

STAFF REPORT

MEETING DATE: September 23, 2009

TO: Mayor, Rob Schroder and Members of the Martinez City Council

FROM: Jeffrey A. Walter, City Attorney

SUBJECT: *Ostrosky Enterprises, Inc. v. City of Martinez*

REQUEST

Approve the deal points of the Settlement Agreement and Open Space Easement Deed attached to this report, but authorize the City Manager, City Attorney and Special Counsel, William Bates, III, to further negotiate the terms of the settlement, if necessary, and once the final terms have been negotiated by said persons, authorize the Mayor to execute the necessary instruments to consummate the settlement; provided, however, that should material modifications to the deal points contained in the attached settlement documents be proposed, said material changes must first be submitted to Council for decision before they are incorporated into the settlement.

BACKGROUND

In 1983, Melvin and Carolyn Phillips, and their son, David Phillips, purchased approximately 156 acres in the Alhambra Hills in Martinez, California ("subject property"). The property they purchased is shown in diagrammatic form on Exhibit 1 attached hereto. In 1984, the Phillips' applied to the City for permits to build a 10,000 square-foot home on the subject property. As a condition to approving same, the City required the Phillips to dedicate 120 acres of the subject property to open space. In 1984, the Phillips' signed and acknowledged an Open Space Easement Deed to fulfill this condition. See Exhibit 2. Although they signed it "under protest" in 1984, the easement deed was recorded in July 1985.

It was also in 1985 that Mr. Phillips sued the City, contending that the easement deed was confiscatory and invalid and demanding that he be paid millions of dollars in damages and that the easement deed be rescinded. He pursued his case to the United States Supreme Court, but lost at each level.

Staff Report to Mayor and Council Members

City of Martinez

Re: Ostrosky v. Martinez

September 17, 2009

Page 2

The Phillips' also proceeded to build their 10,000 square-foot home. At the time the Phillips' were processing their application for entitlements to build their 10,000 square-foot home, the City was undertaking the preparation and adoption of a specific plan called the Alhambra Hills Specific Plan ("AHSP"). In early drafts of the plan, as well as in the environmental documents prepared for the plan, the Phillips' home site was acknowledged as an existing home site subject to development. Exhibit 3. When the AHSP was finally approved in 1987, it included a land use map showing that four homes, plus the Phillips' home, could be constructed on the subject property. Exhibit 4. In short, then, the AHSP contemplated up to five homes being built on the Phillips' property.

Several years after the Open Space Easement Deed was recorded, a dispute arose between the City and Mr. Phillips as to the boundaries of the open space easement. The actual Open Space Easement Deed that was recorded had attached to it, as the legal description of the property burdened by the 120-acre easement, a copy of the original deed that was used to convey all 156 acres of the property to the Phillips' in 1983. See Exhibit 2. Notwithstanding the fact that the legal description attached to the Open Space Easement Deed encompassed all 156 acres of the Phillips' property, Mr. Phillips maintained that the diagram shown as Exhibit 5 attached hereto and not the Easement Deed itself, accurately reflected the area of the property that was encumbered by the open space easement. Although staff prepared the necessary documents to modify the legal description of the open space easement to more closely align itself with the diagram attached as Exhibit 5, ultimately, Mr. Phillips refused to execute the necessary documents to effect the amendment and the matter has languished, unresolved to the present time.

Evidently, when the Phillips' purchased the property in 1983, they were unaware of the fact that by virtue of some historic deed and conveyance documents, their property actually consisted of four legal lots.

In November 2002, Ostrosky Enterprises, Inc. ("Ostrosky") purchased the property from the Phillips'. Sometime thereafter, Ostrosky submitted documents to the City to support Ostrosky's claim that the property actually consisted of seven lots. The City did not agree, but ultimately recorded what is called a Conditional Certificate of Compliance validating four parcels on the 156 acres once owned by the Phillips'. Based upon that

four-lot determination, Ostrosky applied for a lot-line adjustment. In December 2007, the City Council denied that lot-line adjustment and, in March 2008, Ostrosky sued the City.

THE LAWSUIT

This lawsuit contains three, basic claims. First, a claim that the Council's 2007 decision denying the lot-line adjustment application submitted by Ostrosky was unlawful because lot-line adjustments are merely the drawing of lines on a piece of paper, whereas the Council denied the lot-line adjustment because one of the lots was located in an area that the AHSP specifically declared undevelopable. Second, the lawsuit claimed that because the legal description of the Open Space Easement Deed was uncertain, it was invalid. And; third, the lawsuit claimed that even if the Open Space Easement Deed was not invalid, the Court was asked to determine the Open Space Easement Deed's boundaries. The Court has dismissed Ostrosky's claims that the Open Space Easement Deed was invalid, leaving for trial two issues: (1) whether or not denial of the lot-line adjustment ("LLA") was lawful; and (2) determining the boundaries of the Open Space Easement Deed.

The Court has set October 26, 2009, as the trial date.

SETTLEMENT PROPOSAL

In an effort to avoid continuing to incur substantial legal fees and expenses in litigating this case, to finally put to rest the boundaries of the open space easement and to secure certainty as to the appropriate location of the five residential sites contemplated by the AHSP, staff is recommending that the Council approve the attached settlement, as conditioned above.

The central and salient points of the settlement proposal are:

1. The litigation is stayed for up to 15 months.
2. Within 180 days, Ostrosky is required to file development applications of its choice. It may be the case that Ostrosky will apply for a lot-line adjustment, a vesting

tentative map, a general plan/specific plan amendment and re-zoning. Attached hereto as Exhibit 6 is a conceptual diagram showing a possible parcel configuration identifying the location, area and size of the five residential lots and two open space areas. This is submitted for discussion purposes only and may or may not be representative of the application which Ostrosky may submit in accordance with the proposed Settlement Agreement.

3. Whatever application Ostrosky is entitled to file within that 180 days, it is subject to the following conditions:
 - A. It cannot involve more than five residential lots.
 - B. It cannot propose development on any slopes greater than 30 percent.
 - C. It cannot propose development near the swimming pool at the end of Lindsey Drive.
 - D. All development must be screened and properly sited.
4. Ostrosky will have to comply with the California Environmental Quality Act.
5. A new Open Space Easement Deed in the form attached to the Settlement Agreement must be signed and notarized and submitted with the City or placed in an escrow pending the outcome of Ostrosky's development applications. The easement deed must cover at least 120 acres and be comprised of no more than two non-contiguous areas.
6. Prior to the point in time at which the Ostrosky development applications come to the City Council for final approval, Ostrosky will be given the opportunity to attempt to strike an agreement with an open space district or conservation organization under which Ostrosky and the district/organization agree to convey and accept, respectively, the 120 acres of open space such that the district/organization becomes the ultimate owner of same and agrees to maintain it in perpetuity. If this type of arrangement cannot be effected, then upon Ostrosky's approval of the development entitlements granted by the City, the Open Space Easement Deed would be recorded along with conditions, covenants and restrictions obligating the owners of the five residential lots to maintain the open space areas in perpetuity.

7. Upon Ostrosky's approval of the land use entitlements granted by the City, the open space instrument would be recorded and the current lawsuit would be dismissed with all parties bearing their own costs and attorneys' fees.

8. If the City Council rejects Ostrosky's development proposal or, in approving same, conditions it in a fashion unacceptable to Ostrosky or, the Settlement Agreement otherwise terminates in accordance with its terms, then Ostrosky is barred from suing the City for taking such actions and its only remedy is to re-institute the instant litigation. However, under such circumstances, Ostrosky would be compelled to pay all outside consultants and professionals retained by the City to process the Ostrosky entitlement applications, but Ostrosky would be entitled to be refunded the fees it paid to the City to pay for the City's in-house staff costs.

The current iteration of the Settlement Agreement developed by the City's Special Counsel, William Bates, III, is attached as Exhibit 7. It is likely that additional fine-tuning and negotiations will be required to finalize this document and, thus, the City Attorney is requesting the Council to authorize the City Manager, Special Counsel Bates, and the City Attorney to continue those negotiations until a final agreement can be reached that is acceptable to those three individuals. If, during those negotiations, any material changes are proposed by Ostrosky, then those material changes cannot be approved except upon consent of the City Council.

