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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

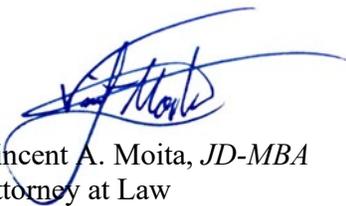
- Here, Seeno is proposing to build six new homes, which would create additional vehicular traffic, pedestrian traffic, and parking. The proposal is situated in the middle of a collector street as laid out in the MCRSP. This establishes a solid foundation for a nexus with the City’s exaction (a collector 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, it’s 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:

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**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.

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Exhibit 3:

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

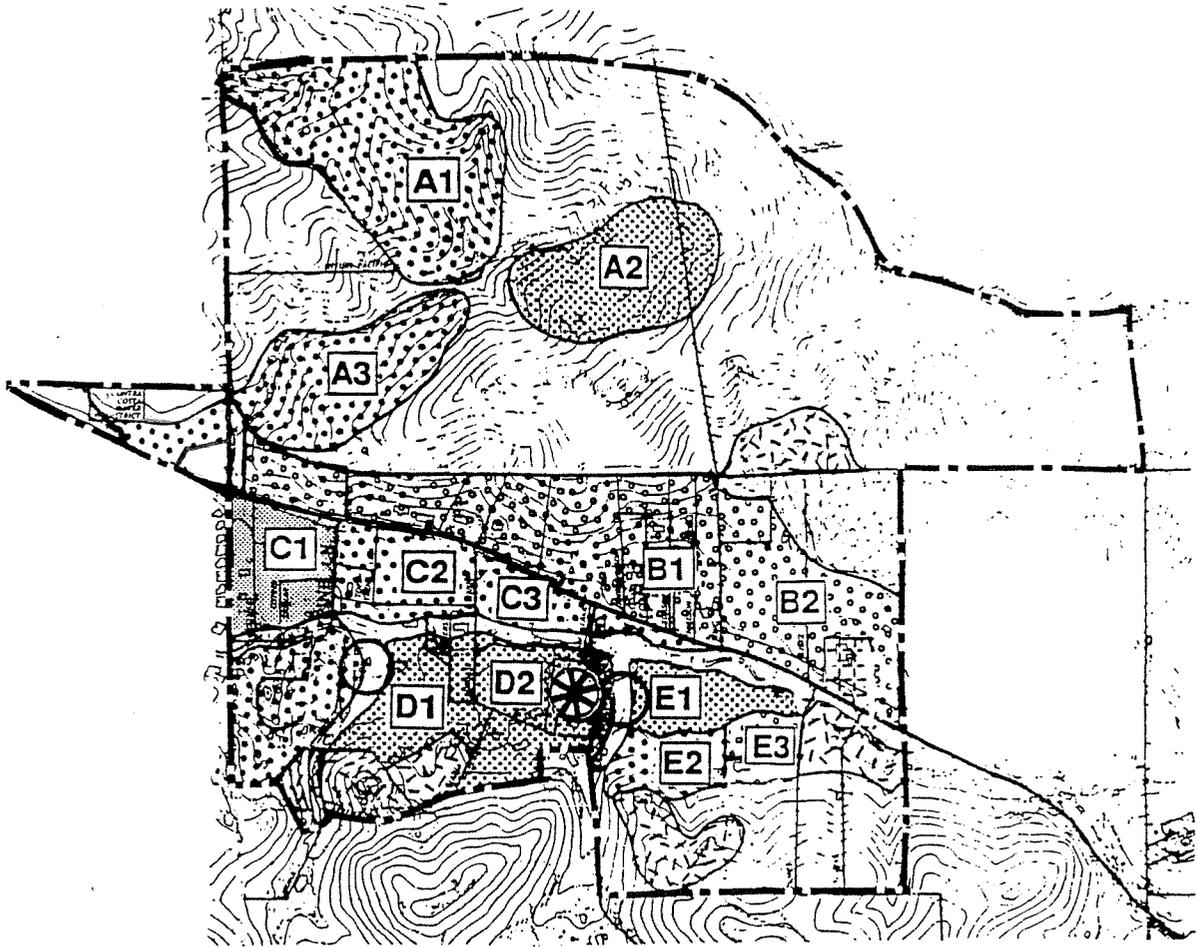
Chapter VIII Circulation Element:

