill Way from Morello to Center.) Developer shall grade and pave to park standards 4' A.C. walkway in all of the above trail or pathway locations.

The developer shall dedicate a trail over oil pipeline easement(s) in the vicinity of Lots #133-134, and unusable portions of Lot #133, and construct a 12-foot trail, two rows of trees, and a cross-walk in the same manner as the above, from the California Riding and Hiking Trail on Lot #133 to the dedicated lot #134.

A 20-foot wide non-exclusive easement shall be dedicated to provide access to the California Riding and Hiking Trail over the driveway to Lot 112 and between Lots 111 and 113.

8. TREES

- a. Existing Oak trees shall be preserved on Lots #8-9, 36, 81-82 and 112. Grading plans shall be revised to not provide for any grading within the driplines.



- b. Street trees, Center Avenue and Morello Avenue: Not less than three street trees shall be placed on all lots fronting either of these streets; two of these trees shall be placed in the planter areas required under Condition #3.b and 3.c. Corner lots shall have not less than six street trees, with two in the front planter, and three in the street-side side yard; lots on the corner of Morello and Center shall have three trees in the street-side side yard planter area.
 - c. Street trees, other streets: Not less than two street trees per lot, five on corner lots.
 - d. Rear yard trees: Not less than two trees per lot shall be required in the rear yards of Lots #6-15; 30-40; 60-66; 79-83; 100-106; 108-111; 126-128; 131-133; and 135-139.
 - e. Side yard trees: Not less than two trees shall be planted in the exposed side yard, adjoining the house, on Lots #17 and 58.
 - f. Trail: Trees shall be planted on both sides of the trail required on Lots #26, 59, 60-66 and 133, as specified under Condition #7.
 - g. All trees required above, plus lawn installation in all front yards and street-side side yard areas shall be shown on a plan to be approved by the Planning Department and guaranteed in the subdivision performance bond.
9. Sewer Access: Sewer access via pipeline stubs and easements shall be provided in the location and quantity requested by the Mt. View Sanitary District along the common boundary with the Muir Oaks Tract.
 10. Water Pressures: All lots over elevation 300, except Lot #112 will experience somewhat lower water pressures (about 30 psi minimum) than normal (about 40 psi minimum), but this should prove adequate for normal domestic needs. The developer shall so inform the Real Estate Commissioner of this fact and the appropriate lot numbers, for inclusion in the Public Report on the subdivision. Lot #112 will require a private pumping system or, alternatively, would require a connection to the Muir Oaks Hydropneumatic system.
 11. Architectural:
 - a. The following lots shall be limited to one story (above street grade) construction; lots #29-36, 79-83, 99-106, 108-111 and 113.
 - b. All street-side side yards on corner lots, plus exposed sides on Lots #17, 18, 58 and 136 shall receive architectural treatment consistent with front elevations.



Mr. James Busby

July 9, 1976

Page 6

- c. Rear elevations on Lots #6-15, 30-36, 60-66, 79-83, 100-106 and 108-111 shall receive architectural treatment consistent with front elevations.
12. Fencing: The developer shall install fencing as follows:
- a. Cattle-strength wire fencing around the boundary of Lot #25 (comprised of shown lots #25-27 and 59); Lot #66 (comprised of shown lots #66, 77, 78 and the rear portion of #67); Lot 107 and 112.
- b. Street-side side yard fencing from the rear corner of the house straight back to the property line on all corner lots (total 13).
13. Construction Plans: Grading and improvement plans shall be submitted to the Planning Department for approval prior to approval by the City Engineer.
14. Design Review: House plans shall be submitted for review and approval of the Planning Commission prior to the issuance of any building permits.
15. Clearing: The thistle, or wild artichoke infestation on Lot #26 and adjoining areas shall be removed by the developer during clearing operations.
16. Abandon Access: The Planning Commission recommends to the City Council that the 10-foot wide pedestrian access easement between Center Avenue and the Open Space and Park Use Easement, lying over a portion of Lot #139 be abandoned after dedication of Center Avenue and Lots #134-135 to the City.

Very truly yours,



Barry E. Whittaker, Secretary
Martinez Planning Commission

mf

cc: City Eng.
Bldg. Insp.



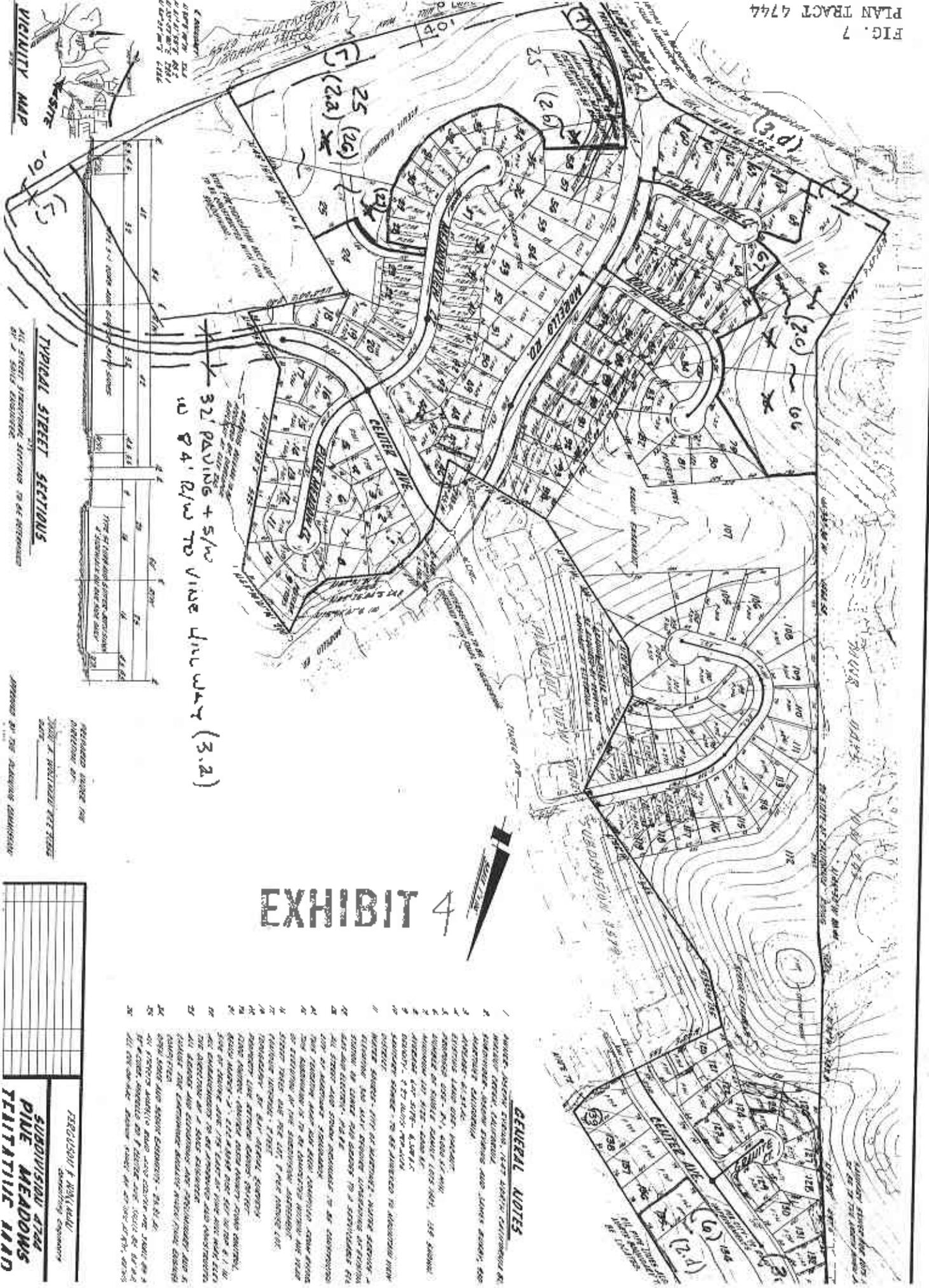


EXHIBIT 4



GENERAL NOTES

1. ALL LOTS SHALL BE CONVEYED BY DEED.
2. ALL LOTS SHALL BE CONVEYED BY DEED.
3. ALL LOTS SHALL BE CONVEYED BY DEED.
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25. ALL LOTS SHALL BE CONVEYED BY DEED.
26. ALL LOTS SHALL BE CONVEYED BY DEED.

PREPARED BY: W.M. WARD
SUBDIVISION DATA
PINE MEADOWS
TENTATIVE MAP

RESOLUTION NO. 108-76

H-4
(P2+4)

AMENDS GENERAL PLAN TO TRACTS 4744 and 4774

WHEREAS, the City Council of the City of Martinez has received a recommendation from the Planning Commission to amend the General Plan to Tracts 4744 and 4774 in the vicinity of the Veteran's Administration Hospital area; and

WHEREAS, the effect of the General Plan amendment is to increase the total number of lots in the two subdivisions by 22⁺, reduce permanent open space by approximately two acres, change some permanent public open space to permanent private space and grade and build on three knolls adjoining Muir Oaks; and

WHEREAS, the EIR and addendum were certified to by the Martinez Planning Commission prior to its recommendation to the City Council; and

WHEREAS, the City Council held a public hearing this date and considered the recommendations.

NOW, THEREFORE, BE IT RESOLVED, by the City Council of the City of Martinez that the General Plan be and the same is hereby amended, pertaining to Tracts 4744 and 4774, bounded by Vine Hill Way, Muir Oaks, V.A. Hospital, Orleans Plaza, Kaiser Hospital, Pleasant View No. 3 and Pine Meadows Golf Course, and changes Tract 4774 from "Parkway Holding Zone" to Residential, 0-6 du/acre and permanent open space; and Tract 4744 providing for minor changes in boundaries between Residential, 0-6 du/acre, and permanent open space, and changes their permanent open space from "planned public open space" to "Private open space".

