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February 6, 2008

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 respond to the letters dated January 24, 2008 and January 31, 2008 submitted by Dana Dean, the applicant's new counsel.

As a preliminary matter, I note that at the December 5, 2007 hearing on this matter, the applicant's prior counsel criticized me for not sending my November 28, 2007 and December 4, 2007 letters directly to him. (I was not aware of his name and address at that time.) Despite this criticism, the applicant's current counsel elected not to send her January 24, 2008 and January 31, 2008 letters directly to me. Therefore, I have had very little time to review and respond to her arguments.

MS. DEAN'S JANUARY 24, 2008 LETTER

In her January 24 letter, Ms. Dean makes three assertions:

1. The City has not acquired "ownership" of a scenic easement covering the portion of the property zoned "private open space".

2. The City has the authority to change the General Plan designation and zoning of the portion of the property zoned as "private open space" if continuing its designation as open space is infeasible.

3. Continuing to maintain the open space area in open space is infeasible.

I. THE SCENIC EASEMENT REFERENCED IN CONDITION OF APPROVAL NO. 5 OF THE PINE MEADOWS SUBDIVISION APPROVAL IS ENFORCEABLE.

A. Whether the City "Owns" the Scenic Easement Is Not in Issue.

Ms. Dean devotes most of her January 24 letter to arguing that the City never obtained a real estate ownership interest in the portion of the property zoned "private open space". While this is an interesting issue, it is not germane to the City Council's decision regarding the General Plan Amendment. At this point in time, the City either has the right to enforce the easement or it does not. The current proposal to amend the General Plan does not require the City to decide that issue. The applicant has not asked the City to abandon the easement. He merely asserts that the City does not "own" the scenic easement as a matter of real estate law. This assertion does not require a response from the City at this time.

Also, Ms. Dean fundamentally misconceives the nature of a scenic easement. A "scenic easement" is not something that one "owns"; it is a right to exclude certain land uses from the area covered by the easement. *See, e.g., Silacci v. Abramson* (1996) 45 Cal.App.4th 558, 564 ("An easement, however, is not an ownership interest, and certainly does not amount to a fee simple estate"); *Paoli v. Cal. Coastal Com.* (1986) 178 Cal.App.3d 544, 548 ("An open-space easement is an instrument whereby the owner relinquishes to the public the right to construct improvements upon the land, effectively preserving for public use or enjoyment the natural or scenic character of the open-space land. (See Gov. Code, § 51051)").

B. The City Has the Right To Enforce the Scenic Easement.

Ms. Dean argues the scenic easement is not enforceable because the City (1) never "accepted" the offer of the easement as a matter of contract law; (2) never "recorded" the easement nor "transferred" an easement interest as a matter of real estate law; and (3) never "accepted" the easement using the procedures of the Open-Space Easement Act of 1974 (Gov. Code §§ 51070 *et seq*.). These contentions are beside the main point: that the scenic easement mitigation measure is enforceable under CEQA. Nevertheless they are discussed below.

1. Under CEQA, the City may enforce the scenic easement.

Ms. Dean gets it wrong when she artificially distinguishes the "1976 mitigation" articulated in the Pine Meadows EIR from the "conditions of approval" for the tentative subdivision map, in arguing that the 1976 approvals did not create a legally binding easement. Here, the City specifically adopted the mitigation of "a minimum 250-300 foot wide scenic and open space easement" as Condition of Approval No. 5 to the subdivision map approval. *See* July 9, 1976 letter to James Busby

from the City Planning Department. *See* Pub. Res. Code § 21081.6, subd. (b) ("A public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures. Conditions of project approval may be set forth in referenced documents which address required mitigation measures ...."); CEQA Guidelines § 15126.4, subd. (a)(2).

2. Under contract law, the City may enforce the scenic easement.

Ms. Dean focuses on whether the Pine Meadows developer made an "offer" to grant the scenic easement and whether the City "accepted" that offer. As discussed below, this way of framing the issue is unduly narrow. Nevertheless, even conceived in these narrow terms, there was an "offer" and "acceptance" of the easement.

The Pine Meadows developer "offered" to grant the scenic easement by including it in his revised tentative subdivision map for Tract 4744. *See* October 3, 2007 City Council staff report, Attachment H, p. 2 of 8, top row. The City "accepted" this offer by conditioning the approval of the tentative subdivision map on the dedication of a scenic easement (Condition No. 5).

Alternatively, the Pine Meadows developer "offered" to grant the scenic easement by accepting the tentative subdivision map approval with Condition of Approval No. 5; and the City "accepted" this offer by adopting Resolution 108-76 on August 18, 1976, which amended the General Plan to change the designation of the area in question from "planned public open space" to "private open space" to reflect the terms of Condition No. 5 and the scenic easement.

