

Janet Calderon

From: Glenn Miller <glennmiller44@comcast.net>
Sent: Saturday, June 26, 2021 10:44 AM
To: Janet Calderon
Cc: Reina Schwartz; Letecia "Holly" Tillman; Jim Warburton
Subject: Re: Public Comment Action Item #5 - OAKHURST GEOLOGICAL HAZARD ABATEMENT DISTRICT - Meeting of June 29th 2021

Re agenda item #5 - Adopt a Resolution Ordering Improvements and Confirming Real Property Assessments in the Oakhurst Geological Hazard Abatement District for FY 2021/22.

Written Public Comment to Madam Chair and Council Members and Staff

As an interested resident who lives within the GHAD I support the recommended GHAD increases under consideration.

However, I do wish to remind the Council that intended services covered by the GHAD's scope, have in this past year not taken place. I have confirmed this recently with both a physical inspection and in past months with conversations with maintenance personnel. The reason given was COVID restrictions and crew availability. Thus there seems to be a need for discussion and an explanation as to why there is not a substantial fund carryover of funds from the previous year that is included in the budget process and planning to complete the work in this budget resolution and considered assessment.

I remind the Chair and council that in order to be in compliance with the EPA's **National Pollutant Discharge Elimination System (NPDES) Program** and the City's **Storm Water Pollution Prevention Plan (SWPP)** including the City's annual **SWPP** permit, the infrastructure covered by the GHAD including all connected storm drains, inlets, all associated swales and outlets must be cleaned and maintained annually.

From experience this usually must take place by mid fall usually and before October 15th.

Therefore the Council should include in their **discussion, deliberations and direction** addressing these commitments and permit obligations including funding and if needed contracting of outside services to see that Clayton is in compliance and that no violation of these programs and permits occurs.

Thank you for your consideration and I look forward to your response.

Glenn D. Miller

Peacock Creek

Vincent A. Moita -----

Attorney at Law

8117 Marsh Creek Road,
Clayton, CA 94517
(925) 783-9688 Tel
vm@moitalaw.com

SENT VIA EMAIL

June 25, 2021

Attn: City Council, City of Clayton

RE: Proposed Oak Creek Canyon Drive - Illegal Nonconformance MCRSP

Dear City Council,

We respectfully request that a Motion be made for Agenda Item 8 (b) – “Oak Creek Canyon Project” to be continued until August 17, 2021. We do not believe the proposal conforms to the Marsh Creek Road Specific Plan (see attached letter). We are in ongoing negotiations with the principals of the project, which we aim to resolve by August 17. In the event such continuance is not granted, we reserve all rights.

Respectfully,

Vince Moita
Attorney at Law

Vincent A. Moita -----

Attorney at Law

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Clayton, CA 94517
(925) 783-9688 Tel
vm@moitalaw.com

SENT VIA EMAIL

April 2, 2021

Attn: City Council, City of Clayton

RE: Proposed Oak Creek Canyon Drive - Illegal Nonconformance MCRSP

Dear City Council,

I have emailed this letter to you all individually to ensure delivery, inclusion in the Agenda Packet, and, if you so choose, your advance review. Despite being provided 72 hours in advance of the last scheduled meeting, my prior letter was, for some unknown reason, not included in Planning Commission Agenda. This time you have it.

I represent the interests of Clayton Estates, LLC: owner of the majority of the developable land in Section A of the Marsh Creek Road Specific Plan's land use designation. The property amounts to over 160 acres and was planned for over 110 homes, after over 42 public meetings in 1995. *See* Exhibit 4, Figure 6.

The proposed project, commonly known as the Oak Creek Canyon Residential Planned Development Project (the "**Project**"), proposed by project applicant West Coast Home Builders ("**Seeno**"), is not in compliance with the Marsh Creek Road Specific Plan (the "**MCRSP**") and, therefore, must be denied by the City of Clayton (the "**City**") pursuant to California Government Code Section §66473.5, §66474(b), and §65860. *See* Exhibit 1 for Cal. Gov't Code sections.

The MCRSP's Chapter VIII – Circulation Element and Chapter X – Implementation Element set forth the applicable provisions for the instant issue. The relevant provisions are listed below and also attached as Exhibit 3:

Implementation Element Policies IM – 1, 2, 3, 4, 13, & 14
Circulation Element Policies CI – 1, 2, 2b, 3, 3a, 6, & 7

The MCRSP provides that the road to be constructed on the subject site must be a Collector Road. Per the MCRSP, a Collector Road must have a 48' right-of-way with 32' of pavement to provide sufficient access to the Moita, Heartland, and Morgan interests. *See* MCRSP Figure 10, attached in Exhibit 4.

“CI-2b. – Collector roadways. Four collector roads connecting to Marsh Creek Road will serve the residential developments in the study area. These roads will include the following:

- The access road to the Heartland, Moita and Morgan sites, which is referred to as Oak Creek Canyon Drive in this Plan. . .

The collector roadways will have pavement widths of 32 feet within a 48-foot right-of-way. The streets will have two 11-foot travel lanes and one ten-foot parking and bike lane.” (CI-2b, Circulation Element, pg. 96, MCRSP)

Seeno’s proposed tentative map is not consistent with this standard. Moreover, Seeno has not made a request to alter the specific plan to overcome such inconsistency. Seeno argues that following the MCRSP would require them to build a “road to nowhere.” So be it; the MCRSP makes no exception for first-moving developers to curtail infrastructure improvements so as to only serve their own parcels. We contend the collector road is not a road to nowhere, but, even if so, the MCRSP requires developers to conform to the standards set forth therein and then, potentially, seek funding via reimbursement or alternative funding mechanisms as contemplated by the plan.

When considering a land use project, a city’s findings regarding consistency between its general plan and a given specific plan is granted a high level of deference¹; here, however, no reasonable person could conclude that the Project, as proposed by Seeno, is in conformance based on that certain Planning Commission Staff Report, written by City Staff and dated as of February 23, 2021. Such report provides:

“The submitted Vesting Tentative Map shows two typical cross sections for Saltbrush Lane that currently **do not conform to the Marsh Creek Road Specific Plan. The standard for a collector road in the Marsh Creek Road Specific Plan shows a 4-foot sidewalk, a 6-foot landscape strip, 10-foot parking and bike lane, two 11-foot travel lanes, and 6 feet of landscaping.**

Should the Planning Commission recommend approval, drafted conditions included would ensure conformance with the Marsh Creek Road Specific Plan:

- The dedication of a 48-foot right-of-way; and
- Grading of the entire 48-foot right-of-way; and
- Road construction of:
 - o **24-foot roadway (including gutter) to accommodate two travel lanes and a 2-foot shoulder;** and
 - o A 4-foot sidewalk; and
 - o A 6-foot landscape strip (including curb).” Planning Commission Staff Report February 23, 2021 (**emphasis added**)

The Conditions of Approval, *even* as revised, are inadequate. Modification No. 2, No. 3, and Street Conditions No. 1 require a 24-foot roadway that does not satisfy the Implementation or Circulation Elements of the MCRSP as required by Cal. Gov’t Code §66473.5, §66474(b), and §65860. Read in conjunction with the policies of the MCRSP, no reasonable person could conclude that deferral of the ultimate buildout was ever anticipated to allow piecemeal construction for the benefit of first-moving developers. The MCRSP’s four corners clearly defined how development in the subject area should

¹ *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 637, 91 Cal.Rptr.3d 571

proceed, explicitly contemplating both project phasing and project financing. See IM-13 and IM-14, attached as Exhibit 3.

Seeno wishes to circumvent the very intent of the MCRSP for personal gain. Seeno's attempt to receive the benefit of favorable zoning under the MCRSP while ignoring the required circulation, infrastructure, and implementation elements "frustrates the very purpose" of such planning tools.² There are six specific Circulation Policy Elements that explicitly call for this road to be built to the collector street standard, *immediately when developed*. Further, this would allow for the natural development to occur in this area from West to East, outlined in Policy IM-6 and IM-7.

At this time, we respectfully request that the City require the Project conform with the MCRSP in its entirety.

To do so, the Conditions of Approval Modifications No. 2, No. 3, and Street Conditions No. 1. must be modified to match the Circulation Element CI-2b, which among other requirements, demand buildout of 32-foot-wide pavement. Draft language is provided in Exhibit 2, showing both current language and acceptable proposed modifications for conformance with the MCRSP.

Seeno's contention that requiring them to conform to the 25-year-old MCRSP constitutes a taking is wholly illusory. There are four possible arguments Seeno can make from a Taking standpoint, which I will highlight and dismiss in order, citing actual cases, in contrast to Seeno's unqualified, oral assertions of unconstitutionality and unfairness made in Mr. Doug Chen's December 22, 2020 certain Letter and again during the Planning Commission Meeting on February 23, 2021.

1. **Permanent physical invasion.**
 - Not relevant; City is not physically acquiring possession to any land.
2. **Denial of all economically beneficial use.**
 - Not relevant; Seeno is granted ability to develop six homes on subject site.
 - *See Lucas v. Southern California Coastal Commission*, 505 U.S. 1003, 1015 – 16 (must deprived of "all economically beneficial use") *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 609 (2001)(Regulation permitting a land owner from building a substantial residence on an 18-acre parcel did not leave the property "economically idle"), *see also Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164, 171 (1992) (Lucas principals do not apply because all property is not taken); *see also William C. Haas & Co. v. City and County of San Francisco*, 605 F. 2d. 1117, 1119 (9th Cir. 1979).
3. **General Regulatory Takings in which regulation goes too far.**

² *See Naraghi Lakes Neighborhood Preservation Assn. v. City of Modesto* (2016) 1 Cal.App.5th 9 [204 Cal.Rptr.3d 67, 1 Cal.App.5th 9](State law does not require precise conformity of a proposed project with the land use designation for a site, or an exact match between the project and the applicable general plan; instead, a finding of consistency requires only that the proposed project be compatible with the objectives, policies, general land uses, and programs specified in the applicable plan, which courts had interpreted as requiring that a project be in agreement or harmony with the terms of the applicable plan, not in rigid conformity with every detail thereof. However, the essential question when considering a project's consistency with a general plan is whether the project is compatible with, and does not frustrate, the general plan's goals and policies) *See also Cal. Gov't Code Section 65860*

- Here, conditions imposed on the project for conformance to the Collector Street's requirement of a 32-foot pavement have been in place for over 25 years. Required conformance presents minimal, if any, interference with distinct investment-backed expectations because such requirement was known for over 25 years and it is a valid exercise of Police Powers for the City to uphold its General Plan and Specific Plan.
- See *Penn Central Transportation Company vs. City of New York*, 438 U.S. 104 (1978) (three factor test 1. "economic impact of the regulation on the claimant", 2. "the extent to which the regulation has interfered with distinct investment backed expectations", 3. "the nature of the government action")

4. Land Use Exactions

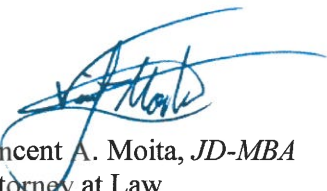
- Here, Seeno is proposing to build six new homes, which would create additional vehicular traffic, pedestrian traffic, and parking. The proposal is situated in the middle of a collector street as laid out in the MCRSP. This establishes a solid foundation for a nexus with the City's exaction (a collector road) to promote its legitimate interest in conformance with its adopted specific plan. The collector road requirement serves not only as a form of ingress and egress for the specific residents of the development, but also as ingress and egress to the residents of City. The City's Growth Management Plan requires maintenance of 3 Acres per 1,000 residents for developed parks, and 7 Acres per 1,000 residents of Maintained Open Spaces. As such, the Project is required to have trails and open space, which they have included. However, as proposed, the limited parking and narrow lane-width would be prohibitive to the greater public's use, frustrating the purpose of the MCRSP and General Plan. Therefore, the requirement of the collector road at 32' and 48' right-of-way not only maintains "rough proportionality" but *necessary* proportionality for access to the established open space.
- **Essential Nexus** See *Nolan vs. California Coastal Commission*, 484 U.S. 825 (1987) (nexus must be established between identified impact of the project and the condition imposed that "substantially advance" a "legitimate state interest.")
- **Rough Proportionality** See *Dolan v. City of Tigard*, 514 U.S. 374, 391 (1994) (cities must prove that development conditions placed on a discretionary permit have a "rough proportionality" to the development's impact where "no precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extend to the impact of the proposed development") See also *Ayres v. City Council of City of Los Angeles*, 34 Cal. 2d 31, 42, 207 P.2d 1, 7 (1949) ("It is the petitioner who is seeking to acquire the advantages of lot subdivision and upon him rests the duty of compliance with reasonable conditions for design, dedication, improvement and restrictive use of the land so as to conform to the safety and general welfare of the lot owners in the subdivision and of the public") See also *Associated Home Builders etc., Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606 (1971) (sustaining constitutionality of statute authorizing cities and counties to require dedication of land or payment of fees as condition to approval of subdivision map, and of city ordinance and resolutions)

We caution the City from relying on that certain letter written by Mr. Doug Chen (“**Chen**”) and submitted to the City, dated as of December 22, 2020. Chen includes a section under the header “Legal Basis” in which quotes the U.S. Supreme Court and Mitigation Fee Act (without citation). He concludes that the “proper solution” has been drafted by City staff and agreed to by Seeno and “is an elegant solution that complies with all laws.” Chen is wholly unqualified to attest that the plan “complies with all laws.” Chen is not a lawyer and, therefore, may not offer legal advice. The City should give no consideration to Chen’s application of the law to the instant project, or any project for that matter. My request to review the letter provided by Seeno’s counsel has remained unanswered, so I cannot speculate to the merits of their arguments, but I urge the City to reconsider, with advice and input from the City Attorney, its decision to not release the Seeno side letter and to evaluate the arguments provided above.

As a final point, we contend the name of the proposed road should remain Oak Creek Canyon Drive, not Saltbush Lane. The name Oak Creek Canyon Drive is consistent with City Council Resolution No. 68-2003 and extensively documented in the MCRSP. *See* Figure 13, attached in Exhibit 4.

If these proposed changes are not accommodated, we will continue to raise the issue until all available administrative remedies are exhausted. We prefer to resolve this without litigation but, if forced to, we will consider all avenues to protect our rights.

Respectfully,



Vincent A. Moita, *JD-MBA*
Attorney at Law

CC:

Jim Moita <jmi-acorn@sbcglobal.net>
Malathy Subramanian, City Attorney, <msubramanian@bbklaw.com>
Carl Wolfe, Mayor, <cwolfe@ci.clayton.ca.us>
Peter Cloven, Vice Mayor, <pcloven@ci.clayton.ca.us>
Reina Schwartz, City Manager, <rschwartz@ci.clayton.ca.us>
Jeff Wan, City Councilmember, <jwan@ci.clayton.ca.us>
Holly Tillman, City Councilmember, <htillman@ci.clayton.ca.us>
Jim Diaz, City Councilmember, <jdiaz@ci.clayton.ca.us>

Exhibit 1:
California Government Code

California Government Code §66473.5:

No local agency shall approve a tentative map ... or a parcel map ... unless the legislative body finds that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan...or any specific plan

California Government Code §66474(b):

A legislative body of a city or county shall deny approval of a tentative map, or a parcel map for which a tentative map was not required, if it makes any of the following findings...(b) that the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans

California Government Code §65860:

(a) County or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974. A zoning ordinance shall be consistent with a city or county general plan only if both of the following conditions are met:

(1) The city or county has officially adopted such a plan.

(2) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan.

(b) Any resident or property owner within a city or a county, as the case may be, may bring an action or proceeding in the superior court to enforce compliance with subdivision (a). Any such action or proceeding shall be governed by Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure. No action or proceeding shall be maintained pursuant to this section by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days of the enactment of any new zoning ordinance or the amendment of any existing zoning ordinance.

(c) In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to the plan, or to any element of the plan, the zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended.

(d) Notwithstanding Section 65803, this section shall also apply to a charter city.

Exhibit 2:
Current COA on Oak Creek Canyon Project

Modifications

2. Saltbrush Lane shall be modified as shown in the Marsh Creek Road Specific Plan (MCRSP) right-of-way of 48 feet. The VTM, grading plans, landscape plans, and site/development plans shall be modified to depict grading of the full right-of-way section, including the area adjacent to lot 6.
3. The Developer shall construct a 4-foot sidewalk on the west/north side of the right of-way which shall connect to the 6-foot pathway on the eastern side of the property, 6-foot landscape strip (including curb) and 24-foot roadway (including gutter on the west/north side). Additional width shall be constructed if a berm is required on the east/south side of the right-of-way for drainage purposes.

Street Conditions

1. Prior to the issuance of a grading permit, the project road labeled Saltbrush Lane shall be modified. The right-of-way width for the project road shall be 48 feet. The ultimate street width shall be 32 feet from face-of-curb to face-of-curb. A sidewalk shall be provided on the north side of the project road and shall have a width of 4.5 feet (from face-of-curb). Residential setbacks shall be measured from the edge of the right-of-way.

Proposed Modified COA on Oak Creek Canyon Project (Changes Bold & Strikethrough)

Modifications

2. Saltbrush Lane shall be modified as shown in the Marsh Creek Road Specific Plan (MCRSP) right-of-way of 48 feet, **and 32-foot pavement**. The VTM, grading plans, landscape plans, and site/development plans shall be modified to depict grading of the full right-of-way section, including the area adjacent to lot 6.
3. The Developer shall construct a 4-foot sidewalk on the west/north side of the right of-way which shall connect to the 6-foot pathway on the eastern side of the property, 6-foot landscape strip (including curb) and ~~24~~ **32-foot** roadway (including gutter on the west/north side). Additional width shall be constructed if a berm is required on the east/south side of the right-of-way for drainage purposes.

Street Conditions

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Exhibit 3:

Select Policies from Marsh Creek Road Specific Plan, June 1995.