RECOMMENDATION

It is recommended that the City Council approve the Settlement Agreement and its attachment appended hereto as Exhibit 7, and authorize the City Manager, Special Counsel Bates and the City Attorney to negotiate the document, if necessary, in accordance with the terms and conditions stated above.

ATTACHMENTS

- Exhibit 1: Diagram of Property Location
- Exhibit 2: Open Space Easement Deed
- Exhibit 3: AHSP map showing Phillips' Home
- Exhibit 4: 1987 AHSP Land Use Map
- Exhibit 5: Phillips' Diagram of Open Space Easement Area
- Exhibit 6: Conceptual Lot Layout
- Exhibit 7: [Proposed] Settlement Agreement

City Clerk's Office
25 Henrietta Street
Martinez, CA 94553

85 97804

copy

RESOLUTION NO. 117-84

RESOLUTION BY THE MARTINEZ CITY COUNCIL
ACCEPTING THE OFFER OF 120 ACRES OF HILLSIDE LAND
AS AN OPEN SPACE AND SCENIC EASEMENT FROM
MELVIN D. AND CAROLYN D. PHILLIPS

WHEREAS, at its meeting of June 6, 1984, the Martinez City Council approved a Design review application for a proposed 10,500 sq. ft. residence located on a 163+ acres;

WHEREAS, the City Council imposed a condition requiring the dedication of 120+ acres of this property to the City of Martinez as an Open Space and Scenic Easement prior to issuance of Building Permits.

WHEREAS, Section 51084 of the California Government Code requires the City to make the following findings prior to acceptance of the offer of dedication of the Open Space and Scenic Easement:

- 1) The preservation in perpetuity of large portions of this property as Open Space is consistent with the City's adopted General Plan for the area; and
- 2) The preservation of large portions of the property as Open space as described in the terms of the easement is in the best interests of the City of Martinez for the following reasons:
 - a) Retention of the land in its natural state has scenic value to the public and will implement the Conservation policies of the Alhambra Valley Conservation Zone.
 - b) Retention of the land in its natural state will avoid exacerbating existing hazardous drainage problems within the Alhambra Creek drainage basin.

THEREFORE, BE IT RESOLVED, the Martinez City Council finds that the acceptance of the Open Space and Scenic Easement for the Phillips' property is consistent with the findings necessary for acceptance on behalf of the public as outlined in Sec. 51084 of the California Government Code.

* * * * *

RECORDED AT REQUEST OF

City of Martinez

JUL 25 1985

AT 11 O'CLOCK M
CONTRA COSTA COUNTY RECORDS

J. R. OLSSON
COUNTY RECORDER
FEE:

Office

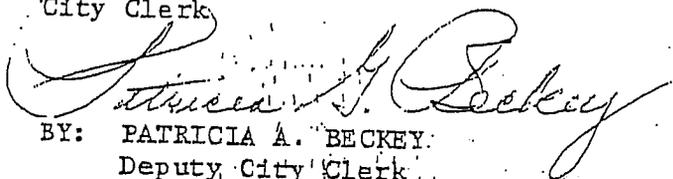
I HEREBY CERTIFY that the foregoing is a true and correct copy of a Resolution duly adopted by the City Council of the City of Martinez at a regular meeting of said Council held on the 18th day of July 1984, by the following vote:

AYES: Councilmembers Hernandez, Langley, Pollacek, Radke and Mayor Menesini.

NOES: None.

ABSENT: None.

LAWRENCE J. KOWALSKI
City Clerk


BY: PATRICIA A. BECKEY
Deputy City Clerk

WP 215.4

OPEN SPACE AND SCENIC EASEMENT DEED

THIS INDENTURE made this 27 day of July 1984, between Melvin D., Carolyn D., David S., and Stephan D. Phillips hereafter referred to as "Grantors" and the City of Martinez (a municipal corporation) of the State of California hereafter referred to as "Grantee":

RECITALS

1. The Grantors are the owners in fee of certain real property situated in the City of Martinez, State of California, more particularly described in attached "Exhibit A" as a 1.63+ acre parcel which includes one home site pad of 3/4 of 1 acre suitable for construction of one single family dwelling with access thereto and referred to as "the subject property";

2. The real property of the Grantors has certain natural scenic beauty and existing open space:

3. The preservation of the land as open space is in the best interest of the Grantee; and

4. Both the Grantors and the Grantee desire to preserve and conserve for public enjoyment the great natural scenic beauty, open space, and natural terrain of the subject property; and

5. The Grantors, subject to the reservations hereafter set forth, wish to grant to the Grantee the scenic use of the subject property, and thereby protect the present scenic beauty and existing open space by restricting the use and enjoyment of the property by the Grantors;

NOW, THEREFORE, for and in consideration of the premises, the Grantors grant and convey to the Grantees an Open Space and Scenic Easement of the nature and character and to the extent hereafter expressed, in the subject property described in Exhibit "A", attached hereto and made a part hereof by this reference. The easement, which results from the restrictions imposed by this indenture upon the use of the property by Grantors shall constitute a servitude and to that end and for the purpose of accomplishing the intent of the parties, the Grantors do covenant on behalf of themselves, their heirs, successors, and assigns with the said Grantee, its successors and assigns to do and refrain from doing severally and collectively upon the subject property of the Grantors the various acts hereafter mentioned. It is the intent of the parties that the restrictions imposed upon the subject property by this easement be deemed an enforceable restriction within the meaning of Article XXVIII of the Constitution of the State of California, as provided for in Chapter 6.6 of Part 1 of Division 1 of Title 5 of the Government Code of California, commencing with Section 51080.

FIRST: The subject property shall be used by the Grantors or their successors in interest for no purpose other than those which will maintain the existing open space character of the site.

SECOND: The Grantors, their successors and assigns shall refrain from doing any of the following acts upon the subject property, except where approved by Grantee:

1. Construct, or permit to be constructed, place or maintain additional residences, or any other accessory buildings or structures (greater than 200 sq. ft. in size) or obscure fencing or other improvements without Planning Commission approval except for such buildings or structures referred to in the reservations hereinafter made in Paragraph "FOURTH".
2. Locate on or within the property any advertising of any kind or nature.
3. Engage in or permit any grading activity of a magnitude requiring a permit (fifty cubic yards) without Planning Commission approval except that emergency grading repair work may be undertaken with the written authorization of the City Engineer.
4. Construct, keep, place or maintain dumps for the disposal of ashes, trash, rubbish, sawdust, garbage, animal waste, sewage or any unsightly and offensive material, except that required in conjunction with the herein permitted residential and agricultural uses.
5. Construct, or permit to be constructed, place or maintain overhead pipes, conduits or wires for the purpose of transmitting messages, heat, light or power without Planning Commission approval, except such temporary electrical services as may be authorized by the Director of Planning and Building.

6. Construct, or permit to be constructed, grade or maintain roadways which would provide access to adjoining properties except in conjunction with emergency access roads, as approved by the Planning Commission, except such fire breaks and/or trails for internal use on the property which are not paved.
7. Removal of trees, other than fruit and nut trees, over 12" in diameter (3' above the ground) without Planning Commission approval except that authorization for removal of trees presenting an immediate hazard may be given by the Director of Planning and Building.

THIRD: The Grantors, their heirs, successors and assigns shall not further subdivide the subject property into separate lots or parcels as defined pursuant to Government Code 66424, or its successor, except as referred to in the reservations hereinafter made in Paragraph "FOURTH".

FOURTH: The Grantors on behalf of themselves, their heirs, successors and assigns expressly reserve the following rights and privileges with respect to the subject property, so long as they are not inconsistent with the restrictions enumerated above:

1. The right to place or erect upon the existing approximate 3/4 acre building pad one (1) single family residence, parking, swimming pool or other associated improvements reasonably necessary for the use and enjoyment of the property by the Grantors, but only as specifically approved by the Grantee, pursuant to its Design Review authority.
2. All uses, occupancy, ingress and egress to, in and upon the subject property, including the right to prohibit entry thereon by unauthorized persons, other than as specified in Paragraph "SEVENTH".
3. The right to manage the land and its resources in a manner consistent with accepted principles of conservation practice in accordance with all applicable State and local ordinances.

FIFTH: In the event an action in eminent domain for condemnation of any interest in the subject property is filed or when it is acquired in lieu of eminent domain for a public improvement by a public agency or person, these restrictions are null and void as to such interest in land actually being condemned or acquired.

