



**CITY OF MARTINEZ**

**CITY COUNCIL AGENDA  
November 3, 2010**

**TO:** Mayor and City Council

**FROM:** Corey Simon, Senior Planner  
Jeffrey Walter, City Attorney

**SUBJECT:** Reconsideration of Appeal of Planning Commission's denial of proposed lot line adjustment #06-04 affecting an approximate 155.7 acre site located at 370 Lindsey Drive, APN's 366-150-024,026,027,028 & 029 (sometimes "Subject Property")

**DATE:** October 28, 2010

**RECOMMENDATION:**

Grant requested appeal and approve lot line adjustment request to adjust parcel boundaries between four existing lots, creating a new 4-lot configuration as proposed, with lots ranging in size from 8.45 to 64.41 acres.

**BACKGROUND:**

On November 13, 2007, the Planning Commission denied Lot Line Adjustment #06-04. Subsequently, the applicant filed a timely appeal to the City Council, which on December 19, 2007 unanimously voted to uphold the Planning Commission's decision. The consensus of both bodies was that the lot line adjustment did not conform to the Alhambra Hills Specific Plan (AHSP).

The owner and applicant took legal action and sued the City, claiming the City erred in making its decision to deny the lot line adjustment (LLA). The City contended otherwise, and on August 16, 2010, the Court issued its ruling in this case. The court found that the City Council's decision may have been affected by the incomplete understanding of the exact size and location of an Open Space Easement that had been conveyed to the City in 1984 by the current owner's predecessors-in-interest, members of the Melvin Phillips' family. A copy of the Court's Statement of Decision on Mandamus Cause of Action is attached as **Exhibit A**. The Court has ordered the Council to set aside its December 19, 2007, decision and reconsider its denial of the LLA. On September 15, 2010, the Council set aside its December 19, 2007, decision. The matter is before the Council at this time in order for the Council to reconsider the LLA application in light of the Court's ruling.

**Project Information**

The owner of the Subject Property has stated that it desires the Council to reconsider the same LLA denied by the Council on December 19, 2007. That was the thrust of the Court's order in any event. Thus, the applicant's proposal to obtain approval of a lot line adjustment pursuant to the Subdivision Map Act, reconfiguring four existing parcels to create four newly configured parcels ranging in size from 8.45 to 64.41 acres (see **Exhibit B**) is identical to the previous application submitted in 2007. The total land area of the existing and proposed parcels is approximately 155.7 acres. These parcels are in an environmentally sensitive area with limited frontage and difficult access. Any new access roads would have to be cut through sloped terrain, and/or go through existing neighborhoods at ends of cul-de-sacs.

### **The Subject Property Consists of Four, Not Seven, Legal Parcels**

Counsel for the owner, Scott Sommer, has submitted to the Council for its consideration his September 9, 2010, letter (with attachments) ("9/9/10 Letter"), along with his October 26, 2010, letter reiterating the comments and arguments in his September 9, 2010, letter. Those documents are attached as **Exhibit C**. In his 9/9/10 Letter (at p. 4), Mr. Sommer argues that the Subject Property consists of seven parcels. Mr. Sommer has made the same argument to the Court and asked the Court to confirm that his client's property includes seven parcels. The Court has refused to issue such a ruling.

In November 2002, Ostrosky Enterprises, Inc. (Ostrosky), purchased the Subject Property from the Phillips'. In 2003, Ostrosky applied to the City for the issuance and recordation of a certificate of compliance (C of C). **Exhibit G**, at pars. 25-26. The purpose for applying for a C of C is to obtain from the City a determination as to whether the property for which the application is submitted complies with the Subdivision Map Act (SMA) and relevant local subdivision ordinances. If the City agrees that the parcel in question was properly created under the SMA and local subdivision ordinances, then it issues and records a C of C. If the local agency determines that the property in question was not legally created pursuant to the SMA and/or local subdivision regulations, then it still must issue and record a C of C, but the City issues a "Conditional" C of C,<sup>1</sup> in which it explains that the parcel(s) in question were not lawfully created and sets forth the conditions which must be complied with by the property owner in order to achieve compliance with the SMA and applicable laws and regulations.

In 2003, Ostrosky requested the City to determine that four parcels allegedly located within the Subject Property had been lawfully created under the SMA and local regulations adopted pursuant to the SMA. This application was premised on Ostrosky's view that the Subject Property consisted of seven, lawful parcels. Thus, had the City issued a C of C as to the four parcels identified by Ostrosky in its 2003 application, that approval would have resulted in or laid the foundation for a determination that the Subject Property was comprised of seven, lawful lots. The City's engineering department determined that the four lots applied for had *not* been lawfully created under the SMA and/or local subdivision regulations and, on June 9, 2004, the City Engineer recorded a Conditional Certificate of Compliance stating such. **Exhibit D**.

Ostrosky, its engineers and its counsel, Mr. Sommer, disputed this determination. However, they never timely challenged the determination by initiating legal proceedings (90 day statute of

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<sup>1</sup> Even if the agency determines the property in question was lawfully established under the SMA and local subdivision regulations, but wishes to condition said determination, then it still must issue a C of C, but the local agency issues a "Conditional" C of C.

limitations), and, as a result, that determination is binding on Ostrosky and cannot be challenged. Ostrosky tried to file two other C of C applications, each of which included the same parcels which the City Engineer had earlier determined to have been unlawfully created. The City Engineer refused to accept or process said applications. Ultimately, the parties met and conferred over the issue of the number of parcels that were lawfully created under the SMA and local subdivision regulations. From those discussions an agreement was reached that the Subject Property consisted of only four parcels which had been lawfully created under the SMA and local subdivision regulations. A draft Conditional C of C reflecting this understanding was prepared by the City Engineer and forwarded to Mr. Sommer by cover letter dated April 4, 2007. After waiting over a month, on May 17, 2007, the City Engineer recorded the Conditional C of C determining that the Subject Property consists of four parcels, lawfully created under the SMA and local subdivision regulations. See, **Exhibit E**.

Ostrosky never timely challenged said May 17, 2007 Conditional C of C. Thus, it is binding on Ostrosky and establishes that four parcels comprise the Subject Property. Indeed, during the Council's Dec. 19, 2007, hearing at which the Council first considered Ostrosky's LLA application, Ostrosky's counsel stated:

Now, there is a dispute over how many lots there were, but for purposes of our meeting tonight, there are four certificates of compliance. The property owners have submitted to that and there is no disagreement. **Exhibit F**, at pp. 88-89.

Moreover, Ostrosky's original LLA application (and the LLA application that is at issue here) was based on the same, four parcels the May 17, 2007 Conditional C of C determined to have been lawfully created under the SMA and the City's subdivision regulations. *Compare, Exhibit B with Exhibit E*. By approving the LLA presently before the Council, the Council will not be deemed to be determining that the Subject Property consists of seven parcels.

### **Current and Applicable Regulations**

#### A. The Subdivision Map Act's Criteria

The Subdivision Map Act governs lot line adjustment applications in the following manner:

*A local agency or advisory agency shall limit its review and approval to a determination of whether or not the parcels resulting from the lot line adjustment will conform to the local general plan, any applicable specific plan, any applicable coastal plan, and zoning and building ordinances. An advisory agency or local agency shall not impose conditions or exactions on its approval of a lot line adjustment except to conform to the local general plan, any applicable specific plan, any applicable coastal plan, and zoning and building ordinances, to require the prepayment of real property taxes prior to the approval of the lot line adjustment, or to facilitate the relocation of existing utilities, infrastructure, or easements. Cal. Gov't Code section 66412(d).*

Thus, in order to approve Ostrosky's LLA application, the Council must be able to find that the lots resulting from the LLA conform to the City's General Plan, the AHSP and the City's zoning code.

B. The Specific Plan Prohibits Development South of Christie Drive But Ostrosky has Assured the City that Its LLA Application Does not Involve Development

In his 9/9/10 Letter, Mr. Sommer argues -- as he did in connection with the Council's December 19, 2007, hearing -- that the AHSP permits development throughout Ostrosky's property wherever the slope of the land does not exceed 30%. This, even though the AHSP land use map shows no "development area" on the Subject Property save for four remote homesites north of Christie Drive. **Exhibit H**, at p. 112. Mr. Sommer contends that the map is not controlling, and is trumped by contrary provisions found in the AHSP's text.

Among other things, the AHSP plan, the resolution adopting the AHSP and the environmental documents and other studies developed in connection with the City's consideration and adoption of the AHSP evince the Council's intentions, in May 1987 when the AHSP was approved by the Council and re-confirmed in December 2007 when the Council denied Ostrosky's LLA application, to prohibit development on the Subject Property south of Christie Drive (except for the Phillips' homesite).

The development and consideration of the AHSP by the City and the AHSP Plan Advisory Committee spanned a period of almost five years. During that time, a variety of development scenarios for the plan area were proposed and considered. In the Final EIR for the AHSP prepared in March 1986, the development scenarios under consideration were called the proposed "Third Draft" Plan, the "Modified Third Draft" Plan and the Revised "Third Draft" (No Phillips) Plan. See **Exhibit I**, at pp. 114, 120-122, 128, 130, 134. The proposed "Third Draft" Plan and the "Modified Third Draft" Plan showed that development along the western edge of the Subject Property, four remote homesites between Christie and Lindsey Drives and four more remote homesites north of Christie Drive would be entertained. This level and location of development were clearly denoted on these plans with the use of shading and circles (and a legend explaining same). **Exhibit I**, at pp. 128, 130.

The "Third Draft" Plan had been under consideration in various forms and had been the subject of analysis by the City's consultants and the AHSP Plan Advisory Committee for almost two years prior to the preparation of the Final EIR in March 1986. During this process, however, one of the then owners of the Subject Property, Melvin Phillips, delivered to the City an October 30, 1985, letter in which he stated in relevant part:

**It is not my desire to have any building whatsoever on any portion of my property that lies south of Christie Drive. In addition, four estate lots are shown on my property [between Christie and Lindsey Drives]. The estate lots are shown in areas that are the subject of a scenic easement at the present time with the City of Martinez, and all single family dwellings are prohibited in the scenic easement. The draft should be changed to show that no estate lots are contemplated for any of the area within the scenic easement. I know that some of these developments occurred after the drafting of portions of these documents, but the latest circumstances concerning my property should be communicated to the drafters of this plan so that appropriate changes may be made.**

**Exhibit J**, at p. 141. For an understanding of where the development areas and remote homesites on the Subject Property were contemplated at the time of Mr. Phillips' letter, see

**Exhibit I**, at p. 128.

In the "Response to Comments" portion of the Final EIR for the AHSP, the preparers of the AHSP responded to Mr. Phillips' letter as follows:

**In response to this comment, the Implementation Element and the Final EIR (Land Use and Plan Viability sections) have been revised to incorporate references to an additional plan alternative, "Scenario 5" which would eliminate Phillips property development and all infrastructure south of Christie Drive (see Table E-12 in the Final EIR). The scheme would result in 56 fewer plateau area units (from 458 to 402), and the elimination of all road, water, sewer, and storm drainage infrastructure on this property which, at 159.6 acres, is the largest parcel in the planning area (indicated on figure E-4, DEIR page C-7, as property "F"). The maximum development capacity of Scenario 5 would be 690, rather than 750, units.**

**Exhibit J**, at pp. 137-138.

Consistent with this recommendation, the Final EIR included a development "Scenario 5" which it called: "Revised 'Third Draft' No Phillips". Scenario 5 envisioned (i) no development along the western edge of the Subject Property (the plateau areas) and (ii) the four remote homesites south of Christie Drive deleted. **Exhibit I**, at pp. 134, 135. The preparers of the Final EIR recommended that the specific plan could be revised to show these changes "if and when" the landowner agreed to rezone the property to "permanent open space." The Final EIR preparer also stated that if these changes were incorporated into the AHSP the development area configurations for the plateau areas (along the western border of the Subject Property – in the Final EIR, these areas are labeled areas 5, 6 and 7) would revert back to the previous AHSP adopted in 1973, and as shown on Figure E-6 and Table E-6 of the Final EIR. **Exhibit I**, at pp. 125, 133.

However, the preparer of the Final EIR was mistaken when it opined that the Council could not adopt a specific plan precluding development south of Christie Drive unless and until the landowner consented to same. The exercise of the land use authority of the City is not contingent on landowner consent (although, here, the landowner not only consented to changing the AHSP to preclude development south of Christie Drive, he requested it). Moreover, making the adoption of a specific plan provision contingent on the adoption of zoning is also contrary to the law. The specific plan is not required to be consistent with zoning. Rather, zoning is required to be consistent with the specific plan. Cal. Gov't Code section 65455.