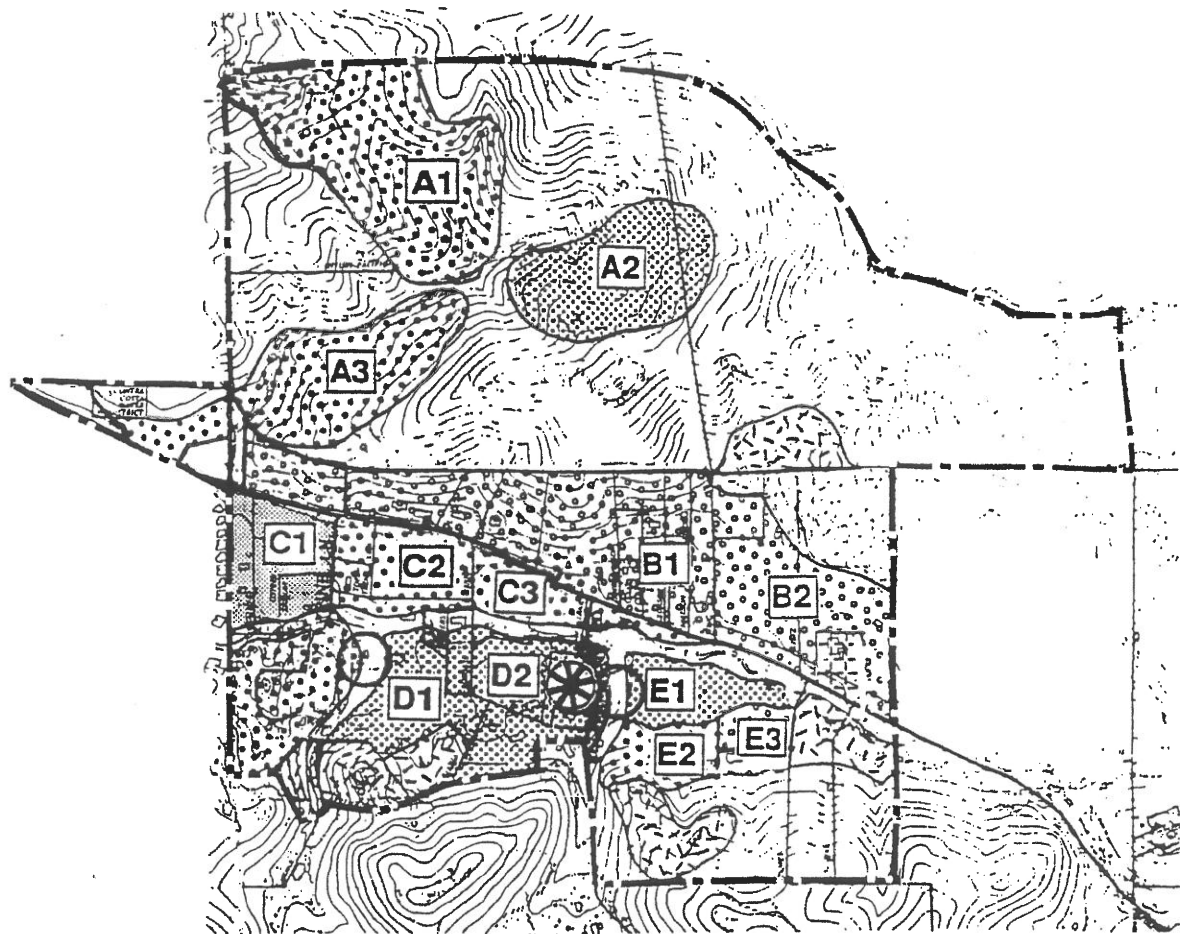
Chapter VIII Circulation Element:

- Policy CI-1: Roadways serving development areas shall generally conform to the pattern shown in Figure 10. Where Figure 10 shows that a roadway is required to serve development on several different parcels, roadway planning and construction for each parcel shall include provisions for access to adjacent parcels.
- Policy CI-2: All roadways developed under the Specific Plan shall be built to follow the standards of one of four types of streets: arterials, collectors, local roadways and minor cul-de-sacs.
- Policy CI-2b: Collector roadways. Four collector roads connecting to Marsh Creek Road will serve the residential developments in the study area. These roads will include the following:
- The access road to the Heartland, Moita and Morgan sites, which is referred to as Oak Creek Canyon Drive in this Plan...
- The collector roadways will have pavement widths of 32 feet within a 48-foot right-of-way. The streets will have two 11-foot travel lanes and one ten-foot parking and bike lane. On one side of the road there will be a 6-foot planter strip, while a 6-foot planter strip and a 4-foot decomposed granite, quarter-by-dust or asphalt sidewalk on the other side of the road will complete the right-of-way.
- Policy CI-3: Intersections built to accommodate Specific Plan buildout should be designed in accordance with the diagrams of intersections alignments shown in Figure 13.
- Policy-C-3a: Diablo Parkway/ Marsh Creek Road. This will become a four-legged intersection providing access to Development Area A, and will include an eastbound left-turn pocket for cars entering the Heartland site. This intersection shall be signalized (when warranted) for traffic safety and to meter traffic entering the urbanized portion of Clayton.
- Policy CI-6: As existing parcels develop, they should rely on access from streets that follow the general layout shown in Figure 10.
- Policy CI-7: Internal circulation within subdivisions shall be designed at the discretion of the property owner, subject to the approval by the City, provided that it allows for through access to adjacent parcels as indicated on Figure 10.

Chapter X Implementation Element:

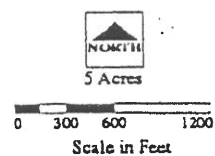
- Policy IM-1: No subdivision, use permit, design review application, or other entitlement for use, and no public improvement, shall be authorized in the study area until a finding has been made that the proposed project is consistent with this Specific Plan.
- Policy IM-2: City staff shall review all construction projects requiring a building permit to ensure that they comply with the Design Guidelines and all other plan provisions.
- Policy IM-3: The City Planning Commission shall review all subdivisions and development projects of five units or more at a public hearing.
- Policy IM-4: The City shall, by reference, incorporate into its zoning code the relevant land use, resource conservation and design specifications found in Chapter V, VI and VII, respectively.
- Policy IM-6: Development should generally begin in the western part of the study area, to be followed by development farther east. Development Areas A and C will be the first to develop, followed by area D. Development Areas B and E will probably be the last to develop.
- Policy IM-7: Within individual development area, parcels that are closest to collector streets, including Pine Lane and Russellman Road, should be developed first. This may mean that some parcels that are adjacent to Marsh Creek Road, but which are not planned to have direct access from Marsh Creek Road after development, will have to wait to develop until adjacent parcels have developed.
- Policy IM-13: Improvements on individual properties required under this Specific Plan shall be financed by individual property owners or developers.
- Policy IM-14: Improvements that will require coordinated implementation on or along several parcels, such as widening of Marsh Creek Road and installation of new water mains, traffic signals, water tanks, trunk sewers, storm drainage facilities and downstream sewer improvements shall be overseen by the City and should be financed with a mechanism that attempts to ensure ultimate fair-share repayment of all costs to those who pay them by the landowners or developers who will benefit from them. Examples of appropriate funding mechanisms are included in Section D.3 of this chapter.

Exhibit 4:
Figures from MCRSP



Legend

- Specific Plan Boundary
- Ranchette Residential
1 unit/5 acres
- Rural Residential
0.21 - 1.1 units/acre
- Low Density Residential
1.11 - 1.5 units/acre
- Medium Density Residential
1.51 - 2.2 units/acre
- Suburban Density Residential
2.21 - 3.0 units/acre
- Convenience Commercial
- Open Space
- Conceptual Location of
Potential Park Site
- Historic Building and
Potential Park Sites
- Development Area Designation

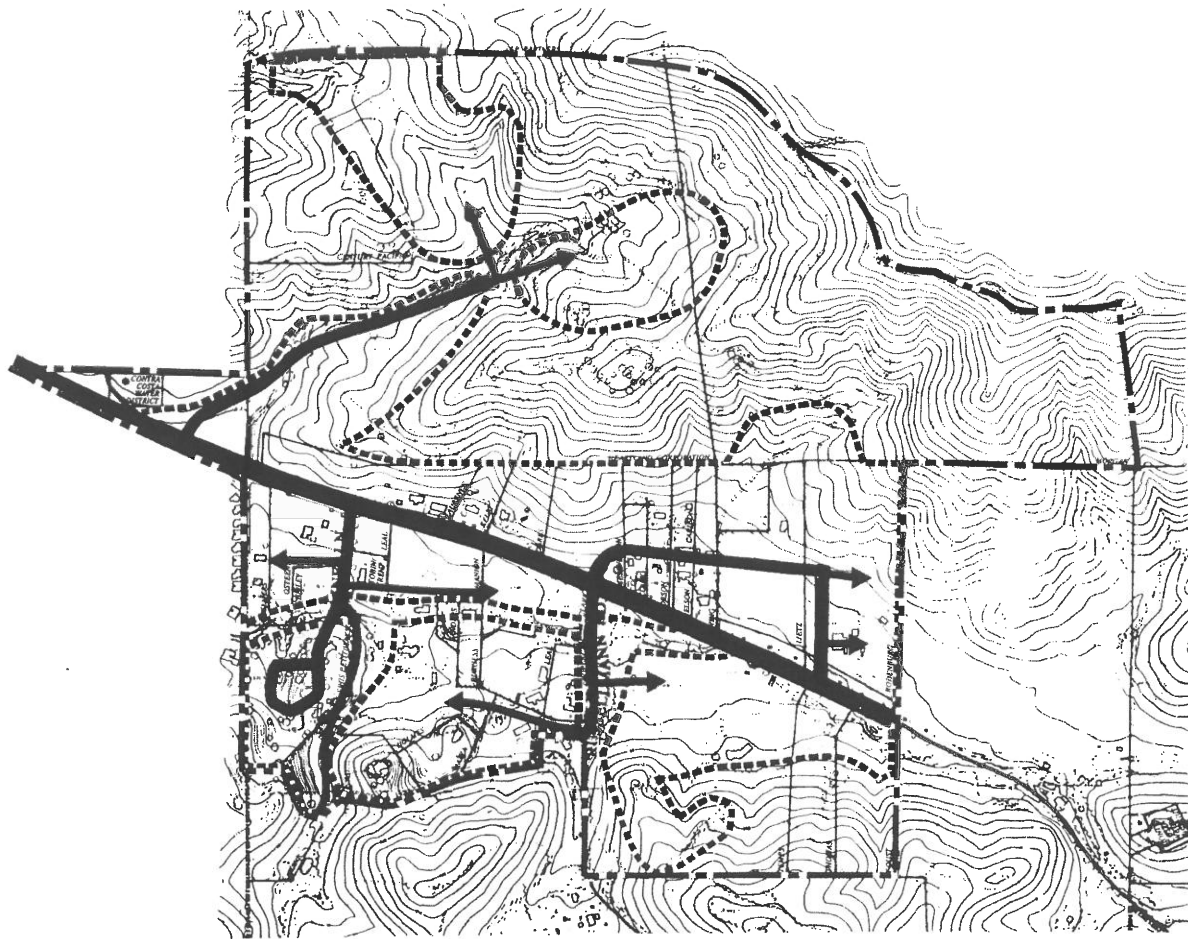


MARSH CREEK ROAD SPECIFIC PLAN






■ ■ ■
FIGURE 6

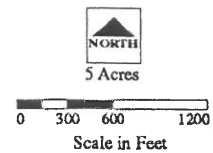
Land Use Designations

Amended by Resolution 14-2005, dated 4/5/05



Legend

-  Arterial Street (Marsh Creek Road)
82' ROW, 34' pavement
-  Collector Street
48' ROW, 32' pavement
-  Local Street
44' ROW, 28' pavement
-  Development Area Boundaries
-  Specific Plan Boundary

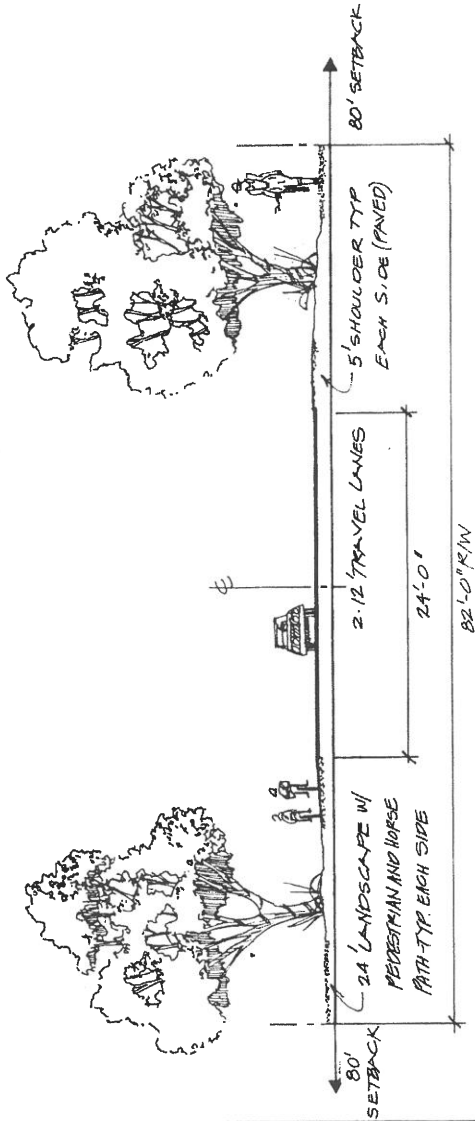


MARSH CREEK ROAD SPECIFIC PLAN

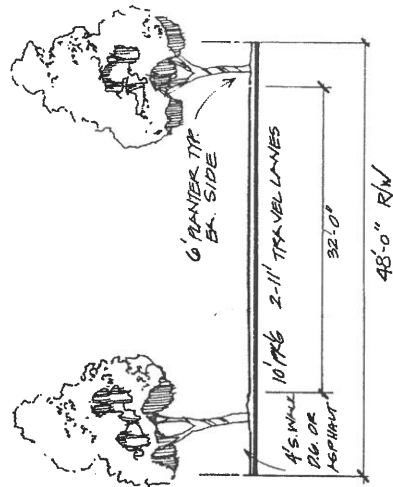


FIGURE 10

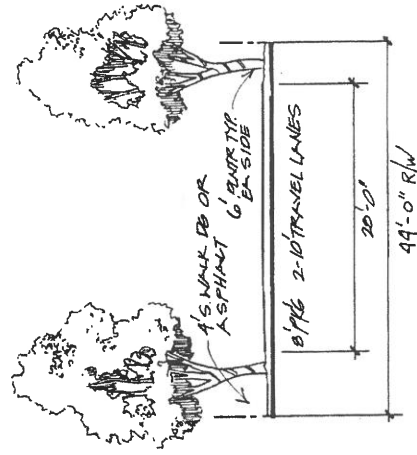
Circulation Plan



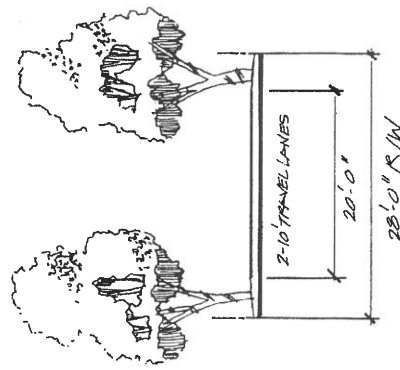
Arterial Road - (Marsh Creek Road)



Collector Road



Local Road



Minor Cul-de-Sac



MARSH CREEK ROAD SPECIFIC PLAN

CITY OF CLAYTON CALIFORNIA

BRADY AND ASSOCIATES, INC. PLANNERS AND LANDSCAPE ARCHITECTS

FIGURE 11

Street Sections

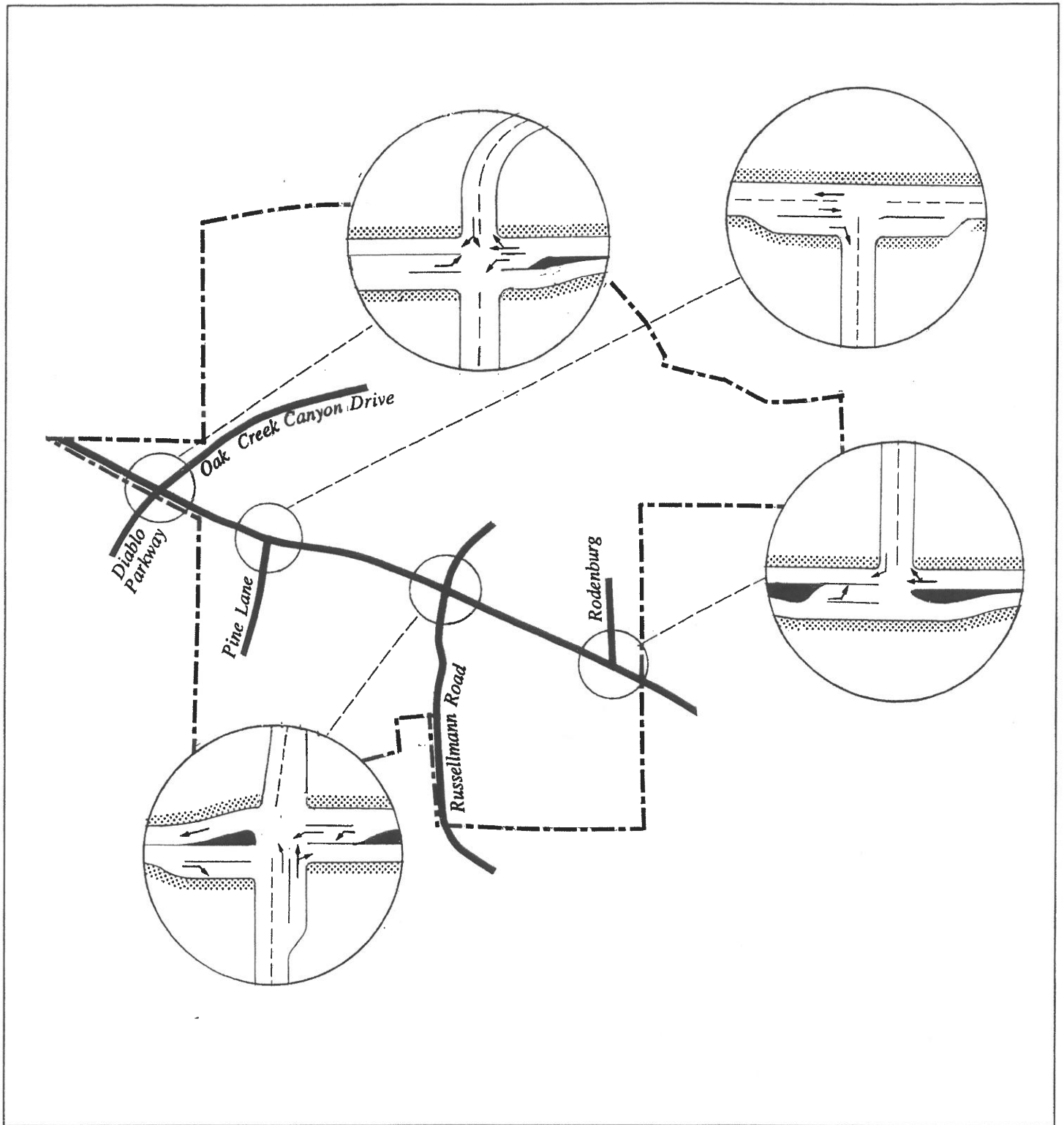


FIGURE 13

Intersection Configurations

Intersection configurations are illustrative only. Actual design will conform to accepted engineering standards that account for traffic speed and sight distance.