SIXTH: The grant of this easement is effective as of the date of its acceptance by the Grantee. It is effective in perpetuity as a covenant running with the land, and is established pursuant to the rights given above.

SEVENTH: The power of any federal, state or local agency or entity to acquire the subject property or any portion thereof by eminent domain is not limited by this instrument. This instrument does not prohibit the installation of public service facilities installed for the benefit of this or other adjoining property owners. or the installation of public service facilities authorized by Grantee, Consolidated Fire District or any other governmental agency. Any of the above acquisitions must be computed on the basis of fair market value as if this easement did not apply.

EIGHTH: The open space easement described herein may be abandoned in the manner provided in Sections 51090 to 51094, or successor statutes of the Government Code of the State of California.

NINTH: This grant shall bind successors and assigns of the Grantors, shall constitute a servitude upon said subject property and the reservations shall inure to the benefit of Grantee, its successors and assigns to the extent hereinafter provided.

IN WITNESS WHEREOF, the Grantors has executed the Deed the day and year first hereinabove written. This document is signed under protest.

Melvin D. Phillips
Melvin D. Phillips

Carolyn D. Phillips
Carolyn D. Phillips

David S. Phillips
David S. Phillips

Stephan D. Phillips
Stephan D. Phillips

STATE OF CALIFORNIA)
) ss.
COUNTY OF CONTRA COSTA)

On July 27, 1984, before me, the undersigned, a Notary Public in and for said State, personally appeared MELVIN D. PHILLIPS, CAROLYN D. PHILLIPS, DAVID S. PHILLIPS and STEPHAN D. PHILLIPS, known to me or proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same.

WITNESS my hand and official seal.

Donna G. Reese
DONNA G. REESE



RECEIVED
RECORDING REQUESTED BY DEC 27 1983

83 100206 DEC 8 - 1983

RECORDED AT REQUEST OF
WESTERN TITLE INSURANCE CO.

AND WHEN RECORDED MAIL TO
NAME MELVIN PHILLIPS
ADDRESS CAROLYN D. PHILLIPS
CITY & STATE 509 1st St.
Rodeo, CA 94572

CONTRA COSTA CO.
FEE \$ 440.00

AT 8 O'CLOCK A.M.
CONTRA COSTA COUNTY RECORDS
FEE \$ J.R. OLSSON
COUNTY RECORDER

BOOK 11562 PAGE 540

Title Order No. _____ Escrow No. 458846

SPACE ABOVE THIS LINE FOR RECORDER'S USE

MAIL TAX STATEMENTS TO
NAME SAME AS ABOVE
ADDRESS
CITY & STATE

Documentary transfer tax \$ 440.00
 Computed on full value of property conveyed, or
 Computed on full value less liens and encumbrances
remaining thereon at time of sale.

Signature of declarant or agent determining tax - Arm name
WESTERN TITLE INSURANCE COMPANY

Individual Grant Deed

WESTERN TITLE FORM NO. 104

AP # 366-150-013

FOR VALUE RECEIVED,

RAY DeGENNARO AND MARGARET DeGENNARO his wife and RICHARD J. CLANCY AND GRANT to CLARE CLANCY, his wife

MELVIN D. PHILLIPS AND CAROLYN D. PHILLIPS, husband and wife
DAVID S. PHILLIPS, a single man, and STEPHAN D. PHILLIPS, a single man,
all that real property situate in the City of Martinez all as joint tenants

County of Contra Costa, State of California, described as follows:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF FOR LEGAL DESCRIPTION.

Dated November 23, 1983

Ray DeGennaro
RAY DeGENNARO
Richard J. Clancy
RICHARD J. CLANCY

Margaret DeGennaro
MARGARET DeGENNARO
Clare Clancy
CLARE CLANCY

STATE OF CALIFORNIA County of Contra Costa

On November 23, 1983
before me, Marcia Lutz, a Notary Public, in
and for said State, personally appeared RAY DeGENNARO AND MARGARET
DeGENNARO, RICHARD J. CLANCY AND CLARE CLANCY
of satisfactory evidence to be the persons whose names
subscribed to the within instrument, and acknowledged to me that
they executed the same

FOR NOTARY SEAL OR STAMP
MARCIA LUTZ
NOTARY PUBLIC - CALIFORNIA
My Commission Expires 11/15/84

Marcia Lutz
Notary Public

Contra Costa
Feb.

Those parcels of land in the City of Martinez, County of Contra Costa, State of California, described as follows:

PARCEL ONE

Portion of the Rancho Las Juntas, described as follows:

Beginning on the southeast line of Tract No. 2586, filed April 30, 1958, Map Book 69, page 34, Contra Costa County records, at the southwest line of the parcel of land described as Parcel One in the deed to Antoni T. Goyak, et ux, recorded November 16, 1962, Book 4244 Official Records, page 604; thence from said point of beginning southwesterly along the exterior line of said Tract No. 2586, to the west line of the 50 feet in width strip of land secondly reserved in the deed to Forest Hills Improvement Association, a non-profit corporation, recorded June 1, 1959, Book 3384, Official Records, page 311; thence south $9^{\circ} 22'$ west, along said west line to the southeast line of the parcel of land described as Parcel One in the deed to Louis H. Martin, et al, recorded March 17, 1958, Book 3136, Official Records, page 46; thence north $49^{\circ} 46' 20''$ east, along said southeast line to the southwest line of said Goyak parcel; thence north $41^{\circ} 18' 20''$ west along said southwest line to the point of beginning.

PARCEL TWO

Portion of the Rancho Las Juntas, described as follows:

Beginning at the most westerly corner of Lot 125, map of Tract No. 2586, filed April 30, 1958, Map Book 69, page 34, Contra Costa County records; thence from said point of beginning along the exterior line of said Tract No. 2586, south $41^{\circ} 18' 20''$ east, 72.94 feet and southwesterly along the arc of a curve to the left with a radius of 60 feet to the southwest line of the 50 feet in width strip of land firstly reserved in the deed to Forest Hills Improvement Association, a non-profit corporation, recorded June 1, 1959, Book 3384, Official Record, page 311; thence northwesterly along said southwest line to the northwest of the parcel of land described as Parcel One in the deed to Lou. H. Martin, et al, recorded March 17, 1958, Book 3136, Official Record, page 46; thence north $49^{\circ} 46' 20''$ east along said northwest line to a point which bears north $41^{\circ} 18' 20''$ west from the point of beginning; thence south $41^{\circ} 18' 20''$ east to the point of beginning.

PARCEL THREE

A portion of the Rancho Las Juntas, and a portion of the Rancho Canada Del Hambre, Southern Part, described as follows:

Beginning at the western corner of Lot 39, Tract No. 2308 (Forest Hills Estates) filed October 20, 1955, in Book 61 of Maps, page 28, in the office of the County Recorder of Contra Costa County; thence from said point of beginning, north 54° west, 20 feet; thence south 49° west, 1000 feet; thence south $31^{\circ} 15'$ east, 300 feet; thence north 70° east, 720 feet; thence north 21° east to the exterior line of said

Tract No. 2308; (61 M 28); thence along said exterior line, as follows: North $31^{\circ} 14' 22''$ west to an angle point therein; south 30° west, 16.06 feet and north 54° west, 155 feet to the point of beginning.

EXCEPTING FROM PARCEL THREE: That portion thereof lying within Tract No. 2626, filed March 30, 1960, Map Book 77, page 5, Contra Costa County records.