I HEREBY CERTIFY that the foregoing is a true and correct copy of a resolution duly adopted by the City Council of the City of Martinez at a regular meeting of said Council held on the 18th day of August, 1976, by the following vote:

AYES: Councilmen - GIANNO, KRAUSE, LANCE, THELEN, SPARACINO

NOES: Councilmen - NONE

ABSTAIN: Councilmen - NONE

ABSENT: Councilmen - NONE

EXHIBIT 5

Lucia A. Steiner, Deputy
City Clerk of Martinez

Staff
commendation:

That the Planning Commission, by resolution, adopt the recommended amendment to the General Plan and recommend to the City Council that it do the same.

M-4
(p. 3-4)

Discussion:

The effects of amending the General Plan as recommended are summarized as follows:

1. Density increases:

- a. Tract 4744: The plan recommended for approval will yield about 132 lots consistent with the General Plan amendment, as opposed to about 116 lots if developed to conformance to present General Plan policy:
EFFECT: Increase of 16 lots +.
- b. Tract 4774: The plan recommended for approval will yield about 60 lots consistent with the General Plan amendment, as opposed to about 54 lots if developed in conformance to present General Plan policy extended onto this site:
EFFECT: Increase of 6 lots +.

2. Permanent Open Space:

- a. Reduction of Area, Tract 4744: There would be a reduction of permanent open space of about 2 acres over that required by present General Plan policy, due to the construction of eight houses and lots on the Coward Knoll adjoining Vine Hill Way, rather than this area remaining as permanent open space. Impact of change is visual.
- b. Change of designation from planned permanent public open space to planned permanent private open space: Present General Plan policy calls for an 8-10 acre public open space area along Vine Hill Way including the top of Coward's knoll; revised policy would call for approximately 6 acres of private open space alongside Vine Hill Way, incorporated into a "horse set-up" lot, restricted by a "scenic easement" prohibiting the erection of structures, obscure fencing, or grading.

(The original Hidden Lakes area General Plan policies called for preservation of the entire Coward site, including the Pine Meadows Golf Course and all adjoining undeveloped property, as permanent public open space. An amendment in 1973 revised this by City Council directive, to allow for development of all of the undeveloped 23 acre area (except the Golf Course) except for the small "permanent public open space" area noted above. In retrospect, no reason remained for the "public" designation, as no reasonable public use of this area can be foreseen.)

(Underlining
from
original)



CITY OF MARTINEZ

DRAFT MITIGATED NEGATIVE DECLARATION

Project Name: Freitas Development - Subdivision 9120, requiring General Plan Amendment and Rezoning of portion of Private "Pine Meadows" Open Space

Project Location: The project site is located at 633 Vine Hill Way, at the northeast corner of Vine Hill Way and Morello Avenue, within the City of Martinez, in Contra Costa County. (APN 162-420-009)

Description of project: The property owner proposes to subdivide a 5.57 acre parcel to allow the development of 4 new single family homes, in addition to the one existing single-family home, at 635 Vine Hill Way. The development also requires a General Plan Amendment and Rezoning of approximately 3 acres from "Open Space" to "Residential". Proposed lots will range between ±16,000 to ±72,000 square feet. The 4 new residential lots would generally be located adjacent to the intersection of Ashwood Drive and Vine Hill Way. Project would require the rezoning of approximately 3 acres from OS (Open Space) to R-10 (One-Family Residential: 10,000 square feet minimum site area). The property is mostly grassland, which has been seasonally mowed since this lot was created in the mid 1970's as a part of the "Pine Meadows" subdivision. The northeast corner of the property has been improved with a single family residence and accessory structures, all of which are within the ½ acre portion of the site currently zoned "residential." The remaining 5 acres is currently zoned as "Open Space." At the time of the subdivision's approval, the parcel was envisioned as a "horse set up" lot, preserving the ungraded slopes adjacent to Vine Hill Way and Morello Avenue frontages as scenic mitigations within the then urbanizing Vine Hill Way corridor. The frontages themselves were planted with naturalizing tree species and improved with a rustic walking trail. The proposal would create a new "shared driveway" behind the trail, parallel to Vine Hill Way. Approval for the grading and design of the custom home for the 4 new lots is not being requested at this time.

The project will require the following entitlements:

- (a) General Plan Amendment to change the land use designations of approximately three acres from Open Space to Residential.
- (b) Rezoning from OS to R-10
- (c) Major Subdivision Map to allow for 5 single family lots

Findings: It is hereby determined that, based on the information contained in the attached Initial Study, the project would not have a significant adverse effect on the environment.

Mitigation measures necessary to avoid, or reduce to a less-than-significant level, the project's potentially significant effects on the environment are detailed on the following pages. These mitigation measures are hereby incorporated and fully made part of this Draft Mitigated Negative Declaration. The project applicant has hereby agreed to incorporate and implement each of the identified mitigation measures as part of the project. The Mitigation Measures will be adopted as a part of a Mitigation Monitoring and Reporting Program.

Corey M. Simon, Senior Planner

EXHIBIT 7

June 29, 2007

Date

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporation	Less Than Significant Impact	No Impact
I. AESTHETICS — Would the project:				
a) Have a substantial adverse effect on a scenic vista?		X		
b) Substantially damage scenic resources, including, but not limited to, trees, rock outcroppings, and historic buildings within a state scenic highway?		X		
c) Substantially degrade the existing visual character or quality of the site and its surroundings?		X		
d) Create a new source of substantial light or glare, which would adversely affect day or nighttime views in the area?				X

Discussion:

a-d) The site subject 5.5 acre parcel, the majority of which is designated private open space, is the result of the environmental review/public review process that created the 1976 subdivision ("Pine Meadows") of which it's a part. At that time, the City wished to preserve the rural appearance of Vine Hill Way, then the only through road within the urbanizing area. The perspective toward what was then known as "Coward's Knoll" (now cul-de-sac bulb of Meadowvale Court) was seen as the most significant, thus the western third of the site is proposed to remain as open space. Of secondary significance was the view onto the site from Vine Hill Townhomes, and the "windshield perspective" east of the knoll.

Visual simulations illustrate the impact of the proposed development, as illustrated in Attachment 1. While the existing trees along the unusually wide right-of-way between edge of pavement and subject property (trail and plantings also part of original 1976 subdivision) provide some mitigation, additional design refinements are needed to reduce the visual impacts of the new units. With the mitigations listed below, the units themselves would be visually diminutive, thus preserving the original intent of the open space designation.

- **Mitigation Measure AES-1:** The property line between proposed Lots 1 and 2 be moved approximately 100' eastward, so that the side yards areas of the two lots "line up" with Ashwood Drive, preserving more of the unbuilt appearance of the site from northbound Ashwood Drive.
- **Mitigation Measure AES-2:** The visual height the units ultimately be built on the proposed lots (Design Review approval entitlements not requested at this time) be reduced by either lowering the average elevation of the homesite be off-haul grading and/or imposition of a more restrictive height limit (e.g. single story 18' maximum) than the 2 story 25' maximum typically allowed in the proposed R-10 Zoning District.

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporation	Less Than Significant Impact	No Impact
d) Be located on a site which is included on a list of hazardous materials sites compiled pursuant to Government Code Section 65962.5 and, as a result, would it create a significant hazard to the public or the environment?				X
e) For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project result in a safety hazard for people residing or working in the project area?				X
f) For a project within the vicinity of a private airstrip, would the project result in a safety hazard for people residing or working in the project area?				X
g) Impair implementation of or physically interfere with an adopted emergency response plan or emergency evacuation plan?				X
h) Expose people or structures to a significant risk of loss, injury or death involving wild land fires, including where wild lands are adjacent to urbanized areas or where residences are intermixed with wild lands?				X

Discussion:

- a-d) The project will result in the continuation of existing residential use. The activities normally associated with residential use would not result in the creation, emission, or transport of hazardous materials.
- e-f) The project is not located within an airport land use plan or within the vicinity of a private airstrip.
- g) The proposed subdivision would not impair implementation of or physically interfere with an adopted emergency response plan or emergency evacuation plan.
- h) The project site is contained within an established residential neighborhood with no significant open spaces or wildland areas nearby. Therefore, the risk of exposure to wildland fires is non-existent.

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporation	Less Than Significant Impact	No Impact
VII. HYDROLOGY AND WATER QUALITY — Would the project:				
a) Violate any water quality standards or waste discharge requirements?		X		

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporation	Less Than Significant Impact	No Impact
b) Substantially deplete groundwater supplies or interfere substantially with groundwater recharge such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level (e.g., the production rate of pre-existing nearby wells would drop to a level which would not support existing land uses or planned uses for which permits have been granted)?				X
c) Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, in a manner, which would result in substantial erosion or siltation on- or off-site?		X		
d) Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, or substantially increase the rate or amount of surface runoff in a manner, which would result in flooding on- or off-site?				X
e) Create or contribute runoff water which would exceed the capacity of existing or planned storm water drainage systems or provide substantial additional sources of polluted runoff?				X
f) Otherwise substantially degrade water quality?				X
g) Place a building within a 100-year flood hazard area as mapped on a federal Flood Hazard Boundary or Flood Insurance Rate Map or other flood hazard delineation map?				X
h) Place within a 100-year flood hazard area structures, which would impede or redirect flood flows?				X
i) Expose people or structures to a significant risk of loss, injury or death involving flooding, including flooding as a result of the failure of a levee or dam?				X
j) Inundation by seiche, tsunami, or mudflow?				X

Discussion:

a,c-f) As a residential use, there will be discharge of wastewater, other than typical residential sewage. The Site is within the Central Contra Costa Sanitation District, who is responsible for wastewater treatment. There are no natural watercourses on the project site or its area.