- 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 Russelman 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



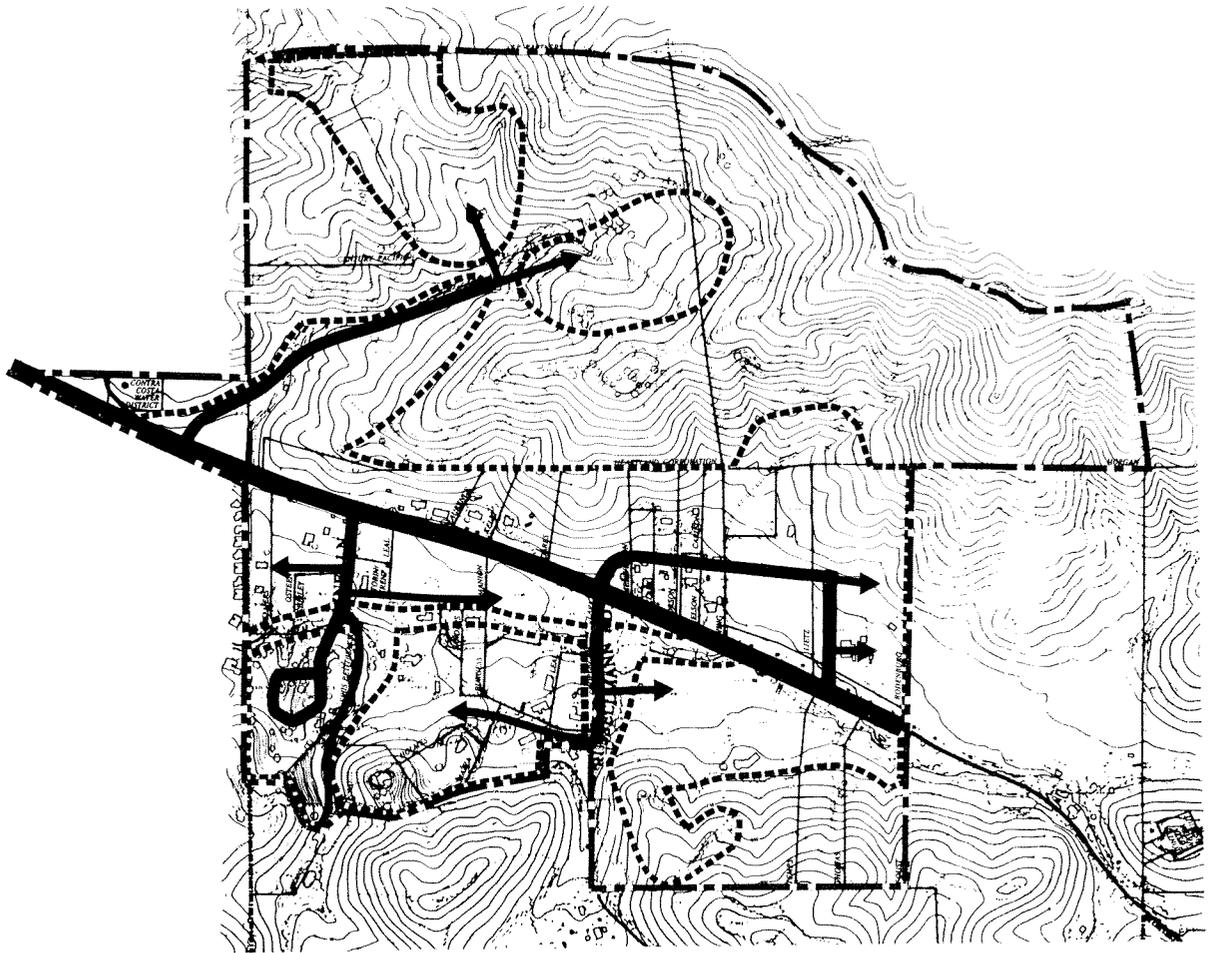
0 300 600 1200
Scale in Feet

**MARSH
CREEK
ROAD
SPECIFIC
PLAN**

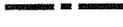
■ ■ ■
FIGURE 6

Land Use Designations

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