Consequently, when the City Council adopted the AHSP in May 1987, it modified the previous "Third Draft" Plan and the "Modified Third Draft" Plan described in the Final EIR and approved a plan that clearly removed all "development areas" (no more shaded or stippled markings) from the plan as it pertained to the Subject Property and deleted the four remote homesites shown in the previous "Third Draft" Plan and the "Modified Third Draft" Plan located between Christie and Lindsey Drives. Compare **Exhibit H**, at p. 112 with **Exhibit I**, at pp. 128, 130. The Council did not wait for the landowner to consent to rezoning the Subject Property to permanent open space. Moreover, instead of following the Final EIR preparer's suggestion that if the development areas and four remote homesites on the Subject Property were deleted the development areas on the map would revert to the 1973 AHSP map's development

configuration,<sup>2</sup> the AHSP map actually approved by the Council in May 1987 showed no development areas to the east of the Subject Property's western property boundary. *Compare Exhibit H*, at p. 112 *with Exhibit I*, at p. 129.

To make it perfectly clear that the AHSP intended no development south of Christie Drive and that it had altered the plans previously discussed by the planning commission and studied in the environmental analysis, when it adopted the Resolution approving the AHSP on May 6, 1987, the Council incorporated into that Resolution a finding that stated: "**Plan has been altered. No development on Phillips property south of Christie Drive (Map 31.30).**" *Exhibit K*, at p. 145.

That the Council and the City as a whole understood the AHSP to preclude development south of Christie Drive was further evidenced by actions and statements of City staff subsequent to the adoption of the AHSP. Sometime in 1986 or 1987, Mr. Phillips had submitted an application to create an 18 lot subdivision on a portion of the Subject Property north of Christie Drive. By letter dated May 14, 1987, eight days after the Council had adopted the AHSP, Project Planner David Wallace wrote to Mr. Phillips stating:

**As we discussed, a general plan amendment will be necessary for approval of your proposal. The previous general plan [referring to the 1973 AHSP], and the previously proposed general plan revisions [referring to the "Third Draft" Plan and/or the "Modified Third Draft" Plan] would have allowed development on other portions of your property, primarily on the uppermost elevations [the plateaus]. Partly at your request and partly as a result of changed perceptions of the appropriate development for the Alhambra Hills the Specific Plan adopted by the city Council on May 6, 1987 eliminated all future development on your property except for four remote homesites. It is uncertain whether the Planning Commission and City Council would approve the general plan amendment necessary for your current proposal.**

*Exhibit L*, p. 146, par. 2.

In analyzing the location and intensity of development which the AHSP should permit, the lands within the plan area situated at the higher elevations were called "plateau" areas. Section 31.32 of the AHSP text lists those properties which contain "plateau" areas governed by the AHSP. Section 31.32 also specifies the maximum number of dwelling units that can be constructed on each parcel so listed. Parcel F (the Subject Property) is not listed at all. In his 9/9/10 Letter, Mr. Sommer attaches the first three pages of the 1987 AHSP text and points to section 31.32 thereof as evidence that in adopting the 1987 AHSP, the Council intentionally omitted reference to the Subject Property in listing maximum densities for each of the plateau areas because the Council intended the determination of the developability of the Subject Property to depend upon an individualized slope density analysis. Mr. Sommer argues that that meant that there was no limitation on the number of units permitted to be built on the Subject Property, and that, instead, that maximum number was to be determined by applying the less than 30% slope criteria found elsewhere in the AHSP text (Mr. Sommer points to section 31.31 which contains a general statement that "Development Area" shall consist of all areas under 30% slope, which "shall be

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<sup>2</sup> The 1973 AHSP's plan showed some development potential on the Subject Property along and east of its western boundary. *Exhibit I* at p. 129.

considered developable.”). **Exhibit C**, at pp. 18-19.

There does not appear to be any evidentiary support for Mr. Sommer’s assertion that section 31.32’s failure to list the Subject Property means that there was no limitation on the number of units that could be built upon the Subject Property, except any restrictions that may arise out of applying a 30% slope density formula. The Subject Property was the largest parcel governed by the AHSP. There are no facts to suggest that the City Council intended to allow this one parcel’s maximum density – out of all the others -- to depend upon some future calculation. Rather, it appears that consistent with the Council’s decision to modify the AHSP plan to prohibit development south of Christie Drive, the Subject Property was not listed in section 31.32 because the Council had determined that there would be *no units* allowed on the plateau areas of the Subject Property. It would have been clearer had section 31.32 listed the Subject Property (F) and caused a zero to be written next to it. But by omitting the Subject Property altogether, the AHSP accomplished the same objective.

### C. Mollich Is Distinguishable

In his 9/9/10 Letter, Mr. Sommer cites to the manner in which City staff treated the Mollich property as evidence that the City intended all areas under 30% slope to be developable. **Exhibit C**, at pp. 15-16.

Mrs. Mollich’s property is identified in the AHSP as parcel I. **Exhibit I**, at p. 126. It is located immediately adjacent to and south of the Subject Property. **Exhibit H**, at p. 112. The AHSP map shows no development areas or remote homesites on the Mollich property. *Id.* There are no plateau areas on the Mollich property. Sometime in the mid-2000’s, Mrs. Mollich wanted to subdivide her 9 acre property for residential structures.

The AHSP map itself denotes that no development is permitted on Mrs. Mollich’s property (other than the family home that was located on the Mollich property at the time the AHSP was adopted). In May 2006, the City’s Community Development Director (CDD) wrote to Mrs. Mollich and although conceding that the AHSP map showed that no development was permitted on her property, he referenced some historical discussions between staff and the planning commission which he construed as indicating an intention on the part of the planning commission to allow development anywhere in the plan area where slopes were less than 30%. In support of his conclusions, the CDD cited to section 31.31 of the AHSP text where it states that “Development Area” means all land covered by the AHSP which is less than 30% slope, and section 31.326 which provides that in “Development Area[s]” along Alhambra Avenue, densities “shall” range from 3 to 5 units and “shall not exceed the density of existing development”. **Exhibit C**, at p. 25. The CDD concluded that Mrs. Mollich did not need a general plan amendment or a rezoning to obtain approval of a residential subdivision.

This rationale was relied upon in September 2007 by the City’s Senior Planner, and ultimately in March 2008, the Deputy Community Development Director approved Mrs. Mollich’s three lot subdivision. **Exhibit C**, at attachments 2 and 3.

Mr. Sommer asserts that the same rationale advanced by the CDD in support of Mrs. Mollich’s development proposal should govern the developability of the Subject Property.

First, the CDD’s interpretation of the AHSP was flawed. The AHSP’s text was not intended to

trump or supersede the AHSP's plan, particularly with respect to (but not necessarily limited to) the Subject Property. Moreover, it is not the planning commission's intentions or the CDD's divinations therefrom that control here. It is the City Council's intentions in adopting the AHSP that are dispositive.

Second, neither the planning commission nor the City Council were presented the Mollich application for determination and thus, never had the opportunity to determine whether the CDD's construction of the AHSP was correct. The Deputy Community Development Director approved Mrs. Mollich's three lot subdivision in March 2008. That approval was never appealed or referred to the planning commission or to the City Council.

Finally, even if the CDD were correct in his construction of the AHSP as it applied to Mrs. Mollich's property, such a construction is inapposite to the Subject Property. The Subject Property's treatment in the AHSP was unique and arose from the particular circumstances giving rise to the development prohibitions imposed on it by the AHSP. The AHSP was "modified" in order to make sure that development of the Subject Property south of Christie Drive was proscribed. Thus, to the extent that the text of the AHSP may provide for flexibility in determining the developability of some of the other properties included within its ambit, those provisions are simply inapplicable to the Subject Property.

#### D. Zoning, AHSP and General Plan Conformity

The site is divided between two Residential zoning districts: R-7.5 (7,500 square foot minimum parcel size) and R-10 (10,000 square foot minimum parcel size). With parcels sizes ranging from 8.45 acres to 64.41 acres, the applicant's proposal is ostensibly consistent with these zoning district regulations. However, these zoning regulations are not consistent with the AHSP's development restrictions imposed upon the Subject Property. Consequently, on a going-forward basis it will be necessary to amend the City's zoning code to bring it into harmony with the AHSP.

The AHSP, the zoning code and the City's General Plan are documents whose principal purpose is to set forth the standards and criteria under which development and the use of land in the City are to be guided and controlled. Ostrosky has repeatedly represented to the City that its LLA application is not a development application or proposal. Ostrosky maintains that all it is proposing to accomplish is the moving of property boundary lines on a piece of paper. Ostrosky has assured the City that Ostrosky is not proposing any development scheme at the present time. Ostrosky has also represented that it is not proposing any change in the use of the Subject Property as a consequence of its LLA application being granted. **Exhibits C, M** (pp. 151, 152, 154) **and F** (at pp.89, 90, 92, 94).

Since the time Ostrosky purchased the Subject Property in 2002 and continuing to the present time, Ostrosky has devoted the Subject Property to cattle grazing and agricultural uses. Even before Ostrosky purchased the property, one of its principals, Robert De Vries, leased the Subject Property for several years from the Phillips for the same purpose. **Exhibit G**. These uses are permitted by the zoning and are contemplated under the General Plan's Policy 30.6241. Even as to the newly configured parcels proposed by Ostrosky's LLA application, such uses may lawfully continue on these lots. According to Ostrosky, it intends to continue using the Subject Property, even after its LLA application is approved, for cattle grazing and related agricultural uses: uses which are not commonly understood to constitute development. **Exhibit M**. The

AHSP permits animal grazing on the Subject Property. There are no provisions in the zoning code, the AHSP or General Plan that require that each lot created in the properties governed by the AHSP to have a developed homesite on it.

Ostrosky has represented that its LLA application is not a development application. Consequently, the development standards and/or restrictions set forth in the AHSP, the zoning code and/or the General Plan are essentially irrelevant to such an application and therefore conformity with these planning documents appears to be established.

It needs to be emphasized that by approving the LLA at issue here, the City is in no way indicating its intentions with respect to any future development application that may be submitted concerning the Subject Property. To the contrary, as Ostrosky itself has assured the City, Ostrosky's LLA application has nothing to do with development and notwithstanding the approval of the LLA, the City retains all its discretionary authority to address and decide any and all future development proposals pertinent to this property.

### **ACTION**

Adopt resolution granting appeal of Planning Commission denial, and approve lot line adjustment #06-04.

### **FISCAL IMPACT**

None

### **Attachment**

Site Vicinity Map  
Resolution of City Council Granting Appeal and Lot Line Adjustment Proposed by Ostrosky Enterprises, Inc.