PARCEL FOUR

Portion of the Rancho Las Juntas and a portion of the Rancho Del Hambre, Southern Part, described as follows:

Beginning on the southwest line of Alhambra Avenue, being the southwest line of the parcel of land described in the deed to Contra Costa County, recorded September 21, 1956, Book 2848, Official Records, page 62, at the southeast line of the 28.74 acre parcel of land described as Parcel Two in the deed to V.B. Likins, et al., recorded September 8, 1955, Book 2607, Official Records, page 152; thence from said point of beginning along the southeast lines of said 28.74 acre parcel as follows: South 45° west, 836.32 feet; south $12^{\circ} 25'$ west, 678.48 feet and south 45° west, 484.44 feet to the most southerly corner of said 28.74 acre parcel; thence along the southeast and southwest lines of the 25.20 acre parcel of land described as Parcel One in said deed to Likins, south 45° west, 273.90 feet and north $45^{\circ} 20'$ west, 1125.30 feet to the most southerly corner of the 141.8 acre parcel of land described as Parcel One in the deed to V. B. Likins, et al, recorded September 8, 1955, Book 2607, Official Records, page 148; thence along the exterior lines of said 141.8 acre parcel as follows: North 40° west, 1820.28 feet; north $5^{\circ} 15'$ west, 818.40 feet; north $45^{\circ} 30'$ west, 414.48 feet; north $46^{\circ} 15'$ west, 165 feet; north 39° west, 159.06 feet and north 32° east, 81.18 feet to the southwest line of the 16 acre parcel of land described as Parcel Two in said deed to Likins, 2607 OR 148; thence along the southwest and northwest lines of said 16 acre parcel north 15° west, 71.97 feet and north $59^{\circ} 30'$ east to the southwest line of the parcel of land described as Parcel One in the deed to Kurt Zocher, recorded November 30, 1955, Book 2662, Official Records, page 265; thence south $39^{\circ} 31' 10''$ east along said southwest line, 281.95 feet to the northwest line of the parcel of land described in the deed to Forest Hills Development Company, recorded October 20, 1955, Book 2632, Official Records, page 593; thence south $33^{\circ} 04' 17''$ west, along said northwest line, 85 feet to the northeast line of the parcel of land described as Parcel Two in the deed to Louis H. Martin, et al, recorded March 17, 1958, Book 3136, Official Records, page 46; thence along the exterior lines of said Martin parcel as follows: North 54° west, 20 feet; south 49° west, 1000 feet; south $31^{\circ} 15'$ east, 300 feet; north 70° east, 720 feet and north 21° east to the southwest line of said Forest Hills Development Company parcel; thence along said southwest line south $31^{\circ} 14' 22''$ east

to an angle point therein and south $36^{\circ} 16' 37''$ east, 75 feet to the most southerly corner thereof; thence along the exterior lines of the parcel of land described in the deed to Forest Hills Realty Company, recorded August 23, 1956, Book 2831, Official Records, page 576, as follows: South $36^{\circ} 16' 37''$ east, 240 feet; north $53^{\circ} 43' 23''$ east, 170 feet, south $36^{\circ} 16' 37''$ east, 277.05 feet; south $38^{\circ} 52' 10''$ east, 531.95 feet and south $51^{\circ} 07' 07''$ east, 37.78 feet to the northwest line of the parcel of land described as Parcel One in said deed to Martin, 3136 OR 46; thence along the exterior lines of the last mentioned Martin parcel as follows: South $38^{\circ} 21' 30''$ west, 250 feet; south $40^{\circ} 13' 40''$ east, 230 feet; south $49^{\circ} 46' 20''$ west, 650 feet; south $40^{\circ} 13' 40''$ east, 250 feet; north $49^{\circ} 46' 20''$ east, 700 feet; south $40^{\circ} 13' 40''$ east, 500 feet, and north $52^{\circ} 16' 20''$ east, to the southwest line of said Alhambra Avenue being the southwest line of the parcel of land described in said deed to Contra Costa County, 2848 OR 62; thence southeasterly along said Alhambra Avenue along the arc of a curve to the right with a radius of 1950 feet, to the point of beginning.

EXCEPTING FROM PARCEL FOUR

- 1- That portion thereof lying within the 229.071 acre parcel of land described in the decree quieting title against Kurt J. Zocher, et al, (Case No. 61930) a certified copy of which was recorded February 14, 1957, Book 2931, Official Records, page 140.
- 2- That portion thereof conveyed to Forest Hills Improvement Association recorded June 1, 1959, Book 3384, Official Records, page 311.

PARCEL FIVE

A right of way (not to be exclusive) for use as a roadway for vehicles of all kinds, pedestrians and animals; for water, gas, oil and sewer pipe lines, and for telephone, television service, electric light and power lines, together with the necessary poles or conduits, as an appurtenance to Parcels One, Two, Three and Four, described as follows:

Portion of the Rancho Las Juntas, described as follows:

Beginning on the southeast line of the 15 acre parcel of land described as Parcel Two in the deed to Thomas C. Grieve, et ux, recorded August 20, 1951, Book 1809, Official Records, page 292, at the most westerly corner of Lot 33, as designated on the map of Tract No. 2308, filed October 20, 1955, Map Book 61, page 28, Contra Costa County records; thence from said point of beginning south $60^{\circ} 29' 57''$ west, along said southeast line, 137.55 feet; thence south $30^{\circ} 59' 30''$ east, 20 feet; thence north $60^{\circ} 29' 57''$ east, 110.09 feet; thence north $23^{\circ} 55'$ east, 33.55 feet to the point of beginning.

PARCEL SIX

A right of way (not to be exclusive) for use as a roadway for vehicles of all kinds, pedestrians and animals, for water, gas, oil and sewer pipe lines, and for telephone, television service, electric light and power lines, together with the necessary poles or conduits, as an appurtenance to Parcels One, Two, Three and Four, described as follows:

Portion of the Rancho Las Juntas, described as follows:

Commencing on the southeast line of the 15 acre parcel of land described as Parcel Two in the deed to Thomas C. Grieve, et ux, recorded August 20, 1951, Book 1809, Official Records, page 292, at the most westerly corner of Lot 33, map of Tract No. 2308, filed October 20, 1955, Map Book 61, page 28, Contra Costa County records; thence from said point of commencement south $23^{\circ} 55'$ west, 33.55 feet; thence south $60^{\circ} 29' 57''$ west, 39.58 feet to the actual point of beginning of the parcel of land herein described; thence from said point of beginning south $29^{\circ} 30' 23''$ east, 20 feet; thence south $60^{\circ} 29' 57''$ west, 110 feet; thence westerly and northwesterly along the arc of a curve to the right with a radius of 144.87 feet, through a central angle of $40^{\circ} 00'$, an arc distance of 101.14 feet; thence north $79^{\circ} 30' 23''$ west, 14 feet; thence north $34^{\circ} 55'$ west, 21.93 feet; thence south $79^{\circ} 30' 23''$ east, 30 feet; thence easterly and northeasterly along the arc of a curve to the left with a radius of 129.87 feet, through a central angle of $40^{\circ} 00'$, an arc distance of 90.67 feet; thence north $60^{\circ} 29' 57''$ east, 95 feet; thence north $29^{\circ} 30' 23''$ west, 5 feet to a point which bears south $60^{\circ} 29' 57''$ west from the point of beginning; thence north $60^{\circ} 29' 57''$ east, 15 feet to the point of beginning.

EXCEPTING FROM PARCEL SIX: That portion lying southwesterly of the northeast line of the parcel of land described in the deed to Forest Heights Investors, recorded September 8, 1967, Book 5449, Official Records, page 602.

PARCEL SEVEN

A right of way (not to be exclusive) for use as a roadway for vehicles of all kinds, pedestrians and animals, for water, gas, oil and sewer pipe lines, and for telephone, television service, electric light and power lines, together with the necessary poles or conduits, as an appurtenance to Parcels One, Two, Three and Four, described as follows:

Portion of the Rancho Las Juntas, described as follows:

Beginning on the southeast line of the 15 acre parcel of land described as Parcel Two in the deed to Thomas C. Grieve, et ux, recorded August 20, 1951, Book 1809, Official Records, page 292, at the southwest line of Smith Drive, as designated on the map of Tract No. 2524, filed February 27, 1957, Map Book 66, page 30, Contra Costa County records; thence from said point of beginning south 60°

29' 57" west, along said southeast line, 125 feet; thence north 23° 55' east, 30.24 feet to the most southerly corner of Lot 6, as designated on said map (66 Maps 30); thence north 60° 29' 57" east, along the southeast line of said Lot 6, 100 feet to the southwest line of said Smith Drive; thence southerly along said southwest line, along the arc of a curve to the left with a radius of 60 feet, an arc distance of 18.08 feet to the point of beginning.

