Law Offices of
THOMAS N. LIPPE, APC

329 Bryant Street
Suite 3D
San Francisco, California 94107

Telephone: 415-777-5600
Facsimile: 415-777-9809
Email:Lippelaw@sonic.net

November 28, 2007

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

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

Dear Mayor Schroder and City Council,

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

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

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

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

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

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

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

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

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

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

The City thus conditioned approval of the subdivision on preservation of several lots as "permanent private open space" with scenic easements granted to the City. These lots included Lots 26 and 27 shown on the tentative map,[1] which constitute the portion of the Freitas Property that is the subject of the current General Plan Amendment proposal. (*See* letter from City of Martinez Planning Commission Secretary Barry E. Whittaker to property owner James Busby, dated July 9, 1976, pp. 1 and 3, attached hereto as Exhibit 3; and the tentative subdivision map appearing as Figure 7 to the 1976 EIR, attached hereto as Exhibit 4.)

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Segmentation of the Project Approvals Violates CEQA.

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

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

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

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

---

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

Thank you for your attention to this matter.

Very truly yours,

Thomas N. Lippe

Enclosures