### **Exhibits**

- A Statement of Decision on Mandamus Cause of Action
- B Diagrams of existing property boundaries and proposed property boundaries
- C Scott Sommer Letters of Oct. 26, 2010, and Sept. 9, 2010 (with attachments)
- D Conditional Certificate of Compliance recorded June 9, 2004
- E Conditional Certificate of Compliance recorded May 17, 2007
- F Partial transcript of Council's Dec. 19, 2007, hearing on Ostrosky's LLA
- G Excerpts from Ostrosky's Second Amended Complaint dated Jan. 2009
- H AHSP
- I AHSP Final EIR (March 1986) (excerpts)
- J AHSP Final EIR (March 1986) Response to Comments
- K Resolution No. 56-87 adopted by Council on May 7, 1987, adopting the AHSP
- L May 14, 1987, letter from City Planner to Melvin Phillips
- M Briefs filed by Ostrosky in *Ostrosky v. City of Martinez*, Case No. N08-0408 (excerpts)



RESOLUTION NO. -10

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARTINEZ, GRANTING AN APPEAL OF THE PLANNING COMMISSION'S DENIAL, AND APPROVING A PROPOSED LOT LINE ADJUSTMENT AFFECTING AN APPROXIMATE 155.7 ACRE SITE, ADJUSTING BOUNDARIES BETWEEN FOUR EXISTING LOTS, CREATING A NEW 4-LOT CONFIGURATION AS PROPOSED BY APPLICANT, EACH NEW LOT RANGING IN SIZE FROM 8.45 TO 64.41 ACRES, AT 370 LINDSEY DRIVE (APN'S:366-150-024,026,027,028 & -029)

**WHEREAS**, the applicant, Ostrosky Enterprises, Inc. (Ostrosky), submitted an application for a lot line adjustment (LLA #06-04) to adjust the lot configuration of four lots, comprising a 155.7 acre parcel located at 370 Lindsey Drive (Subject Property); and

**WHEREAS**, on November 13, 2007, at a duly noticed public hearing, the Planning Commission voted unanimously to deny the application, believing it to be inconsistent with applicable land use regulations, including the Alhambra Hills Specific Plan (AHSP); and

**WHEREAS**, on November 14, 2007 the Commission's decision was appealed to the City Council; and

**WHEREAS**, a duly noticed public hearing was held on December 19, 2007 by the City Council, public comment was received and the public hearing was closed; and

**WHEREAS**, on December 19, 2007, the City Council adopted Resolution No. 099-07, which upheld the findings of the Planning Commission and denied Ostrosky's application; and

**WHEREAS**, Ostrosky sued the City, claiming that the City improperly adopted Resolution No. 099-07. The City contended otherwise; and

**WHEREAS**, the Court ordered the Council to set aside and reconsider its December 19, 2007, action adopting Resolution No.099-07; and

**WHEREAS**, on September 15, 2010, the City Council adopted Resolution No. 094-10, setting aside and rescinding Resolution 099-07 pursuant to said Court Order; and

**WHEREAS**, to reconsider Ostrosky's appeal, a duly noticed public hearing was held on November 3, 2010 by the City Council, public comment was received and the public hearing was closed; and

**NOW, THEREFORE, BE IT RESOLVED** that the City Council, based on

its independent judgment, does hereby find and resolve as follows:

1. That the Project is exempt from the requirements of CEQA, pursuant to CEQA Guidelines Section 15061(b)(3), because (i) the applicant has represented that by its lot line adjustment (LLA) application at issue herein, it is not seeking the right to improve the Subject Property, alter the land on the Subject Property, or erect structures or engage in any of the activities defined as "development" in Cal. Gov't Code section 65927 and (ii) by approving said Project, the City is not granting to the applicant the right nor, as a consequence of said approval, shall the applicant be entitled to improve the Subject Property, alter the land on the Subject Property, erect structures or engage in any of the activities defined as "development" in Cal. Gov't Code section 65927. Moreover, the applicant has represented that it does not intend to change the use of the Subject Property from the uses to which the applicant has been putting the Subject Property for at least the previous eight years, namely, grazing cattle and related agricultural uses conforming to the policies of the City's General Plan, the policies of the AHSP and the regulations of the City's zoning code. In short, no development or change in allowable land uses is either approved, or potentially enabled by, the City Council's approval of the lot line adjustment. As such, the applicant's LLA itself, if approved, does not entail nor contemplate a substantial or potentially substantial, adverse change in any of the physical conditions within the area affected by the Project. Consequently, in approving the applicant's lot line adjustment application and adjusting the property boundaries of the four parcels comprising the Subject Property under these circumstances there is no possibility that such will have a significant effect on the environment.

2. The Specific Plan Prohibits Development South of Christie Drive But Ostrosky has Assured the City that Its LLA Application Does not Involve Development

3. In support of its LLA application, Ostrosky has submitted to the City a letter from Ostrosky's attorney, Scott Sommer, dated September 9, 2010 (with attachments) ("9/9/10 Letter"), along with an October 26, 2010, letter reiterating the comments and arguments contained in the 9/9/10 Letter. In his 9/9/10 Letter, Mr. Sommer argues -- as he did in connection with the Council's December 19, 2007, hearing -- that the AHSP permits development throughout Ostrosky's property wherever the slope of the land does not exceed 30%. This, even though the AHSP land use map shows no development area on the Subject Property save for four remote homesites north of Christie Drive. Mr. Sommer contends that the map is not controlling, and is trumped by

contrary provisions found in the AHSP's text.

4. Among other things, the AHSP plan, the resolution adopting the AHSP and the environmental documents and other studies developed in connection with the City's consideration and adoption of the AHSP evince the Council's intentions, in May 1987 when the AHSP was approved by the Council, reconfirmed in December 2007 when the Council denied Ostrosky's LLA application and the Council's present intention, to prohibit development on the Subject Property south of Christie Drive (except for the homesite constructed by Ostrosky's predecessors in interest, members of Melvin Phillips' family).

5. The development and consideration of the AHSP by the City and the AHSP Plan Advisory Committee spanned a period of almost five years. During that time, a variety of development scenarios for the plan area were proposed and considered. In the Final EIR for the AHSP prepared in March 1986, the development scenarios under consideration were called the proposed "Third Draft" Plan, the "Modified Third Draft" Plan and the Revised "Third Draft" (No Phillips) Plan. The proposed "Third Draft" Plan and the "Modified Third Draft" Plan showed that development along the western edge of the Subject Property, four remote homesites between Christie and Lindsey Drives and four more remote homesites north of Christie Drive would be entertained. This level and location of development were clearly denoted on these plans with the use of shading and circles (and a legend explaining same. The "Third Draft" Plan had been under consideration in various forms and had been the subject of analysis by the City's consultants and the AHSP Plan Advisory Committee for almost two years prior to the preparation of the Final EIR in March 1986.

6. During this process, however, the then owner of the Subject Property, Melvin Phillips, delivered to the City an October 30, 1985, letter in which he stated in relevant part:

**It is not my desire to have any building whatsoever on any portion of my property that lies south of Christie Drive. In addition, four estate lots are shown on my property [between Christie and Lindsey Drives]. The estate lots are shown in areas that are the subject of a scenic easement at the present time with the City of Martinez, and all single family dwellings are prohibited in the scenic easement. The draft should be changed to show that no estate lots are contemplated for any of the area within the scenic easement. I know that some of these developments occurred after the drafting of portions of these documents, but the latest circumstances concerning my property should be communicated to the drafters of this plan so that**

appropriate changes may be made.

7. In the "Response to Comments" portion of the Final EIR for the AHSP, the preparers of the AHSP responded to Mr. Phillips' letter as follows:

In response to this comment, the Implementation Element and the Final EIR (Land Use and Plan Viability sections) have been revised to incorporate references to an additional plan alternative, "Scenario 5" which would eliminate Phillips property development and all infrastructure south of Christie Drive (see Table E-12 in the Final EIR). The scheme would result in 56 fewer plateau area units (from 458 to 402), and the elimination of all road, water, sewer, and storm drainage infrastructure on this property which, at 159.6 acres, is the largest parcel in the planning area (indicated on figure E-4, DEIR page C-7, as property "F"). The maximum development capacity of Scenario 5 would be 690, rather than 750, units.

8. Consistent with this recommendation, the Final EIR included a development "Scenario 5" which was called: "Revised 'Third Draft' No Phillips". Scenario 5 envisioned (i) no development along the western edge of the Subject Property and (ii) the four remote homesites south of Christie Drive deleted. The preparers of the Final EIR recommended that the AHSP could be revised to show these changes "if and when" the landowner agreed to rezone the property to "permanent open space." The Final EIR preparer also stated that if these changes were incorporated into the AHSP, the development area configurations for the plateau areas (along the western border of the Subject Property - in the Final EIR, these areas are labeled areas 5, 6 and 7) would revert back to the previous AHSP adopted in 1973, and as shown on Figure E-6 and Table E-6 of the Final EIR.

9. However, the preparer of the Final EIR was mistaken when it opined that the Council could not adopt a specific plan precluding development south of Christie Drive unless and until the landowner consented to same. The exercise of the land use authority of the City is not contingent on landowner consent (although, here, the landowner not only consented to changing the AHSP to preclude development south of Christie Drive, he requested it). Moreover, making the adoption of a specific plan provision contingent on the adoption of zoning is also contrary to the law. The specific plan is not required to be consistent with zoning. Rather, zoning is required to be consistent with the specific plan. Cal. Gov't Code section 65455.

10. Consequently, when the City Council adopted the AHSP in May 1987, it modified the previous "Third Draft" Plan and the

"Modified Third Draft" Plan described in the March 1986 Final EIR and approved a plan that clearly removed all "development areas" (no more shaded or stippled markings) from the plan as it pertained to the Subject Property and deleted the four remote homesites shown in the previous "Third Draft" Plan and the "Modified Third Draft" Plan located between Christie and Lindsey Drives. The Council did not wait for the landowner to consent to rezoning the Subject Property to permanent open space. The Council modified and approved the AHSP intending to preclude all development on the Subject Property south of Christie Drive, except for the Phillips' homesite. Moreover, instead of following the Final EIR preparer's suggestion that if the development areas and four remote homesites on the Subject Property were deleted the development areas on the map would revert to the 1973 AHSP map's development configuration, the AHSP map actually approved by the Council in May 1987 showed no development areas to the east of the Subject Property's western property boundary.

11. To make it abundantly clear that the AHSP intended no development south of Christie Drive and that it had altered the plans previously discussed by the planning commission and studied in the environmental analysis, when it adopted the Resolution approving the AHSP on May 6, 1987, the Council incorporated into that Resolution a finding that stated: **"Plan has been altered. No development on Phillips property south of Christie Drive (Map 31.30)."**

12. The Council and the City as a whole understood that insofar as the Subject Property was concerned, one of the purposes of approving the AHSP was to preclude development south of Christie Drive. Sometime in 1986 or 1987, Mr. Phillips had submitted an application to create an 18 lot subdivision on a portion of the Subject Property north of Christie Drive. By letter dated May 14, 1987, eight days after the Council had adopted the AHSP, Project Planner David Wallace wrote to Mr. Phillips stating:

**As we discussed, a general plan amendment will be necessary for approval of your proposal. The previous general plan [referring to the 1973 AHSP], and the previously proposed general plan revisions [referring to the "Third Draft" Plan and/or the "Modified Third Draft" Plan] would have allowed development on other portions of your property, primarily on the uppermost elevations [the plateaus]. Partly at your request and partly as a result of changed perceptions of the appropriate development for the Alhambra Hills the Specific Plan adopted by the city Council on May 6, 1987 eliminated all future development on your property except for four remote homesites. It is uncertain whether the Planning Commission and City Council would approve the**

**general plan amendment necessary for your current proposal.**

13. In analyzing the location and intensity of development which the AHSP should permit, the lands within the plan area situated at the higher elevations were called "plateau" areas. Section 31.32 of the AHSP text lists those properties which contain "plateau" areas governed by the AHSP. Section 31.32 also specifies the maximum number of dwelling units that can be constructed on each parcel so listed. Parcel F (the Subject Property) is not listed at all. In his 9/9/10 Letter, Mr. Sommer attaches the first three pages of the 1987 AHSP text and points to section 31.32 thereof as evidence that in adopting the 1987 AHSP, the Council intentionally omitted reference to the Subject Property in listing maximum densities for each of the plateau areas because the Council intended the determination of the developability of the Subject Property to depend upon an individualized slope density analysis. Mr. Sommer argues that that meant that there was no limitation on the number of units permitted to be built on the Subject Property, and that, instead, that maximum number was to be determined by applying the less than 30% slope criteria found elsewhere in the AHSP text (Mr. Sommer points to section 31.31 which contains a general statement that "Development Area" shall consist of all areas under 30% slope, which "shall be considered developable.").

14. The Council does not agree that section 31.32's failure to list the Subject Property meant that there was/is no limitation on the number of units that could/can be built upon the Subject Property, except any restrictions that may arise out of applying a 30% slope density formula. The Subject Property was the largest parcel governed by the AHSP. There are no facts to suggest that in 1987 the City Council intended to allow this one parcel's maximum density - out of all the others - to depend upon some future calculation. And that has not been the intention of the Council ever since. In adopting the AHSP, the Council expressly modified the AHSP plan to prohibit development south of Christie Drive and intentionally omitted listing the Subject Property in section 31.32 because the Council had determined that there would be *no units* allowed on the plateau areas of the Subject Property.

15. The Subject Property is divided between two Residential zoning districts: R-7.5 (7,500 square foot minimum parcel size) and R-10 (10,000 square foot minimum parcel size). With parcels sizes ranging from 8.45 acres to 64.41 acres, the applicant's proposed LLA is ostensibly consistent with these zoning district regulations. However, these zoning regulations are not consistent with the AHSP's development restrictions imposed upon the Subject Property. Consequently, on a going-forward basis

it will be necessary to amend the City's zoning code to bring it into harmony with the AHSP. And this Council directs the City Manager to take those steps necessary to amend the City's zoning code accordingly.