END OF DOCUMENT

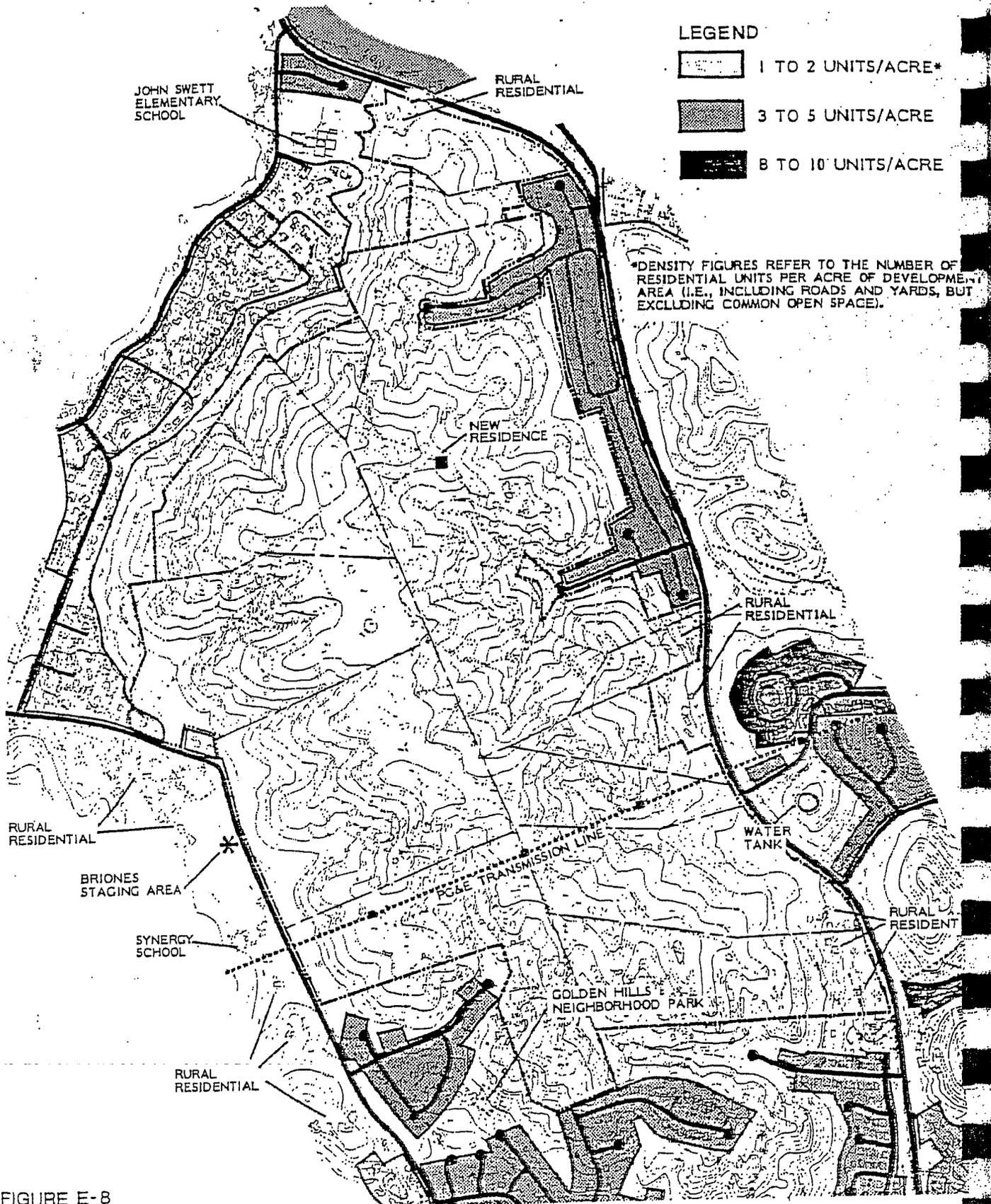
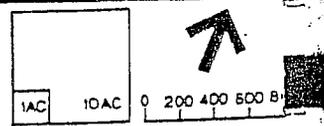


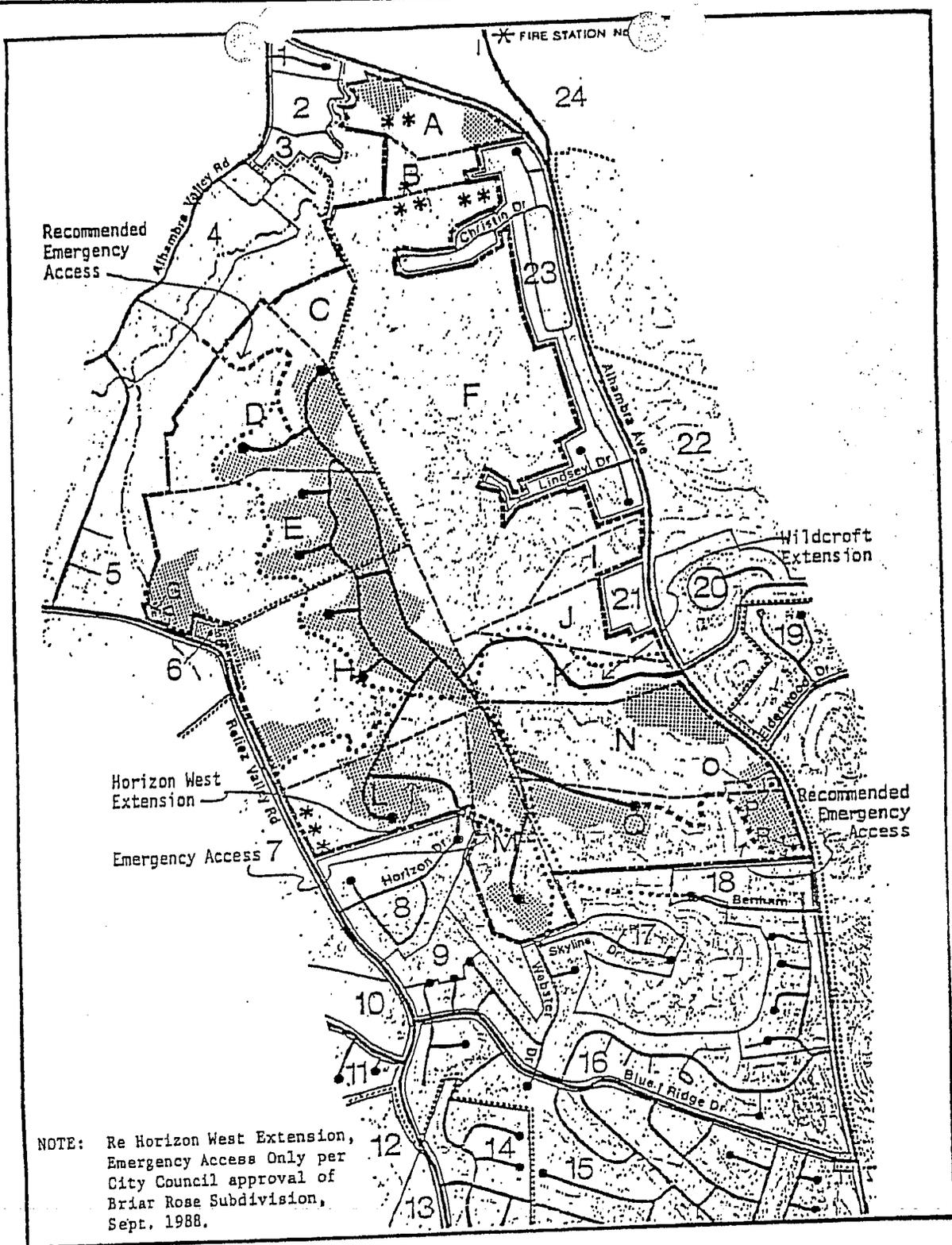
FIGURE E-8
EXISTING LAND USE

ALHAMBRA HILLS SPECIFIC PLAN · MARTINEZ, CA.