MARSH
CREEK
ROAD
SPECIFIC
PLAN

CLAYTON
CALIFORNIA

BRADY AND ASSOCIATES, INC.
PLANNERS AND LANDSCAPE ARCHITECTS

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Bay Area Open Space Council



June 28th, 2021

Community Development Director
City of Clayton
6000 Heritage Trail
Clayton, CA 94517

RE: Concerns about Oak Creek Canyon Residential Subdivision

Dear Community Development Director,

Save Mount Diablo (SMD) is a non-profit conservation organization founded in 1971 which acquires land for addition to parks on and around Mount Diablo and monitors land use planning which might affect protected lands. We build trails, restore habitat, and are involved in environmental education. In 1971 there was just one park on Mount Diablo totaling 6,778 acres; today there are almost 50 parks and preserves around Mount Diablo totaling 120,000 acres. We include more than 11,000 donors and supporters.

We are writing to inform you of concerns we have with the proposed Oak Creek Canyon Residential Subdivision (Project), for consideration during the City Council hearing on the Project on Tuesday June 29th. Issues we would like to call attention to are substantial grading of the Project site and the wisdom of developing at the edge of Clayton, in the wildland-urban interface, given the dangers of wildlife and the consequences of climate change.

Attachment O of the proposed Initial Study and Mitigated Negative Declaration for the Project shows significant grading of the topography of the Project site directly north of units 1 through 5. Figure 1 (below) is a Google Streetview image of the Project site showing the hill that would be graded to accommodate the six units proposed for the Project. Development that accommodates natural terrain to blend with the landscape is more aesthetically sensitive and oftentimes avoids biological impacts on plants and wildlife to a greater degree than development that relies on heavy grading. We encourage you to consider recommending reducing the number of units that would be constructed in the Project to help keep Clayton's hillsides intact.

In addition, the Project Site is located at the very limit of where development could occur in Clayton, right up against the Urban Limit Line. This places the Project unequivocally at what is termed the "wildland-urban interface", or WUI. Development at the WUI has been one of the causes of increasingly severe costs and damage due to wildfires. It also exacerbates the catastrophe of human-caused climate change by increasing the number of people that live in places far away from job and service centers, leading to increased greenhouse gas emissions from driving. Please see the article [HERE](#) for an illuminating discussion of these issues in the context of the recent and recurring catastrophic wildfires in California. Figure 2 (below) shows the Project Site located in a High Fire Hazard Severity Zone and very close to Very High Fire Hazard Severity Zones. The City Council should consider the wisdom of further development of Clayton's WUI vs infill development, as well as recommending more mitigation measures to reduce costs and damage associated with wildlife and potentially recommending a reduction of the unit count of the Project.





Figure 1. Google Streetview image of the proposed Project Site and the hill that would be graded to accommodate development.

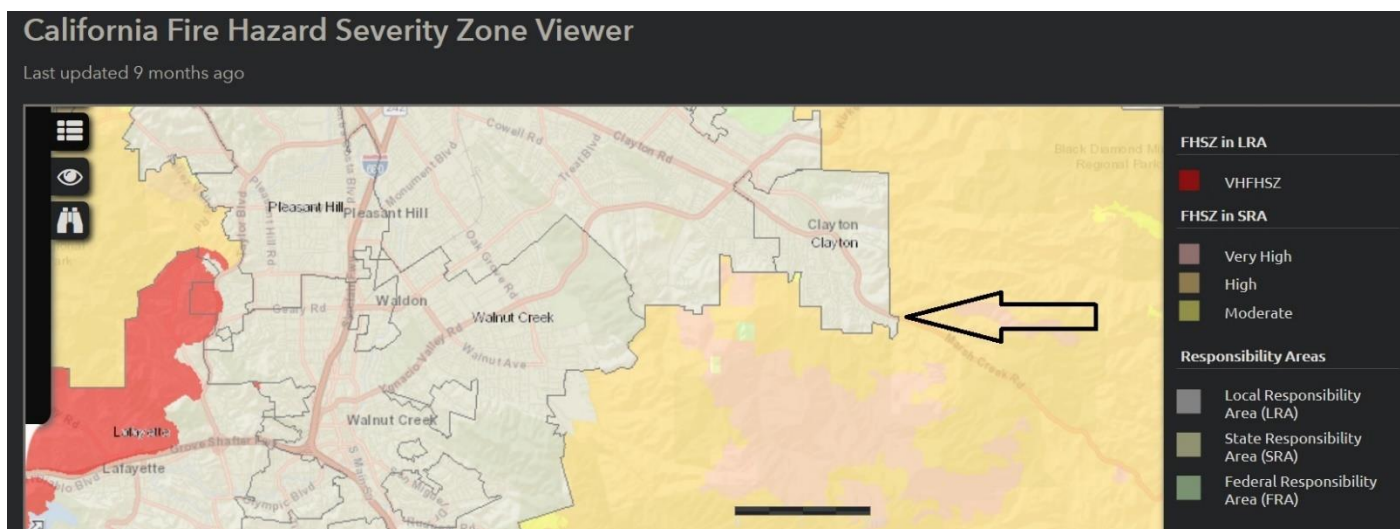


Figure 2. Map of California Fire Hazard Severity Zones showing the location of the Project Site (black arrow points to Project Site). Note the Project site lies in a High Fire Hazard Severity Zone, and lies just west and north of Very High Fire Hazard Severity Zones.

Regards,

Juan Pablo Galván Martínez
Senior Land Use Manager

Vincent A. Moita -----

Attorney at Law

8117 Marsh Creek Road,
Clayton, CA 94517
(925) 783-9688 Tel
vm@moitalaw.com

SENT VIA EMAIL

June 25, 2021

Attn: City Council, City of Clayton

RE: Proposed Oak Creek Canyon Drive - Illegal Nonconformance MCRSP

Dear City Council,

We respectfully request that a Motion be made for Agenda Item 8 (b) – “Oak Creek Canyon Project” to be continued until August 17, 2021. We do not believe the proposal conforms to the Marsh Creek Road Specific Plan (see attached letter). We are in ongoing negotiations with the principals of the project, which we aim to resolve by August 17. In the event such continuance is not granted, we reserve all rights.

Respectfully,

Vince Moita
Attorney at Law

Vincent A. Moita -----

Attorney at Law

8117 Marsh Creek Road,
Clayton, CA 94517
(925) 783-9688 Tel
vm@moitalaw.com

SENT VIA EMAIL

April 2, 2021

Attn: City Council, City of Clayton

RE: Proposed Oak Creek Canyon Drive - Illegal Nonconformance MCRSP

Dear City Council,

I have emailed this letter to you all individually to ensure delivery, inclusion in the Agenda Packet, and, if you so choose, your advance review. Despite being provided 72 hours in advance of the last scheduled meeting, my prior letter was, for some unknown reason, not included in Planning Commission Agenda. This time you have it.

I represent the interests of Clayton Estates, LLC: owner of the majority of the developable land in Section A of the Marsh Creek Road Specific Plan's land use designation. The property amounts to over 160 acres and was planned for over 110 homes, after over 42 public meetings in 1995. *See* Exhibit 4, Figure 6.

The proposed project, commonly known as the Oak Creek Canyon Residential Planned Development Project (the "**Project**"), proposed by project applicant West Coast Home Builders ("**Seeno**"), is not in compliance with the Marsh Creek Road Specific Plan (the "**MCRSP**") and, therefore, must be denied by the City of Clayton (the "**City**") pursuant to California Government Code Section §66473.5, §66474(b), and §65860. *See* Exhibit 1 for Cal. Gov't Code sections.

The MCRSP's Chapter VIII – Circulation Element and Chapter X – Implementation Element set forth the applicable provisions for the instant issue. The relevant provisions are listed below and also attached as Exhibit 3:

Implementation Element Policies IM – 1, 2, 3, 4, 13, & 14

Circulation Element Policies CI – 1, 2, 2b, 3, 3a, 6, & 7

The MCRSP provides that the road to be constructed on the subject site must be a Collector Road. Per the MCRSP, a Collector Road must have a 48' right-of-way with 32' of pavement to provide sufficient access to the Moita, Heartland, and Morgan interests. *See* MCRSP Figure 10, attached in Exhibit 4.

“CI-2b. – Collector roadways. Four collector roads connecting to Marsh Creek Road will serve the residential developments in the study area. These roads will include the following:

- The access road to the Heartland, Moita and Morgan sites, which is referred to as Oak Creek Canyon Drive in this Plan. . .

The collector roadways will have pavement widths of 32 feet within a 48-foot right-of-way. The streets will have two 11-foot travel lanes and one ten-foot parking and bike lane.” (CI-2b, Circulation Element, pg. 96, MCRSP)

Seeno’s proposed tentative map is not consistent with this standard. Moreover, Seeno has not made a request to alter the specific plan to overcome such inconsistency. Seeno argues that following the MCRSP would require them to build a “road to nowhere.” So be it; the MCRSP makes no exception for first-moving developers to curtail infrastructure improvements so as to only serve their own parcels. We contend the collector road is not a road to nowhere, but, even if so, the MCRSP requires developers to conform to the standards set forth therein and then, potentially, seek funding via reimbursement or alternative funding mechanisms as contemplated by the plan.

When considering a land use project, a city’s findings regarding consistency between its general plan and a given specific plan is granted a high level of deference¹; here, however, no reasonable person could conclude that the Project, as proposed by Seeno, is in conformance based on that certain Planning Commission Staff Report, written by City Staff and dated as of February 23, 2021. Such report provides:

“The submitted Vesting Tentative Map shows two typical cross sections for Saltbrush Lane that currently **do not conform to the Marsh Creek Road Specific Plan. The standard for a collector road in the Marsh Creek Road Specific Plan shows a 4-foot sidewalk, a 6-foot landscape strip, 10-foot parking and bike lane, two 11-foot travel lanes, and 6 feet of landscaping.**

Should the Planning Commission recommend approval, drafted conditions included would ensure conformance with the Marsh Creek Road Specific Plan:

- The dedication of a 48-foot right-of-way; and
- Grading of the entire 48-foot right-of-way; and
- Road construction of:
 - o **24-foot roadway (including gutter) to accommodate two travel lanes and a 2-foot shoulder;** and
 - o A 4-foot sidewalk; and
 - o A 6-foot landscape strip (including curb).” Planning Commission Staff Report February 23, 2021 (**emphasis added**)

The Conditions of Approval, *even* as revised, are inadequate. Modification No. 2, No. 3, and Street Conditions No. 1 require a 24-foot roadway that does not satisfy the Implementation or Circulation Elements of the MCRSP as required by Cal. Gov’t Code §66473.5, §66474(b), and §65860. Read in conjunction with the policies of the MCRSP, no reasonable person could conclude that deferral of the ultimate buildout was ever anticipated to allow piecemeal construction for the benefit of first-moving developers. The MCRSP’s four corners clearly defined how development in the subject area should

¹ *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 637, 91 Cal.Rptr.3d 571

proceed, explicitly contemplating both project phasing and project financing. See IM-13 and IM-14, attached as Exhibit 3.

Seeno wishes to circumvent the very intent of the MCRSP for personal gain. Seeno's attempt to receive the benefit of favorable zoning under the MCRSP while ignoring the required circulation, infrastructure, and implementation elements "frustrates the very purpose" of such planning tools.² There are six specific Circulation Policy Elements that explicitly call for this road to be built to the collector street standard, *immediately when developed*. Further, this would allow for the natural development to occur in this area from West to East, outlined in Policy IM-6 and IM-7.

At this time, we respectfully request that the City require the Project conform with the MCRSP in its entirety.

To do so, the Conditions of Approval Modifications No. 2, No. 3, and Street Conditions No. 1. must be modified to match the Circulation Element CI-2b, which among other requirements, demand buildout of 32-foot-wide pavement. Draft language is provided in Exhibit 2, showing both current language and acceptable proposed modifications for conformance with the MCRSP.

Seeno's contention that requiring them to conform to the 25-year-old MCRSP constitutes a taking is wholly illusory. There are four possible arguments Seeno can make from a Taking standpoint, which I will highlight and dismiss in order, citing actual cases, in contrast to Seeno's unqualified, oral assertions of unconstitutionality and unfairness made in Mr. Doug Chen's December 22, 2020 certain Letter and again during the Planning Commission Meeting on February 23, 2021.

1. **Permanent physical invasion.**
 - Not relevant; City is not physically acquiring possession to any land.
2. **Denial of all economically beneficial use.**
 - Not relevant; Seeno is granted ability to develop six homes on subject site.
 - *See Lucas v. Southern California Coastal Commission*, 505 U.S. 1003, 1015 – 16 (must deprived of "all economically beneficial use") *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 609 (2001)(Regulation permitting a land owner from building a substantial residence on an 18-acre parcel did not leave the property "economically idle"), *see also Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164, 171 (1992) (Lucas principals do not apply because all property is not taken); *see also William C. Haas & Co. v. City and County of San Francisco*, 605 F. 2d. 1117, 1119 (9th Cir. 1979).
3. **General Regulatory Takings in which regulation goes too far.**

² *See Naraghi Lakes Neighborhood Preservation Assn. v. City of Modesto* (2016) 1 Cal.App.5th 9 [204 Cal.Rptr.3d 67, 1 Cal.App.5th 9](State law does not require precise conformity of a proposed project with the land use designation for a site, or an exact match between the project and the applicable general plan; instead, a finding of consistency requires only that the proposed project be compatible with the objectives, policies, general land uses, and programs specified in the applicable plan, which courts had interpreted as requiring that a project be in agreement or harmony with the terms of the applicable plan, not in rigid conformity with every detail thereof. However, the essential question when considering a project's consistency with a general plan is whether the project is compatible with, and does not frustrate, the general plan's goals and policies) *See also Cal. Gov't Code Section 65860*

- Here, conditions imposed on the project for conformance to the Collector Street's requirement of a 32-foot pavement have been in place for over 25 years. Required conformance presents minimal, if any, interference with distinct investment-backed expectations because such requirement was known for over 25 years and it is a valid exercise of Police Powers for the City to uphold its General Plan and Specific Plan.
- See *Penn Central Transportation Company vs. City of New York*, 438 U.S. 104 (1978) (three factor test 1. "economic impact of the regulation on the claimant", 2. "the extent to which the regulation has interfered with distinct investment backed expectations", 3. "the nature of the government action")

4. Land Use Exactions

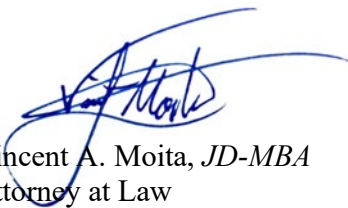
- Here, Seeno is proposing to build six new homes, which would create additional vehicular traffic, pedestrian traffic, and parking. The proposal is situated in the middle of a collector street as laid out in the MCRSP. This establishes a solid foundation for a nexus with the City's exaction (a collector road) to promote its legitimate interest in conformance with its adopted specific plan. The collector road requirement serves not only as a form of ingress and egress for the specific residents of the development, but also as ingress and egress to the residents of City. The City's Growth Management Plan requires maintenance of 3 Acres per 1,000 residents for developed parks, and 7 Acres per 1,000 residents of Maintained Open Spaces. As such, the Project is required to have trails and open space, which they have included. However, as proposed, the limited parking and narrow lane-width would be prohibitive to the greater public's use, frustrating the purpose of the MCRSP and General Plan. Therefore, the requirement of the collector road at 32' and 48' right-of-way not only maintains "rough proportionality" but *necessary* proportionality for access to the established open space.
- **Essential Nexus** See *Nolan vs. California Coastal Commission*, 484 U.S. 825 (1987) (nexus must be established between identified impact of the project and the condition imposed that "substantially advance" a "legitimate state interest.")
- **Rough Proportionality** See *Dolan v. City of Tigard*, 514 U.S. 374, 391 (1994) (cities must prove that development conditions placed on a discretionary permit have a "rough proportionality" to the development's impact where "no precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extend to the impact of the proposed development") See also *Ayres v. City Council of City of Los Angeles*, 34 Cal. 2d 31, 42, 207 P.2d 1, 7 (1949) ("It is the petitioner who is seeking to acquire the advantages of lot subdivision and upon him rests the duty of compliance with reasonable conditions for design, dedication, improvement and restrictive use of the land so as to conform to the safety and general welfare of the lot owners in the subdivision and of the public") See also *Associated Home Builders etc., Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606 (1971) (sustaining constitutionality of statute authorizing cities and counties to require dedication of land or payment of fees as condition to approval of subdivision map, and of city ordinance and resolutions)

We caution the City from relying on that certain letter written by Mr. Doug Chen (“**Chen**”) and submitted to the City, dated as of December 22, 2020. Chen includes a section under the header “Legal Basis” in which quotes the U.S. Supreme Court and Mitigation Fee Act (without citation). He concludes that the “proper solution” has been drafted by City staff and agreed to by Seeno and “is an elegant solution that complies with all laws.” Chen is wholly unqualified to attest that the plan “complies with all laws.” Chen is not a lawyer and, therefore, may not offer legal advice. The City should give no consideration to Chen’s application of the law to the instant project, or any project for that matter. My request to review the letter provided by Seeno’s counsel has remained unanswered, so I cannot speculate to the merits of their arguments, but I urge the City to reconsider, with advice and input from the City Attorney, its decision to not release the Seeno side letter and to evaluate the arguments provided above.

As a final point, we contend the name of the proposed road should remain Oak Creek Canyon Drive, not Saltbush Lane. The name Oak Creek Canyon Drive is consistent with City Council Resolution No. 68-2003 and extensively documented in the MCRSP. *See* Figure 13, attached in Exhibit 4.