16. The AHSP, the zoning code and the City's General Plan are documents whose principal purpose is to set forth the standards and criteria under which development and the use of land in the City are to be guided and controlled. Ostrosky has repeatedly represented to the City that its LLA application is not a development application or proposal. Ostrosky maintains that all it is proposing to accomplish is the moving of property boundary lines on a piece of paper. Ostrosky has assured the City that it is not proposing any development scheme at the present time. Ostrosky has also represented that it is not proposing any change in the use of the Subject Property as a consequence of its LLA application being granted.

17. Since the time Ostrosky purchased the Subject Property in 2002 and continuing to the present time, Ostrosky has devoted the Subject Property to cattle grazing and agricultural uses. Even before Ostrosky purchased the property, one of its principals, Robert De Vries, leased the Subject Property for several years from the Phillips for the same purposes. These uses are permitted by the zoning and are contemplated under the General Plan's Policy 30.6241. Even as to the newly configured parcels proposed by Ostrosky's LLA application, such uses may lawfully continue on these lots. According to Ostrosky, it intends to continue using the Subject Property, even after its LLA application is approved, for cattle grazing and related agricultural uses: uses which are not commonly understood to constitute development. The AHSP permits animal grazing on the Subject Property. There are no provisions in the zoning code, the AHSP or General Plan that require that each lot created in the properties governed by the AHSP to have a developed homesite on it.

18. Ostrosky has represented that its LLA application is not a development application. Consequently, the development standards and/or restrictions set forth in the AHSP, the zoning code and/or the General Plan are essentially irrelevant to such an application and therefore conformity with these planning documents appears to be established, and this Council so finds.

19. By approving the LLA at issue here, the City Council is in no way indicating its intentions with respect to any future development application that may be submitted concerning the Subject Property. To the contrary, as Ostrosky itself has assured the City, Ostrosky's LLA application has nothing to do with development and notwithstanding the approval of same, the

City Council retains all its discretionary authority to address and decide any and all future development proposals pertinent to this property.

**NOW, THEREFORE, BE IT RESOLVED** that the City Council approves Lot Line Adjustment #06-04 subject to conditions of approval which are attached hereto and incorporated herein by this reference.

\* \* \* \* \*

**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 an Adjourned Regular Meeting of said Council held on the 3<sup>rd</sup> day of November 2010:

AYES:

NOES:

ABSENT:

RICHARD G. HERNANDEZ, CITY CLERK  
CITY OF MARTINEZ

CONDITIONS OF APPROVAL  
AS APPROVED BY CITY COUNCIL

Project Name: Ostrosky Lot Line Adjustment

Site Location: 370 Lindsey Drive (APN'S:366-150-024,026,027,028 & -029)

I. Description of Permit

These conditions apply to and are part of the approval of lot line adjustment application # 06-04 affecting an approximate 155.7 acre site, adjusting boundaries between four existing lots, creating a new 4-lot configuration as proposed by applicant, each new lot ranging in size from 8.45 to 64.41 acres.

II. Exhibits

The following exhibits are incorporated as conditions of approval, except where specifically modified by these conditions:

EXHIBIT	DATE RECEIVED	PREPARED BY	PAGES
Lot Line Adjustment Exhibit	Dec 11, 2007	Roark Weber PE	3

III. Conditions

- A. The Lot Line Adjustment is not effective until FINAL deed(s), plats and legal descriptions are submitted to the Engineering Division for review and approval, and are then subsequently recorded with the Contra Costa County Recorder's Office.
- B. The deed(s) which are recorded to consummate the lot line adjustment approved hereby shall reference and have attached to it/them a true and correct copy of the Resolution to which these conditions are appended.

IV. Validity of Permit and Approval

- A. The approval to which these conditions pertain shall expire in one year from the date on which it became effective (unless extended under B below) unless recorded within the said one year time period. The *effective date* of the approval is November 3, 2010.
- B. A time extension of the expiration date, November 3, 2011, of the approval can be considered if an application with required fees is filed with the City at least 45 days before the expiration date. (Otherwise a new

application is required.) A public hearing will be required for all extension applications, except those involving only Design Review. Extensions are not automatically approved: Changes in conditions, City policies, surrounding neighborhood, and other factors permitted to be considered under the law, may require or permit denial.

- C. The applicant and its successors in interest, shall defend, indemnify and hold harmless the City and its agents, officers, attorneys and employees from any claim, action, or proceeding brought against the City or its agents, officers, attorneys or employees to attack, set aside, void, or annul the City Council's decision to approve LLA #06-04, and any environmental document approved in connection therewith. This indemnification shall include damages or fees awarded against the City, if any, cost of suit, attorneys' fees, and other costs and expenses incurred in connection with such action whether incurred by applicant and its successors in interest, the City, and/or the parties initiating or bringing such action.
  
- D. The applicant and its successors in interest shall defend, indemnify and hold harmless the City, its agents, officers, employees and attorneys for all costs incurred in additional investigation of, or study of, or for supplementing, preparing, redrafting, revising, or amending any document (such as the Negative Declaration), if made necessary by said legal action and if the applicant and its successors in interest desires to pursue securing such approvals, after initiation of such litigation, which are conditioned on the approval of such documents, in a form and under conditions approved by the City Attorney.
  
- E. In the event that a claim, action or proceeding described in Subsection D, above, is brought, the City shall promptly notify the applicant and its successors in interest of the existence of the claim, action or proceeding, and the City will cooperate fully in the defense of such claim, action or proceeding. Nothing herein shall prohibit the City from participating in the defense of any claim, action or proceeding. In the event that the applicant and its successors in interest is required to defend the City in connection with any said claim, action, or proceeding, the City shall retain the right to (i) approve the counsel to so defend the City, (ii) approve all significant decisions concerning the manner in which the defense is conducted, and (iii) approve any and all settlements, which approval shall not be unreasonably be withheld. The City shall also have the right not to participate in said defense, except that the City agrees to cooperate with the applicant and its successors in interest in the defense of said claim, action or proceeding. If the City chooses to have counsel of its own to defend any claim, action or proceeding where the applicant and its successors in interest has already retained counsel to defend the City in such matters, the fees and expenses of the counsel selected by the City shall be paid by the City, except that the fees and expenses of the City Attorney shall be paid by the applicant.

- F. The applicant and its successors in interest shall indemnify the City for all the City's costs, fees, and damages which the City incurs in enforcing the above indemnification provisions.
  
- G. The Conditions of Project Approval set forth herein include certain fees, dedication requirements, reservation requirement, and other exactions. Pursuant to Government Code Section 66020(d)(1), these Conditions constitute written notice of a statement of the amount of such fees, and a description of the dedications, reservations, and other exactions. You are hereby further notified that the 90-day approval period in which you may protest these fees, dedications, reservations, and other exactions, pursuant to Government Code Section 66020(a), has begun. If you fail to file a protest within this 90-day period complying with all of the requirements of Section 66020, you will be legally barred from later challenging such exactions.

# # #

**Lot Line Adjustment #06-04**  
**Applicant: Ostrosky Enterprises, Inc.**



# **EXHIBIT A**

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF CONTRA COSTA - MARTINEZ  
UNLIMITED JURISDICTION

OSTROSKY ENTERPRISES, INC., a California Corporation,  <p style="text-align: center;">Plaintiff and Petitioner,</p>	}	No. N08-0408  <b>STATEMENT OF DECISION ON MANDAMUS CAUSE OF ACTION</b>  Trial Date: January 19, 2010 Time: 8:30 a.m. Dept.: 7 Location: 725 Court Street Martinez, CA 94553  Action Filed: March 17, 2008
vs.	}	
CITY OF MARTINEZ, DOES 1 through 10 inclusive, and all other persons unknown claiming any right, title, estate, license, lien, or interest in the real property adverse Plaintiff's title,  <p style="text-align: center;">Defendant and Respondent.</p>	}	

The Cause of Action for Writ of Administrative Mandamus of the above-entitled cause came on regularly for hearing on January 28, 2010, in Department 7 of the above-entitled Court, the Hon. Barry Baskin, Judge, presiding. Petitioner OSTROSKY ENTERPRISES, INC. ("OSTROSKY") appeared by Scott A. Sommer and Pillsbury Winthrop Shaw Pittman LLP. Defendant CITY OF MARTINEZ ("CITY") appeared by Jeffrey A. Walter and Walter & Pistole.

The Court, having considered the evidence and arguments of counsel, and being fully advised, with good cause appearing therefore, hereby issues its final decision.

1 I. FACTUAL BACKGROUND

2 The court declines to take judicial notice of the matters requested by  
3 Ostrosky as being mooted by the remand contained in this order. The Court  
4 incorporates by reference the entire statement of decision on the first cause of action  
5 in this case.

6  
7 A. The OSTROSKY Property.

8 The administrative record shows that OSTROSKY is the owner of real property  
9 totaling approximately 163 acres, located in the City (“the Property”). The Property  
10 currently consists of vacant land, on which animal grazing is conducted and much litigation  
11 has surrounded this property for decades. The size and exact description of the property  
12 and according to whom, to the extent this has any relevance, is referred to more fully in the  
13 statement of decision on quiet title that is also issued on this date.

14  
15 B. Applicable City Plans and Ordinances.

16 The Property is subject to CITY’s General Plan (“GP”), the Alhambra Hills Specific  
17 Plan (“AHSP”) and the R-10 and R-7.5 zoning designations.

18  
19 C. Specific Plan.

20 CITY adopted the Alhambra Hills Specific Plan (“AHSP”) on May 6, 1987.  
21 Pursuant to the AHSP, “[s]ites shall be planned to preserve open space [and] existing  
22 vegetation...as much as possible.” Animal grazing is specifically permitted.

23 Section 31.382. On page 1, the AHSP defines development areas as follows:

24 31.31. Development Areas, remote homesites and land use designations are  
25 shown on Fig. 31.30. The Development Area *shall* consist of all Plan areas  
26 *under 30% slope which shall be considered developable* unless site  
constraints prevent development of that particular area (see Policies 31.321  
and 31.322). (emphasis added.)

27 Section 31.312 provides:

1 Development and grading shall . . . be limited to the Development Area  
2 *except* under the following circumstances:

3 A. Development of designated Remote Homesites;

4 B. Access roads and residences as allowed by Policy 31.314... *Id.*

5 Zoning Ordinances.

6 OSTROSKY's property is zoned R-10 and R-7.5, with minimum lot areas of 10,000  
7 square feet and 7,500 square feet, respectively. The proposed lot sizes far exceed these  
8 minimum requirements: Lot A=8.45 acres, Lot B=30.67 acres, Lot C=64.41 acres, Lot  
9 D=52.38 acres. Permitted uses include agricultural ("raising of fruit and nut trees,  
10 vegetables and horticultural specialties"), raising of small animals, and private horse  
11 stables. There is no requirement in the zoning ordinances that all parcels be developable  
12 or that a residence or other building must be placed on parcels.

13

14 D. OSTROSKY's Lot Line Adjustment Application.

15 On September 1, 2006 OSTROSKY filed an application for a lot line adjustment  
16 with CITY to reconfigure the boundary lines of four existing, adjoining lots within the  
17 Property. AR 771-800, AR 17-19. The lot line adjustment would have reconfigured the  
18 existing parcels of record as follows (AR 19):

19

Proposed	Total Acres
Parcel A	8.44
Parcel B	30.5
Parcel C	64.4
Parcel D	52.3

20  
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22

23

24 E. Staff Report to Planning Commission.

25 CITY may have improperly considered application of the easement to  
26 OSTROSKY's lot line adjustment [Staff proposed configuration at AR 29 to "uphol[d] the  
27 integrity of the 120 acre easement"] because it did not know the exact location, size and  
28 parameters of the easement.

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1 F. Proceedings Before the City Planning Commission.

2 On November 13, 2007 the City Planning Commission denied OSTROSKY's  
3 application for a lot line adjustment following a public hearing. Some comments from the  
4 Planning Commissioners referenced an issue as to the size and location of the 120-acre  
5 open space easement.

6 The Planning Commission resolution denying the lot line adjustment stated, in  
7 pertinent part:

8 WHEREAS, the proposed location of Lot D does not conform to the  
9 Alhambra Hills Specific Plan in that the site falls outside of the development  
10 area and is not a remote homesite as detailed in figure 31.30 of said plan; ...  
NOW, THEREFORE, the Planning Commission of the City of Martinez  
resolves . . .

11 2. That the proposed lot line adjustment, and specifically lot D,  
12 does not conform to the land use policies of the adopted Alhambra  
Hills Specific Plan.