WAGSTAFF AND BRADY · URBAN AND ENVIRONMENTAL PLANNERS · BERKELEY, CALIFORNIA



A63



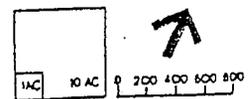
LEGEND

- Planning Area Boundary
- Martinez City Limits
- Primary Access Roads
- Emergency Egress
- Conceptual Nature Trail
- ▨ Development Area
- * Remote Homesites

Land Use and Circulation Figure 31.30

ALHAMBRA HILLS SPECIFIC PLAN

Exhibit D



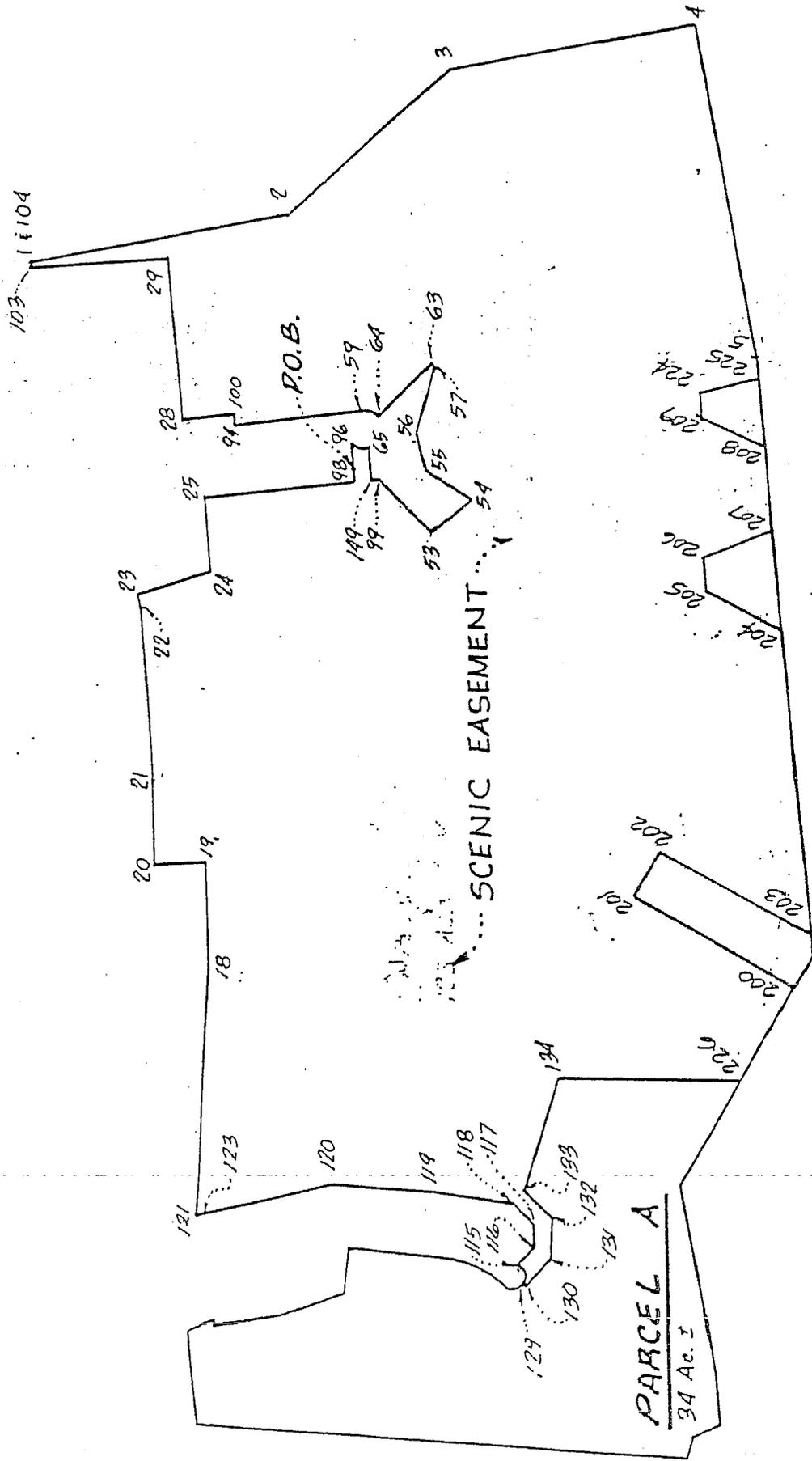
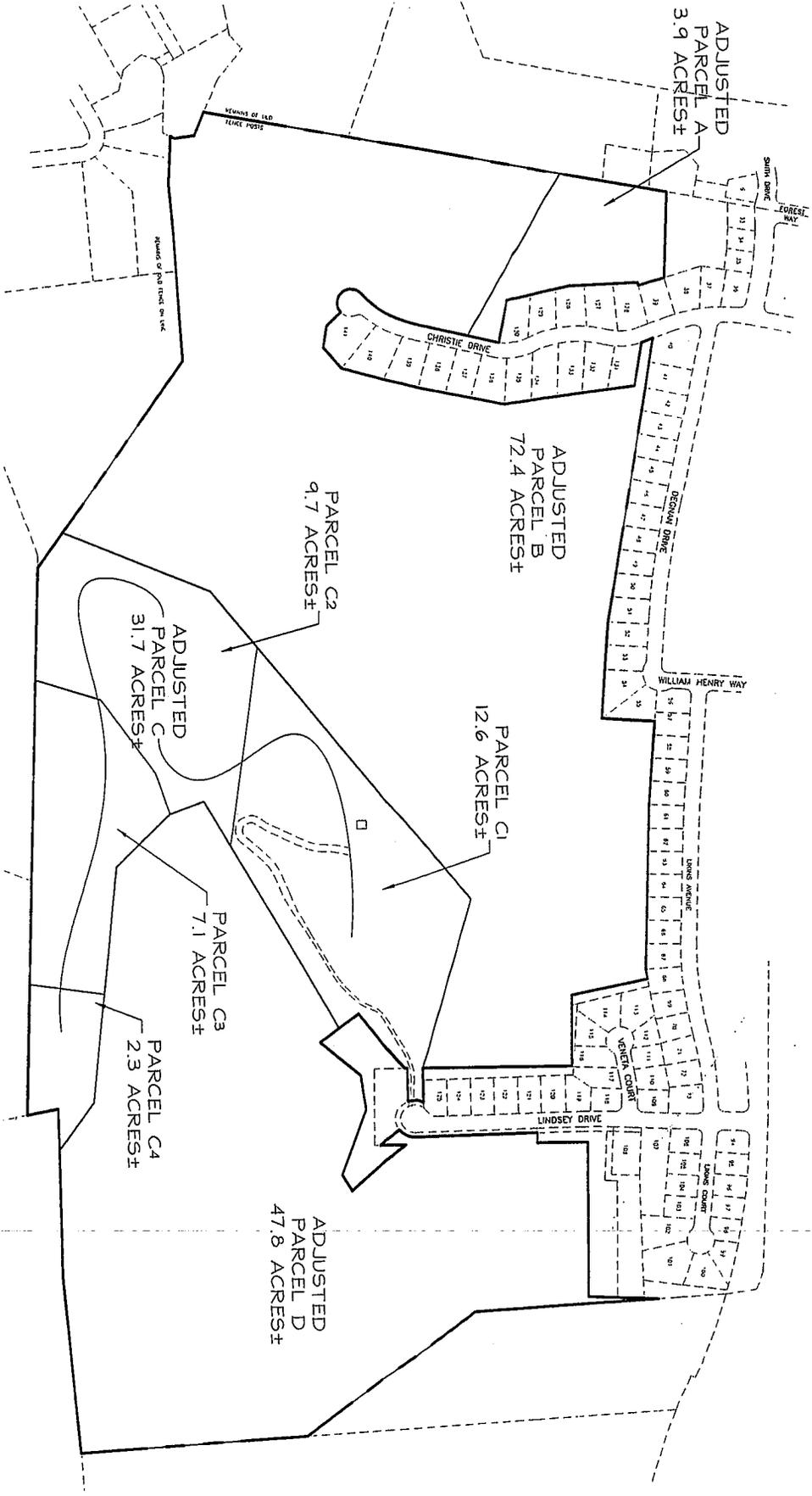


EXHIBIT 5



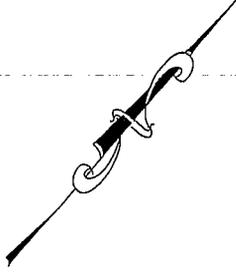
PROPOSED BOUNDARY
LINE ADJUSTMENT

SLOPE MAP

TOTAL AREA = 155.7± ACRES



SCALE: 1" = 500'



OWNER: OSTROSKY ENTERPRISES, INC.
2240 RAILROAD AVENUE
LIVERMORE, CA 94550

CONTACT: ROBERT DEVRIES
925-455-1500

MAP PREPARED BY:
Weber, Ohio, & Associates, Inc.
Professional engineers

PG. BOX 231
301 AMSTERDAM, CA 92319

Job # 2324
9/16/09

Settlement Agreement

This Settlement Agreement ("Agreement") is entered as of ~~July~~ September, 2009, by and between the City of Martinez ("City"), on the one hand, and Ostrosky Enterprises, Inc. ("Ostrosky"), on the other hand (collectively the "Parties" and each individually a "Party").