If these proposed changes are not accommodated, we will continue to raise the issue until all available administrative remedies are exhausted. We prefer to resolve this without litigation but, if forced to, we will consider all avenues to protect our rights.

Respectfully,



Vincent A. Moita, *JD-MBA*
Attorney at Law

CC:

Jim Moita <jmi-acorn@sbcglobal.net>
Malathy Subramanian, City Attorney, <msubramanian@bbklaw.com>
Carl Wolfe, Mayor, <cwolfe@ci.clayton.ca.us>
Peter Cloven, Vice Mayor, <pcloven@ci.clayton.ca.us>
Reina Schwartz, City Manager, <rschwartz@ci.clayton.ca.us>
Jeff Wan, City Councilmember, <jwan@ci.clayton.ca.us>
Holly Tillman, City Councilmember, <htillman@ci.clayton.ca.us>
Jim Diaz, City Councilmember, <jdiaz@ci.clayton.ca.us>

Exhibit 1:
California Government Code

California Government Code §66473.5:

No local agency shall approve a tentative map ... or a parcel map ... unless the legislative body finds that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan...or any specific plan

California Government Code §66474(b):

A legislative body of a city or county shall deny approval of a tentative map, or a parcel map for which a tentative map was not required, if it makes any of the following findings...(b) that the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans

California Government Code §65860:

(a) County or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974. A zoning ordinance shall be consistent with a city or county general plan only if both of the following conditions are met:

(1) The city or county has officially adopted such a plan.

(2) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan.

(b) Any resident or property owner within a city or a county, as the case may be, may bring an action or proceeding in the superior court to enforce compliance with subdivision (a). Any such action or proceeding shall be governed by Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure. No action or proceeding shall be maintained pursuant to this section by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days of the enactment of any new zoning ordinance or the amendment of any existing zoning ordinance.

(c) In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to the plan, or to any element of the plan, the zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended.

(d) Notwithstanding Section 65803, this section shall also apply to a charter city.

Exhibit 2:

Current COA on Oak Creek Canyon Project

Modifications

2. Saltbrush Lane shall be modified as shown in the Marsh Creek Road Specific Plan (MCRSP) right-of-way of 48 feet. The VTM, grading plans, landscape plans, and site/development plans shall be modified to depict grading of the full right-of-way section, including the area adjacent to lot 6.
3. The Developer shall construct a 4-foot sidewalk on the west/north side of the right of-way which shall connect to the 6-foot pathway on the eastern side of the property, 6-foot landscape strip (including curb) and 24-foot roadway (including gutter on the west/north side). Additional width shall be constructed if a berm is required on the east/south side of the right-of-way for drainage purposes.

Street Conditions

1. Prior to the issuance of a grading permit, the project road labeled Saltbrush Lane shall be modified. The right-of-way width for the project road shall be 48 feet. The ultimate street width shall be 32 feet from face-of-curb to face-of-curb. A sidewalk shall be provided on the north side of the project road and shall have a width of 4.5 feet (from face-of-curb). Residential setbacks shall be measured from the edge of the right-of-way.

Proposed Modified COA on Oak Creek Canyon Project (Changes Bold & Strikethrough)

Modifications

2. Saltbrush Lane shall be modified as shown in the Marsh Creek Road Specific Plan (MCRSP) right-of-way of 48 feet, **and 32-foot pavement**. The VTM, grading plans, landscape plans, and site/development plans shall be modified to depict grading of the full right-of-way section, including the area adjacent to lot 6.
3. The Developer shall construct a 4-foot sidewalk on the west/north side of the right of-way which shall connect to the 6-foot pathway on the eastern side of the property, 6-foot landscape strip (including curb) and **24 32-foot** roadway (including gutter on the west/north side). Additional width shall be constructed if a berm is required on the east/south side of the right-of-way for drainage purposes.

Street Conditions

1. Prior to the issuance of a grading permit, the project road labeled Saltbrush Lane shall be modified. The right-of-way width for the project road shall be 48 feet. The **ultimate** street width shall be 32 feet from face-of-curb to face-of-curb. A sidewalk shall be provided on the north side of the project road and shall have a width of 4.5 feet (from face-of-curb). Residential setbacks shall be measured from the edge of the right-of-way.

Exhibit 3:

Select Policies from Marsh Creek Road Specific Plan, June 1995.

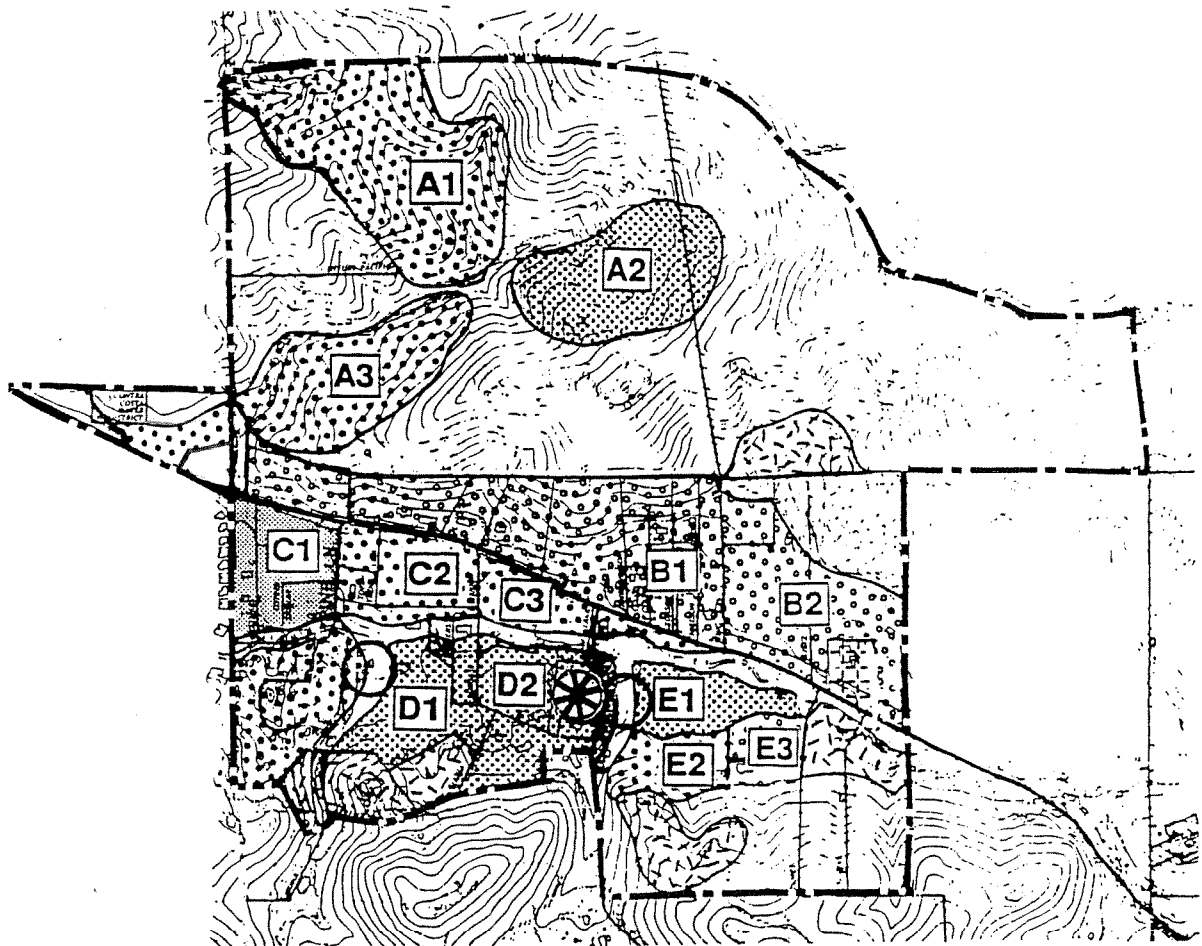
Chapter VIII Circulation Element:

- Policy CI-1: Roadways serving development areas shall generally conform to the pattern shown in Figure 10. Where Figure 10 shows that a roadway is required to serve development on several different parcels, roadway planning and construction for each parcel shall include provisions for access to adjacent parcels.
- Policy CI-2: All roadways developed under the Specific Plan shall be built to follow the standards of one of four types of streets: arterials, collectors, local roadways and minor cul-de-sacs.
- Policy CI-2b: Collector roadways. Four collector roads connecting to Marsh Creek Road will serve the residential developments in the study area. These roads will include the following:
- The access road to the Heartland, Moita and Morgan sites, which is referred to as Oak Creek Canyon Drive in this Plan...
- The collector roadways will have pavement widths of 32 feet within a 48-foot right-of-way. The streets will have two 11-foot travel lanes and one ten-foot parking and bike lane. On one side of the road there will be a 6-foot planter strip, while a 6-foot planter strip and a 4-foot decomposed granite, quarter-by-dust or asphalt sidewalk on the other side of the road will complete the right-of-way.
- Policy CI-3: Intersections built to accommodate Specific Plan buildout should be designed in accordance with the diagrams of intersections alignments shown in Figure 13.
- Policy-C-3a: Diablo Parkway/ Marsh Creek Road. This will become a four-legged intersection providing access to Development Area A, and will include an eastbound left-turn pocket for cars entering the Heartland site. This intersection shall be signalized (when warranted) for traffic safety and to meter traffic entering the urbanized portion of Clayton.
- Policy CI-6: As existing parcels develop, they should rely on access from streets that follow the general layout shown in Figure 10.
- Policy CI-7: Internal circulation within subdivisions shall be designed at the discretion of the property owner, subject to the approval by the City, provided that it allows for through access to adjacent parcels as indicated on Figure 10.











Chapter X Implementation Element:

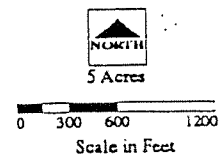
- Policy IM-1: No subdivision, use permit, design review application, or other entitlement for use, and no public improvement, shall be authorized in the study area until a finding has been made that the proposed project is consistent with this Specific Plan.
- Policy IM-2: City staff shall review all construction projects requiring a building permit to ensure that they comply with the Design Guidelines and all other plan provisions.
- Policy IM-3: The City Planning Commission shall review all subdivisions and development projects of five units or more at a public hearing.
- Policy IM-4: The City shall, by reference, incorporate into its zoning code the relevant land use, resource conservation and design specifications found in Chapter V, VI and VII, respectively.
- Policy IM-6: Development should generally begin in the western part of the study area, to be followed by development farther east. Development Areas A and C will be the first to develop, followed by area D. Development Areas B and E will probably be the last to develop.
- Policy IM-7: Within individual development area, parcels that are closest to collector streets, including Pine Lane and Russellman Road, should be developed first. This may mean that some parcels that are adjacent to Marsh Creek Road, but which are not planned to have direct access from Marsh Creek Road after development, will have to wait to develop until adjacent parcels have developed.
- Policy IM-13: Improvements on individual properties required under this Specific Plan shall be financed by individual property owners or developers.
- Policy IM-14: Improvements that will require coordinated implementation on or along several parcels, such as widening of Marsh Creek Road and installation of new water mains, traffic signals, water tanks, trunk sewers, storm drainage facilities and downstream sewer improvements shall be overseen by the City and should be financed with a mechanism that attempts to ensure ultimate fair-share repayment of all costs to those who pay them by the landowners or developers who will benefit from them. Examples of appropriate funding mechanisms are included in Section D.3 of this chapter.

Exhibit 4:
Figures from MCRSP



Legend

- Specific Plan Boundary
-  Ranchette Residential
1 unit/5 acres
-  Rural Residential
0.21 - 1.1 units/acre
-  Low Density Residential
1.11 - 1.5 units/acre
-  Medium Density Residential
1.51 - 2.2 units/acre
-  Suburban Density Residential
2.21 - 3.0 units/acre
-  Convenience Commercial
-  Open Space
-  Conceptual Location of
Potential Park Site
-  Historic Building and
Potential Park Sites
-  Development Area Designation
B1

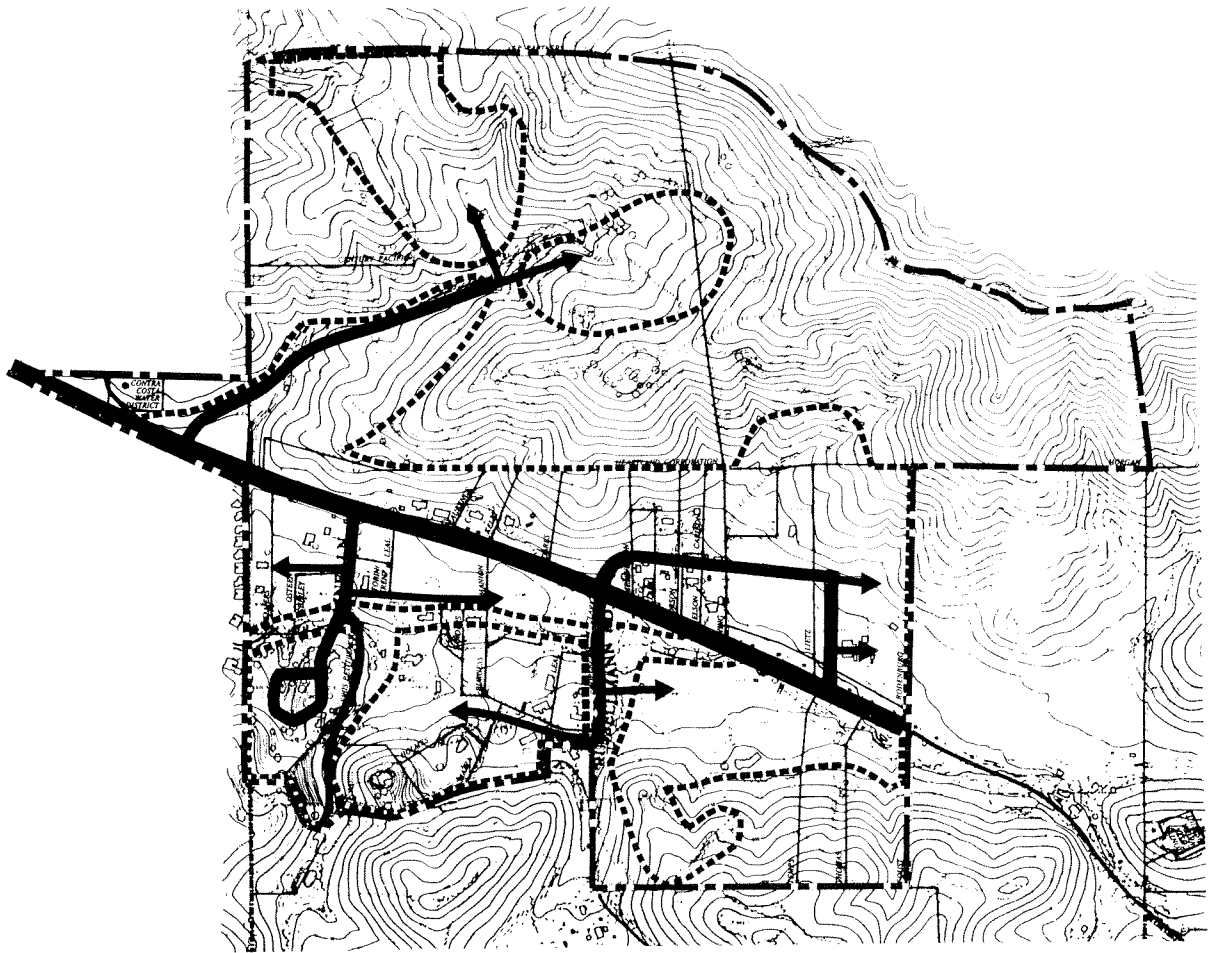


MARSH CREEK ROAD SPECIFIC PLAN





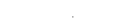
■ ■ ■
FIGURE 6

Land Use Designations

Amended by Resolution 14-2005, dated 4/5/05



Legend

-  Arterial Street (Marsh Creek Road)
82' ROW, 34' pavement
-  Collector Street
48' ROW, 32' pavement
-  Local Street
44' ROW, 28' pavement
-  Development Area Boundaries
-  Specific Plan Boundary



5 Acres

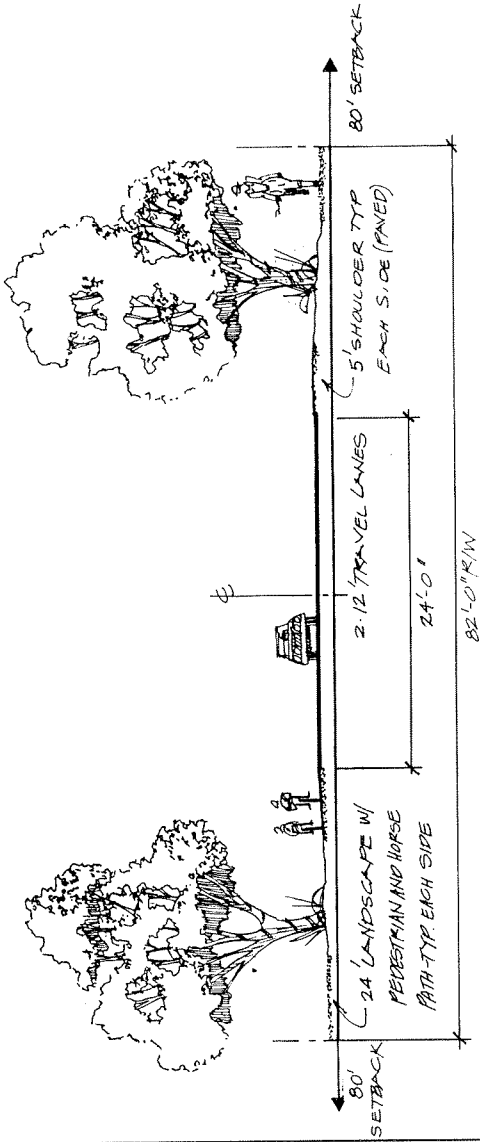
0 300 600 1200
Scale in Feet

MARSH CREEK ROAD SPECIFIC PLAN

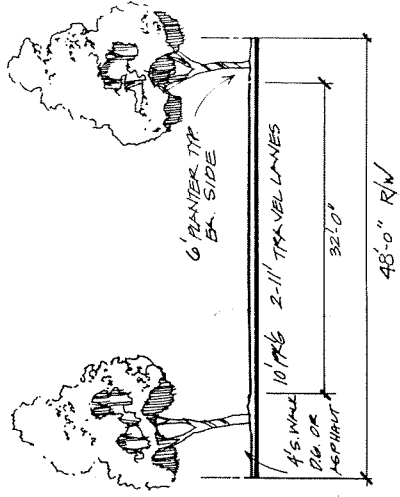


FIGURE 10

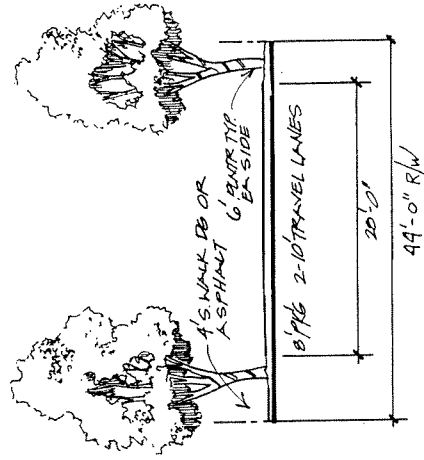
Circulation Plan



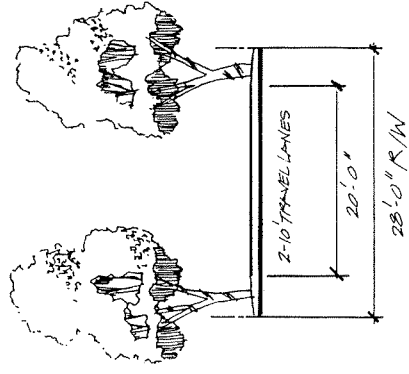
Arterial Road - (Marsh Creek Road)



