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December 4, 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.

Since the impact from loss of this open space was found significant in 1976, it is still significant. Therefore, deleting the open space mitigation measure requires preparation of an Environmental Impact Report (“EIR”).

The November 30, 2007 staff report for the Council’s December 5, 2007 hearing on this matter compares two revised mitigation measures, AES-1 and AES-2, to the original mitigation measures AES-1 and AES-2 described at page 5 of the June 29, 2007 Mitigated Negative Declaration (“MND”) with respect to whether recirculation of the MND is required. But the original AES-1 and AES-2 mitigation measures were not “equivalent” to the 1976 mitigation measure requiring preservation of this open space. Therefore, the question whether revised AES-1 and AES-2 are “equivalent” to the original AES-1 and AES-2 is somewhat beside the point.

Nevertheless, the staff report contends that recirculation of the MND is not required, citing the text of CEQA Guideline 15073.5. In fact, recirculation of the Negative Declaration is required.

CEQA Guideline 15073.5 is an administrative regulation issued by the Secretary of Resources. The courts will “afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA.” *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal. 4th 1112, 1123 n. 4. Here, Guideline 15073.5 simply does

not describe all of the circumstances that require recirculating an MND.

For example, in *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359 the court held that adding new mitigation measures after the MND has been circulated for public comment requires recirculation where there is substantial evidence to support a fair argument that the project - as mitigated before consideration of the new measures - would have a significant effect, stating:

If there was substantial evidence to support a fair argument that the Project would have a significant effect on the Stephens' kangaroo rat, then the City could not adopt new mitigation conditions aimed at this effect without recirculating its proposed negative declaration. Nevertheless, the City added mitigation condition 24.h, relating to effects on the Stephens' kangaroo rat, without recirculating. In so doing, it abused its discretion.

Gentry v. City of Murrieta, supra, 36 Cal.App.4th at 1411-1412.

Here, the City found impacts from the loss of this exact same parcel of open space significant in 1976. Therefore, there is substantial evidence supporting a fair argument that the current Project would have that same significant effect by deleting the mitigation measure previously adopted to avoid that effect. Therefore, adding new mitigation measures relating to this potentially significant effect without recirculating the MND is an abuse of discretion.

Also, the California Supreme Court has held that where “new information that demonstrates that an EIR commented upon by the public was so fundamentally and basically inadequate or conclusory in nature that public comment was in effect meaningless triggers recirculation....” *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1130. As noted in my letter dated November 28, 2007, the original AES-2 was not specific regarding height limits. The revised measure AES-2 at least has a specific maximum elevation performance standard. Since the original AES-2 did not, the MND previously circulated for public comment “was so fundamentally and basically inadequate or conclusory in nature that public comment was in effect meaningless” such that recirculation of the MND is required.

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.

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Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in blue ink that reads "Thomas Lippe". The signature is written in a cursive style with a large initial 'T' and a long, sweeping underline.

Thomas N. Lippe