WHEREAS, Ostrosky is the fee owner of property within the City that was conveyed to Ostrosky by that certain grant deed recorded November 8, 2002, as Document No. 2002-04175-00 in the Official Records of Contra Costa County ("Property");

WHEREAS, an Open Space and Scenic Easement Deed encumbering a portion of the Property was conveyed to and accepted by the City and recorded July 25, 1985, as Document No. 85-97804 in the Official Records of Contra Costa County;

WHEREAS, Ostrosky filed an application to the City for a lot-line adjustment concerning the Property, pursuant to California Government Code section 66412, on February 9, 2007;

WHEREAS, Ostrosky's lot-line adjustment application was denied, and the denial was upheld by Resolution No. 099-07 of the City's City Council;

WHEREAS, Ostrosky filed and there is now pending in the Superior Court for the County of Contra Costa Case No. N08-0408, an action entitled "Ostrosky Enterprises, Inc. v. City of Martinez, *et al.*," which concerns the easement conveyed by the Open Space and Scenic Easement Deed and the City's denial of Ostrosky's lot-line adjustment application (the "Litigation"); and

WHEREAS, the Parties desire to resolve the disputes that gave rise to the Litigation;

NOW, THEREFORE, in consideration of the mutual promises contained herein, for other good and valuable consideration as set forth below, and intending to be bound, the Parties agree as follows:

1. Stay of Litigation

The Parties, through their attorneys, shall seek to stay the Litigation until the Termination (defined below) of this Agreement or until the Litigation is dismissed with prejudice pursuant to this Agreement.

2. Applications by Ostrosky

- a. Within the ~~90~~ 180 days following the date of this Agreement, Ostrosky may submit land use applications of its choosing to the City regarding the Property, except as provided in the following subparagraphs.
- b. Ostrosky shall not submit any application (for example, to amend the Alhambra Hills Specific Plan or for a tentative map) that provides for or would allow development of more than five residences on the Property.

c. Ostrosky shall not submit any application that provides for or would allow:

- development on slopes of more than thirty percent, or
- development at or near the swimming pool at the end of Lindsay Drive, or
- structures or improvements that are unscreened or that are not sited properly.

d. Ostrosky shall submit no other land use applications regarding the Property until the City has taken final action on those that are submitted within the 90-180 days following the date of this Agreement.

e. The City will not charge Ostrosky a fee for a lot-line adjustment application that conforms in all material respects to the application Ostrosky filed on February 9, 2007. The City will impose its regular fees and charges for any other land use application.

f. Any application by Ostrosky shall be deemed rejected without the necessity for further action by the City, unless:

- Within 180 days from the date of this Agreement, Ostrosky deposits into escrow, with instructions mutually acceptable to the Parties, an executed and notarized corrective deed, with the text shown in Exhibit A, to be approved by the City pursuant to California Government Code section 37114 with respect to the open space easement on a portion of the Property. Ostrosky shall pay all fees associated with the escrow.
- The portion of the Property to be encumbered by the open space easement comprises no more than two noncontiguous areas that together total at least 120 contiguous acres. The corrective deed shall describe the property to be encumbered with the easement by its metes and bounds.

g. The City shall process all of Ostrosky's land use applications such that its final actions with respect to them shall occur simultaneously. Ostrosky waives any right it might otherwise have to have them processed on any other schedule.

h. Except as set forth in subparagraph e. above, Ostrosky shall bear all costs of processing the applications it submits. The City will process them according to its ordinary practices, observing, among other things, all applicable requirements of CEQA. The City gives no assurance that any such application will be recommended by staff or approved by any City decision-maker. The City reserves all its discretionary land use and police powers in considering and acting upon Ostrosky's applications.

3. Certificate

If and when Ostrosky is satisfied, in its sole discretion, with the City's actions on the land use applications Ostrosky submitted pursuant to paragraph 2, Ostrosky shall deliver a certificate ("Certificate") to the City so stating and referring to this paragraph 3. By delivering the Certificate, Ostrosky waives any right to challenge any act or omission by the City, including its staff and subordinate bodies, with respect to those applications.

4. Actions re Open Space

a. The parties shall irrevocably instruct the escrow agent holding the corrective deed described in subparagraph 2.f. above to deliver it to the City upon receipt of a copy of the Certificate. The City may approve but shall not record the corrective deed described in subparagraph 2.f. above unless and until it has received the Certificate from Ostrosky.

b. Ostrosky shall provide for maintaining the property encumbered by the open space easement by one of the following means:

- When the City records the corrective deed concerning the open space easement, Ostrosky shall record a covenant running with the land acceptable to and enforceable by the City that imposes a joint and several obligation on the owner(s) of any and all residential sites the City has approved within the Property to maintain the property encumbered by the open space easement in perpetuity; or
- When the City records the corrective deed concerning the open space easement, Ostrosky shall deed the fee interest in the property encumbered by that easement to an open space district or conservation organization acceptable to the City that makes a promise, acceptable to and enforceable by the City, to maintain that property in perpetuity; or
- Ostrosky shall present to the City (i) a form of corrective deed that is acceptable to an open space district or conservation organization and (ii) a proposed promise by that entity, enforceable by the City, to maintain the property encumbered by the open space easement in perpetuity; and the City shall determine in its sole and absolute discretion to accept these proffers in satisfaction of Ostrosky's obligation under this subparagraph b; and such corrective deed shall be recorded in lieu of the corrective deed attached as Exhibit A.

5. Release and Dismissal

a. Simultaneously with the City's recordation of a corrective deed, as provided above, Ostrosky's delivery of the Certificate to the City, and without the need for any further action by either Party, Ostrosky releases and forever discharges City and its assigns, employees, agents, attorneys, officers, and subordinate bodies from any and all manner of actions, claims, defenses, and causes of action of any kind or nature whatever that Ostrosky has or may have against City at the date the Certificate is delivered, whether known or unknown, suspected or unsuspected, and whether or not any such unknown claims, if known by Ostrosky, would have materially affected its decision to enter into this Agreement.

b. The Parties acknowledge that they are familiar with section 1542 of the California Civil Code, which provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

Each Party expressly waives and relinquishes any rights or benefit which it has under said section 1542, or any other statute or legal principle with similar effect.

c. When Ostrosky delivers the Certificate to the City, Ostrosky shall instruct its attorneys promptly to dismiss the Litigation with prejudice, with each Party to bear its own attorneys' fees and costs.

6. Termination

This Agreement shall terminate upon the earliest to occur of the following:

- a. The court presiding over the Litigation shall decline to stay it, or any stay shall expire; or
- b. ~~Ninety-180~~ days shall have elapsed from the date of this Agreement, and Ostrosky shall have submitted no land use applications to the City; or
- c. Sixty days shall have elapsed from the date Ostrosky submitted a land use application to the City and (i) the City shall not have determined that the application is complete or (ii) the application shall not be deemed complete pursuant to section 65943 of the California Government Code; or
- d. Ten days shall have elapsed after the City's final action with respect to all land use applications that Ostrosky submitted to the City within ~~ninety-180~~ days from the date of this Agreement, and Ostrosky shall not have delivered the Certificate to the City; or
- e. ~~One year~~Fifteen months shall have elapsed from the date of this Agreement, and Ostrosky shall not have delivered the Certificate to the City; or
- f. Ostrosky shall deliver a notice to the City of its determination not to deliver the Certificate; or
- g. A material breach of this Agreement by either Party.

7. Effect of Termination; Limitation of Remedies

If this Agreement is terminated, the Parties agree (and such agreement shall survive termination of the Agreement) that all of Ostrosky's land use applications shall be deemed withdrawn as of the day they were filed, *nunc pro tunc*, ~~but~~ The City (i) shall be entitled to retain any ~~amounts~~ application or processing fees it has received from Ostrosky as payments to third-parties who assisted the processing (including by way of illustration only, environmental consultants), but (ii) shall refund to Ostrosky any application or processing fees received for the City's own account when Ostrosky and Ostrosky shall pay the City any incurred but unpaid ~~amounts~~ such fees it has incurred but not paid to the City for payments to third-parties who assisted the processing within thirty days after termination. Any action on any of Ostrosky's land use applications by the City Council, any subordinate body, or any City staff shall likewise be rescinded *nunc pro tunc*, and the corrective deed shall be returned to Ostrosky unrecorded. Except insofar as legal action may be necessary to enforce the provisions of this ~~paragraph~~ preceding two sentences or subparagraph 4.b. above, the Parties agree that, if this Agreement terminates for any reason, the sole remedy and recourse for any breach of this Agreement or alleged wrongful conduct in the processing of Ostrosky's land use applications shall be to recommence the Litigation from the point at which it was

stayed, and neither Party shall have rights that are more, less, or different than they are at the date of this Agreement.