Collector Road



Local Road



Minor Cul-de-Sac



MARSH CREEK ROAD SPECIFIC PLAN

CITY OF CLAYTON CALIFORNIA
BRADY AND ASSOCIATES, INC. PLANNING AND LANDSCAPE ARCHITECTS

FIGURE 11

Street Sections

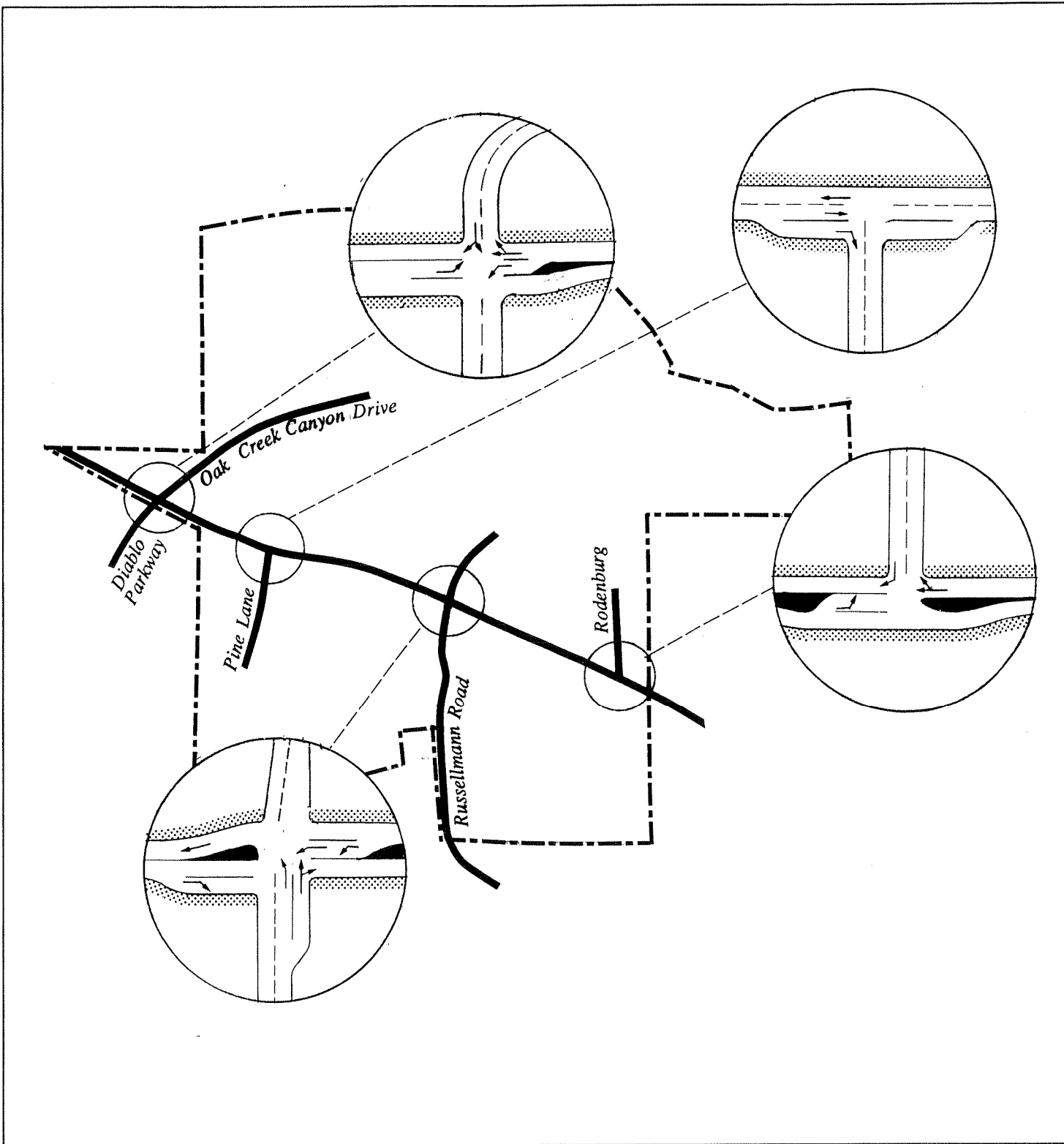


FIGURE 13

Intersection Configurations

Intersection configurations are illustrative only. Actual design will conform to accepted engineering standards that account for traffic speed and sight distance.



MARSH
CREEK
ROAD
SPECIFIC
PLAN

CLAYTON
CALIFORNIA

BRADY AND ASSOCIATES, INC.
PLANNERS AND LANDSCAPE ARCHITECTS

Jim & Julie Moita -----

8117 Marsh Creek Rd
Clayton, CA 94517

June 29, 2021

Sent Via Email

Clayton City Hall
Attn: Carl Wolfe, Mayor
6000 Heritage Trail
Clayton, CA 94517

RE: Seeno – Oak Creek Canyon Subdivision

Dear Mayor Wolfe,

Thank you for your work to continue to make Clayton a great city to live in and raise a family.

The Marsh Creek Specific Plan (MCRSP) was approved 26-years ago in 1995. Hopefully, the City of Clayton will continue to move forward and our 164-acres of land along with the Morgan's that was planned for 108 planned homes will eventually be annexed and built out. This will allow the City of Clayton to help meet its 570 units outlined in the Regional Housing Needs Allocation numbers written by the Association of Bay Area Governments. Obviously, we have a shortage of housing and the MCRSP allows for a non-downtown project to be built out and keep the downtown small town character of Clayton.

In relation to the Oak Creek Canyon Subdivision Notice and Application dated August 19, 2020, I have attached a copy of a letter from Rick Agrisani (32-year City Engineer for the City of Clayton) dated 8-28-20. And a letter from Randy Hatch (10-year Planning Director for the City of Clayton). If Rick's letter is correct, it is extremely disturbing. In a one fell swoop for a small 6-lot subdivision Seeno will use the City of Clayton as a demolition tool to complete the following:

1. Block the current access to my home that I have used for 30-years.
2. Block the current access that the Morgan Family has used for 150-years.
3. Gut the MCRSP required infrastructure.
4. Narrow the 48-foot Collector Street so none of the other 108 planned homes per the MCRSP can ever be built.
5. Potentially force my family and the Morgan's into litigation with Seeno & possibly the City of Clayton to protect our access rights.
6. Potentially force my family to pay for the cost of relocation of an active Phillips 66 Petroleum gas pipeline at an approximate cost of \$750,000.

Since 2000 when I acquired the Heartland land, I have tried in good faith to purchase an easement from Seeno over the 48-foot Collector Street as outlined in the approved Marsh Creek

Road Specific Plan. (MCRSP). Each time I have met with resistance from a different Seeno representative and no resolution for an easement. I have been told or received emails of the following:

1. Seeno does not want to sell an easement at this time (for nearly 20-years).
2. Seeno wants to buy a portion of your land.
3. Seeno wants to buy your home and all land – how much do you want to sell for?

None of these options are good. On the bright side over the last month or so I have met with Albert Seeno III and we are close to signing an agreement drafted by Albert Seeno III. But we are still apart.

The City of Clayton has always strived to do the right thing. Instead of being forced into litigation with any or all parties, we request a one-month postponement to meet with Seeno to cobble together an access agreement.

Our two son's Vince & Joe Moita were raised at our home near Clayton and attended De La Salle, Brown & Columbia University. Both then attended Law School, and are now licensed California Attorneys. Clayton has been a great place to raise our family.

Thank you for your consideration.

Sincerely,



Jim J. Moita



Design Resources, Inc.

Planning ■ Engineering ■ Surveying

August 28, 2020

Jim Moita
8117 Marsh Creek Road
Clayton, CA 94517

RE: Seeno - Oak Creek Canyon Submittal

Dear Jim,

Thank you for choosing P/A Design Resources to help you understand the intricacy of the revised Oak Creek Canyon Subdivision submitted by Seeno to the City of Clayton. Their project lies to the west of your 164 acres. Per your request, I have reviewed thoroughly Seeno's new plans for Oak Creek Canyon.

As we discussed, I previously worked as the City Engineer for the City of Clayton for almost 32 years between 1986 and 2017. And, as a result, I am very familiar with this area and worked on the Marsh Creek Road Specific Plan (MCRSP) process from 1990 to June 1995 when it was approved. The MCRSP was the result of a comprehensive and detailed planning process and was intended to guide home development in the future as California faces a huge housing shortage and related housing crises.

As a result of my review, I have the following recommendations/concerns:

- 1) I recommend that you immediately contact an attorney to explore filing for an easement or ownership of the portion of Seeno's property being used for your driveway, possibly through the doctrine of adverse possession. If Seeno constructs the roadway as shown, you will have to move your existing driveway back onto your property which will likely require the lowering of the existing oil pipeline at a cost of \$750,000 or more.
- 2) Seeno's map is showing a 21' wide access road from Marsh Creek Road to approximately 20' away from your common property line. Additionally, at the southeast corner of Lot 6, Seeno is showing a "Future Easement for Future Urban Entry". Obviously, both of these items do not meet the standards established in the Marsh Creek Road Specific Plan.
- 3) I would recommend that you send a letter to the City stating that:
 - a. The City should respect, follow and enforce the Marsh Creek Specific Plan;
 - b. Seeno should be required to grant you an easement for access and utilities over the proposed roadway all the way from Marsh Creek Road to the property line in accordance with the Marsh Creek Road Specific Plan;

- c. Seeno should be required to construct his improvements (including the roadway, sewers, storm drains and dry utilities) all the way to your common property line –
 - i. You may offer to cooperate with Seeno for any encroachments he needs to construct the improvements including replacing his proposed headwall with a graded slope on your property;

That is it for now. If I think of anything else, I will let you know.

Thank you for the opportunity.

A handwritten signature in black ink, appearing to read "R. Angrisani", followed by a horizontal line extending to the right.

Rick Angrisani P.E.,
PA Design Resources, Inc



RANDY HATCH
Planning
Consultation

August 30, 2020

Julie Pierce, Mayor
City of Clayton
6000 Heritage Trail
Clayton, Ca. 94517

Re: IS/MND ENV-02-16, GPA-02-18, et al

Dear Mayor Pierce,

I want to thank you for your public service for over 30 years on behalf of the citizens of the City of Clayton and for advocating for good and thoughtful urban planning. As you recall, I worked as the Planning Director for the City of Clayton from 1990 to 2000. For over one half of that time, we worked together on the on future residential development southeast of Clayton along Marsh Creek Road.

As background, Contra Costa County had requested that the City study the region and develop planning documents laying out the City's vision. So, working collaboratively, I was part of a comprehensive effort with you and the Planning Commission, the City Council, land owners, environmental consultants, engineers, and land planners and countless citizens of Clayton in over 100 public meetings during a more than 4-year time span. The effort culminated in a thoughtful study and plan that was approved in June 1995 known as the Marsh Creek Road Specific Plan (MCRSP). Unfortunately, Contra Costa County did not allow the plan that they requested to be implemented as the Urban Limit Line has delayed the home development that we worked so hard to plan for.

As a lifelong professional planner living in Northern California it is my opinion and that of many others that many more homes need to be planned and built in Northern California to help alleviate the housing crises that now the whole State faces.

Julie Pierce, Mayor
Page Two

I have become aware of and reviewed the proposed application that Oakcreek Canyon has submitted to the City. In the "Notice Of Intent To Consider Adoption Of A Mitigated Negative Declaration" that has been released for this Project it says under Findings that "All other impacts in the categories of ...land use and planning...were found to be less than significant". As I detail below that is not an accurate statement. I am requesting that the City require the developer to comply with the standards outlined in the MCRSP. Otherwise, the opportunity to implement the Specific Plan with potentially 108 housing units planned to the east will be lost forever and all the precious time we spent together planning for the area will be blocked from ever happening.

Specifically, in order for the plan to comply our longstanding MCRSP I am suggesting the following modifications / mitigations:

1. Road width & elevation to insure connection to former Heartland and Moita properties who both helped pay for and participated in the Specific Plan project;
2. That the sizing and placement of utilities be consistent with the MCRSP;
3. That the drainage basin be sized for future development per the MCRSP;
4. That the road alignments and right-of-way conform to the MCRSP;
5. That the density and number of units also follow the Specific Plan.

Thank you for your consideration of my comments. Though not a resident of Clayton, I care deeply about the community and view my past service there fondly.

Feel free to contact me as needed,

Respectfully,



Randy Hatch

Phone: (209) 986-3977

Email: randyhatch@sbcglobal.net

CC: Christina Gregory; Jim Moita; RickAngrisani

Dear Mayor Pierce,

Thank you for your years of public service for the City of Clayton. Your history in this area provides you with the insight to understand the degree to which my family has been a part of this community for the last 150 years. You have left a history of integrity, so you understand the trust my family has placed on the integrity of the City of Clayton and its planning process.

Our neighbor, Jim Moita, provided us with a copy of the August 19, 2020 Notice of Interest to Consider Adoption of a Mitigated Negative Declaration and Notice of Public Hearing for the proposed application for the Oak Creek Canyon Residential Subdivision owned by Seeno. Jim also provided us with a copy of a letter written by Rick Agrisani of P/A Design Resources (Past City of Clayton City Engineer for 32) years dated Aug 28th, 2020 (copy attached). Seeno's application violates the promises your city made to my family in your planning process.

My Father, Bill Morgan, attended most of the 4-years of community meetings that went into the Marsh Creek Road Specific Plan before it was approved in 1995. As a federally licensed civil engineer and longtime Board Member for the East Contra Costa Fire Protection District, my father contributed to the plan by insisting on the need for safer and wider roads. A need that is now being felt by several neighboring cities who allowed developments with streets too narrow for a fire department response, and are now subject to numerous lawsuits because of the liability of their planning process.

The City of Clayton, given Seeno's plan is stepping into the same liability risk. The planned Collector Street shown on page 94 of the approved 1995 MCRSP is 48' wide with a 32' wide paved section. On page 43 of the approved MCSRSP there were 5 homes allocated to the Morgan property. The current Seeno application for Oak Creek Canyon hastily narrows Collector Street. If the City of Clayton honors its commitment to let us build those houses, they would not have adequate access for fire service. If the City dishonors its promises and sacrifices our development opportunities so a morally questionable organization like Seeno can build, I think you would understand the moral and legal implications.

We believe that the MCRSP that is now 25 years old is the product of an environmentally comprehensive plan that will provide limited housing for workers who will commute to San Francisco as you and your husband commuted for many years. The Bay Area, as you know is seriously in need of more housing, and our current health crisis illustrates the hazards of compact housing situations. The link between forcing workers to commute longer hours by denying housing, and increased pollution from those commutes is clear. Clayton has no choice but to grow. How it grows is up to you.

The Seeno Organization, best known for cheap housing, and many lawsuits; is trying to control the growth of neighboring properties by restricting access. It is not known for its honesty or its commitment to any community. My family has treated this community honorably and has contributed much. Therefore, the question is whether the City is going to honor its agreement with us.

This letter is written to formally request that the City of Clayton deny the proposed project as submitted and force Mr. Seeno to comply with all terms and conditions of the approved 1995 MCRSP. Including but not limited to building the 48' road with a 32' wide paved section.

This request is made for the following reasons.

1. The MCRSP took four years to create and 108 homes were carefully and environmentally planned for development to the east of the Seeno five lot subdivision. The MCRSP predates Seeno's invasion of our community.
2. Mr. Seeno wants his small subdivision approved so he can block our planned MCRSP access and then grade off our current road access. It appears obvious the Seeno objective is to devalue our properties, buy them cheaply then regrade the road and develop our properties.
3. If Clayton approves this departure from a plan that was approved 25-years ago and Mr. Agrisini's letter is correct, then we will be forced into litigation with Seeno and probably need to enjoin the City of Clayton to protect our access rights that we have enjoyed for more than 150 years. That process would put Clayton's integrity and honesty under a very harsh public spotlight.
4. Mr. Moita's family will also be forced into litigation to protect their access to March Creek Road and the MCRSP.

Instead of being forced into litigation, we are requesting that you direct Seeno to meet with the neighboring properties and your City Attorney to cobble out an agreement that upholds the approved MCRSP and allow Seeno to move forward with his project now. Litigation will only hurt and cost everyone, and the one party with the funds who does not seem to care is Seeno.

The City of Clayton has always strived to do the right thing. We are respectfully requesting that Clayton help us in dealing with a developer who is only interested in his own short term self-interest and litigation where he can financially squeeze out others from the development process. Do the posters declaring the virtues of Clayton mean anything?

I want to again thank you for your decades of service to the greater Clayton Community.