13 The Resolution did not specify which "land use policies" of the AHSP the lot line  
14 adjustment did not conform with. The resolution does not cite-and could not cite- the  
15 location of the easement, which was unknown until this case was decided.

16  
17 G. Staff Report to City Council.

18 At the Council level, CITY continued its consideration of the Easement [Staff  
19 proposed configuration "allowing the scenic easement to be preserved"]), a fact that was  
20 not actually correct because it is not clear that the city was actually referring to the  
21 easement to be defined by this litigation or to some other easement.  
22

23 H. The City Council's Resolution Denying the Lot Line Adjustment.

24 OSTROSKY timely appealed the Planning Commission's denial of the lot line  
25 adjustment application to the City Council.

26 On December 19, 2007, the City Council denied OSTROSKY's lot line adjustment.  
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1 The City Council adopted Resolution No. 099-07, upholding the Planning Commission's  
2 denial of OSTROSKY's lot line adjustment application, provided:

3 WHEREAS, the project consists of lots A, B, C & D as shown in the  
4 application and exhibits made part of the record; and

5 WHEREAS, the proposed location of Lot D does not conform to the  
6 Alhambra Hills Specific Plan ("Plan") in that the site falls outside of the  
permitted "Development Area" and is not a remote home site as detailed in  
figure 31.30 of said Plan; and

7 WHEREAS, [the Plan] . . . was adopted in 1987 to allow limited  
8 development in this environmentally sensitive area, and in approving the  
9 Plan the Martinez City Council adopted a specific finding under the  
10 California Environmental Quality Act ("CEQA") expressly prohibiting  
development in portions of the subject 160 acre parcel (south of Christie  
Drive). Proposed lot D is located entirely within the area in which the  
Council proscribed development...

11 NOW, THEREFORE, the City Council of the City of Martinez resolves . . .

12 2. That the proposed lot line adjustment, and specifically lot D,  
13 does not conform to the land use policies and requirements of the  
adopted Alhambra Hills Specific Plan.

14 3. That because the proposed lot line adjustment does not  
15 conform with the [Plan] it also does not conform with the General  
Plan.

16  
17 It is not clear that the council specifically understood the size, location  
18 and extent of the easement. It could not. This fundamental error is perhaps one reason why  
19 Councilmember Menesini stated:

20 In 1984, the bargain was that this area was going to remain entirely a scenic  
21 easement...[T]he fact of the matter is, in this specific instance, this 163 acres, per the  
22 bargain struck in 1984, was to remain a scenic easement. On this record it is not clear that  
23 the council recognized this erroneous understanding of the easement.

24  
25 **DETERMINATION OF THE ISSUES**

26 This Court has authority to grant mandamus relief under Code of Civil Procedure  
27 sections 1085 et seq., and specifically section 1094.5. The applicable inquiry extend[s] to  
28 questions whether [1] the respondent has proceeded without, or in excess of jurisdiction; [2]

1 whether there was a fair trial; and [3] whether there was any prejudicial abuse of discretion.  
2 Code Civ. Proc. § 1094.5(b). Abuse of discretion is established if the respondent has not  
3 proceeded in the manner required by law, the order or decision is not supported by the  
4 findings, or the findings are not supported by the evidence. *Id.* Similarly, an unfair trial is  
5 established when the record shows a fundamental misunderstanding or mistake of fact.

6 Here, CITY clearly conducted an unfair trial/hearing because CITY's Resolution  
7 denying OSTROSKY's lot line adjustment application is based at least in part on an  
8 incomplete understanding of the nature, location and extent of the easement.

9 The incorrect Easement may have been a factor in the CITY's processing and denial  
10 of OSTROSKY's lot line adjustment application. The Easement was discussed in both the  
11 Staff Report to the Planning Commission and to the City Council and was discussed by  
12 three out of five Planning Commissioners and two of five Councilmembers.

13 The comments of two Councilmembers, references in the staff report,  
14 comments and the hearing including those by the CITY attorney, indicate that the  
15 misunderstood easement may have been a ground for the vote. Comments by  
16 Councilmembers and staff may be considered as one circumstance shedding light on  
17 a City's formal action. *Save Tara v. City of Hollywood* (2008) 45 Cal.4th 116, 142  
18 n.13.

19 Both sides asked this court to rule on a number of other issues all of which  
20 are mooted by the remand contained by this order. By not reaching those issues the  
21 court is not making any determination on them at this time.

22 Accordingly, a preemptory writ of mandamus shall issue remanding the lot  
23 line adjustment to the City Council for reconsideration in light of this Court's ruling  
24 on the location of the 120-acre open space easement and such other materials as may  
25 be presented at the time of hearing.

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1 Dated: June 30th, 2010

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The Honorable Barry Baskin  
JUDGE OF THE SUPERIOR COURT

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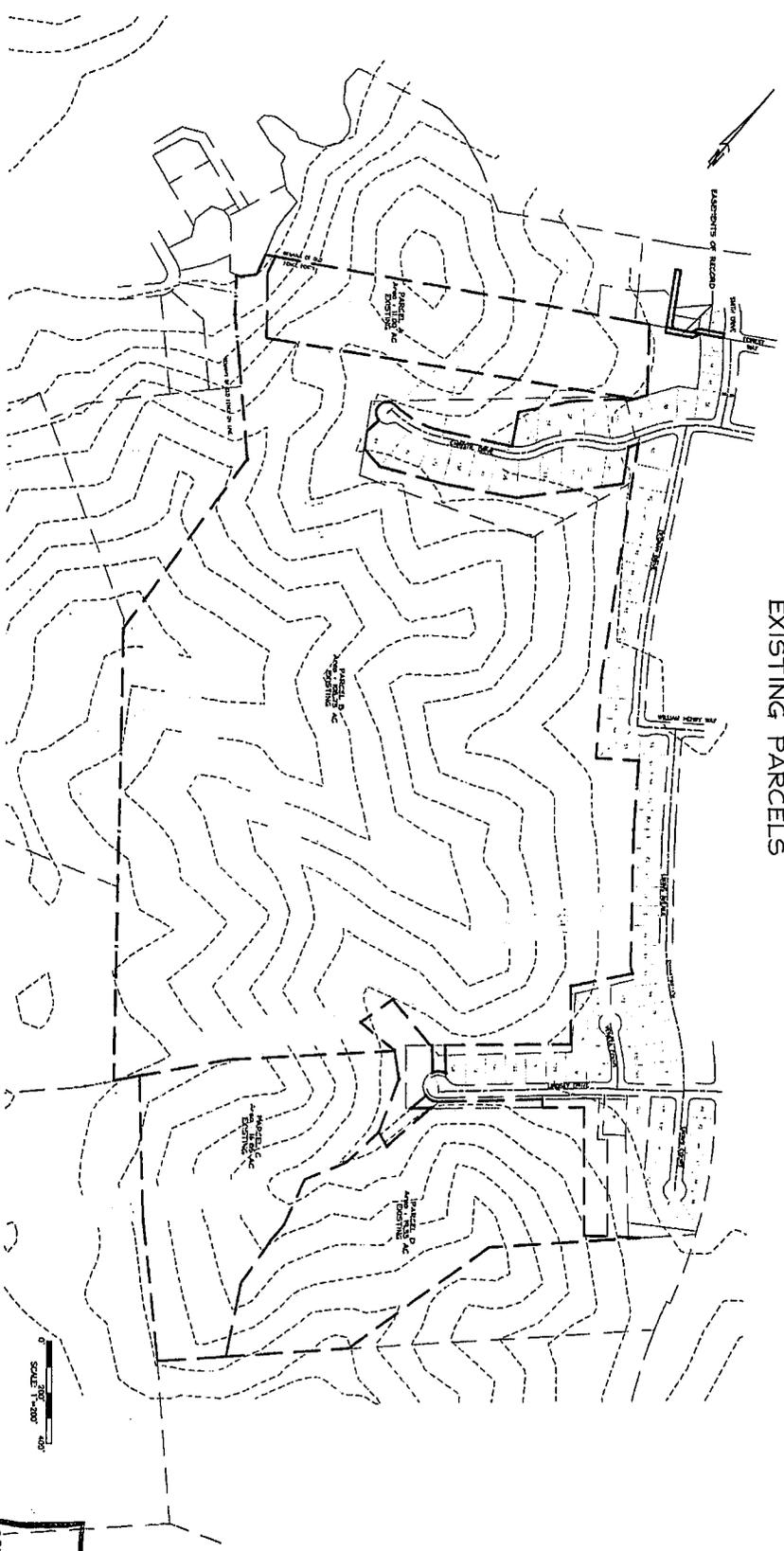
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**EXHIBIT B**

BOUNDARY LINE  
ADJUSTMENT APPLICATION  
EXISTING PARCELS



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

CONTACT: ROBERT DEAVRIES  
825-455-1500



- EASEMENTS OF RECORD:
1. AN EASEMENT FOR ROAD AND UTILITY PURPOSES AND APPURTENANCES THERE TO AND INCIDENTAL PURPOSES, RECORDED FEBRUARY 16, 1990 IN BOOK 3857, PAGE 348 OF OFFICIAL RECORDS.
  2. AN EASEMENT FOR ROAD AND UTILITY PURPOSES AND INCIDENTAL PURPOSES, RECORDED AUGUST 3, 1991 IN BOOK 3823, PAGE 574 OF OFFICIAL RECORDS.
  3. AN EASEMENT FOR ROAD AND UTILITY PURPOSES AND INCIDENTAL PURPOSES, RECORDED AUGUST 3, 1991 IN BOOK 3823, PAGE 577 OF OFFICIAL RECORDS.
  4. CONTRA COSTA COUNTY RECORDS.

PARCEL A (11.00 AC) A PORTION OF PARCEL 2, 2907 O.R. 148.  
PARCEL B (106.75 AC) A PORTION OF PARCEL 1, 2907 O.R. 148.  
PARCEL C (18.85 AC) A PORTION OF PARCEL 1, 2907 O.R. 152.  
PARCEL D (18.33 AC) A PORTION OF PARCEL 2, 2907 O.R. 152.  
A PORTION OF RANCHO DEL HAMBRE IN THE CITY OF MARTINEZ,  
CONTRA COSTA COUNTY, CALIFORNIA

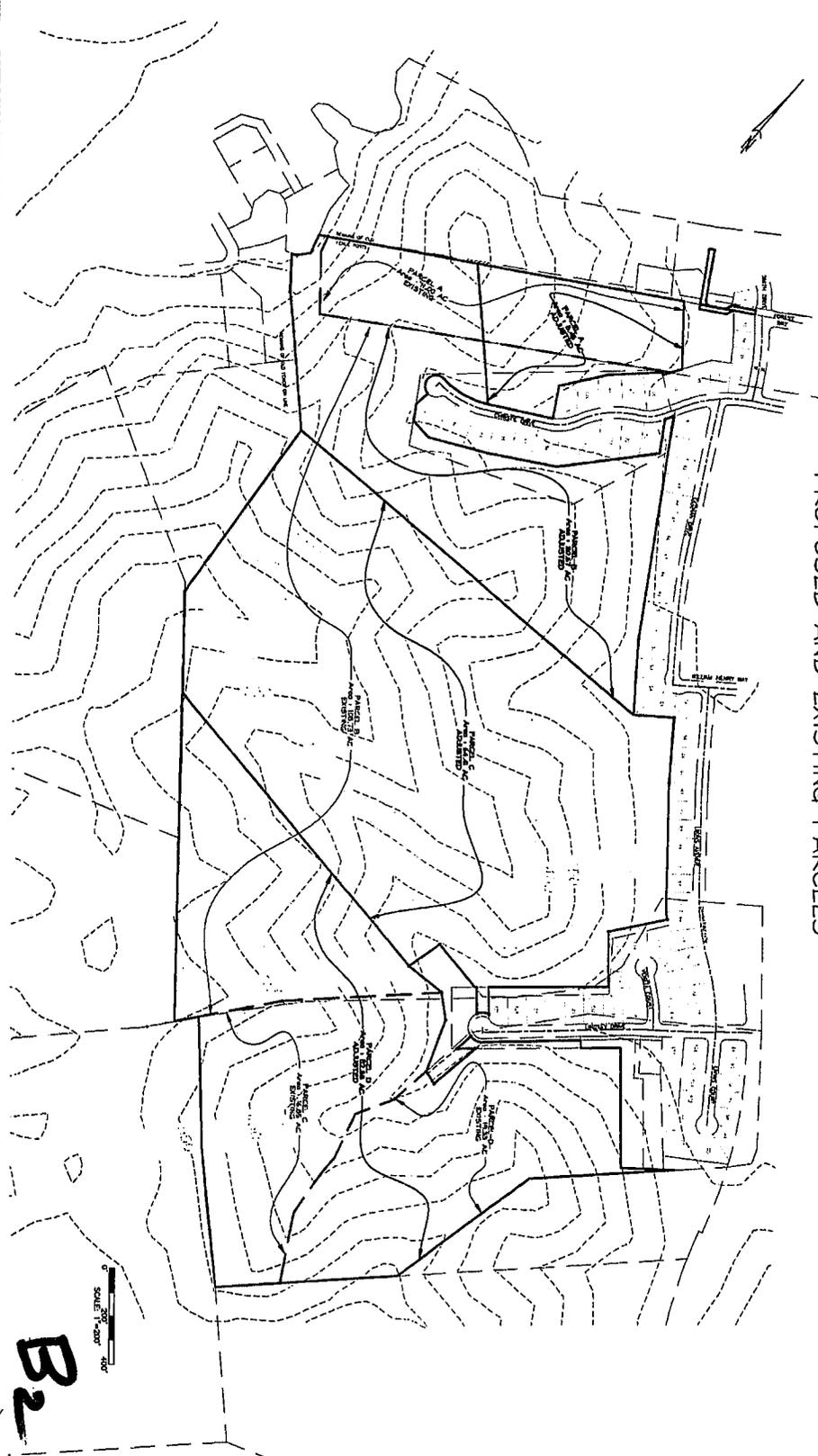
**Exhibit B**

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COMMUNITY DEV DEPT

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BOUNDARY LINE  
ADJUSTMENT APPLICATION  
PROPOSED AND EXISTING PARCELS