Runoff water quality is regulated by the Federal National Pollution Discharge Eliminating System (NPDES) Nonpoint Source Program (established through the Clean Water Act). The NPDES program objective is to control and reduce pollutants to water bodies from nonpoint discharges. The Program is administered by the California Regional Water Quality Control Boards. The project site would be under the jurisdiction of the San Francisco Bay RWQCB.

The City of Martinez is a participant in the Contra Costa Clean Water Program. The Clean Water Program maintains compliance with the NPDES Storm Water Discharge Permit and promotes storm water pollution prevention within that context. Compliance with the NPDES Permit is mandated by State and Federal statutes and regulations.

New development and significant redevelopment projects that are subject to Provisions C.3 of the NPDES Permit are grouped into two categories based on project size. The proposed project would be considered a Group 1 project, a redevelopment project that would create or replace more than one acre of impervious surface (e.g. roof area, streets, sidewalks, parking lots). This project is subject to the provisions included below:

- Numeric Sizing Criteria For Pollutant Removal Treatment Systems
- Operation and Maintenance of Treatment Measures
- Limitation on Increase of Peak Stormwater Runoff Discharge Rates

The proposed project has been designed at a conceptual level. Final grading, drainage, or landscape plans have not yet been developed for the site. Construction activities and post construction land uses could result in degradation of water quality in nearby surface water bodies by reducing the quality of storm water runoff. Implementation of the following mitigation measures would ensure compliance with the above noted standards and guidelines to ensure potential impacts to water quality would be less than significant.

- Mitigation Measure HYD-1: The project applicant shall submit grading and drainage plans to the City Engineering Division for their review and approval. The grading plan and the drainage plan for the project shall be prepared by a licensed professional engineer. The plans shall include drainage components that are designed in compliance with City of Martinez standards. In addition, the applicant shall submit a complete Stormwater Control Plan for all phases of project, an Operations and Maintenance Plan, and apply for a C.3. Permit.
- Mitigation Measure HYD-2: The applicant shall file a Notice of Intent (NOI) to comply with the General Construction Activity permit. This permit requires that the project proponent prepare a Storm Water Pollution Prevention Plan (SWPPP) designed to reduce potential impacts to surface water quality through the construction period of the project. It is not required that the SWPPP be submitted to the RWQCB, but must be maintained on site and made available to RWQCB, or City staff upon request. The SWPPP shall be submitted to the City prior to approval of the grading plan. The City shall review and approve the final design for operational period BMP's. The SWPPP shall include:
 - Specific and detailed Best Management practices (BMP's) designed to mitigate construction related pollutants to a level of insignificance. At minimum, BMP's shall include practices to minimize the contact of construction materials, equipment, and maintenance supplies (e.g., fuels, lubricants, paints, solvents, adhesives) with stormwater. The SWPPP shall specify properly designed centralized storage areas that keep these materials out of the rain.

- An important component of the storm water quality protection effort is knowledge of the site supervisors and workers. To educate on-site personnel and maintain awareness of the importance of storm water quality protection, site supervisors shall conduct regular tailgate meetings to discuss pollution prevention. The frequency of the meetings and required personnel attendance list shall be specified in the SWPPP.
 - The SWPPP shall specify a monitoring program to be implemented by the construction site supervisor, and must include both dry and wet weather inspections. In addition, in accordance with the State Water Resources Control Board Resolution No. 2001-046, monitoring would be required during the construction period for pollutants that may be present in the runoff that are "not visually detectable runoff" The developer shall retain an independent monitor to conduct weekly inspections and provide written monthly reports to the City of Martinez to ensure compliance with the SWPPP. RWQCB personnel, who may make unannounced site inspections, are empowered to levy considerable fines if it is determined that the SWPPP has not been properly prepared and implemented.
 - BMP's designed to reduce erosion of exposed soil, may include, but are not limited to: soil stabilization controls, watering for dust control, perimeter silt fences, placement of hay bales, and sediment basins. The potential for erosion is generally increased if grading is performed during the rainy season as disturbed soil can be exposed to rainfall and storm runoff. If grading must be conducted during the rainy season, the primary BMP's selected shall focus on erosion control, which is, keeping sediments on the site. End-of-pipe sediment control measures (e.g., basins and traps) shall be used only as secondary measures. If hydroseeding is selected as the primary soil stabilization method, then these areas shall be seeded by September 1st and irrigated as necessary to ensure that adequate root development has occurred prior to October 1st. Entry and egress from the construction site shall be carefully controlled to minimize off-site tracking of sediment. Vehicle and equipment wash down facilities shall be provided and designed to be accessible and functional during both dry and wet conditions.
 - Mitigation Measure HYD-3: The applicant shall fully comply with the requirements and intent of the current County NPDES permit. The permit requires a comprehensive approach to stormwater management that implements: a) site design measures to minimize impervious area, reduce direct connections between impervious area and the storm drain system, and mimic natural systems; and employs; b) source control, and c) treatment control measures, which can reduce runoff and the entry of pollutants into stormwater and receiving waters. The project shall incorporate site design measures for reducing water quality impacts of the project in compliance with the NPDES Permit Provision C.3 requirements.
 - Mitigation Measure HYD-4: Landscaping proposed as part of the project shall utilize Integrated Pest Management (IPM) practices to reduce the potential sources of pollution on the site. The applicant shall include procedures to reduce pesticide, fertilizer, and water use, and designate an IPM certified applicator in the Operations and Maintenance Plan submitted to the City prior to issuance of a Certificate of Occupancy.
- g-h) The site is not located within a 100-year flood hazard area (Flood Insurance Rate Map, Community Panels #0650440002 B, May 2, 2002).
- i) The project will not affect a levee or dam.
- j) The project is not in a coastal location which could be subject to seiche or tsunami. There are no significant natural watercourses in the area that could cause mudflow.

Law Offices of
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December 4, 2007

Mayor and City Council
City of Martinez – City Hall
525 Henrietta Street
Martinez, CA 94553

Re: Freitas Development at 635 Vine Hill Way – Subdivision 9120, proposing General Plan Amendment and later Rezoning of portion of Private Permanent “Pine Meadows” Open Space

Dear Mayor Schroder and City Council,

This office represents Keep Our Open Space, an association of citizens who live in the area of this project, as well as Mark and Lorna Thomson, who reside at 918 Meadowvale Court in the City of Martinez, on property directly adjacent to the open space sought to be developed by this project. I am writing to submit additional public comment on this project for the Council’s consideration at its public hearing on December 5, 2007.

Since the impact from loss of this open space was found significant in 1976, it is still significant. Therefore, deleting the open space mitigation measure requires preparation of an Environmental Impact Report (“EIR”).

The November 30, 2007 staff report for the Council’s December 5, 2007 hearing on this matter compares two revised mitigation measures, AES-1 and AES-2, to the original mitigation measures AES-1 and AES-2 described at page 5 of the June 29, 2007 Mitigated Negative Declaration (“MND”) with respect to whether recirculation of the MND is required. But the original AES-1 and AES-2 mitigation measures were not “equivalent” to the 1976 mitigation measure requiring preservation of this open space. Therefore, the question whether revised AES-1 and AES-2 are “equivalent” to the original AES-1 and AES-2 is somewhat beside the point.

Nevertheless, the staff report contends that recirculation of the MND is not required, citing the text of CEQA Guideline 15073.5. In fact, recirculation of the Negative Declaration is required.

CEQA Guideline 15073.5 is an administrative regulation issued by the Secretary of Resources. The courts will “afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA.” *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal. 4th 1112, 1123 n. 4. Here, Guideline 15073.5 simply does

not describe all of the circumstances that require recirculating an MND.

For example, in *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359 the court held that adding new mitigation measures after the MND has been circulated for public comment requires recirculation where there is substantial evidence to support a fair argument that the project - as mitigated before consideration of the new measures - would have a significant effect, stating:

If there was substantial evidence to support a fair argument that the Project would have a significant effect on the Stephens' kangaroo rat, then the City could not adopt new mitigation conditions aimed at this effect without recirculating its proposed negative declaration. Nevertheless, the City added mitigation condition 24.h, relating to effects on the Stephens' kangaroo rat, without recirculating. In so doing, it abused its discretion.

Gentry v. City of Murrieta, supra, 36 Cal.App.4th at 1411-1412.

Here, the City found impacts from the loss of this exact same parcel of open space significant in 1976. Therefore, there is substantial evidence supporting a fair argument that the current Project would have that same significant effect by deleting the mitigation measure previously adopted to avoid that effect. Therefore, adding new mitigation measures relating to this potentially significant effect without recirculating the MND is an abuse of discretion.

Also, the California Supreme Court has held that where "new information that demonstrates that an EIR commented upon by the public was so fundamentally and basically inadequate or conclusory in nature that public comment was in effect meaningless triggers recirculation...." *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1130. As noted in my letter dated November 28, 2007, the original AES-2 was not specific regarding height limits. The revised measure AES-2 at least has a specific maximum elevation performance standard. Since the original AES-2 did not, the MND previously circulated for public comment "was so fundamentally and basically inadequate or conclusory in nature that public comment was in effect meaningless" such that recirculation of the MND is required.

For the forgoing reasons, Keep Our Open Space and Mark and Lorna Thomson request that the City Council deny this application for a General Plan Amendment.

City of Martinez Mayor and City Council

December 4, 2007

Page 3

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Thomas Lippe". The signature is written in a cursive style with some loops and flourishes.