Sincerely,


Cheryl Morgan

MADISON D. DIZINNO
ATTORNEY
DIRECT DIAL (415) 995-6492
DIRECT FAX (415) 541-9366
E-MAIL mdizinno@hansonbridgett.com



June 29, 2021

VIA ELECTRONIC MAIL ONLY

Clayton City Council
Clayton City Hall
6000 Heritage Trail
Clayton, CA 94517

Re: Responses to Public Comments, Oak Creek Canyon Development (Agenda Item 8(b))

Dear City Council Members:

We submit this letter on behalf of our client, West Coast Home Builders, Inc. ("WCHB"), in response to a certain late public comment letters submitted to the City regarding the Oak Creek Canyon Development (the "Project"). We apologize for the late submission, but we only received these letters within the past 24 hours.

In short, the comment letters from Save Mount Diablo and Vincent Moita do not impact the Oak Creek Canyon Project, nor do they raise issues that have not already been addressed through the Project's environmental review process. As such, these public comments do not warrant further assessment or delay, and we respectfully request that the City Council make a decision to approve the Project this evening.

Save Mount Diablo's June 28, 2021 Letter

Save Mount Diablo's comment letter raised two discrete concerns addressed below.

- **Grading:** Save Mount Diablo raises concerns that grading would have visual impacts to the Project site's hillsides. The potential impact of hillside grading has been addressed in detail at pages 4 and 19 to 24 of the IS-MND, and specific mitigation measures have been prescribed to avoid impact. Moreover, the Project is consistent with the Marsh Creek Road Specific Plan. (See MCRSP Policy LU-5b, DD-4, DD-6; and Community Design Objectives 6)
- **Wildfire:** Save Mount Diablo raises concerns about the Project and associated wildfire risks. Wildfire risks and the fact that the Project is located in a Wildfire Urban Interface zone (WUI) are thoroughly vetted in the IS-MND. (See IS-IMD pp 68 and 104-105.) In fact, because the Project site is located within a WUI, all residences would be equipped with automatic fire sprinklers and fire alarm systems to reduce the demand for fire protections services from the project site. (IS-MND at 104.) The water supply system for fire protection and "defensible space" around on-site structures make the Project site safer than surrounding undeveloped land. (See *Clews Land & Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161, 193 [court concluded that project infrastructure

reduced fire hazards relative to existing baseline conditions: "by incorporating a new water line and fire hydrant, the project appears to increase fire safety in the area"]; *accord Maacama Watershed Alliance, et al. v. County of Sonoma, et al.* (2019) 40 Cal.App. 5th 1007, review denied (Jan. 2, 2020).)

Additionally, Save Mount Diablo's assertion that the Project is located in a "High Fire Hazard Severity Zone and very close to Very High Fire Hazard Severity Zones." First, this assertion is incorrect; "High Fire Hazard Severity Zones" are not identified within local responsibility areas such as the City of Clayton (see Gov. Code § 51178), and the map shown in the commenter's letter does not support the claim asserted. Regardless of labels, the Project site's proximity to pertinent fire severity zones and its location in a WUI is repeatedly identified in the IS-MND, and the subsequent impacts discussion fully meets all CEQA requirements. There is no evidence to the contrary.

Moita June 25, 2021 Correspondence

A neighboring property owner, the Moita family (represented by Mr. Vincent Moita), has raised several concerns with the Project that have already been addressed in prior communications with the City and at the Planning Commission hearing. Mr. Moita is now seeking that the upcoming hearing on the Project be continued to August 17, 2021. This request would result in an unnecessary delay to the applicant and Council, and would also potentially result in the violation of a tolling agreement to which the City and WCHB are parties and appeal procedures in the Clayton Municipal Code. It would also indulge the neighbor in an improper attempt to build a roadway that the Moitas themselves are obligated to build.

Specifically, Mr. Moita is attempting to gain a financial windfall for his family by lobbying the City to condition Project approval upon financing and constructing a much wider Saltbrush Lane that would serve Mr. Moita's undeveloped property on the assumption that the Moita family might, one day, apply for and secure requisite approvals to construct a large residential development on its property. We addressed this issue, and the legal authority explaining why his proposition is unlawful under *Nollan/Dolan* proportionality standards, at length in a letter submitted to the City on March 3, 301 attached hereto as **Exhibit A**. We sent a letter to the Planning Commission containing similar information on February 22, 2021.

Though Mr. Moita's concerns are baseless, we briefly address a few of these claims below.

- **Compliance with Specific Plan, Circulation Element Policies:** Mr. Moita alleges that WCHB failed to comply with Circulation Element policies 1, 2, 2b, 3, 3a, 6, and 7 laid out in the Marsh Creek Road Specific Plan. Please see the consistency matrix WCHB provided to the City in March 2021 reattached hereto as **Exhibit B** for an analysis of the Project's consistency with CI-1, CI-2b, CI-3, CI-3a, and CI-7.

Policy CI-2, which merely indicates that roads should be built to arterial, collector, local roadway, and minor cul-de-sac standards, is similarly not an issue here. Mr. Moita asserts that the applicant is required to build a collector roadway. This is not so. Development of Saltbrush Lane is an internal dead-end road for the Project and, with two 10-foot-wide lanes of travel, a sidewalk, and landscaping, is appropriately sized under the Specific Plan's standard. Importantly, this right-sized road does not inhibit Mr. Moita's future residential development, and the applicant has already agreed to grant the City a dedication of the full 48-foot right-of-way to construct a collector street if and when Mr. Moita seeks approval for residential development on his property. Plainly, Mr. Moita

is asking the applicant—and the City—to do his work for him. We note, too, that the Moita development is entirely speculative, as the property sits outside the County's Urban Limit Line and, not in decades, has the family submitted any applications for development entitlements.

- **Compliance with Specific Plan, Implementation Policies:** Mr. Moita indicates that the Project does not comply with Implementation Policies 1, 2, 3, 4, 13, and 14 as laid out in the Marsh Creek Road Specific Plan. This is not so.
 - **Policy 1:** Policy 1 simply requires that developments are consistent with the Specific Plan. As discussed at length in the consistency matrix attached at Exhibit B, the Project is consistent.
 - **Policy 2:** Policy 2 requires compliance with Design guidelines, which have been followed since the Project's inception.
 - **Policy 3:** WCHB has complied with Policy 3 which requires the Planning Commission review development projects of a certain size at a public hearing.
 - **Policy 4:** Policy 4, which requires the City to incorporate relevant land use, resource conservation, and design specifications into its zoning code, is not within the applicant's control and therefore cannot have been violated by the applicant. That said, the City has incorporated all pertinent land use controls into its regulatory framework, and there is no evidence to the contrary.
 - **Policies 13 and 14:** WCHB has complied with policies 13 and 14, which require that improvements on individual properties be financed by individual property owners or developers and that improvements that affect several parcels be subject to fair-share repayment of all costs respectively. WCHB has agreed to grant a right-of-way on Saltbrush Lane and install the necessary utility infrastructure to serve Mr. Moita provided that Mr. Moita agrees to pay his pro-rata fair share. Documentation of this compliance is more fully set forth in Exhibit A to this letter.
- **Takings and Exactions:** Mr. Moita has taken issue with our assertion that requiring a wider roadway would offend constitutional proportionality requirements. His position is fundamentally incorrect and contrary to established case law. Land use exactions must substantially advance the same governmental interest that would furnish a valid ground for denial of the permit (i.e., there must be a "nexus" between the proposed impact and the condition of approval) and must be "roughly proportional" both in nature and extent to the impact of the proposed development. (*Nollan v. Cal. Coastal Com.* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374.) These principles are codified in California law by requiring local governments to establish a "reasonable relationship" between an exaction and a project's impact. (Gov. Code § 66001(a)-(b); *Boatworks, LLC v. City of Alameda* (2019) 35 Cal.App.5th 290.)

Mr. Moita overstates the increased vehicular and pedestrian traffic that would result from the six-residence development. For instance, he suggests the Project would engender the need for a wider roadway because it would accommodate recreationalists intending

to visit open space. But the project contains no trailhead or staging area, and the Project's 6-foot-wide trail is intended to serve local pedestrians, and the open space on the Project site is entirely private. Mr. Moita's "justification" for a wider roadway is based on misinformation, runs afoul of constitutional requirements regarding exactions, and contradicts basic land use principles.

Please don't hesitate to contact our office with questions or concerns.

Sincerely,



Madison D. DiZinno
Attorney



Christina Berglund
Attorney

cc: Sean Marciniak, Hanson Bridgett
Clients
City Attorney

CHRISTINA L. BERGLUND
SENIOR COUNSEL
DIRECT DIAL (916) 491-3031
DIRECT FAX (916) 442-2348
E-MAIL cberglund@hansonbridgett.com



March 3, 2021

VIA E-MAIL

Malathy Subramanian
City Attorney
City of Clayton
Best Best & Krieger
2001 North Main Street, Suite 390
Walnut Creek, CA 94596
E-Mail: msubramanian@bbkllaw.com

Re: Oak Creek Canyon Project – CEQA Review (ENV-02-16), Vesting Tentative Map (MAP-01-16), General Plan Amendment (GPA-02-18), Specific Plan Amendment (SPA-01-18), Zone Amendment (ZOA-01-18), Development Plan Permit (DP-01-19), and Tree Removal Permit (TRP-31-19)

Dear Ms. Subramanian:

We submit this letter on behalf of our client West Coast Home Builders (“WCHB”) with respect to the proposed Oak Creek Canyon Project, a six-unit subdivision located on the north side of Marsh Creek Road and the intersection of Diablo Parkway in the City of Clayton (“Project”). WCHB is seeking approval of the above-referenced suite of entitlements.

On February 23, 2021, the Planning Commission held a public hearing to consider the Project. A significant portion of the hearing was focused on the width of Saltbrush Lane, the proposed access road for the Project. You may already be aware that the neighboring property owner, Jim Moita, is lobbying the City of Clayton (“City”) to condition approval of the Project on a requirement that WCHB finance and construct Saltbrush Lane as a 32-foot wide roadway within a 48-foot wide right-of-way, which would be the collector street to serve Mr. Moita’s property, on the assumption that he might, one day, apply for and secure all necessary approvals to construct a residential development on his property. Please note this development, which could range from one to 110 units, is not reasonably foreseeable, and the Moita property sits entirely outside the City’s limits and more than 90 percent of the Moita’s holdings sit outside the Urban Limit Line established by Contra Costa County.

As part of the discussion at the public hearing, Commissioner Altwal specifically requested a City Attorney opinion as to whether the City could impose such a disproportionate obligation on WCHB considering the modest size of the Project, *i.e.*, six homes. While WCHB has offered to dedicate the ultimate/build-out right-of-way sought by Mr. Moita, my client’s six-unit Project does not require the construction of the ultimate/build-out collector street. Rather, it requires construction of a 24-foot wide roadway to accommodate two travel lanes and a 2-foot shoulder per City standard (S-1, Residential) and fire code width criteria (20-foot wide minimum). We submit this letter setting forth the legal authority that prohibits any agency from imposing a condition of approval like the one Jim Moita proposes; such a condition is unlawful because it is

well out of proportion to the actual impact of the Project, which would generate a very low average daily traffic (“ADT”) of 57 daily vehicle trips, of which 11 trips would be anticipated to occur during peak hours. (Initial Study/Mitigated Negative Declaration (“MND”), p. 95 [Table 10].)¹ For the sake of comparison, using current trip generation rates in the Institute of Traffic Engineer’s Trip Generation Handbook, a 110-unit single-family residential subdivision would generate an ADT of 1,038 daily vehicle trips — or roughly 95 percent of the total ADT for the Project plus the future Moita development.

We respectfully request that the City Attorney’s Office issue an opinion that a larger road is not, and cannot be, required as a condition of approval. Mr. Moita’s request for a wider roadway would leave the City vulnerable to legal challenge, as it would run afoul of constitutional principles related to land use exactions. We further request that the City Attorney’s Office find the Project, with the narrower roadway as currently proposed, is consistent with the Marsh Creek Road Specific Plan (“MCRSP”).

A. Relevant Factual Background

WCHB’s application for the Project was deemed complete on March 3, 2017. The Project site is subject to the MCRSP adopted by the City in 1995. Mr. Moita’s property, located east of the Project site, is also within the MCRSP area. Notably, however, the Moita property is not within the City limits, and sits mostly beyond Contra Costa County’s Urban Limit Line. This notwithstanding, Mr. Moita wishes to develop as many as 110 residential units on his property at some unknown time in the future. There are no applications on file for such a development, nor any indication that the City will receive a formal proposal in the near future. Further, we are unaware of any engineering or other studies demonstrating the Moita property can accommodate any large-scale residential development.

Saltbrush Lane is identified in the MCRSP as a future collector road to serve residential development to the east, in the event Mr. Moita ever applies for a project and it is approved by the City, subject to the constraints of the Urban Limit Line. (MCRSP, p. 94 [Figure 10].) The standard for a collector road in the MCRSP shows a 4-foot sidewalk, a 6-foot landscape strip, 10-foot parking and bike lane, two 11-foot travel lanes, and 6 feet of landscaping — for a total of 48-foot right-of-way. (Staff Report, p. 9; MCRSP, pp. 95 [Figure 11], 96 [Policy CI-2b].)

In light of this future vision, WCHB has agreed to offer to the City a dedication of the full 48-foot right-of-way. This way Saltbrush Lane can be fully constructed as a collector street when, and if, Mr. Moita ever seeks approval of a residential development project on his property. Until the time there is an actual need for a collector street, whenever that may be, Saltbrush Lane will serve as an internal dead-end road for the Project. Plainly put, the Project neither precludes nor hinders any future development on the Moita property.

Nevertheless, on December 18, 2020, Vincent Moita submitted a letter to the Planning Commission incorrectly asserting that the City must require WCHB to finance and construct Saltbrush Lane to its ultimate/build-out configuration. (Moita Letter, p. 2.) Vincent Moita further threatens that failure to do so “would leave the [C]ity vulnerable to legal challenge.” (Moita

¹ The Project is estimated to generate only five trips during the a.m. peak hour and six trips during the p.m. peak hour.

Letter, p. 3.) In response, WCHB agreed to modify the Project's conditions of approval to provide that the developer would construct Saltbrush Lane as a collector street including utility infrastructure to accommodate the future Moita development if: (1) the Moitas define what those infrastructure needs are; and (2) they pay their pro-rata fair share cost of the construction, in accordance with MCRSP Implementation Objective No. 1, which requires landowners to contribute a pro-rata fair share toward the cost of common study area improvements necessitated by the specific plan. (MCRSP, p. 22.) If the Moitas are serious about constructing their development, payment of such costs at this time are not unreasonable. However, the neighbor will not concede to this request.

What the Moitas seek is an inappropriate windfall. In essence, they would like my client to construct a roadway meant for 110 homes, essentially constructing a mini-highway through a six-home neighborhood, on the off chance they are able to secure, at some unknown time, approval of a major development outside all urban jurisdictional lines. Note that building outside the County's Urban Limit Line could require a vote of the County's constituency. Meanwhile, the family is not willing to commit any resources to this venture.

The upshot of any such result would be an absurdity — a wide avenue that abruptly ends, with no prospect for extension (and also leaves the question as to who would maintain this wide avenue). Not only does such a result offend good planning principles and aesthetic values — it also offends the federal and state constitutions, as well as the Mitigation Fee Act, as discussed below.

B. City staff has expertly crafted a condition of approval ensuring that the Project is consistent with the MCRSP without violating constitutional principles against takings.

The Project as conditioned meets the intent and requirements of the MCRSP — and as currently written the condition of approval related to Saltbrush Lane is within the City's land use authority as limited by federal and state constitutional principles, as well as the Mitigation Fee Act (Gov. Code, § 66000 et seq.).

1. Conditioning Project approval on construction of Salt Brush Lane as a collector street to serve a hypothetical 110-unit residential development is unlawful.

As indicated above, not only does Mr. Moita's proposal constitute poor land use planning, it is unlawful. As you are aware, the law requires that land use exactions must substantially advance the same government interest that would furnish a valid ground for denial of the permit (*i.e.*, there must be a "nexus" between the proposed impact and the condition of approval) and must also be "roughly proportional" both in nature and extent to the impact of the proposed development. (*Nollan v. Cal. Coastal Com.* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374 ("*Dolan*").) The rough proportionality rule applied in *Dolan* considers whether dedications demanded as a condition of development are proportional to the development's anticipated impacts. (*Breneric Associates v. City of Del Mar* (1998) 69 Cal.App.4th 166.) Demands for ad hoc exactions made during the permit review process must also meet these constitutional requirements, even if the permit is denied and the exaction is never imposed. (*Koontz v. St. Johns River Water Management Dist.* (2013) 570 U.S. 595, 606.)

Similarly, the Mitigation Fee Act, which in large part codifies the requirements established by the U.S. Supreme Court in *Nollan* and *Dolan*, requires a local government to establish a “reasonable relationship” between an exaction and a project’s impact. (Gov. Code, § 66001(a)-(b); *Boatworks, LLC v. City of Alameda* (2019) 35 Cal.App.5th 290 [Mitigation Fee Act limits imposition of fees to those that have a reasonable relationship to the burden posed by the development].) In doing so, the Legislature declared its intent to codify holdings of *Bixel Assn. v. City of Los Angeles* (1989) 216 Cal.App.3d 1208; *Rohn v. City of Visalia* (1989) 214 Cal.App.3d 1463, 1475; and *Shapell Industries, Inc. v. Governing Bd.* (1991) 1 Cal.App.4th 218. In *Bixel*, the appellate court considered a challenge to fire hydrant fees imposed as a condition of issuing a building permit, and concluded the fees were invalid because there were no safeguards limiting their use to the burden of new development; in particular, the city planned to attribute the cost of replacing a 97-year-old water main to the applicant’s project, although the water main should have been replaced 47 years previously. (*Bixel, supra*, 216 Cal.App.3d at p. 1220.)

Meanwhile, the court in *Rohn* concluded that a city could not properly condition approval of a development on dedication of 14 percent of its land for realignment of an intersection because the record showed the change in the use of the property would not impose a significant traffic burden, and the dedication was merely a means of implementing long-planned traffic improvements. (*Rohn, supra*, 214 Cal.App.3d at p. 1476.) Finally, in *Shapell*, the court concluded that a school district could not properly impose on new development the full cost of new schools, rather than allocating the amount of increased enrollment attributable to the new development. (*Shapell, supra*, 1 Cal.App.4th at pp. 234-239.)