OWNER: OSTROSKY ENTERPRISES, INC.  
 2240 RAILROAD AVENUE  
 LIVERMORE, CA 94550  
 CONTACT: ROBERT DEVERES  
 925-455-1600

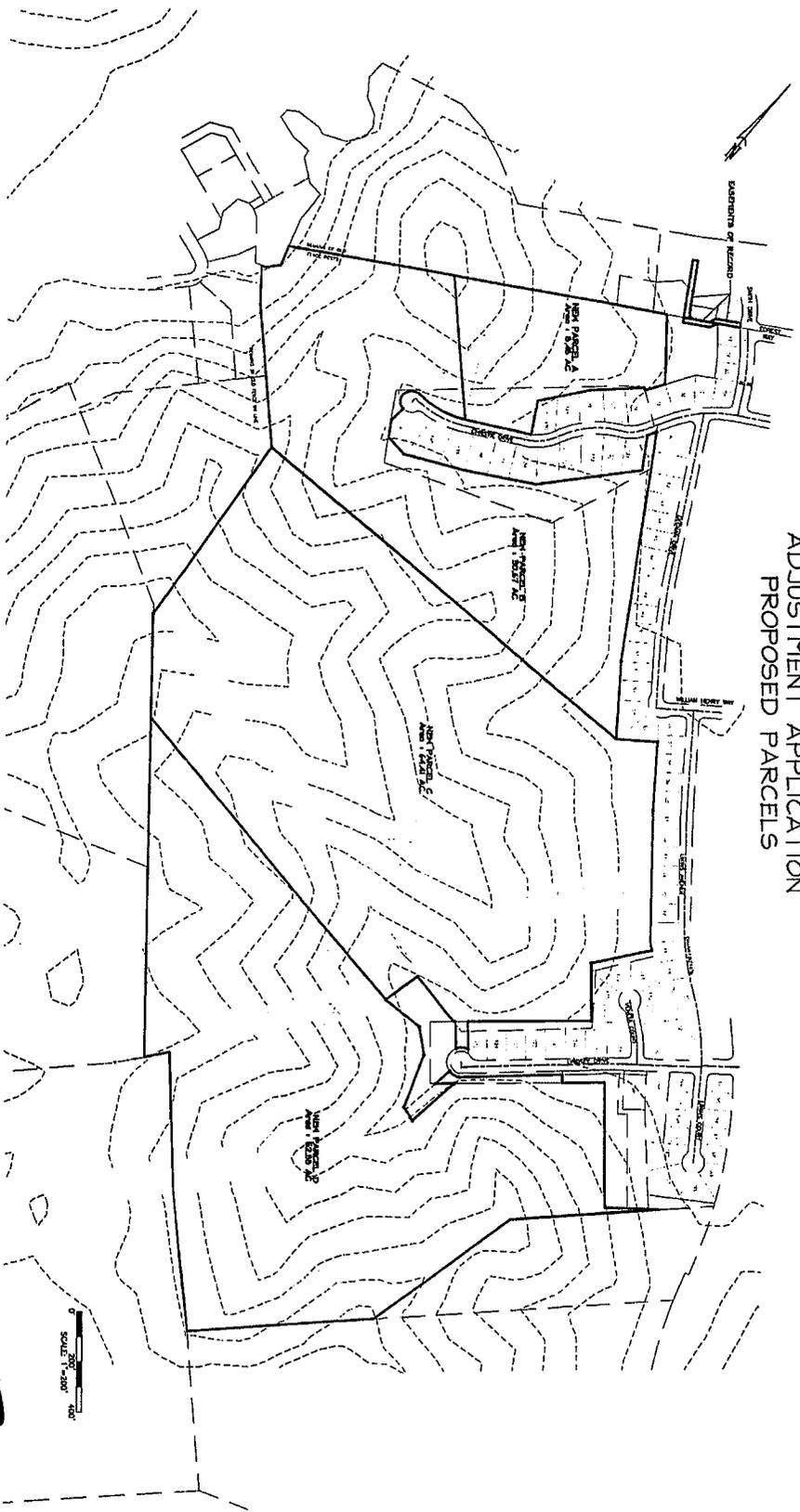


EXISTING PARCELS  
 PARCEL A = 11.00 AC  
 PARCEL B = 108.73 AC  
 PARCEL C = 16.85 AC  
 PARCEL D = 18.33 AC  
 TOTAL = 165.91 AC

PROPOSED PARCELS  
 PARCEL 1 = 6.45 AC  
 PARCEL 2 = 30.87 AC  
 PARCEL 3 = 64.41 AC  
 PARCEL 4 = 64.28 AC  
 TOTAL = 165.91 AC

**B2**

BOUNDARY LINE  
ADJUSTMENT APPLICATION  
PROPOSED PARCELS



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

CONTACT: ROBERT DEVERES  
925-455-1500



- EASEMENTS OF RECORD:
1. AN EASEMENT FOR ROAD AND UTILITY PURPOSES AND APPURTENANCES THERETO AND INCIDENTAL PURPOSES, RECORDED FEBRUARY 16, 1980 IN BOOK 3557, PAGE 346 OF OFFICIAL RECORDS.
  2. AN EASEMENT FOR ROAD AND UTILITY PURPOSES AND INCIDENTAL PURPOSES, RECORDED AUGUST 3, 1981 IN BOOK 3823, PAGE 574 OF OFFICIAL RECORDS.
  3. AN EASEMENT FOR ROAD AND UTILITY PURPOSES AND INCIDENTAL PURPOSES, RECORDED AUGUST 3, 1981 IN BOOK 3823, PAGE 577 OF OFFICIAL RECORDS.
  4. OPEN SPACE SCENIC EASEMENT, RECORDED IN INSTRUMENT No. 85-87804 IN BOOK 12423, PAGE 122, CONTRA COSTA COUNTY RECORDS.

PROPOSED PARCELS  
PARCEL 1 = 6.46 AC  
PARCEL 2 = 30.87 AC  
PARCEL 3 = 64.41 AC  
PARCEL 4 = 62.38 AC

**B3**

# **EXHIBIT C**



Pillsbury Winthrop Shaw Pittman LLP  
50 Fremont Street | San Francisco, CA 94105-2228 | tel 415.983.1000 | fax 415.983.1200  
MAILING ADDRESS: P. O. Box 7880 | San Francisco, CA 94120-7880

OCT 27 2010

Scott A. Sommer  
tel 415.983.1813  
scott.sommer@pillsburylaw.com

October 26, 2010

Via Overnight Delivery and Electronic  
Transmission (rschroder@cityofmartinez.org)

Mayor Rob Schroder  
City of Martinez – City Hall  
525 Henrietta Street  
Martinez, CA 94553

Re: Ostrosky Lot Line Adjustment Application #06-04  
Hearing Before City Council – November 3, 2010 at 7:00 p.m.

Dear Mayor Schroder:

Back when we thought the City Council intended to consider the reconsideration of the Ostrosky Lot Line Adjustment Application #06-04 on September 15, 2010, we were told by City Attorney Jeff Walter to submit our comments on September 9, 2010, and we did so. Our opening comments have not changed in the intervening weeks. Now that City Council is scheduled to consider the reconsideration of the Lot Line Adjustment on November 3, 2010, we resubmit our letter of September 9, 2010 and attachments, a copy of which is attached hereto, for consideration by the Council.

As we have not yet seen a staff report and do not know what position the City Attorney will be taking on the Lot Line Adjustment, we request an immediate copy of same. We may submit further comments in response to the staff report for this agenda item.

Mayor Rob Schroder  
October 26, 2010  
Page 2

Thank you for your attention and consideration.

Very truly yours,



Scott A. Sommer

- Attachments:
1. Pages 1, 2, 3 and 12 of Alhambra Valley Specific Plan;
  2. Supplemental Request for Judicial Notice;
  3. Record of Survey approved by Contra Costa County Surveyor, January 27, 2005;
  4. Correspondence dated September 8, 2010 to City Attorney.

cc (w/attach.): Mercy G. Cabral, Deputy City Clerk (mcabral@cityofmartinez.org)  
Lara DeLaney, Vice Mayor (ldelaney@cityofmartinez.org)  
Mark Ross, Councilmember (mross@cityofmartinez.org)  
Janet Kennedy, Councilmember (jkennedy@cityofmartinez.org)  
Michael Menesini, Councilmember (mmenesini@cityofmartinez.org)  
Jeffrey A. Walter, Esq. (jwalter@walterpistole.com)



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OCT 27 2010

Scott A. Sommer  
tel 415.983.1813  
scott.sommer@pillsburylaw.com

September 9, 2010

Via U.S. Mail and Electronic Transmission (rschroder@cityofmartinez.org)

Mayor Rob Schroder  
City of Martinez – City Hall  
525 Henrietta Street  
Martinez, CA 94553

Re: Ostrosky Lot Line Adjustment Application #06-04  
Hearing Before City Council – September 15, 2010 at 7:00 p.m.

Dear Mayor Schroder:

The Statement of Decision on Mandamus Cause of Action and Judgment Quieting Title and Granting Peremptory Writ of Mandate in Superior Court of the State of California Action No. N08-0408 require that City set aside and reconsider its decision of December 19, 2007, Resolution No. 099-07. The reconsideration is to include the Court's ruling on the location of the 120-acre open space easement and such other materials as may be presented at the time of hearing.

Ostrosky Enterprises, Inc. has been prejudiced in its ability to present materials at this hearing due to the apparently intentional failure of the City and/or the City Attorney's Office to provide any notice of the hearing to the undersigned as counsel of record for Ostrosky in the administrative proceeding and the litigation. A mailing of the notice to Peter Ostrosky occurred by the City Clerk immediately prior to the long Labor Day weekend on September 2, 2010. Undersigned counsel received notice only on Tuesday, September 7, 2010. Undersigned counsel was advised by the City Attorney

at 5:41 p.m. on September 8, 2010 that any materials would have to be submitted to the City Clerk by close of business on Thursday, September 9, 2010. The City Attorney has not forwarded a staff report or any other materials to be submitted to the City Council to the applicant or undersigned counsel through the issuance of this correspondence. This is not good faith compliance with the Court's directive that the City Council is to reconsider its previous decision based on such other materials as may be presented for the hearing. Refer to attached correspondence to the City Attorney dated September 8, 2010.