Thomas N. Lippe

F:\Thomson\Corr\C002 comment letter to City Council.wpd

Dana Dean
Amber Vierling *Of Counsel*
Venus Vilorio Berdan *Associate*

Law Offices of
DANA DEAN



835 First Street
Benicia, California 94510
p 707.747-5206 • f 707.747-5209

January 24, 2008

City Council
City of Martinez
525 Henrietta Street
Martinez California 94553

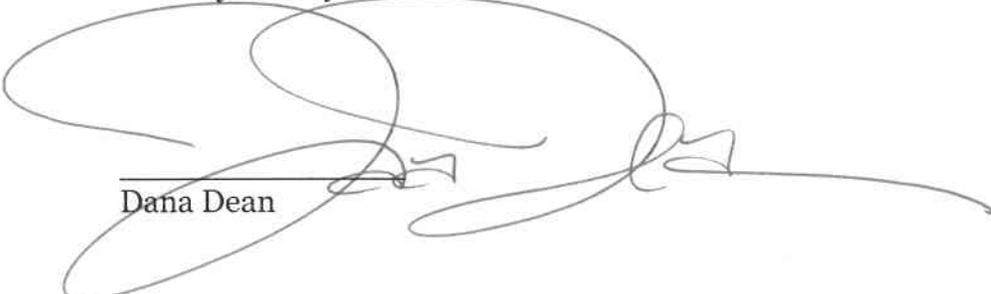


Re: Proposed Additional Findings for the Freitas Subdivision

Dear Councilmembers:

In addition to my comment letter, dated January 24, 2008, in support of the Freitas subdivision, I have enclosed proposed findings for the Council's consideration for inclusion in the Resolution -08 in support the Mitigated Negative Declaration and Mitigation and Monitoring Reporting Program for a General Plan amendment.

Thank you for your consideration.


Dana Dean

Dana Dean
Amber Vierling Of Counsel
Venus Viloría Berdan Associate

Law Offices of
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January 24, 2008

City Council
City of Martinez
525 Henrietta Street
Martinez, California 94553
Via Facsimile and US Mail



Re: Application to Amend the General Plan
Applicant: Gary Freitas
Hearing Date: February 6, 2008

Dear Council Members:

Please be advised that this office has been retained by the above-referenced project applicant and submits these comments on his behalf in support of the proposed Freitas Subdivision, located at 635 Vine Hill Way. This letter details the legal foundation supporting the proposed General Plan amendment for and future rezone of the Freitas Property (hereafter, "Property," "Project," or "Subdivision"). Additionally, we respond to the comments submitted to Council by attorney Thomas Lippe summarizing the project opponents' criticism of the Project.¹

BACKGROUND

As you know, Mr. Freitas seeks Council approval for the subdivision of a 5.57 acre parcel, located near the intersection of Vine Hill Way and Morello Avenue. The Project would result in 4 residential parcels (R-10) and a remainder property, comprised of the existing house, located on .6 acres (R-20), as well as approximately 2 acres zoned as public open space.

The Property was discussed in the 1976 Environmental Impact Report for the Pine Meadows and Muir Oaks subdivisions ("1976 EIR".) Subsequent to the certification of the 1976 EIR, the Council amended the General Plan, changing the designation of the subject Property from public open space to so-called "permanent" private open space.

¹ Mr. Lippe, representing an unincorporated association called "Keep Our Open Space" ("KOS") and Mark and Lorna Thompson, has submitted two letters to Council, dated November 28, 2007 and December 4, 2007.

THE CURRENT CITY COUNCIL HAS THE POWER TO CHANGE
THE LAND USE DESIGNATION FOR THIS PROJECT

The 1976 City Approvals of the Pine Meadows Subdivision Did Not Create a Designation That Could Never be Changed by Future Governing Bodies

Of critical importance to the City's proper application of CEQA to *this* Project is a preliminary determination of whether or not the 1976 City approvals of Pine Meadows required that the Property owners transfer a *perpetual* restrictive easement on the Property, preserving open space, scenery or some other environmental resource, forever as the opponents opine. Or, did the 1976 mitigation simply require that the Property be designated open space? As articulated below, the 1976 approvals expressly required that the land use designation of the property change. However, they did not entitle the City to require a scenic easement or other *perpetual* burden on title.

Opponents of the Project base their arguments largely on the fundamental assumption that the 1976 EIR and subsequent approvals perfected an open space designation at the project site and that such a designation could never be changed by future governing bodies. Close review of the mitigations as *actually* articulated in the 1976 EIR reveals that such a conclusion is plain overreaching.

More specifically, the opposition mischaracterizes the mitigation of the potential visual impacts of the 1976 Pine Meadows and Muir Oaks Subdivisions (hereafter, "1976 mitigation") by construing it as far more restrictive than may reasonably be interpreted. In short, the EIR required the Property be zoned open space, which it was. The *conditions of approval* imposed a requirement that a scenic easement be dedicated to the City.

As detailed herein, the scenic easement contemplated in Condition Number 5 was never lawfully created, because it lacks the statutory requirements for imposing a dedication of an easement, among other shortcomings. However, before addressing the issue of Condition Number 5 of the 1976 Pine Meadows subdivision, it is important to distinguish what the 1976 EIR required of the Freitas Property.

The 1976 Mitigation Does Not Require that the Freitas Property and Title Become Burdened by a Highly Restrictive Perpetual Easement

First, the 1976 mitigation measure does not specify that it requires that the Freitas Property be burdened by a restrictive scenic, or other, easement in favor of the City, the public, or a nonprofit organization, as the project opponents presume.

Second, the EIR determined that (a) "planning" a particular land use designation, (b) setting the 1976 subdivision back, and (c) saving oak trees were adequate mitigations to

bring the levels of significant impacts to less than significant.² This was done in 1976. Any objection to the mitigations as written then has long since been waived.³ The opposition cannot now rewrite the 1976 EIR to create mitigations and significant impacts that were not a part of the actual EIR as certified over 30 years ago.

Thirdly, the City used the term “easement” when it actually meant “designation.” Even though the 1976 conditions of approval used the term “easement,” which can mean an interest of the property, it is not reasonable to construe that is what the City meant that in this context, because 1.) there are exceedingly few, if any, of the requirements to describe or timely transfer an easement; and 2.) the Martinez Zoning Code also refers to open space as an “easement.”⁴ In other words, the Code refers to easements when it actually means *land use designations*.

Moreover, other references in the 1976 EIR define the 1976 mitigation as a zoning change, not as a restriction on property that would run with the land forever, or in perpetuity. For example, the 1976 mitigation required that the Freitas Property be zoned “open space.” The 1976 EIR states that one of the mitigations for the Pine Meadows subdivision was to zone “a similar sized area from “single-family development” to “planned open space.”⁵

Conservation easements in the United States have been used since 1880.⁶ If the 1976 City Council had wanted to permanently restrict (not just zone) the Freitas Property, it would have done so by meeting the requirements necessary to acquire such an interest in the land.

Interestingly, in 1974, just prior to the approvals of the 1976 subdivision, the California state legislature passed the Open Space Easement Act of 1974⁷. This act enabled counties or cities to acquire or approve an open space easement and described the procedure for doing so. As such, actual open space easements⁸ (as the opposition advocates) could be obtained by cities and counties, but the Act required that certain

² 1976 EIR, page 9.

³ PRC §21167(b) (c)

⁴ See Martinez Municipal Code §22.28.070 stating zoning of open space includes “open space easements.”

⁵ 1976 EIR, page 20.

⁶ The first American conservation easements were written in the late 1880s to protect parkways in and around Boston, according to a history of easements published by the Land Trust Alliance in 1985;(See http://findarticles.com/p/articles/mi_m1016/is_n1-2_v100/ai_15143332, last visited January 15, 2008.)

⁷ Government Code §51070 *et seq.*

⁸ Open-space easement" means any right or interest in perpetuity or for a term of years in open-space land acquired by a county, city, or nonprofit organization pursuant to this chapter where the *deed or other instrument* granting such right or interest imposes restrictions which, through limitation of future use, will effectively preserve for public use or enjoyment the natural or scenic character of such open-space land. An open-space easement *shall contain a covenant* with the county, city, or nonprofit organization running with the land, either in perpetuity or for a term of years, that the landowner shall not construct or permit the construction of improvements except those for which the right is expressly reserved in the instrument....(Government Code §51075 (d) (*Emphasis added.*))

procedure take place and that particular findings be made by the City, including but not limited to:⁹

- (a) That the preservation of the land as open space is consistent with the general plan of the county or city; and
- (b) That the preservation of the land as open space is in the best interest of the county or city and specifically because one or more of the following reasons exist:
 - (1) That the land is essentially unimproved and if retained in its natural state has either scenic value to the public, or is valuable as a watershed or as a wildlife preserve, and the instrument contains appropriate covenants to that end.
 - (2) It is in the public interest that the land be retained as open space because such land either will add to the amenities of living in neighboring urbanized areas or will help preserve the rural character of the area in which the land is located.
 - (3) The public interest will otherwise be served in a manner recited in the resolution and consistent with the purposes of this subdivision and Section 8 of Article XIII of the Constitution of the State of California.

The subject 1976 approvals did not follow the required procedure nor make the required findings. Thus, no perpetual scenic or open space easement was created by the 1976 approvals.

Even absent the statutory failures the most basic requirements to convey an interest in land were never met. An easement is an interest in land. Conveyance of such an interest has very particular requirements. To the extent there was an actual interest in the title, if any, that was supposed to be conveyed, the City failed to perfect it. The City cannot now, especially more than 30 years later, require that an easement actually burden the Property. Any attempt to assert an easement now exists is plagued by problems including:

- There is no deed transferring such an interest, no money allocated by the City or developer to pay for an easement,
- There is no description of the extent that the easement will burden the Property,
- No entity is identified as that who or which is to own the easement,

⁹ Government Code §51084.

- There is no signed instrument from the owner of the burdened land that would purport to conveying the easement.