The California Environmental Quality Act (“CEQA”) (Pub. Resources Code, § 21000 et seq.) further codifies these well-established constitutional principles. For example, CEQA requires mitigation measures to “be ‘roughly proportional’ to the impacts of the project.” (CEQA Guidelines, § 15126.4(a)(4)(B), citing *Dolan, supra*, 512 U.S. 374; see *City of Marina v. Bd. of Trustees v. Calif. State Univ.* (2006) 39 Cal.4th 341, 361-362 [trustees need not pay to mitigate effects caused by other uses of the base].) In *Environmental Protection Information Center v. Cal. Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 510-511, the court explained that to require that mitigation measures be “roughly proportional” to a landowner’s impact on a species means that the landowner is required to mitigate only its own impacts on the species.

The progeny of cases is clear. Local agencies may impose conditions on development so long as the conditions are reasonable, and there exists a sufficient nexus between the conditions imposed and the projected burden of the proposed development. More importantly, the agency imposing the condition bears the burden of demonstrating, by an individualized determination, that the required condition is roughly proportional to the extent of the impact of the proposed development. To the extent the City requires my client to construct the ultimate/build-out of Saltbrush Lane as a collector street, it would be unable to meet that burden.

The Project is a modest six-unit subdivision anticipated to generate 57 daily vehicle trips, of which only 11 would be within the a.m. and p.m. peak hours. (MND, p. 95.) Saltbrush Lane, as the 24-foot wide roadway currently proposed, is adequate to accommodate such trips. As we explained to the Planning Commission both orally and in writing, a roadway designed to serve 116 homes (the Project plus Mr. Moita’s hypothetical 110 homes) is well out of proportion to the actual impacts of the Project. Requiring WCHB to construct a collector roadway at a time when

development on the Moita property is, at best, nothing more than an illusory plan would exceed constitutional limitations.

2. Approval of the Project is consistent with the MCRSP.

While Mr. Moita provides a correct recitation of Government Code section 66473.5, which requires approvals of tentative maps to be consistent with applicable land use plans, he ignores that the consistency doctrine does not require a precise or an exact match between a project and the specific plan. (Moita Letter, p. 1.) Instead, it requires only that a project be “compatible with the objectives, policies, general land uses, and programs specified in’ the applicable plan” — which this Project is. (Gov. Code, § 66473.5)

As a threshold matter, Policy CI-2b is not even applicable to the Project. As development on the Moita property is well beyond what could be considered reasonably foreseeable, Saltbrush Lane will be an internal circulation road — not a collector road. Policy CI-7 provides that internal circulation roads may be designed at the discretion of the property owner, subject to approval by the City, provided that it includes provisions for access to adjacent parcels. (MCRSP, pp. 100, 93 [Policy CI-1 provides that where a roadway is planned to serve development on several different parcels, roadway planning and construction for each parcel shall include provisions for access to adjacent parcels].) By offering to dedicate the full 48-foot right-of-way, the Project includes provisions for access to the Moita property at some time in the future when it is actually needed to serve a residential development. The Project is therefore consistent with Policy CI-7 and related Policy CI-1.

Regardless, even if Policy CI-2b were applicable to the Project, there is no consistency problem. The policy provides that “collector roadways will have pavement widths of 32 feet within a 48 foot right-of-way.” (MCRSP, p. 96.) Policy CI-2b further provides that the access road to serve the residential development on the Moita property will be a collector road. (*Id.*) At this time, there is, however, no ascertainable residential development to be served. Therefore, the question of “when” the road will have to assume these dimensions is subject to the discretion of the City based on principles of sound planning and the limits of the federal and state constitutions. Mr. Moita’s interpretation of Policy CI-2b to require Saltbrush Lane to be constructed as a collector road, at this moment in time, is not only unsupported by the black letter language of the policy — it would result in an unlawful policy, which as a matter of law, is to be avoided. (*City of San Diego v. Rider* (1996) 47 Cal.App.4th 1473, 1490.) All that is required now is that the City approve our client’s Project in a way that does not preclude the width specified under Policy CI-2b. (See MCRSP, pp. 93 [Policy CI-1], 100 [Policy CI-7].) The Project, as proposed, satisfies this requirement.

Unlike strict compliance with constitutional provisions, the City has discretion in the interpretation of its own policies — discretion which is entitled to great deference unless it results in an unreasonable or unlawful interpretation. (See *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 217-220 [courts do not afford deference to a city’s unreasonable or unlawful interpretation of its policies]; *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1563 [city has broad discretion to construe its own policies]; *Sequoiah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 794, 717 [city’s determination that a project is consistent with applicable land use plans is entitled to a strong presumption of regularity]; *Cal. Native Plant Society v. City of Rancho Cordova* (2009)

172 Cal.App.4th 603, 637 [court defers to the agency's factual finding of consistency unless no reasonable person could have reached the same conclusion on the evidence before it].)

Moreover, courts recognize that land use plans must be functional from a practical perspective, and that perfect conformity with each particular policy is neither achievable nor required. A project is consistent with an applicable land use plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment. (See *Corona-Norco Unified School Dist. v. City of Corona* (1993) 13 Cal.App.4th 1577, 1586; *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 817 [to be consistent a project need only be "in agreement or harmony" with the applicable plan]; *San Franciscans Upholding the Downtown Plan v. City of San Francisco* (2002) 102 Cal.App.4th 656, 678 [courts interpret the consistency doctrine as requiring that a "project be 'in agreement with' the terms of the applicable plan, not in rigid conformity with every detail thereof"].) This standard acknowledges that a land use plan's policies reflect competing interests and a local agency must be allowed to weigh and balance those interests in applying its policies. (*Friends of Lagoon Valley, supra*, 154 Cal.App.4th at 816; see, e.g., *Sacramentans for Fair Planning v. City of Sacramento* (2019) 37 Cal.App.5th 698, 707 [upholding city's interpretation of general plan policy to allow approval of project that exceeded maximum building heights and intensities].) Thus, even if the Project could be interpreted to be inconsistent with Policy CI-2b, which it cannot, that alone does not provide a sufficient legal basis for denial.

Here, viewed in light of the correct analytical framework, the Project is consistent with the MCRSP. Nothing about this Project frustrates or is incompatible with the goals and policies of the specific plan. One of the overall goals of the MCRSP is to "[p]rovide a plan framework under which individual landowners can develop their lands independently, but in an orderly manner which is harmonious with a comprehensive land use plan for the area." (MCRSP, p. 18.) Approval of the Project does precisely that; it allows for the residential development envisioned by the MCRSP without precluding future residential development of the Moita property at some unknown time in the future.

More specifically, the Project conforms with the low-density residential land use designation shown in the MCRSP. (MCRSP, pp. 41 [Figure 6], 42 [Policy LU-11 provides that all development to conform with the identified land use designations].) WCHB will provide five acres of open space as well as a six-foot wide pedestrian trail to be constructed as shown in the MCRSP. (See MCRSP, pp. 48 [Policy LU-16, which provides that development should include some form of open space or similar amenity], 52 [Policy RE-5 related to trail network].) The Project will also comply with MCRSP policies encouraging tree preservation. (MND, p. 76.) WCHB has agreed to grade the entire 48-foot right-of-way of Saltbrush Lane and install the necessary utility infrastructure to serve the Moita property provided that Mr. Moita agrees to pay his pro-rata fair share — which is consistent with Policy IM-14 and Policy IM-14. (MCRSP, pp. 121 [Policy IM-13 states that improvements on individual properties shall be financed by individual property owners or developers], 122 [Policy IM-14 provides that improvements that affect several parcels will be subject to fair-share repayment of all costs].)

To interpret Policy CI-2b as Mr. Moita does is impractical — and more importantly unlawful. The MCRSP provides that Saltbrush Lane will be a collector road to serve residential development on the Moita property. There is no reasonably foreseeable residential development contemplated at this time, and we are unaware of any effort by the Moita family to develop the

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City Attorney
March 3, 2021
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property. Any residential development on the Moita property is theoretical and the City lacks the legal authority to compel WCHB to finance and construct a collector roadway for its modest six-unit subdivision.

C. Conclusion

From a practical perspective, constructing Saltbrush Lane as a collector road as part of my client's Project, when development of the Moita property is speculative at best, puts the cart well before the horse. There is no reason to incur the environmental impacts associated with full build-out of Saltbrush Lane given the grave uncertainty the Moitas face in getting the required entitlements. The property is not within the City limits and much of it is beyond Contra Costa County's Urban Limit Line.

Given these facts, City staff has already expertly drafted a solution consistent with the MCRSP that ensures the Moita family is not precluded from developing its property should they ever receive the necessary entitlements. WCHB has agreed to dedicate the 48-foot right-of-way for a collector road, and has further agreed to grade the entire right-of-way and size utilities appropriately to accommodate future residential development provided that the Moita family pay its pro rata fair-share. It is a well-thought out solution that complies with all laws, and to require more creates a constitutional infirmity.

For the reasons set forth herein, we respectfully request that the City find the Project is consistent with the MCRSP, and acknowledge that Mr. Moita's interpretation of Policy CI-2b would result in a violation of basic federal and state constitutional principles. What my client proposes is a roadway that fits the scale of the development proposal before the City; what the neighbor proposes is a mini-highway with an abrupt ending, with no foreseeable extension. What is before the City is an attempt to extract a "freebie" from my client, which is fundamentally unfair and where such unfairness, as explained above, is contrary to legal principles codified by two constitutions and California statutory law.

Very truly yours,



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OAK CREEK CANYON PROJECT CONSISTENCY WITH THE MARSH CREEK ROAD SPECIFIC PLAN		
MCRSP Goals, Objectives, & Policies		Project Consistency
Plan Goals		
Plan Goal 1 – Maintain the rural character of the study area.	Consistent – The Project Site's Single-Family Low-Density designation allows for 6 to 16 residences on the site, and the Project contemplates only 6 residences, the lower end of that scale. (See Planning Commission Staff Report pp. 8-9). The Projects elevations reflect rural architecture by using vertical and horizontal siding, brick, fieldstone, ledgerstone, timber materials, colors, and roofing material that combine to create a country sense. (See Planning Commission Staff Report p. 15).	
Plan Goal 2 – Preserve and enhance the natural amenities and features of the study area, including the hillsides and large expanse of open space.	Consistent – The Project includes 5 acres of private open space. (See Planning Commission Staff Report p. 9). The Project includes the preservation of upslope portions of residential lots as open space, thereby preserving hillsides in the study area. (See Initial Study/Mitigated Negative Declaration p. 25). The Project also includes a mix of single-story and two-story homes, so as to break up the massing of the development and enhance views of the preserved upslope portions of the Project Site. (See Initial Study/Mitigated Negative Declaration p. 24).	
Plan Goal 3 – Encourage only development that respects and is in character with the special features and natural amenities of the study area.		
Plan Goal 6 – Provide for recreational uses and public access to open spaces.	Consistent – The Project will include the dedication of a 10-foot-wide public access easement along the eastern edge of lots 5 and 6. A six-foot-wide pedestrian trail shall be installed in the easement. (See Planning Commission Staff Report p. 8).	
Circulation Element		
Circulation and Public Access Objective 1 – Encourage pedestrian-oriented development in the study area that gives equal priority to circulation on foot, horses, bicycles and in cars. Provide for landscaped roadways, pedestrian paths and bikeways in the study area.	Consistent – The Project includes dedication of a 10-foot-wide public access easement along the eastern edge of lots 5 and 6. A six-foot-wide pedestrian trail shall be installed in the easement (See Planning Commission Staff Report p. 8).	

<p>Policy CI-1 – Roadways serving development areas shall generally conform to the pattern shown in Figure 10. Where Figure 10 shows that a roadway is required to serve development on several different parcels, roadway planning and construction for each parcel shall include provisions for access to adjacent parcels.</p>	<p>Consistent – The Project includes the dedication of a 48-foot-right-of-way for Saltbrush Lane to provide access to the future residential buildout to the east contemplated under the Marsh Creek Road Specific Plan. (See Planning Commission Staff Report p. 9). This dedication will allow for access to any parcels to the east that may be annexed into the City. (See Planning Commission Staff Report p. 10).</p>
<p>Policy CI-2b – Four collector roads connecting to Marsh Creek Road will serve the residential developments in the study area. These roads will include the following:</p> <ul style="list-style-type: none"> • The access road to the Heartland, Moita and Morgan sites, which is referred to as Oak Creek Canyon Drive in this Plan. • Pine Lane from Marsh Creek Road to the Oakwood subdivision. • Russellmann Road from Marsh Creek Road to subdivision streets. • The loop road through the Development Area B, connecting to Marsh Creek Road on the James/Iverson and Rodenburg properties. <p>The collector roadways will have pavement widths of 32 feet within a 48 foot right-of-way. The streets will have two 11-foot travel lanes and one ten foot parking and bike lane. On one side of the road there will be a 6-foot planter strip, while a 6-foot planter strip and a 4-foot decomposed granite, quarter-by-dust or asphalt sidewalk on the other side of the road will complete the right-of-way.</p>	<p>Consistent – No future development on the Moita property (which includes the former Heartland property) has been proposed. Development on the Moita property is not reasonably foreseeable and the property sits entirely outside the City's limits and more than 90 percent of the Moita's holdings are outside the Urban Limit Line established by Contra Costa County. There is no proposed residential development requiring access at this time. Policy CI-2b, which applies to collector roads that "will serve residential developments" in the area is therefore not applicable. As any future development on surrounding properties is well beyond what could be considered reasonably foreseeable, Saltbrush Lane can appropriately serve as an internal circulation road — not a collector road — until the time that further residential development is proposed that necessitate its expansion into a collector road.</p> <p>Accordingly, Saltbrush Lane as proposed does not preclude future development of the road as a collector roadway. The Project includes the dedication of a 48-foot-right-of-way for Saltbrush Lane to provide access to the future residential buildout to the east contemplated under the Marsh Creek Road Specific Plan. (See Planning Commission Staff Report p. 9). This dedication will allow for access to any parcels to the east that may be annexed into the City. (See Planning Commission Staff Report p. 10). Saltbrush Lane can be constructed to its ultimate/build-out condition at such time when it is necessary to serve residential development on the Moita property.</p>

<p>Policy CI-4* – The City shall coordinate preparation of a plan line study for Marsh Creek Road to identify the detailed routing for the road, specifications for its construction and any necessary environmental review, using the general description of the road in Policy CI-2a. No development in the study area will be allowed until this study is completed.</p> <p>Alternatively, individual developers may complete plan line studies for Marsh Creek Road for all segments of Marsh Creek Road west of their site access, and for appropriate transitional zones to the east of their site access.</p>	<p>Consistent – The Project's Initial Study/Mitigated Negative Declaration includes an analysis of the impact on circulation, particularly the impact on Marsh Creek Road and Diablo Parkway, and concluded that the Project's impact would be less-than-significant. (See Initial Study/Mitigated Negative Declaration p. 95).</p> <p>The Project includes improvements to Marsh Creek Road, e.g., landscaping and irrigation in the medians in Marsh Creek Road along the Project's frontage. (See Initial Study/Mitigated Negative Declaration Figure 10). The detailed routing called for in this Policy has been realized insofar as the Project's plans show the alignment of Saltbrush Road and the boundaries of the 48-foot right-of-way.</p>
<p>Policy CI-7 – Internal circulation within subdivisions shall be designed at the discretion of the property owner, subject to approval by the City, provided that it allows for through access to adjacent parcels as indicated on Figure 10.</p>	<p>Consistent – Saltbrush Lane is an internal circulation roadway. As part of the Project Saltbrush Lane will be constructed as a 24-foot roadway to accommodate two travel lanes and a two foot shoulder, a 4 foot sidewalk, and a 6 foot (including curb) landscape strip. (See Planning Commission Staff Report p. 9).</p> <p>The Project includes the dedication of a 48 foot-right-of-way for Saltbrush Lane to provide access to the future residential buildout to the east contemplated under the Marsh Creek Road Specific Plan. (See Planning Commission Staff Report p. 9). This dedication will allow for access to any parcels to the east that may be annexed into the City. (See Planning Commission Staff Report p. 10).</p>
<p>Policy CI-12 – Trails outside of development areas should be constructed where possible in the general alignments shown in Figure 7.</p>	<p>Consistent – The Project will include the dedication of a 10-foot-wide public access easement along the eastern edge of lots 5 and 6. A six-foot-wide pedestrian trail shall be installed in the easement. (See Planning Commission Staff Report p. 8).</p>
<p>Land Use Objective 1 – Provide for a transition between the urbanized portions of Clayton to the west and undeveloped</p>	<p>Consistent – The Project Site's Single-Family Low-Density designation allows for 6 to 16 residences on the site, and the</p>

agricultural lands to the east, with emphasis on low development densities.	Project contemplates only 6 residences, the lower end of that scale. (See Planning Commission Staff Report pp. 8-9).
<u>Land Use Objective 2</u> – Plan for land uses that respond to the natural, visual and slope constraints of the study area.	Consistent – The Project includes 5 acres of private open space. (See Planning Commission Staff Report p. 9). The Project includes the preservation of upslope portions of residential lots as open space, thereby preserving hillslides in the study area. (See Initial Study/Mitigated Negative Declaration p. 25). The Project also includes a mix of single-story and two-story homes, so as to break up the massing of the development and enhance views of the preserved upslope portions of the Project Site. (See Initial Study/Mitigated Negative Declaration p. 24).
<u>Land Use Objective 6</u> – Cluster development as appropriate as a means to preserve open space.	
<u>Land Use Objective 8</u> – Provide for decreased development densities in areas with steep slopes.	Consistent – The Project Site's Single-Family Low-Density designation allows for 6 to 16 residences on the site, and the Project contemplates only 6 residences, the lower end of that scale. (See Planning Commission Staff Report pp. 8-9).
<p><u>Policy LU-5b (in relevant part)</u> – In order for the City to approve development with building footprints on slopes between 26 and 40 percent, the City must make the following findings regarding such development.</p> <ul style="list-style-type: none"> • The development is in substantial conformity with this Specific Plan. • The development substantially follows all Design and Development Standards for grading in Policy DD-4 of this Specific Plan, including those which are advisory and use the word "should". • The development is not visible when viewed from Marsh Creek Road or developed portions of Clayton outside the study area. • The development does not intrude on the visual integrity of Mount Diablo. 	<p>Consistent – The Project is in substantial conformity with the MCRSP. It is consistent with the type, location, and intensity of the proposed residential development that has been anticipated in the MCRSP and with other provisions of the MCRSP as set forth herein. Site grading shall generally be limited to areas within the building footprint, under access roads and driveways, and where necessary to create a modest yard or correct unusual site conditions such as landslides. (See Planning Commission Staff Report p. 11).</p> <p>The Project Site includes a very small area on a slope greater than 26 percent, including a small portion of the house footprint at both Lot 4 and Lot 5. Nevertheless, when taking into account the flatter areas upslope and downslope of this small area, the overall slope is under 26 percent.</p> <p>Policy LU-5b is not meant to serve as a bar on development on slopes in excess of 26 percent, and development on such slopes is clearly contemplated. The MCRSP specifically recognizes that:</p>