Previously, the Staff Report to the City Council for the December 19, 2007 agenda, in pertinent part, incorrectly represented that "the 1984 open space easement deed actually executed and recorded by the Phillips in favor of the City contained a legal description that covered the entire 160 acres owned by the Phillips..." Testimony at trial established that the City itself attached the overbroad 160-acre legal description to the package of documents it recorded in 1985, without the knowledge or consent of Phillips. At the hearing on December 19, 2007, Councilmember Menesini represented that he could "remember those hearings [in 1984]" (Administrative Record ("AR"), page 148). Mr. Menesini told the Council:

In 1984, the bargain was that this area was going to remain entirely a scenic easement. ... [T]he fact of the matter is, in this specific instance, this 163 acres, per the bargain struck in 1984, was to remain a scenic easement. (AR 161-162)

The Court cited these comments in its Statement of Decision, referring to this as a "fundamental error" and "erroneous." It is to be noted that Councilmember Menesini appeared at the trial as a witness and did not make these statements when he testified under oath.

Ostrosky has not seen a current Staff Report and does not currently know what will be stated to the Council by staff and/or the City Attorney, nor will it be privy to statements, if any, that may be made to the City Council on this matter in closed session. The undersigned has only had one afternoon to submit materials. Subject to these handicaps, Ostrosky respectfully calls the attention to City Council to the following facts.

Resolution No. 099-07 and the Staff Report to the City Council for the December 19, 2007 City Council agenda also incorrectly stated that the proposed location of Lot D does not conform to the Alhambra Hills Specific Plan because it falls out of a purported "Development Area." To the contrary, Parcel D includes areas open to development under the Court's easement determination. In addition, there is nothing in the Specific Plan nor the Ordinances of the City of Martinez that requires a parcel to have a "Development Area" on it; lesser uses including agricultural and open space are expressly encouraged under the Specific Plan. The Specific Plan does not provide any ground for a denial; to the contrary, development is expressly permitted for areas under 30% slope. Refer to attached copy of pages 1-3 and 12 of the Specific Plan.

In addition, the purported interpretation of the Specific Plan set forth in the Staff Report for December 19, 2007 and adopted by the City Council was false and discriminatory. Contemporaneous with the Ostrosky denial, the City applied a different reading of the Specific Plan to the approval of a three-residential lot subdivision on the immediately adjacent property owned by Mollich. This approval was not known to Ostrosky at the time of the hearing on December 19, 2007, but it was known to staff and presumably the City Attorney. Refer to Supplemental Request for Judicial Notice on Mandamus Cause of Action filed January 22, 2010 (copy attached hereto). As set forth in that material, the Mollich property shows the same plain configuration (without any cross-hatched development area) as exists on

the Ostrosky parcels. By May 4, 2006, the City was telling Mollich that determination of the development area (quoting from the Specific Plan) "shall consist of all Plan areas under 30% slope which shall be considered developable..." and that a "slope density map" was required. This same Specific Plan analysis was confirmed by the City on September 12, 2007, and adopted in the approval of the three-lot Mollich residential minor subdivision 551-07 issued by the City on March 28, 2008.

Accordingly, City should not purport to continue to apply a discriminatory Specific Plan interpretation to Ostrosky, inconsistent with the actual language of the Specific Plan and the customary interpretation that the City applies to neighboring parcels.

The Ostrosky property consists of seven parcels of record based upon the chains of title, as confirmed and set forth in the Record of Survey filed January 27, 2005. The City Attorney represented to Ostrosky that no issue would be made of the open space easement if Ostrosky applied for a four-lot lot line adjustment, which resulted in Ostrosky's submission of the current application. Of course, City then cited the open space easement as a ground for denial as set forth in the Staff Report and proceedings on December 19, 2007 (see, *e.g.*, comments of Councilmember Menesini cited above). However, Ostrosky is simply trying to reconfigure this property so it can be marketed and sold. The City should stop tying this property up by misuse of its administrative authority.

Ostrosky does not waive any of its rights by the late notice or any other acts by the City, but respectfully requests that the City Council recognize that the proposed parcels are far in excess of minimum lot sizes and in complete compliance with applicable zoning, the Specific Plan, and the judgment of the Court on the open space easement. Approval of the lot line adjustment will allow Ostrosky to finally being

able to sell and make use of this property. Denial will be discriminatory and deprive this property owner of its lawful rights.

Notwithstanding the City Attorney's comments, Ostrosky may attempt to submit additional material once a staff report has become available. Thank you for your attention and consideration.

Very truly yours,



Scott A. Sommer

- Attachments:
1. Pages 1, 2, 3 and 12 of Alhambra Valley Specific Plan;
  2. Supplemental Request for Judicial Notice;
  3. Record of Survey approved by Contra Costa County Surveyor, January 27, 2005;
  4. Correspondence dated September 8, 2010 to City Attorney.

cc (w/attach.): Mercy G. Cabral, Deputy City Clerk (mcabral@cityofmartinez.org)  
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Janet Kennedy, Councilmember (jkennedy@cityofmartinez.org)  
Michael Menesini, Councilmember (mmenesini@cityofmartinez.org)  
Jeffrey A. Walter, Esq. (jwalter@walterpistole.com)

## ALHAMBRA HILLS SPECIFIC PLAN

### PLAN AREA

The Specific Plan Area is shown in Fig. 31.30.

### 31.3 POLICIES

#### 31.31 LAND USE

F 31.31 Development Areas, remote homesites and land use designations are shown on Fig. 31.30. The Development Area shall consist of all Plan areas under 30% slope which shall be considered developable unless site constraints prevent development of that particular area (see Policies 31.321 and 31.322).

31.311 Development in the Plan Area shall be limited to single family residential use, except that professional offices may be allowed by Use Permit in the Development Areas adjoining the west side of Alhambra Avenue if the parcels meet the following criteria:

- A. Site depth is inadequate to buffer residential development from Alhambra Avenue noise.
- B. Office traffic would not significantly affect nearby existing uses or traffic on Alhambra Avenue.
- C. Office use of the site would be compatible with adjoining uses.

31.312 Development and grading shall comply with Site Development criteria (Section 31.34), and shall be limited to the Development Area except under the following circumstances:

- A. Development of designated Remote Homesites;
- B. Access roads and residences as allowed by Policy 31.314;

The overall number of units permitted on a property shall under no circumstances be increased.

31.313 No development on areas of 30% or greater slope shall be permitted except:

- A. Where no alternative exists, roads connecting Development Areas may pass over areas of 30% slope, subject to approval by the Planning Commission. Grading shall be limited to that necessary for the road or to the minimum amount which will create the most natural appearing contours. If such grading creates buildable areas (under 30% slope) residential development fronting the road may be permitted subject to approval by the Planning Commission.

B. Small areas (10,000 sq. ft. or less) of 30% and over slope entirely surrounded by areas under 30% slope may be developed. Small infringements on areas of 30% slope may be permitted where the existing topography of the majority of the building area and area to be graded are under 30% slope.

31.314 Development outside of the Development Areas (homesites and access roads) shall comply with the following criteria:

- A. Soils stability shall be demonstrated prior to development approvals;
- B. Minimal visual impact shall result from development;
- C. Minimal grading or vegetation removal shall be required;
- D. Compliance with Site Development Policies (Section 31.34).

31.32 DEVELOPMENT DENSITY

31.321 The Alhambra Hills plateau including the Habitat property shall be rezoned R-10. Slope Density shall be applied to each parcel to determine the maximum number of units permitted on the site. In no case shall the number of units permitted exceed the maximum unit counts established below. The range listed below is the number of units which may be approved for proposals in minimal conformance with Specific Plan criteria up to the maximum permitted for exceptional projects. These numbers are based on slope density calculations performed on the upper portions of the sites and do not include possible development on the lower fringe of the hills, except for the Habitat unit count which is based on a slope density calculation for the entire site.

L & M - Habitat (parcels 164-150-021, 022) *	76-90 units
H, J & K - Waters Inc. (parcels 164-150-016, 164-010-002 and 019)	77-84 units
D & E - Trebino (parcels 366-010-006 and 366-060-001)	94-99 units
N - Kinney (parcel 164-010-007)	12-14 units
Q - Monteros (parcel 164-010-017)	22-26 units
R - Lawrence (parcel 366-102-020)	3-4 <u>units</u>
TOTAL	284-315 units

\* See map for property locations.

These unit counts are the maximums permitted for each property. If it is determined that a Development Area is actually larger than shown on the Land Use Map (Fig. 31.30) no additional units shall be added to the maximums listed above. It is not guaranteed that either the high or the low unit counts will be approved for any particular site. Each development proposal will be judged

NO MAXIMUM  
COUNT  
SET FORTH  
FOR AREA  
F, AND  
AREA F  
REMAINS  
SUBJECT  
TO  
SLOPE  
DENSITY

ANALYSIS. OSROSKY HAS RIGHT TO  
DEVELOPMENT AREA UNDER 30% SLOPE PER FUTURE ANALYSIS  
PLUS 4 REMOTE HOMESITES NORTH OF CHRISTIE DR @ 0019

YET TO  
@cccl  
ON  
OSTROSKY  
PROPERTY

on its merits and must demonstrate that the requested proposal and number of units are in compliance with all Specific Plan policies. Geotechnical, access, grading and visual constraints (among other criteria listed in this Specific Plan), and final Slope Density calculations for the site may reduce the number of units approved for any particular site from the range listed above and may limit the portion of the site that may be developed. Approval of the maximum permitted number of units on a site will require an exceptional project exceeding the development and design criteria of this plan. The following criteria shall be used to determine the appropriate density for individual development proposals.

SAME PROCESS  
AS APPLIED  
FOR MOUNTAIN  
SUBDIVISION  
APPROVAL IN  
2007-8

- A. Soil Stability/Grading - Development density shall be limited to the lower portion of the density range on sites requiring major geologic reconstruction work or requiring major grading to insure safe development.
- B. Visual Impacts - Density shall be limited to the lower portion of the density range on sites where significant visual impacts will result or where extensive grading would be required to mitigate visual impacts.
- C. Tree Preservation/Landscaping - Proposals which preserve significant numbers of existing trees within the developed area shall qualify for higher density. Extensive planting of mature, native landscaping may to a limited degree compensate for removal of existing vegetation.
- D. Residential Design and Materials - site plans designed to fit the topography and well designed structures with higher quality materials may allow higher density.

31.322 A preliminary soils report on each parcel shall be prepared and reviewed by the City's geotechnical consultant as part of each application for project approval by the Planning Commission. Soils report findings may affect project layout, density and total unit count.

31.323 Project densities shall not exceed, and housing type shall be compatible with, nearby existing development.

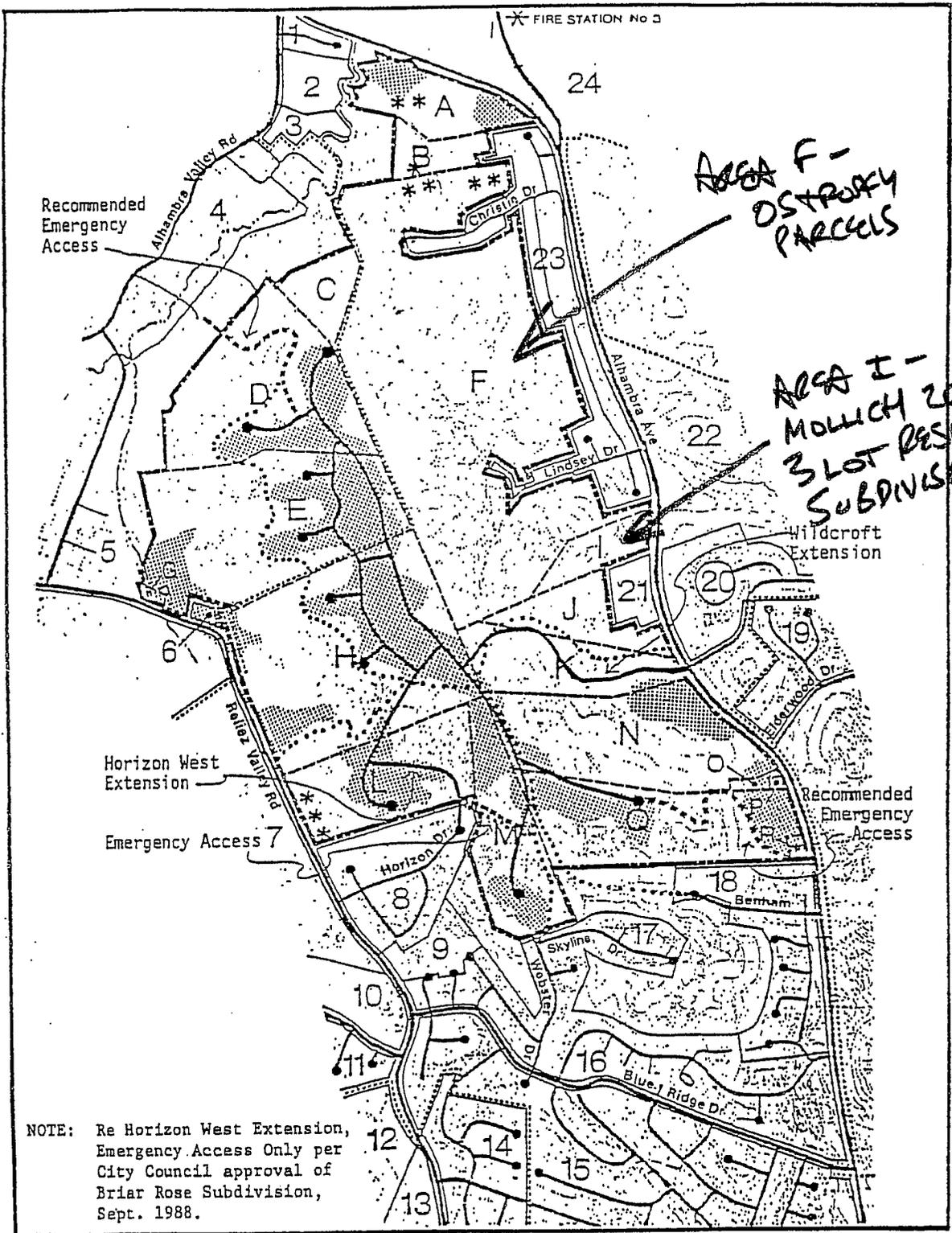
31.324 Compliance with Site Development and Building Design policies shall be considered in determining final project densities (see Sections 31.34 and 31.35 for policies).