The necessary elements have simply not been met in accordance with basic contract or property law.¹⁰ Additionally, there has been no acceptance by the City of a dedication of an easement.¹¹

Considering the foregoing, it appears plain that the opposition is trying to use 30-year-old zoning designations to lock up the subject property forever. However, the law is settled that zoning is not permanent.¹² Zoning does not give the City authority to treat the Freitas Property as if it were “permanently” zoned open space. The opposition argues that, in essence, that the City, or the public, gained a restrictive easement, which runs with the Freitas Property in perpetuity, despite the fact that no such a restrictive easement is discussed as a required mitigation in the 1976 EIR and despite the fact that there is no scenic, conservation, or other similar easement that has ever been recorded on the Freitas Property title.

Carrying the opposition to its logical conclusion, designations could never change in the face of changing needs of a community, regardless of such things as population pressures, technological advances, and the like. Such a position runs completely counter to the realities and progressions of land use in the 21st century.

As a result, the opposition has not met its burden to make a fair argument based on substantial evidence that the Project may have a significant effect on the environment. Rather, substantial evidence supports a City determination that the previous 1976 mitigation does not require that the Freitas Property be permanently burdened by a highly restrictive easement.

To The Extent the Property Was a Part of the 1976 Mitigation, Such Mitigation Has Been Fulfilled

Based upon the above analysis, it is clear that the 1976 mitigation did not require that a restrictive scenic easement burden the title of the Property. It is, however, apparent that 1976 mitigations did apply to the Property. The Record shows that, at most, it was the intention of the City to plan to designate the Property as open space. As is further explained below, such mitigation has long been fulfilled because the Property was zoned open space.

¹⁰ See Government Code §§51051 and 51075 (d).

¹¹ See Government Code §§51055, 51059, 51083 and 51087

¹² See *Selmi and Manaster* 2007 California Environmental Law and Land Use Practice (1998) §60.73(3)(c)(i).

The 1976 mitigation was proffered to mitigate potential significant visual impacts created by the Pine Meadows subdivision.¹³ The mitigation was to visual impacts of the project on surrounding views, such as from Muir Oaks and the Townhouses. In particular, the description of the visual impact emphasizes that the visual impact at the top of Coward Knoll as a result of locating houses on it above the Subject Property.¹⁴

Here, it is important to note that the visual buffer contemplated in 1976 will remain largely intact under the Freitas project, because 2 acres +/- of open space will continue on the west side of the Property which faces Muir Oaks as part of the Project. Therefore, the City should limit its inquiry to the change in visual impacts in light of the 2 acres +/- that remains open space.

The opposition is incorrect in describing the Project as “deleting the open space mitigation.”¹⁵ At most, it could be argued that the Project modifies the mitigation measure. However, even that argument fails, because of the opposition’s overreaching characterization of the 1976 mitigation.

The first time the 1976 documents actually discuss a “scenic easement” is *only* in the conditions of approval, after the 1976 EIR was certified. Any reference to a “scenic easement” was not required as part of the CEQA mitigation for the subdivision to bring the impacts to less than significant levels. The actual mitigation to bring the potentially significant visual impact of the 1976 subdivision was 1.) primarily to require that the houses on Coward’s Knoll be only one story; 2.) to plan for a 250 foot wide scenic and open space on the Property; 3.) to save an oak tree; 4.) to move the 1976 subdivision away from Vine Hill Way and 5.) to zone the property “planned open space.”¹⁶ All of these mitigations were fulfilled.

The EIR states nothing of a restriction on the Property and its title that would run with the land, forever in perpetuity. Such distinction is important. In this case, the 1976 mitigation did not rise to the level of City’s acquiring a restrictive easement over the Freitas Property.

As noted above, the mitigations stated in the 1976 EIR describe what is required to bring the potentially significant impacts to less than significant levels. Such mitigations have been implemented and satisfied. The Conditions of Approval for the 1976 subdivision, in so far as they exceed the mitigations, are not required by CEQA to mitigate the impacts to less than significant levels

¹³ The 1976 EIR states, “Adverse visual impacts are expected to occur in two locations – along Vine Hill Way (and from some of the Vine Hill Townhouses which overlook a portion of the site) adjoining the projects and from several lots within Muir Oaks overlooking the subject projects.” (1976 EIR, page 9.)

¹⁴ 1976 EIR, pages 9 and 36.

¹⁵ Thomas Lippe correspondence, dated December 4, 2007, page 1).

¹⁶ 1976 EIR, pages 9, 20, and 36.

At any rate, the City has not required nor acquired a scenic easement discussed in the Condition. Further yet, the Final Map was accepted without the City's acquisition of the scenic easement.¹⁷ The City can not now require that the scenic easement be dedicated.

The Statute Of Limitations Has Long Since Run On The Opposition's Untimely Objections To The 1976 EIR Mitigations And The Final Subdivision Map

The opposition's complaint is really that the 1976 EIR should have required something more than zoning, moving the lots away, and planning open space. But, the opposition should have complained in 1976 for a stronger mitigation. Now, the statute of limitations on such a complaint has long since run. Additionally, when the words "scenic easement" were eliminated from the Final Map, the opposition could have (again) sought administrative and judicial relief, but failed to do so.

The opposition's complaint comes too late, as the statute of limitations has long since run by more than 30 years. Having missed both opportunities to timely file objections and legal actions to maintain the theory that the mitigation required the City to obtain an easement, the opposition cannot now object to changes to the 1976 project.

THE CURRENT CITY COUNCIL HAS THE POWER
TO MODIFY PREVIOUSLY ADOPTED MITIGATIONS

Even If the City Determined That The Property Is Subject To A Scenic Easement, the Mitigation Restricting the Freitas Property can be Changed Because It Is No Longer Feasible

Previous mitigations for CEQA projects *can be changed* so long as CEQA is properly applied.¹⁸ For example, deletion of previous adopted mitigation measures requires two findings: "a governing body must state a legitimate reason [like infeasibility] for deleting an earlier adopted mitigation measure, and must support that statement of reason with substantial evidence."¹⁹ The City must "undertake or require the undertaking of any feasible mitigation measures specified in the prior [EIR] relevant to a significant effect which the project will have on the environment."²⁰

Thus, even if the Council determines that the 1976 EIR did require mitigation that continues to affect the Freitas Property over 30 years later, only some of the mitigation is changed under the current proposal. The record related to this project plainly

¹⁷ See also Government Code §51055, stating, "No instrument described in Section 51051 shall be effective until it has been accepted by resolution of the governing body of the city or county and its acceptance endorsed thereon." Zoning the property as open space was a mitigation for a term of over 30 years. The Open Space Easement Act permits dedications of easements for terms of 20 years or more. Government Code §51053.

¹⁸ *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal. App. 4th. 342.

¹⁹ *Id.* at p. 359.

²⁰ PRC 21083.3(c)

demonstrates this applicant's careful consideration and crafting of appropriate protections.²¹

The opposition's main argument is that the Freitas Property must be encumbered by a restrictive easement because such was mitigation for the Pine Meadows Subdivision. As detailed above, that is not true. Nonetheless, the requirements for changing such a mitigation in the event it did exist are met here. This is so because there is substantial evidence supporting the governing body's determination that such mitigation is no longer feasible.²²

Specifically, the alleged mitigation to dedicate the land to the City is no longer feasible for the following reasons:

1. The City cannot require that Freitas grant a scenic easement after the final subdivision map was accepted.²³
2. The Freitas Property was not able to remain a horse set up lot nor a grazing site because Mr. Freitas' horses and cattle were repeatedly vandalized.²⁴
3. The Freitas Property used to be rural and is no longer as rural as it formerly was in the 1970's. More roads and development has sprung up causing more of a burden for Mr. Freitas to maintain his property as undeveloped and the impact is less than significant.

Moreover, using a Mitigated Negative Declaration to designate a land use from open space to residential complies with CEQA.²⁵ As in *Baldwin*, the City of Martinez has sufficient open space such that the re-designation of 3 +/- acres of open space to residential will not have a potentially significant impact.

Thus, the City is supported by substantial evidence that it has legitimate reasons for altering the mitigation measure. The opposition has not met its burden proving that there is a fair argument that an EIR must be done for this Project based on the purported fact that the Property was burdened by a perpetual easement. There is no reasonable interpretation that the 1976 EIR required it and even if it did, requiring a scenic easement has become entirely infeasible for legal and economic reasons.

²¹ In particular, the proposal includes the preservation of 2 acres +/- of open space on the west side of the Project which continues to buffer the visual impacts identified in 1976.

²² The City must "undertake or require the undertaking of any feasible mitigation measures specified in the prior [EIR] relevant to a significant effect which the project will have on the environment." PRC 21083.3(c)

²³ See Martinez Planning Commission Staff Report, dated January 10, 1079.

²⁴ See Declaration of Gary Freitas, dated January 22, 2008.

²⁵ *Skip Baldwin et al. v. City of Los Angeles et al.* (1999) 70 Cal. App. 4th 819.

THE ENVIRONMENTAL REVIEW CONDUCTED FOR THE PROJECT
SATISFIES THE REQUIREMENTS OF CEQA

Mitigation Measures For Potentially Significant Impacts From The Project Are Adequate

The opposition complains that the future application of the NPDES permit (C.3 permit) issued by the Regional Water Quality Control Board is inadequate because "there is no particular reason that applying for and obtaining the permit before project approval is 'infeasible.'"²⁶ However, applying for an NPDES permit at this time is infeasible and completely unreasonable. The Project proponent is applying for a General Plan amendment and a future rezone, which will determine if the site may be developed. It is uneconomical for the Project proponent to finalize his development plans prior to obtaining these approvals.