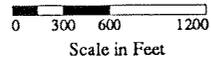


Legend

-  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

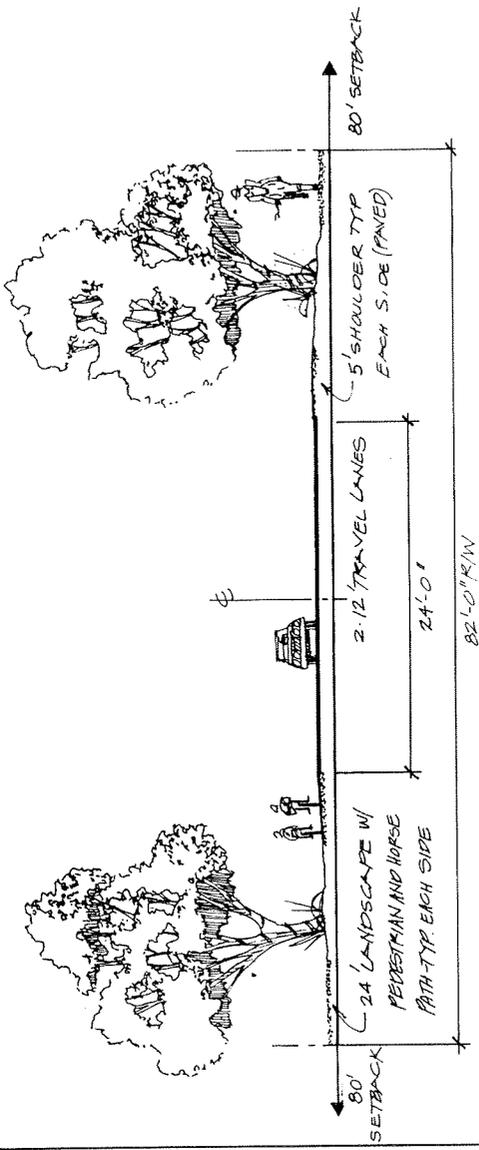


MARSH CREEK ROAD SPECIFIC PLAN

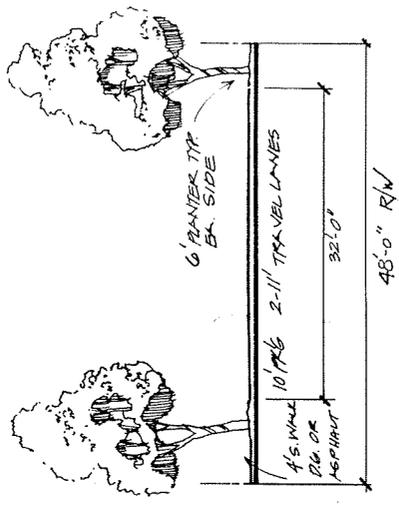


FIGURE 10

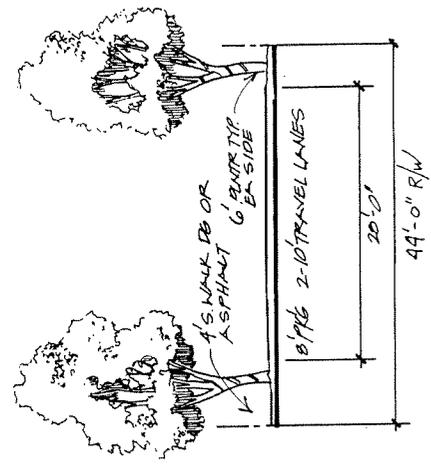
Circulation Plan



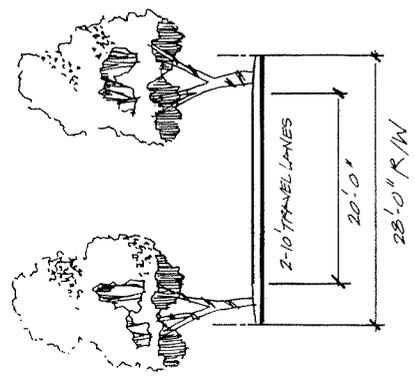
Arterial Road - (Marsh Creek Road)