31.325 Reliez Valley Road densities shall vary from .5 to 1.5 units per Developable Area acre and shall not exceed the density of nearby existing development.

31.326 Densities along Alhambra Avenue shall vary from 3 to 5 units/per Developable Area acre and shall not exceed the density of existing development.

31.327 Remote homesites shall have a minimum 1 Ac lot size, with the building area consisting of existing topography of at least 10,000 sq. ft. under 30% slope.

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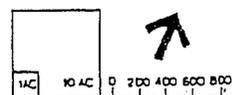


**LEGEND**

- 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**



000021

1 SCOTT A. SOMMER (Bar No. 72750)  
STACEY C. WRIGHT (Bar No. 233414)  
2 PILLSBURY WINTHROP SHAW PITTMAN LLP  
50 Fremont Street  
3 Post Office Box 7880  
San Francisco, CA 94120-7880  
4 Telephone: (415) 983-1000  
Facsimile: (415) 983-1200

5 Attorneys for Plaintiff and Petitioner  
6 OSTROSKY ENTERPRISES, INC., a California Corporation

**FILED**  
JAN 22 2010  
K. TORRE, CLERK  
SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF CONTRA COSTA  
By: \_\_\_\_\_  
Deputy Clerk

7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF CONTRA COSTA - MARTINEZ

10 \_\_\_\_\_  
11 OSTROSKY ENTERPRISES, INC., a  
California Corporation,  
12  
13 Plaintiff and Petitioner,  
14 vs.  
15 CITY OF MARTINEZ, DOES 1 through 10  
inclusive, and all other persons unknown  
16 claiming any right, title, estate, license, lien,  
or interest in the real property adverse  
17 Plaintiff's title,  
18 Defendant and Respondent.  
19 \_\_\_\_\_

No. N08-0408  
**SUPPLEMENTAL REQUEST FOR  
JUDICIAL NOTICE ON  
MANDAMUS CAUSE OF ACTION**  
  
Trial Date: January 28, 2010  
Time: 1:45 p.m.  
Dept: 7  
Judge: Hon. Barry Baskin  
  
Action Filed: March 17, 2008

20 TO THE HONORABLE BARRY BASKIN, JUDGE OF THE ABOVE-ENTITLED  
21 COURT:

22 Petitioner OSTROSKY ENTERPRISES, INC. hereby requests that the Court take  
23 judicial notice of the following matters:

24 **RJN 5:** That certain correspondence dated May 4, 2006 from Richard  
25 Pearson of the City of Martinez to Isolde Mollich.

26 This request is made pursuant to Evidence Code §§ 452(b) and (h) on the ground  
27 that these documents are records of a public entity, which include "records of a city", and as  
28 such are the proper subject of judicial notice.

**000022**

1 Attached hereto as Exhibit 1 is a true and correct copy of the above-referenced  
2 correspondence.

3 RJN 6: That certain correspondence dated September 12, 2007 from  
4 Corey M. Simon of the City of Martinez to William Bruegmann and  
Don Fitch.

5 This request is made pursuant to Evidence Code §§ 452(b) and (h) on the ground  
6 that these documents are records of a public entity, which include "records of a city", and as  
7 such are the proper subject of judicial notice.

8 Attached hereto as Exhibit 2 is a true and correct copy of the above-referenced  
9 correspondence.

10 RJN 7: That certain correspondence dated March 28, 2008 from Albert V.  
11 Lopez of the City of Martinez to Don Fitch.

12 This request is made pursuant to Evidence Code §§ 452(b) and (h) on the ground  
13 that these documents are records of a public entity, which include "records of a city", and as  
14 such are the proper subject of judicial notice.

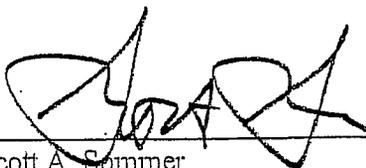
15 Attached hereto as Exhibit 3 is a true and correct copy of the above-referenced  
16 correspondence.

17 Dated: January 20, 2010.

PILLSBURY WINTHROP SHAW PITTMAN LLP

18  
19  
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21  
22  
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25  
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28

By: \_\_\_\_\_

  
Scott A. Sommer  
Attorneys for Plaintiff and Petitioner  
OSTROSKY ENTERPRISES, INC., a California  
Corporation

000023

**EXHIBIT 1**

000024



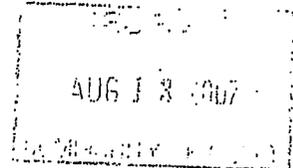
City of Martinez

525 Henrietta Street, Martinez, CA 94553-2394

May 4, 2006

Mrs. Isolde Mollich  
5808 Alhambra Avenue  
Martinez CA 94553

Re: APN 366-150-20



Dear Mrs. Mollich:

We were able to retrieve the old Alhambra Hills Specific Plan files from retention. In looking through the files, I was not able to find anything specific indicating why there is no Development Area shown on the plan map for your property. I did find a reference to a discussion between staff and the Planning Commission indicating that there would be some flexibility allowed in the plan by defining Development Area as all property under 30% slope, rather than relying on only the map designation. This was adopted as part of the plan text, after the first sentence under F31.31:

**“The Development Area shall consist of all Plan areas under 30% slope which shall be considered developable unless site constraints prevent development of that particular area (see Policies 31.321 and 31.322.”**

31.326 states that **“Densities along Alhambra Avenue shall vary from 3 to 5 units per Development Area acre and shall not exceed the density of existing development.”**

Taken together, these two policies would allow you to develop portions of your property under 30% slope, assuming that there are no problems with soil stability or other factors listed under 31.321 and 31.322. You would not need a general plan amendment, or a rezoning. You would need a slope density map, a tentative-subdivision map, and a soils report. You, or someone who purchases the property, should do some preliminary work, then come in for a meeting with our Deputy Community Development Director, Albert Lopez, before you get too far into design. Staff can review it at a preliminary level, and give you suggestions.

If you have any further questions, please call me.

Sincerely,

Richard Pearson  
Community Development Director

cc: Albert Lopez  
William J. Bruegmann

000025

**EXHIBIT 2**

000026



# City of Martinez

525 Henrietta Street, Martinez, CA 94553-2394  
COMMUNITY DEVELOPMENT DEPARTMENT (925) 372-3515

September 12, 2007

William Bruegmann  
2255 Contra Costa Blvd, # 305  
Pleasant Hill, CA 94523

Don Fitch  
Gilbert Fitch and Associates, Inc.  
1320 Galaxy Way # 101  
Concord, CA 94520

**RE: MOLLICH PROPERTY; PRELIMINARY Application review for a 4-Lot minor subdivision, and possible variances to maximum density allowed per requirements of the *Hillside Development Regulations*, and minimum required front yard setback requirements on an approximate 10 acre parcel located at 5808 Alhambra Avenue (APN: 366-150-020); FILE: [preliminary]**

Dear Mr. Bruegmann & Fitch:

Staff has reviewed the preliminary material you submitted on August 13, 2007, including a revised slope density exhibit on August 30, in regards to possible subdivision of the Mollich property. We took in your material as a "preliminary" application, as your client wished to assess the possibility of a 4-lot subdivision prior to completing the geotechnical reports that are required for all minor subdivision applications. The first part of this letter outlines staff's initial observations, following with possible courses of action for your client:

## I. BACKGROUND AND INITIAL COMMENTS

- Any development subject to regulations of the Alhambra Hills Specific Plan and Hillside Development Regulations. Former Director Richard Pearson's letter of May 4, 2006 clarified the Alhambra Hills Specific Plan allows the possibility for development on those portions of your property with less than 30% (without the need for a general plan or Specific Plan amendment). But his letter also states that a subdivision application would require a slope density map (to show compliance with the City's Hillside Development Regulations). The maximum number of possible units on a hillside parcel is determined by the slope density map. The map initially submitted on August 13 (showing a maximum allowance of up to 4 units) incorrectly assigned the flat area of the existing Mollich homesite as if it was naturally level; City policy in implementing slope density limitations is to consider the "natural" slope of the entire site. A corrected slope density map (showing a maximum allowance of up to 3 units) was submitted received from Din Fitch and Associates on August 30, 2007.
- Parcel "C" is not consistent with R-7.5 Zoning District requirements. The placement of a 9' high retaining wall approximately 5' from the Alhambra Avenue right-of-way would require a variance, as no structures over 3' are typically allowed in the 20' deep minimum required front yard. Furthermore, policy 31.324 of the Alhambra Hills Specific Plan states that the nature of development and "housing

type shall be compatible with nearby existing development." It appears any development on the proposed parcel "C" would be much higher than, and/or closer to, Alhambra Avenue than that of neighboring houses, thus creating an incompatible urban image along amongst the established suburban to semi-rural setting.

- Current plan would require approval of variances. Due to the above, the applicant's August 3, 2007 (received August 13, 2007) is not correct when he states that the current proposal is "meets all of the City requirements for the General Plan and zoning and setback requirements. . . there will be no need for variances or any action beyond the simple parcel map process." Should you proceed with the design as proposed, variances to the development standards of the R-7.5 zoning district and slope density limitation of the *Hillside Development Regulations* would be required.

## II. OPTIONS FOR APPLICANT

- Complete application for conforming 3-lot subdivision, for action by Zoning Administrator.

Were Parcel "C" to be removed from the request (area to remain within Parcel "D"), the request would become a "simple parcel map" and could be approved by the Zoning Administrator, acting as a sole decision-maker at a public hearing. Should the property owner choose this option, you would need to complete the tentative map application submittal requirements for the Zoning Administrator's hearing, but barring some yet unforeseen issue, approval would be likely. That portion of fees paid for the "preliminary review" can be applied to the tentative map application fee, as Planning Commission review would not be required (unless Zoning Administrator's decision were to be appealed).

- Proceed to Planning Commission study session with Preliminary application for non-conforming 4-lot subdivision.

Since only the Planning Commission can approve variances to slope density limitations, you could present the 4-lot proposal, prior to completing the soils report, to the Planning Commission at a study session. For the reasons outlined above, staff will not be supportive of allowing Parcel "C", and would recommend that the Planning Commission not support such a proposal.

Once you have reviewed these options with the property owner, staff would be happy to meet with you both and the property owner to facilitate whatever direction you choose. Please feel free to contact me at 925-372-3518. You may also wish to contact Khalil Yowakim, Associate Engineer at 925-372-3569.

Sincerely,



Corey M. Simon  
Senior Planner

cc: Karen Majors, Assistant City Manager, Community & Economic Development  
Khalil Yowakim, Associate Engineer  
file

F:\Community Development\All Projects\MINOR SUBDIVISIONS\PRELIM\Molitch-5508\Alhambra\Molitch-Prelim&Zoning\etrl.doc

**EXHIBIT 3**

000029