Furthermore, future action as mitigation is acceptable where, as here, the City possesses "meaningful information" reasonably justifying an expectation of compliance with the mitigation measures.²⁷ The NPDES permit has specific standards associated with it and the City is justified in its expectation that the Project proponent will comply with the permit conditions.²⁸

The opposition also complains that the future application of the Stormwater Pollution Prevention Plan (SWPPP) must be submitted to the City prior to approval of the grading plan. Again, the approvals specify meaningful information and are reasonably justified in relying on its expectation of compliance. In particular, the SWPPP requires education of on-site personnel, regular tailgate meetings, a monitoring program, compliance with SWRCB resolution No. 2001-046, and particular best management practices, such that it complies with CEQA.

Next, the opposition complains that the utilization of Integrated Pest Management (IPM) to reduce the potential sources of pollution is inadequate and defers mitigation. . On the contrary, the mitigation measure provides meaningful information, including but not limited to the designation of an IPM certified applicator in the Operations and Maintenance Plan. The mitigation has been sufficiently described such that it is meaningful and enforceable because the developer must "designate an IPM certified applicator in the Operations and Maintenance Plan." Foreseeable protections to the environment will flow from application of IPM and the mitigation measures may be reasonably relied upon by the City.

²⁶Lippe correspondence dated, November 28, 2007, page 4.

²⁷ *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 77, fn. 5 and *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 309.

²⁸ For example, the C.3 NPDES permit requires numeric sizing criteria for pollutant removal treatment systems; operation and maintenance of treatment measures and a limitation on increase of Peak stormwater runoff discharge rates. (Initial Study, page 13.)

The opposition further complains that the mitigations for potentially significant impacts to aesthetics. However, the substitute mitigation measure AES-2 does provide meaningful information upon which the City can rely (as did the circulated AES – 2). This is because there are specific standards associated with such mitigation, including, but not limited to limiting the maximum height of roof peaks to the 305 foot elevation, stepping back of second stories, and using shed and hips rather than gable roofs and as previously circulated.

Accordingly, the opposition has failed to make a fair argument based on substantial evidence that the Project requires an EIR because the mitigation measures are inadequate. Instead as demonstrated, substantial evidence supports the determination that the Project's mitigation measures do mitigate any potentially significant impacts to less than significant levels. .

The Proposed Approval Does Not Segment the Project

The opposition complains of improper segmentations - that the environmental review of the project must consider both the General Plan amendment, along with the rezone, *and* the tentative subdivision. That is wrong. Segmentation is analyzing parts of a project separately to avoid proper environmental review by breaking a project into smaller segments. Here, the MND analyzes the whole of the Project, not its separate parts. Moreover, the Project proponent has complied with CEQA by undertaking environmental review at the earliest possible commitment to the issue.²⁹ The MND analyzes the underlying activity – changing the land use designation from open space to residential – in the General Plan and in the Zoning Ordinance.

The opposition's argument that the General Plan amendment must be considered at the same time as the tentative subdivision map is completely impracticable and infeasible. Why would an applicant go to the expense of creating a tentative subdivision map before obtaining the necessary and preliminary approvals? CEQA does not require irrational development. On the contrary CEQA requires that the whole of the project is analyzed, not the individual project approvals.³⁰

The opposition also complains that the future implementation of mitigation measures, such as to AES-2, HYD-1 through HYD-4 illegally segment the Project. Again, the opposition is incorrect in its analysis of what CEQA requires. The Project may be subjected to other governmental approvals, which is to say that future having to obtain future approvals (such as the tentative subdivision map, the SWPPP, the NPDES permit, etc.) In and of itself future consideration does not illegally segment the Project, because the whole of the Project has been sufficiently analyzed in the documents in support of the MND.

²⁹ Guidelines §15352 (b).

³⁰ *Committee for a Progressive Gilroy v. State Water Resources Control Board*, 192 Cal. App. 3d. 847, 863 (1987). Guidelines 15378(c).

Here again, the project opponents have failed to meet their burden to prove that there exists a fair argument based on substantial evidence that an EIR is required. Rather, the City's determination is supported by substantial evidence that the Project is properly analyzed and potentially significant impacts disclosed, mitigated and/or avoided through the MND already prepared and circulated.

The Proposed General Plan Amendment is Consistent with the Martinez General Plan as well as the Contra Costa County General Plan Open Space Element

As reflected in the record the project is consistent with the Martinez General Plan. Moreover, the County General plan goals for Open Space are well met.

The County General Plan Open Space Element states that the overall open space goals are to preserve and protect the ecological, scenic and cultural/historic, and recreational resource lands of the County.³¹ The subject Project continues to meet such goals because the subject property has no important ecological attributes – there are no wetlands, natural waterways, or other areas of environmental sensitivity. Instead, the subject site is surrounded by development and consists primarily of nonnative grasses. Additionally, there are no cultural or historic resources that have been identified at the site. The subject Project will promote the recreational use of the Project because the remaining 2 acres will be dedicated to public use, rather than remain solely for private use.

The County General Plan identifies that the scenic resources include: isolated hilltops, rock outcroppings, mature stands of trees, lakes, reservoirs and other natural features. However, the subject Project eliminates none of these resources. They exist on the subject site, if at all, is on the far western portion the Freitas Property, where sits what the portion of Coward Knoll that was not developed under the 1976 plan and which will be preserved as part of this Project.³² Similarly, none of the scenic resource goals are violated – no area of “high scenic value or major scenic ridges or the scenic qualities of the San Francisco Bay/Delta estuary system or the Sacramento-San Joaquin River/Delta shoreline will be altered in any way whatsoever by this Project.³³

The City is Not Required to Re-circulate the MND

The MND was prepared and circulated for public comment prior to the Planning Commission's hearing in July 2007. Subsequent to that circulation, two of the proposed mitigation measures addressed the need for design refinements to preserve the relatively semi- rural aesthetic of Vine Hill Way. The changes in the mitigation measure

³¹ Contra Costa General Plan 2005-2020, page 9-3.

³² The Freitas Property is not considered as an existing open space area. (Contra Costa General Plan 2005-2020, Figures 9-5, 9-6 and 9-7.)

³³ See Contra Costa General Plan 2005-2020, page 9-5.

have not presented new significant information. As such, MND does not require recirculation or corresponding public comment review.

Planning Staff concluded that the substitute mitigations were merely “technical refinements and clarifications, rather than substantial changes that would require re-distribution.” CEQA Guidelines §15073.5 provides guidance as to how a MND should be re-circulated prior to its approval—recirculation is required when (1) the identification of a new, avoidable significant effect that can be reduced to a less-than-significant level only through the adoption of mitigation, and (2) a determination that originally proposed mitigation is not sufficient to reduce a project’s impact to a less-than-significant level, and that additional mitigation or project revisions are necessary.

In this case the circulated AES-2 mitigation measure mandates that an 18 feet maximum from grade would be allowed. The substituted AES-2 mitigation measure clarifies that the maximum height of roof peaks and ridges are to the topographical elevation of 305 feet. This change clarifies that maximum roof height, despite grading or filling, which is a more objective means by which to describe the mitigation, which was achieved using either the circulated or the substituted mitigation measure. There is no determination that the circulated mitigation measure was not sufficient, only that the substituted mitigation measure is clearer, more objective and better for the environment.

Here then, recirculation is not required because (1) the modifications to the mitigation measures are clarifications, (2) there is no new avoidable significant effect that may only be reduced to less than significant levels through the adoption of a new mitigation measure, and (3) the City has not made a determination that the original mitigation measures are not sufficient to reduce a project’s impact to less than significant levels. The opposition has failed to provide a fair argument based upon substantial evidence that recirculation is required. Rather, substantial evidence supports the City in that recirculation of the MND and associated documents is not required.

CONCLUSION

Council determinations (1) to grant the GPA and future rezone; (2) that the previous mitigation has been satisfied or does not apply; (3) that the mitigations are adequate; and (4) that the environmental review was adequate for this MND are all well supported by substantial evidence in the Record of these proceedings.

In addition to the record before the body and the foregoing legal arguments, a measure of fairness to the land owner and to the community is a good guide for Council action. The community has no right to require or expect that 1970’s zoning of the Freitas Property would remain static forever, especially with the changing times and land use planning trends toward infill rather than sprawl. Moreover, as noted in the Record, Mr. Freitas has worked diligently for nearly 2 decades, including obtaining judicial relief in 1999 to modify the CC&R’s of the Pine Meadow subdivision, to create development that

will respect community aesthetics and provide useful development. As indicated in this application, he has done so.

For all the foregoing reasons, we ask the Council to make the necessary findings and approve the application before it.

Respectfully submitted,

Dana Dean



Declaration of Gary Freitas

I am Gary Freitas. I have personal knowledge of the facts contained herein, and if called upon to testify would do so competently. At all relevant times, I have resided at 635 Vine Hill Way (hereafter, "Property"). I have lived there for nearly 30 years. Additionally, I grew up in Martinez since 1941 and I have witnessed the general change in the area of my Property going from rural to residential. In particular, my Property is now surrounded by custom homes, subdivisions and roads.

At all relevant times, there has never been a scenic easement recorded on my Property.

The current zoning allows for up to 6 horses on the Property. Since 1978 periodically I have pastured horses and cattle on the Property.

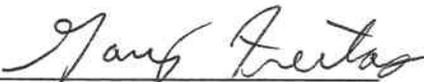
I have experienced several problems with the keeping of livestock on my Property including, but not limited to the following:

- a.) Due to the easy access of the Property the general public tends to feed the horses without permission of the owners, which is dangerous to the public feeding the animals, dangerous to the animals, and it creates unreasonable liabilities to me;
- b.) Due to the easy access of the Property the neighbors and the general public have caused dogs to be turned loose on my Property, which is incompatible with the keeping of livestock;
- c.) Additionally, the neighbors on Meadowvale and the general public have routinely thrown trash into my Property, resulting in a dangerous situation to animals that keep. For example pieces of sharp conduit create a hazard for the livestock and the horses owners had to obtain veterinary treatment for at least two horses that injured their legs as a result of being cut from trash.