<ul style="list-style-type: none"> • The development does not displace any sensitive plant or animal species, riparian corridors or wetlands. <p>It is recognized that these requirements are more restrictive than those for development in flatter areas. This is because development in steep areas requires more sensitive planning than that in flat areas.</p>	<p>“[g]iven the fact that there are many areas with slopes in excess of 26 percent in the study area, development on slopes up to 40 percent may be appropriate in some places after site-specific review by the City.” (See MCRSP p. 39).</p> <p>Clayton Municipal Code Chapter 17.22 requires that residential density not include sensitive land areas, including steep slopes, for the purposes of calculating permitted density. Per Chapter 17.22, the Project Site’s Single-Family Low-Density designation allows for 6 to 16 residences on the site. The Project contemplates only 6 residences, the lower end of that scale. (See Planning Commission Staff Report pp. 8-9). Additionally, development will be clustered in the flatter land area. (See Planning Commission Staff Report p.13; see also Initial Study/Mitigated Negative Declaration Figure 7).</p> <p>The Project incorporates numerous other features to lessen any visual impacts from Marsh Creek Road or other developed portions of Clayton.</p> <p>In addition to the low density and topographical clustering, all developed residential structures will be set back 80 feet from the Marsh Creek Road right-of-way. (See Initial Study/Mitigated Negative Declaration p. 25). Landscaping will be installed along the Project Site’s Marsh Creek Road frontage, and along each residential lot, including Lot 4 and 5, to screen all developed residential structures from view. (See Initial Study/Mitigated Negative Declaration Figure 10, p. 25).</p> <p>The Project includes the preservation of upslope portions of residential lots. Upslope portions of lots will be preserved as private open space, thereby preserving view of the hills and visual integrity of Mt. Diablo from Marsh Creek Road. (See Initial Study/Mitigated Negative Declaration p. 25). The Project also includes a mix of single-story and two-story homes, breaking up the massing of the development and enhancing views of the</p>
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	<p>preserved upslope portions of the Project Site. (See Initial Study/Mitigated Negative Declaration p. 24).</p> <p>All development on the Project Site is subject to the City's Development Plan Review Permit consistent with Clayton Municipal Code Chapter 17.28.050, which would include review of the exterior appearance of all proposed facilities and structures to ensure compliance with the City's General Plan and the MCRSP.</p>
<p>Policy LU-6 – The natural sense of enclosure in the study area shall be preserved by locating development so as not to be silhouetted against the sky along ridgelines.</p>	<p>Consistent – The Project includes the preservation of upslope portions of residential lots as open space, thereby preserving hillsides in the study area. (See Initial Study/Mitigated Negative Declaration p. 25).</p>
<p>Policy LU-7 – The visual integrity of the entire study area shall be preserved for viewers within the study area, in developed portions of Clayton outside the study area, and for travelers along Marsh Creek Road by carefully siting and screening any development.</p>	<p>Consistent – All developed residential structures will be set back 80 feet from the Marsh Creek Road right-of-way. (See Initial Study/Mitigated Negative Declaration p. 25). The Project incorporates landscaping along the Project Site's Marsh Creek Road frontage, and along each residential lot, to screen all developed residential structures from view. (See Initial Study/Mitigated Negative Declaration Figure 10, p. 25).</p> <p>The Project includes the preservation of upslope portions of residential lots. Upslope portions of lots will be preserved as private open space, thereby preserving view of the hills and visual integrity of Mt. Diablo from Marsh Creek Road. (See Initial Study/Mitigated Negative Declaration p. 25). The Project also includes a mix of single-story and two-story homes, breaking up the massing of the development and enhancing views of the preserved upslope portions of the Project Site. (See Initial Study/Mitigated Negative Declaration p. 24).</p>
<p>Policy LU-8 – Development should be clustered within designated development areas where appropriate.</p>	<p>Consistent – The Project conforms to the topography of the site by clustering the development in the flatter land area. (See Planning Commission Staff Report p. 13). Project lot sizes</p>

<u>Policy LU-9</u> – Homes, roadways and other development in the study area shall generally be designed to conform with the existing topography.	conform with the Low Density minimum lot size of 15,000 square feet. (See Planning Commission Staff Report p. 14).
<u>Policy LU-16</u> – All developments in the Specific Plan area should include some form of local park, pocket park, greenbelt area, open space, common equestrian facility, or similar amenity.	Consistent – The Project includes 5 acres of private open space. (See Planning Commission Staff Report p. 9). The Project will include the dedication of a 10-foot-wide public access easement along the eastern edge of lots 5 and 6. A six-foot-wide pedestrian trail shall be installed in the easement. (See Planning Commission Staff Report p. 8).
<u>Design and Development Standards</u>	
<u>Community Design Objective 4*</u> – Maintain landscape and natural vegetation as a means to provide greenery, open space, development buffer and rural atmosphere.	<p>Consistent – The Project includes 5 acres of private open space. (See Planning Commission Staff Report p. 9). The Project includes the preservation of upslope portions of residential lots as open space, thereby preserving hillsides in the study area. (See Initial Study/Mitigated Negative Declaration p. 25). The Project also includes a mix of single-story and two-story homes, so as to break up the massing of the development and enhance views of the preserved upslope portions of the Project Site. (See Initial Study/Mitigated Negative Declaration p. 24).</p> <p>At the time the full build-out of Saltbrush Lane becomes necessary, existing landscape would be removed and the area would be regraded with new landscaping installed to maintain a buffer between the roadway and homes.</p>
<u>Community Design Objective 5</u> – Protect visually significant features in the study area, including rock outcroppings, landmark trees, riparian corridors, and historic homes and structures.	Consistent – The Project includes 5 acres of private open space. (See Planning Commission Staff Report p. 9). The Project includes the preservation of upslope portions of residential lots as open space, thereby preserving hillsides in the study area. (See Initial Study/Mitigated Negative Declaration p. 25). The Project also includes a mix of single-story and two-story homes, so as to break up the massing of the development and enhance views of the preserved upslope portions of the Project Site. (See Initial Study/Mitigated Negative Declaration p. 24).

<p><u>Community Design Objective 6</u> – Design grading for development so as to preserve the overall character of the hillsides and ridgelines of the study area.</p>	<p>Consistent – Site grading shall generally be limited to areas within the building footprint, under access roads and driveways, and where necessary to create modest yard or correct unusual site conditions such as landslides. (See Planning Commission Staff Report p. 11).</p>
<p><u>Community Design Objective 7d</u> – Promote alternative measures for needed sound attenuation in order to prevent unsightly or endless walls.</p>	<p>Consistent – The sound fences on all Lots 1, 2, and 6 shall be “split view fences” with a solid plywood core. The fences will not be concrete or masonry. (See Conditions of Approval, Fencing Conditions 1a – 1c).</p>
<p><u>Policy DD-2</u> – All buildings in the Specific Plan area shall conform to the building setbacks shown under Policy DD-2 in the Design and Development Standards chapter.</p>	<p>Consistent – As part of the Project each house on any parcel bordering the Marsh Creek Road is setback 80 feet from the Marsh Creek Road right of way. Lots will include at least 20 foot front set back, a 10 foot minimum interior side setback, an 20 foot exterior side setback, and a 25 foot rear setback. (See Planning Commission Staff Report p. 14). The Lot 3-4 aggregate side setback it 23 feet, the Lot 4-5 aggregate side setback is 20 feet, and the Lot 1 setback is 19.5 feet. These are below the MCRSP’s aggregate side setback minimum of 25 feet, but the Project’s clustering and steep topography meets the criteria for a reduction in required setbacks where necessary. (See Planning Commission Staff Report p. 14).</p>
<p><u>Policy DD-2d</u> – In order to preserve the rural character along Marsh Creek Road, a house on any parcel bordering the road’s right-of-way shall have the following minimum setbacks, as shown in Figure B:</p> <ul style="list-style-type: none"> • Marsh Creek Road property line: 80 feet. • Side property line: 30 feet. 	<p>Consistent – As part of the Project each house on any parcel bordering Marsh Creek Road is set back 80 feet from the Marsh Creek Road right-of-way.</p> <p>The Project’s clustering and steep topography meets the criteria for a reduction in required setbacks where necessary. (See Planning Commission Staff Report p. 14).</p>

<p><u>Policy DD-2g</u> – Setbacks may be changed based on site specific considerations such as trees, steep topography, road/trail crossing, or appropriate clustering.</p>	
<p><u>Policy DD-3</u> – Development clustering shall be encouraged in Low, Medium and Suburban Density development, provided that the Planning Commission finds that clustering does not result in a site plan that is overly dense or that impedes the conservation of natural or visual resources.</p>	<p>Consistent – The Project conforms to the topography of the site by clustering the development in the flatter land area. (See Planning Commission Staff Report p. 13). Project lot sizes conform with the Low Density minimum lot size of 15,000 square feet. (See Planning Commission Staff Report p. 14).</p>
<p><u>Policy DD-4</u> – The visual impacts of grading shall be minimized in the study area, both by limiting the amount of grading and by properly contouring areas where grading occurs.</p>	<p>Consistent – Site grading shall generally be limited to areas within the building footprint, under access roads and driveways, and where necessary to create modest yard or correct unusual site conditions such as landslides. (See Planning Commission Staff Report p. 11).</p>
<p><u>Policy DD-4e</u> – No artificial slope should exceed the naturally occurring slopes in its immediate vicinity, and graded slopes greater than 3:1 are prohibited without special mitigation or circumstance.</p>	<p>Consistent – The northerly part of the property will include graded slopes with a maximum of 2:1, in excess of the 3:1 graded slopes contemplated by Policy DD-4e. However, the portions of the property with the aforementioned steep slopes will have a special mitigation, a graded bench into the slope with a minimum length of 20 feet. (See, Initial Study/Mitigated Negative Declaration, Appendix C (February 22, 2008 Engeo Updated Geotechnical Report, Figure 8; see also Preliminary Grading Plan).</p>
<p><u>Policy DD-6</u> – Existing trees should be retained wherever possible.</p>	<p>Consistent – Mitigation Measure 5 requires developer to submit a tree protection plan to the City, to adjust the proposed road path design to provide further clearance from trees, to install fencing to protect trees before construction or grading, and provides for various other tree protections during construction. (See Initial Study/Mitigated Negative Declaration p. 20).</p>

<p>Policy DD-9 – In order to protect the scenic quality of Marsh Creek Road, the streetscape should reflect the rural character of the planning area.</p>	<p>Consistent – The Project incorporates landscaping along both the Project's Marsh Creek Road frontage to help screen all developed residential structures from view. (See Initial Study/Mitigated Negative Declaration Figure 10, p. 25).</p>
<p>Policy DD-10 – Each development area in the planning area should have a defined rural neighborhood character.</p>	<p>Consistent – The Project's elevations reflect rural architecture by using vertical and horizontal siding, brick, fieldstone, ledgerstone, timber materials, colors, and roofing material that combine to create a country sense. (See Planning Commission Staff Report p. 15).</p>
<p>Policy DD-13 – Fences and screening should be minimized and reflect the area's rural quality</p> <p>Policy DD-13b – Fences should be visually permeable and no more than four feet tall where they are outside of building envelopes defined in this Specific Plan. Within building envelopes, fences may be up to six feet tall and/or solid, but only if necessary for reasons such as safety, noise insulation or to pen pets. A desire for privacy will generally not be considered an adequate reason for a solid fence.</p> <p>Conformance with this policy shall be required in the Ranchette and Rural Residential designations. In denser areas, conformance is encouraged but not required.</p> <p>Policy DD-13c – No concrete or masonry sound walls should be constructed for noise mitigation in the study area. All exterior noise mitigation should occur through site design, berms or wooden fences built within building envelopes.</p>	<p>Consistent – The Project is conditioned on the use of a rural mesh fence for Open Space Fencing. (See Conditions of Approval, Fencing Conditions 4).</p> <p>Lots 1, 2, and 6 shall contain six foot sound walls, or sound fences. Lot 1 will have a sound fence along the eastern, southern, and western sides of the lot. Lot 2 will have a sound fence along the southern side of the property, set back at least 50 feet from the edge of the right-of-way of Marsh Creek Road. Lot 6 will have a sound fence along the eastern, southern, and western sides of the lot. The sound fences on all Lots 1, 2, and 6 shall be "split view fences" with a solid plywood core. The fences will not be concrete or masonry. (See Conditions of Approval, Fencing Conditions 1a – 1c).</p> <p>Any additional sound wall locations and elevations will be included on the grading plan and subject to review and approval by the Planning Commission. (See Conditions of Approval, Administrative Condition 5).</p>
<p>Policy DD-16 – All buildings shall conform to the maximum building heights in the planning area. These heights vary depending on topography, and are generally intended to require buildings to conform to their underlying topography.</p>	<p>Consistent – Building height shall not exceed 35 feet, the Lot 6 building shall not exceed 28 feet. (See Planning Commission Staff Report p. 14).</p>

Policy DD-17 – Architectural style should reflect traditional rural architecture and the study area's rural character and mild climate, and emphasize the idea of a cohesive community.	Consistent – The Project's elevations reflect rural architecture by using vertical and horizontal siding, brick, fieldstone, ledgerstone, timber materials, colors, and roofing material that combine to create a country sense. (See Planning Commission Staff Report p. 15).
Policy DD-22 – Commercial development shall be designed to reflect the low-intensity, rural character of the study area.	Consistent – The Project Site's Single-Family Low-Density designation allows for 6 to 16 residences on the site, and the Project contemplates only 6 residences, the lower end of that scale. (See Planning Commission Staff Report pp. 8-9).
Natural Resources Element	
Natural Resource Objective 1 – Preserve the natural features, ecology and scenic vistas of the study area.	Consistent – The Project includes 5 acres of private open space. (See Planning Commission Staff Report p. 9). The Project includes the preservation of upslope portions of residential lots as open space, thereby preserving hillside in the study area. (See Initial Study/Mitigated Negative Declaration p. 25). The Project also includes a mix of single-story and two-story homes, so as to break up the massing of the development and enhance views of the preserved upslope portions of the Project Site. (See Initial Study/Mitigated Negative Declaration p. 24).
Natural Resource Objective 2 – Avoid Degradation of habitat used by rare and endangered species within the study area by avoiding development in habitat areas known to harbor such species. Natural Resource Objective 3 – Require studies to determine the existence of sensitive species on a site-specific basis, and limit development where these species are found.	Consistent – No special-status species were observed during field surveys. The Project site contains suitable habitat for western burrowing owl and migratory bird species. (Initial Study/Mitigated Negative Declaration, pp. 40-44.) None of the bird species discussed in the Initial Study/Mitigated Negative Declaration are described as "rare" or listed as "endangered." The Western Burrowing Owl is a "Species of Special Concern" (as opposed to threatened or endangered), and the potential passerine and raptor species protected under the Migratory Bird Treaty Act are described as "sensitive." Therefore, there is no basis for Natural Resources Objective 2 to apply to any of the described bird species. Although special-status plants were not identified within the project area during field surveys in 2018, the USFWS only

considers plant surveys to be valid for three years. Should project construction not occur within three years from the date of the survey, construction activity could impact special-status plant species that may have colonized the project site. The Initial Study/Mitigated Negative Declaration therefore concludes that impacts related to the disturbance of special-status plant species could be significant. (Initial Study/Mitigated Negative Declaration, p. 41.) With mitigation, however, any impacts to special-status wildlife and plant species would be reduced to a less-than-significant level. (Initial Study/Mitigated Negative Declaration, pp. 40-44.)

Mitigation Measures 1-3 address the potential impacts on western burrowing owls, other migratory birds, and special-status plants, respectively. All three require renewed on-site surveys for species before construction begins (Mitigation Measure 3, which concerns plants, only requires this if construction occurs more than three years after the 2018 survey). In the event that any special-status species are found on the site, Mitigation Measures 1-3 include procedures to avoid areas occupied by the special status species, or otherwise take conservation measures to avoid impacts on special-status species.

The proposed mitigation measures are precisely of the type contemplated by the MCRSP EIR. Impacts to special-status plant and animal species and their habitat "would be largely mitigated by location of development areas, which avoid especially sensitive communities." (MCRSP EIR, p. 271.) This suggests that while the MCRSP may direct development activities to avoid particular "areas" on a parcel that contain a rare species, it does not require avoidance of development on the entirety of the parcel. Moreover, as mitigation for this impact, the MCRSP EIR proposes that site specific CEQA review be required for all development proposals, and that "the mitigation of this impact to a less than significant level should be a condition of project approval." (MCRSP EIR, p. 271.) In line with the MCRSP EIR, the

	<p>Project includes mitigation measures to lessen potential biological impacts to a less than significant level</p> <p>Furthermore, compliance with the ECCCHCP mitigates the potential impact on rare and endangered species to a less than significant level. The ECCCHCP was specifically developed to establish a coordinated process for permitting and mitigating the incidental take of endangered species, and was meant to replace to the non-uniform project-by-project approach that existed prior to its adoption. The ECCCHCP was adopted in 2007, more than 10 years after the MCRSP, and the agency that promulgated it, the East Contra Costa Habitat Conservation Plan Association, was not established until 2000, five years after the MCRSP. Therefore, the MCRSP could not take the ECCCHCP and its uniform habitat conservation procedures into account.</p>
<p>Public Services Objectives</p> <p>Public Services Objective 4 – Consolidate water, sewer, cable TV, electrical, and gas utility corridors wherever practical, ideally within the public right of way.</p>	<p>Consistent – All utilities will be within the Saltbrush Lane 48-foot-right-of-way. (See Planning Commission Staff Report p. 11).</p>

*Referenced in Planning Commission Resolution