8. Warranties

Each Party warrants that it has exclusive authority to execute this Agreement on its behalf. Ostrosky warrants that it is the fee owner of the Property and the owner of all of the claims to be released by it pursuant to this Agreement. Ostrosky warrants that it will not assign any such claims to any other person prior to Termination. Any Party breaching any of these warranties shall indemnify the other Party to the extent injured thereby. This section shall survive termination of the Agreement.

9. Compromise

This Agreement is the compromise of disputed claims and shall never be treated for any purpose as an admission of liability by any Party hereto.

10. Agreement Mutual and Knowing

Each Party represents that it has received legal advice with respect to the settlement provided for herein. This Agreement shall be deemed to have been mutually drafted and negotiated by the Parties; neither Party shall benefit from the application of section 1654 of the California Civil Code or any other statute or legal principle with similar effect.

11. No Reliance Upon Other Representations

Each Party warrants that it has not relied upon any statement or representation by the other Party or its agents, employees or attorneys in executing this Agreement, except those expressly set forth in this Agreement. There are no other promises or warranties pertaining to this settlement.

12. Governing Law; Severability

This Agreement shall be construed in accordance with the laws of the State of California without regard to conflict of laws. If any provision of this Agreement is held to be contrary to law, such provision shall be enforced to the maximum extent possible, and the remaining provisions of this Agreement shall remain in full force and effect.

13. Entire Agreement

This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior negotiations and agreements, whether written or oral, relating to its subject matter. This Agreement may not be altered, amended or modified, except by another written agreement that specifically refers to this Agreement, duly executed by representatives of each Party.

14. Time of Essence.

Time is of the essence in this Agreement and each of its provisions.

IN WITNESS WHEREOF, each Party has executed this Agreement as of the date first written above.

Ostrosky Enterprises, Inc.

City of Martinez

By: _____

By: _____

Approved as to form:

Pillsbury Winthrop Shaw Pittman LLP

**Walter & Pistole
Bingham McCutchen LLP**

By: _____

Scott A. Sommer
Attorneys for Ostrosky Enterprises, Inc.

By: _____

Jeffrey A. Walter
Attorneys for City of Martinez

A/73095354.2
A/73095354.3

CORRECTIVE OPEN SPACE AND SCENIC EASEMENT DEED

THIS INDENTURE is made as of this ___ day of _____ 2010, between Ostrosky Enterprises, Inc., hereafter referred to as "Grantor" and the City of Martinez, a municipal corporation of the State of California, hereafter referred to as "Grantee."

RECITALS

1. Grantor is the owner in fee of certain real property situated in the City of Martinez, State of California, more particularly described in the attached Exhibit A;
2. A portion of Grantor's real property is encumbered by a certain Open Space and Scenic Easement Deed in favor of Grantee recorded July 25, 1985, as Document No. 85-97804 in the Official Records of Contra Costa County;
3. Grantor and Grantee agree that an error exists in the description of the property conveyed by said Open Space and Scenic Easement Deed;
4. Grantor and Grantee wish to clarify said Open Space and Scenic Easement Deed in certain respects; and
5. This Corrective Open Space and Scenic Easement Deed has been approved by Grantee pursuant to the Government Code of California, section 37114.

NOW, THEREFORE, for and in consideration of the premises, Grantor grants and conveys to Grantee an Open Space and Scenic Easement of the nature and character and to the extent hereafter expressed, in the property described in Exhibit B (sometimes referred to as the "subject property"), which is attached hereto and made a part hereof by this reference. Grantee acknowledges that this easement does not encumber any portion of Grantor's real property except that described in Exhibit B.

The easement that results from the restrictions imposed by this indenture upon the use of the property by Grantor shall constitute an equitable servitude, and to that end and for the purpose of accomplishing the intent of the parties Grantor covenants on behalf of itself and its successors and assigns to Grantee, for the benefit also of Grantee's successors and assigns, to do and refrain from doing upon the subject property the various acts hereafter mentioned. It is the intent of the parties that the restrictions imposed upon the subject property by this easement be deemed an enforceable restriction within the meaning of Article XXVIII of the Constitution of the State of California, as provided for in Chapter 6.6 of Part 1 of Division 1 of Title 5 of the Government Code of California, commencing with section 51080.

FIRST: The subject property shall be used by Grantor for no purposes other than those that will maintain the existing open space character of the site, except as explicitly set forth below.

SECOND: Without limiting the generality of the foregoing, Grantor shall refrain from doing any of the following acts upon the subject property, except if approved by Grantee in its sole and absolute discretion:

1. The placement or construction of any buildings, other structures, obscure fencing, or other improvements, except:-
 - Up to a maximum of five horse shelters, each comprising 300 sq. ft. or less and similar in design and quality to Powder River Value Shelters, as shown on Exhibit C, and an ancillary watering trough for each shelter.
2. Any advertising of any kind or nature.
3. Any recreational activity, except for horseriding and similar passive recreational uses and activities consistent with the open space character of the site.
4. Any grading or other alteration of the surface of the land (including, without limitation, the excavation or removal of soil, sand, gravel, rock, peat, or sod) involving movement of over fifty cubic yards of soil and/or requiring a permit.
5. Mining, drilling, exploration for, or extraction of minerals, hydrocarbons, steam, soils, or other materials on or below the surface of the subject property.
6. Any use or activity that causes or is likely to cause soil degradation or erosion, or pollution of any surface or subsurface waters.
7. The placement or construction of any dump for the disposal of ashes, trash, rubbish, sawdust, garbage, animal waste, sewage or any unsightly or offensive material.
8. The installation of new, or extension of existing, utilities (including, without limitation, water, sewer, power, fuel, and communication lines and related facilities), unless they are ancillary to uses permitted upon the subject property and are installed underground.
9. The placement or construction of any roadways, except:
 - Unpaved fire breaks and/or trails for internal use on the subject property, and
 - Emergency vehicle access or similar roads built to minimum permissible standards, but only if any such road is required by any governmental authority (i) to permit construction of residences permitted elsewhere on the property described in Exhibit A, or (ii) for any other reason.
- 9.10. The pruning, felling, or other destruction or removal of trees, shrubs, or other native vegetation with trunks in excess of a 6.5-inch diameter (measured 4.5 feet above the ground).

THIRD: Grantor shall not further subdivide the subject property into separate lots or parcels, as defined by section 66424 of the Government Code of California, or its successor.

FOURTH: Grantor, on behalf of itself, its successors and assigns, expressly reserves the following rights and privileges with respect to the subject property, to the extent that they are not inconsistent with the restrictions enumerated in paragraphs FIRST, SECOND and THIRD above:

1. All uses, occupancy, ingress and egress to, and in and upon the subject property, including the right to prohibit entry thereon by unauthorized persons.
2. The right to manage the land and its resources in a manner consistent with accepted principles of conservation practice in accordance with all applicable state and local ordinances.

FIFTH: In the event an action in eminent domain for condemnation of any interest in the subject property is filed, or when it is acquired in lieu of eminent domain for a public use by a public agency or person, the restrictions set forth in this indenture shall be null and void as to the interest in land actually being condemned or acquired. The value of any interest in the subject property so acquired must be computed on the basis of fair market value as if this easement did not apply.

SIXTH: This easement is effective in perpetuity as a covenant running with the land.

SEVENTH: The open space easement described herein may be terminated only in the manner provided in the Government Code of California, commencing with section 51090, or successor statutes.

EIGHTH: Grantor undertakes and agrees that the subject property shall be held, transferred, sold, conveyed, given, leased, occupied, and used in the manner, and subject to all of the restrictions, covenants, easements, equitable servitudes, and affirmative obligations set forth herein.

IN WITNESS WHEREOF, Grantor has executed this indenture as of the date first written above.

OSTROSKY ENTERPRISES, INC.

By _____