- d.) Neighbors have hit numerous golf balls into my Property, creating a nuisance to livestock and humans using my Property.
- e.) I have also pastured steers on the Property, but neighbors have shot in the general direction of the steers, which caused me to move the steers off of the Property.
- f.) The general public has taken down my fences, which is incompatible with the keeping of livestock.

For the foregoing reasons it is infeasible for me to maintain my Property as a horse set up lot and/or open space.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on January 22, 2008 at Benicia, California.


Gary Freitas

RECEIVED
JAN 31 2008

Dana Dean
Amber Vierling Of Counsel
Venus Viloria Berdan Associate

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DANA DEAN



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January 31, 2008

City Council
City of Martinez
525 Henrietta Street
Martinez, California 94553
Via Facsimile and US Mail

Re: Application to Amend the General Plan – Supplemental Comments
Applicant: Gary Freitas
Hearing Date: February 6, 2008

Dear Council Members:

Please accept this correspondence in follow-up to my letter of January 24, 2008 regarding the above-referenced application. I understand that you did not receive the proposed findings sent as part of that submission. To follow, then, is the current iteration of our proposed findings, as well as further detail regarding the bases for our request that you adopt such findings as part of your approval for this application.

Like all projects subject to environmental review under the California Environmental Quality Act ("CEQA"), this project is not reviewed in a vacuum. Rather, it is reviewed in terms of its relationship to the larger environment. Of particular interest here is the fact that the property at issue in this application ("the Freitas Property") is discussed in the prior Environmental Impact Report ("EIR") for the Pine Meadows and Muir Oaks subdivisions ("1976 EIR").

Relationship to the prior review

In my previous comment letter, dated January 24, 2008, I set forth arguments, supported by substantial evidence in the Record, as to how the Freitas property was and was not burdened by the 1976 EIR. Such arguments can be summarized as follows:

1. Burdening the Freitas Property with a scenic easement was not a CEQA mitigation for the 1976 subdivisions. Rather, it was a condition to the approvals. (The 1976 Condition number 5 required the developer, who no longer owns the Freitas parcel, to dedicate Lot 25, now known as the Freitas property, as open space to the City.) Instead, the *mitigation* for the 1976 EIR was for *visual impacts* and it required that the houses atop of Coward's knoll be limited to a

single story. Additionally, the mitigation required that the 1976 subdivision houses be set back 250 to 300 feet from Vine Hill Way. However, such a setback does not mean that the Freitas parcel is now burdened by a perpetual easement. In other words a setback does not equate to a burden on title.

2. To the extent, if any, that the 1976 EIR requires that the Freitas property be zoned open space, such mitigation has been satisfied because the Freitas property was so zoned - as private open space. However, the assertion that zoning is the equivalent to restricting a parcel by a perpetual easement is incorrect. Rather in this case, for reasons previously articulated, the Freitas property has vested with Mr. Freitas without a scenic easement burdening his title.
3. To the extent, if any, that the 1976 EIR required that the Freitas property be locked in open space in perpetuity, such mitigation has become infeasible because among other things, the City lacks authority to now require a restriction in perpetuity. In any case, because the alleged mitigation has become infeasible, the City does have the authority to modify it now.

Resolution of the 1976 EIR question

With the above referenced conclusions in mind, the questions of whether it is necessary to modify the 1976 EIR and, if so, how are easily resolved.

The distinction between a perpetual scenic easement and mere open space zoning is critical here, because the impacts to be mitigated under the 1976 EIR were *visual impacts* not loss of open space per se. Moreover, simply converting open space to residential is not a significant impact in and of itself.¹ Thus, a 2008 determination to convert less than 3 acres of open space to productive use is not foreclosed by the 1976 zoning. Instead, the conversion is appropriate if the visual impacts identified in 1976 remain mitigated to less than significant under the current proposal, as they do.

Moreover, such an adjustment involves a minimal change when looked at from the larger view of the whole 1976 project.

A Subsequent or Supplemental EIR is not required to modify the 1976 EIR Because there are No New Substantial Changes that Requires Major Revisions to the EIR

Often times previously certified Environmental Impact Reports (EIRs) or adopted Mitigated Negative Declarations (MNDs) require changes because land use plans need to be modified and circumstances change.² A City's vision may evolve overtime.³

¹ *Skip Baldwin et al. v. City of Los Angeles et al.* (1999) 70 Cal. App. 4th 819.

² *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal. App. 4th 342.

³ *Id.* at p. 358.

Further CEQA contemplates circumstances where changes to a previous certification can be made by the preparation of a subsequent or supplemental EIR, an addendum or, as we ask here, *no further documentation at all.*⁴

A subsequent or supplemental EIR to the 1976 EIR is not required because there is not substantial evidence in the whole record that “substantial changes are proposed in the project which will require major revisions of the previous EIR ... due to the involvement of new significant environmental effects or a substantial increase in the severity of the previously identified significant effects.”⁵

As detailed below, the relevant impacts identified in 1976 are properly addressed in all of the new documentation that is already before the body for the 2008 project. To require yet another articulation of the same conclusions is simply put, overkill.

Visual impacts identified in 1976 are still mitigated in the new plan

Here, the primary mitigation for the visual impacts of the 1976 subdivisions was that the houses atop Coward’s Knoll be limited to “single story construction above street grade.”⁶ The discussion pertaining to the visual impact of the 1976 project focuses on the visibility of the houses on top of Coward’s Knoll. “The greatest impact would be at the crest of the hill on Vine Hill Way.” A second area of impact is on several of the knoll top units in the Vine Hill townhouse project, who have an excellent view of the present knoll and to whom the knoll top house will be most visible. (See Fig. 2).⁷ Figure 2 shows that the “mitigation” is to “restrict to one-story above street level construction” Lots 29 through 36 and Lots 99 -111.

The narrative portion of the mitigation measure additionally mentions that there is “mitigation already incorporated into the plans (in the nature of moving lots away from Vine Hill Way, reducing cuts and saving an oak tree).”⁸ Because the project mitigations largely maintain the protections required, even considering the 1976 EIR’s discussion of moving lots away from Vine Hill Way, the proposed Project’s conversion of less than 3 acres of open space is not a substantial change that require a major revision of the previous EIR.

Coward’s Knoll Remains as required in 1976

Furthermore, there is not a “substantial increase in the severity of the previously identified significant effects.” This is because the designation of the Freitas property as a scenic easement was *not the primary mitigation* measure to the Visual Impacts of the 1976 project. Therefore, changing the designation of a portion of the Freitas property

⁴ Guidelines §15162(b) (Emphasis added.)

⁵ PRC §21166; See also Guidelines §§15162(a)(1) and 15163(a)(1).

⁶ p. 9, 1976 EIR.

⁷ *Ibid.*

⁸ *Ibid.*

from open space to residential does not increase the severity of the visual impacts identified in the 1976 EIR. Moreover, the proposed Project does not eliminate the open space of the Knoll. Rather, the proposed Project provides more protection for the Knoll than what it currently has because it will be preserved in perpetuity, as opposed to a mere land use designation of open space.

No major revisions are required

Second, a subsequent or supplemental EIR would be required if “substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects.”⁹

In this case, modifying the 5.57 acres of open space designation to 2 acres of open space preserved in perpetuity, which includes the environmental landmark of the actual Knoll is not a “substantial change with respect to the circumstances.” Rather, such a change does not trigger further CEQA analysis because modification of less than 3 acres of open space is does not make the previous mitigation measure ineffective such that the mitigation for visual impacts is reduced to less than significant levels.

Moreover, such change does not require a “major revision in the previous EIR ... due to an involvement of new significant environmental effects or a substantial increase in the severity of the previously identified significant effects.” Instead, the 1976 EIR focused on the preservation of the Knoll. This Project preserves the Knoll in perpetuity, as opposed to the current land use designation of mere zoning the Knoll property as open space. In fact, the current Project more effectively implements the 1976 mitigation to preserve the Knoll in perpetuity, thereby making the impacts of the 1976 subdivision less severe.

There is no substantial new information regarding the visual impacts

Third, there is no “new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete.”¹⁰ On the contrary, the Visual Impacts to Coward’s Knoll were analyzed and disclosed at the time of the circulation and certification of the original 1976 EIR. There is no new information of substantial importance. This is because the elimination of less than 3 acres out of the 4 large parcels that were designated as open space for the 1976 project is not of substantial importance. On the contrary, the primary mitigation that the houses atop of Coward’s Knoll remains in tact.

⁹ Guidelines §§15162(a)(2) and 15163(a)(1).
¹⁰ Guidelines §§15162(a)(3) and 15163(a)(1).