Collector Road



Local Road



Minor Cul-de-Sac



MARSH CREEK ROAD SPECIFIC PLAN

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

FIGURE 11

Street Sections

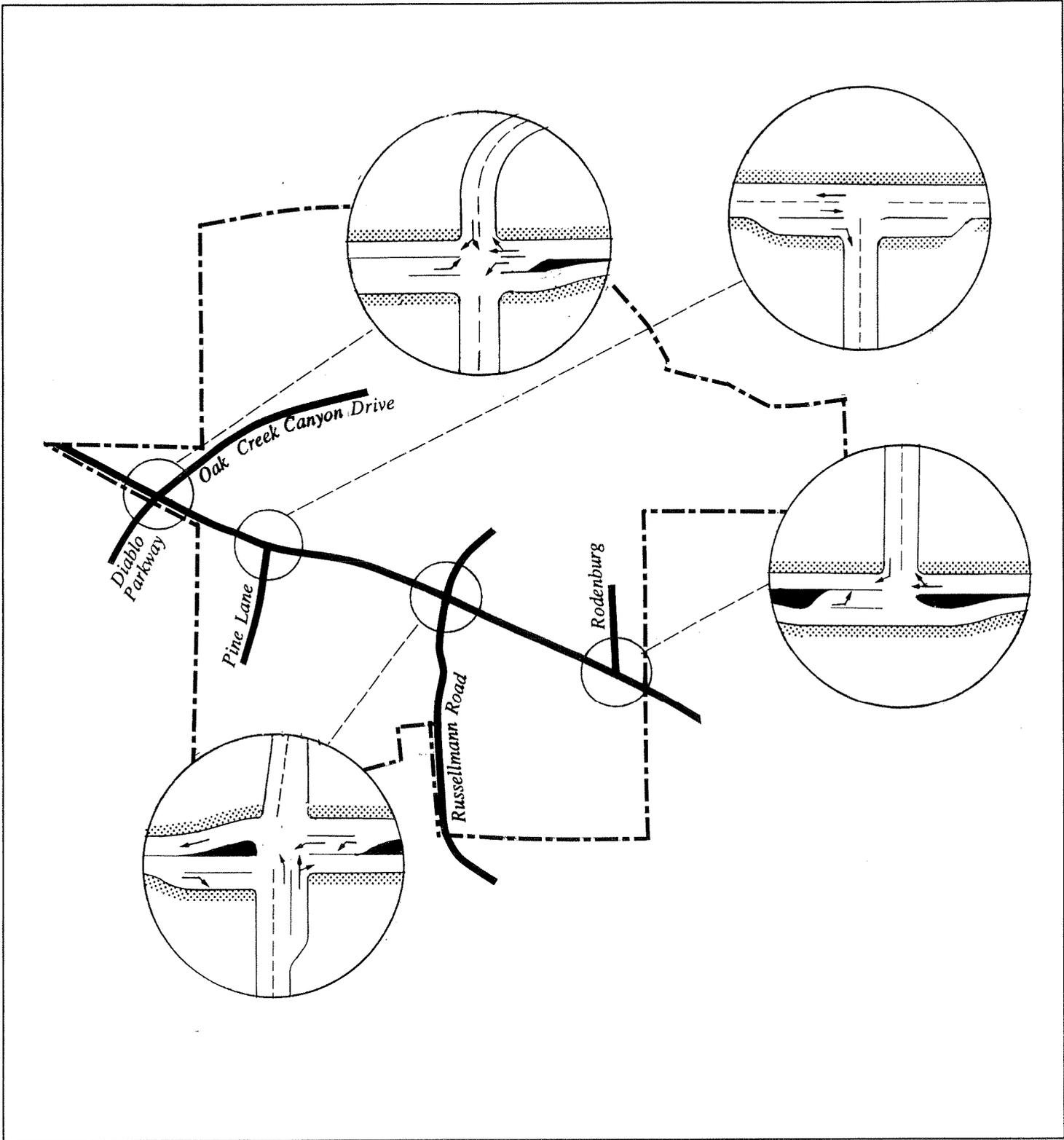


FIGURE 13

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