An Addendum to the Previous EIR May be Adopted Where, as Here, the Test for A Supplemental EIR is Not Met.¹¹

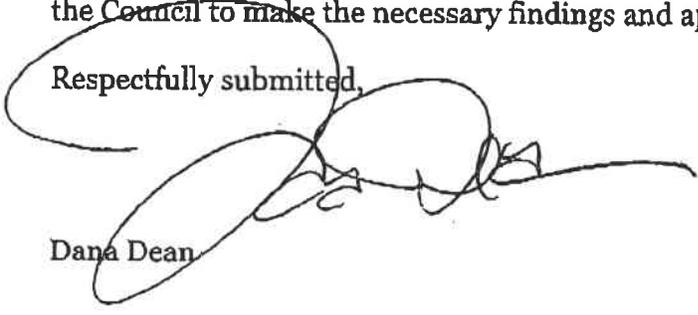
As noted, the change requested is not of a size or scope for which a supplemental EIR is required. *At most*, to whatever extent the current Project requires a change in the 1976 EIR an addendum to the 1976 EIR is the appropriate level of environmental review¹² Though we believe the 1976 impacts are properly addressed in the 2008 documentation, out of an abundance of caution, the Council may choose to accept an addendum to the 1976 EIR in the course of approvals for this Project. As such we have prepared the attached proposed addendum. Additionally, our proposed findings include reference to the addendum that may be adopted or excluded depending on the Council's determination to require an addendum or not.¹³

Conclusion

The City's determination not to prepare a subsequent or supplemental EIR for the 1976 EIR must be supported by substantial evidence. The foregoing analysis, as well as the previously discussed mitigations proposed for this project, provides such substantial evidence. Specifically here, the proposed Project's protection of the Knoll in perpetuity is substantial evidence of better environmental protection for the Knoll, the previous mitigation measures to preserve the Knoll and keep certain Lots as single story remain in tact, and the proposed Project does not create substantial changes that require major revisions to the previous EIR.¹⁴

For all the foregoing reasons and the reasons set forth previous correspondence, we ask the Council to make the necessary findings and approve the application before it.

Respectfully submitted,



Dana Dean

¹¹ An addendum does not require recirculation. Instead a brief explanation of the decision not to prepare a subsequent EIR should be included in the addendum, findings or the Record (Guidelines §§15162(c).)

¹² Guidelines §15164.

¹³ Guidelines §§15162(a) and 15163(a)(1).

¹⁴ Guidelines §§15164(a) and (e).

[Proposed] Addendum to the 1976 Environmental Impact Report for Tract 4744 and 4774
Pine Meadows and Muir Heights Subdivisions

The Martinez City Council has previously certified an Environmental Impact Report for Tract 4744 and 4774 (Pine Meadows and Muir Heights subdivisions) ("1976 EIR"). In accordance with CEQA Guidelines §§15162(b) and 15164 the City Council hereby amends the 1976 EIR with this addendum.

The 1976 EIR discusses a portion of Lot 25, which is now known as "the Freitas Property," which is the subject of a current proposed General Plan amendment currently pending before City Council. This addendum modifies the 1976 EIR to the extent that the 1976 EIR discusses the Freitas property as "a 250 to 300 foot wide scenic and open space easement." (pages 9 and 36 of the 1976 EIR). Council now wishes modify part of the land use designation of the Freitas property, such that approximately 3 of the 5.57 acres of the Freitas Property is re-designated by the General Plan and Zoning Ordinance from open space to residential (R-10).

The City Council adopts this addendum to make such modification rather than a subsequent report because the subject changes to the 1976 EIR does not invoke any of the conditions requiring a subsequent report as set forth in the Public Resources Code.¹

First, there are not substantial changes requiring a major revision of the 1976 EIR. Rather, the changes are *de minimus* because the City of Martinez retains a substantial portion of open space and the 1976 Project also retains a substantial portion of open space. Moreover, the primary mitigation for the visual impacts of the 1976 subdivisions was that the houses atop Coward's Knoll be limited to "single story construction above street grade" because, "[t]he greatest impact would be at the crest of the hill on Vine Hill Way."² Such primary mitigation to restrict the houses to a single story remains.

Furthermore, changing the designation of a portion of the Freitas property from open space to residential does not increase the severity of the visual impacts identified in the 1976 EIR.³ On the contrary, the proposed Project does not eliminate the open space of the Knoll, rather the proposed Project provides more protection for the Knoll than what it currently has because it will be preserved in perpetuity, as opposed to a mere land use designation of open space. Therefore,

¹ Public Resources Code §21166: Changes necessitating subsequent report. When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

² page 9, 1976 EIR.

³ CEQA Guidelines §15162(a)(1).

by amending the 1976 EIR, the Council is doing so in part because such amendment will allow the opportunity for the Knoll, which sits on private property, to be designated as open space in perpetuity. As part of the General Plan amendment the property owner is agreeing to burden the title of his property such that the approximate 2 acres containing the knoll is preserved as open space in perpetuity.

Second, there are not substantial changes with respect to the circumstances which will require major revisions in the 1976 EIR. Rather, circumstances have not changed such that major revisions are required of the 1976 EIR. The Freitas Property is a very small percentage of all of the open space within the City of Martinez, and a small percentage within the 1976 subdivision.

Third, there is no new information, which was not known and could not have been known at the time that the 1976 EIR was certified. Rather, the proposal of the Freitas subdivision, and the corresponding change of approximately 3 acres of open space is a relatively new development. The Visual Impacts to Coward's Knoll were analyzed and disclosed at the time of the circulation and certification of the original 1976 EIR. There is no new information of substantial importance. This is because the conversion of less than 3 acres of open space out of the 4 large parcels (over approximately 20 acres) that were designated as open space for the 1976 project is not of "substantial importance." Rather, it is only a *de minimus* change. On the contrary, the primary mitigation that the houses atop of Coward's Knoll be limited to a single story remains in tact.

Additionally, the City Council has made the following findings pertaining to the feasibility of the 1976 mitigation measure requiring a 250 to 300 foot wide scenic and open space easement.

To any extent, if at all, that the mitigation measures for visual impacts in the 1976 EIR have not been satisfied by the previous land use designation of the Freitas Property as open space, the City Council finds that there are legitimate reasons for modifying the mitigation measures in the 1976 EIR as described below. The 1976 mitigation measures pertaining to the Freitas property have become infeasible for the following reasons:

- a.) A "scenic easement" has not been offered by the landowner of the Freitas property, nor accepted by the City. Imposing a scenic easement more than thirty years after the fact is not capable of being accomplished in a successful manner within a reasonable period of time;
- b.) The final subdivision map for the Pine Meadows subdivision omitted any reference to a scenic easement over the Freitas property and the City cannot legally require the landowner of the Freitas property to dedicate his land to the City;
- c.) To require the landowner of the Freitas property to encumber his land as if it is burdened by a scenic easement is disproportionately uneconomical to the landowner because s/he must continue to bear the economic burden of preserving undeveloped land, while land is developed into residential in the near vicinity;

- d.) Purchasing a scenic easement on the Freitas property is not economically feasible for the City because the City does not have funds to purchase open space such as this that does not preserve particular resources such as wetlands;
- e.) Maintaining the Freitas property as a horse set up lot can not be accomplished in a successful manner because the landowners' livestock have been injured, shot at, and molested in the past;
- f.) The "open space mitigation" no longer is as effective as it was in 1976 because the rural nature of Vine Hill Way is not as rural as it once was, but rather there are far more houses and roads now than was present in 1976; and
- g.) The Freitas property is not as valuable as open spaces that preserve particular resources, such as wetlands, natural waterways, or other areas of environmental sensitivity. Rather, the Freitas property does not contain such values identified for the protection of open space.

**Additional Findings For The Resolution Of The City Council Of The City Of Martinez For
The Draft Mitigated Negative Declaration For the Freitas General Plan Amendment**

NOW, THEREFORE, BE IT RESOLVED by the Martinez City Council that:

- 1.) The City Council finds that mitigation measures for visual impacts in the 1976 Environmental Impact Report for Tract 4744 and 4774 (Pine Meadows and Muir Heights subdivisions) ("1976 EIR") pertaining to the Freitas property have been satisfied because the Freitas property was planned to be zoned open space and the 1976 subdivision was moved away from Vine Hill Way.

- 2.) To any extent, if at all, that the mitigation measures for visual impacts in the 1976 EIR have not been satisfied, the City Council finds that there are legitimate reasons for modifying such mitigation measures as is described below [and as set forth in the Addendum to the 1976 EIR].¹ The 1976 mitigation measures pertaining to the Freitas property have become infeasible for the following reasons:
 - a.) A "scenic easement" has not been offered by the landowner of the Freitas property, nor accepted by the City. Imposing a scenic easement more than thirty years after the fact is not capable of being accomplished in a successful manner within a reasonable period of time;
 - b.) The final subdivision map for the Pine Meadows subdivision omitted any reference to a scenic easement over the Freitas property and the City cannot legally require the landowner of the Freitas property to dedicate his land to the City;
 - c.) To require the landowner of the Freitas property to encumber his land as if it is burdened by a scenic easement is disproportionately uneconomical to the landowner because s/he must continue to bear the economic burden of preserving undeveloped land, while land is developed into residential in the near vicinity;
 - d.) Purchasing a scenic easement on the Freitas property is not economically feasible for the City because the City does not have funds to purchase open space such as this that does not preserve particular resources such as wetlands;
 - e.) Maintaining the Freitas property as a horse set up lot can not be accomplished in a successful manner because the landowners' livestock have been injured, shot at, and molested in the past and the land itself has been mistreated;
 - f.) An "open space mitigation" is no longer as effective as it was in 1976 because the nature of Vine Hill Way is not as rural as it once was, but rather there are far more houses and roads in the immediate vicinity than were present in 1976; and

¹ For inclusion in the event an addendum to the 1976 EIR is adopted.

- g.) The Freitas property is not as valuable as open spaces that preserve particular resources, such as wetlands, natural waterways, or other areas of environmental sensitivity. Rather, the Freitas property does not contain such values identified for the protection of open space.

Accordingly, the City Council hereby modifies the mitigation measures of the 1976 EIR such that the Freitas property shall no longer be deemed a 250 – 300 foot wide scenic and open space easement.

- 3.) For the foregoing reasons, the City Council hereby modifies condition of approval number 5 for the 1976 subdivision such that a “scenic easement” shall not be dedicated to the City for Lot 25 (covering part of the Freitas property).
- 4.) Despite the project’s proposed conversion of approximately 3 acres of land zoned open space to residential, sufficient open space remains in the City of Martinez remains such that the project complies with the General Plan.