Any question as to whether the City accepted the easement is resolved by two other facts. In March of 1977, the Council adopted Ordinance No. 856 to rezone the area in question from "R-7.5" to "Open Space." *See* October 3, 2007 City Council staff report, Attachment H, p. 2 of 8. Also, section 22.28.070, subsection (A), of the Martinez Municipal Code defines an "open space easement" as:

> (a) any right or interest in real property acquired by or dedicated to the City of Martinez (1) for the purpose of preserving for public use or enjoyment the natural, scenic or open character of such property or (2) for the purposes of preserving those uses described in California Government Code §65560, or its successor provisions, or (b) <u>any limitation of future use of real property</u> by way of a deed, covenant, servitude, easement <u>or other property restriction imposed or required by the City of Martinez</u> for the purpose of preserving the natural, scenic or open character of the property <u>which limitation results from the City's (conditional) approval of a plan amendment, zoning change, use permit, subdivision or any other entitlement permit for development</u>. Open space easement shall not include easements described above which have been acquired pursuant to certain specific statutory authorities which

> provide exclusive termination procedures for easements created pursuant to such authority (emphasis added).

Thus, under the City's own definition, the 1976 condition of approval and resulting General Plan designation of the area as "private open space" constitutes an "open space easement."

Alternatively, under a broader view of contract law, the City offered to issue a subdivision map approval to the Pine Meadows developer conditioned on his dedication of a scenic easement. The developer accepted this offer by accepting the approval and not contesting the condition. If the Pine Meadows developer did not want to accept the condition of approval requiring a scenic easement, he could have and should have objected at the time or filed a petition for writ of mandate attacking such condition before going forward with the project. It is much too late for his successor-in-interest to complain about these events now. *See, e.g., Paoli v. Cal. Coastal Com.* (1986) 178 Cal.App.3d 544. In *Paoli,* the Court of Appeal refused to delete an open space easement condition from a coastal development permit, stating: "Although respondent consistently expressed opposition to the open-space easement condition during the review process, he chose to accept the Regional Commission's final approval of his permit (with the easement condition) and did not appeal." 178 Cal.App.3d at 548.

Finally, even if a contract was not technically perfected due to the absence of the City's "acceptance" of the developer's offer, or some other imperfection, this is inconsequential under principles of promissory estoppel. "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Restatement of Contracts, § 90. "California has adopted the Restatement's view on promissory estoppel claims. ... The elements of a promissory estoppel claim are '(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.'" *US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901. Here, (1) the developer's promise to create "a minimum 250-300 foot wide scenic and open space easement" is clear and unambiguous; (2) the City relied on this promise to grant the subdivision approval conditioned on the dedication of a scenic easement; (3) the City's reliance was both reasonable and foreseeable; and (4) the City would be injured by loss of open space if the applicant were able to avoid this obligation.

3. Under real estate law, the City may enforce the scenic easement.

Condition of Approval # 5 states: "Scenic easements ... shall be <u>dedicated</u> to the City of Martinez ..." (emphasis added). The condition does not require that the easements be *recorded*.

Moreover, it is well-settled that "[t]he deed or contract creating the easement need not be

recorded" to be enforceable. 6 Miller & Starr (3d ed. 2006) Cal. Real Estate, § 15:14, at p. 15-65. While it is true that an unrecorded easement may not be enforceable against a bona fide purchaser of the servient estate without notice of the easement (*Zimmerman v. Young* (1946) 74 Cal.App.2d 623, 626–628), Mr. Freitas does not qualify for this exception because as the surveyor for the Pine Meadows subdivision, he was familiar with the conditions of approval.

Ms. Dean also contends, on page 4, that "the basic requirements to convey an interest in land were never met" because "[t]here is no deed transferring such an interest" and "no money allocated by the City or developer to pay for an easement". However, it is well-settled that easements may be created by contract rather than conveyance. *Comm. to Save the Beverly Highlands Homes Ass'n v. Beverly Highlands Homes Ass'n* (2001) 92 Cal.App.4th 1247, 1270. Also, the consideration "paid" by the City for the easement was the subdivision approval, not money.

4. Under the Open-Space Easement Act of 1974, the City may enforce the scenic easement.

Ms. Dean argues the scenic easement is not enforceable because it was not accepted by resolution of the City Council pursuant to the Open-Space Easement Act of 1974, particularly Government Code § 51083, which provides: "No deed or other instrument described in subdivision (d) of Section 51075 shall be effective until it has been accepted or approved by resolution of the governing body of the county or city and its acceptance endorsed thereon."[1] But as discussed above, the scenic easement was accepted by the Council in Resolution 108-76.

Moreover, even if the City did not accept the scenic easement pursuant to the Open-Space Easement Act of 1974, that does not vitiate the City's right to enforce the easement. While that Act provides a specific procedure for creating (and terminating) open space easements, it is not the exclusive means of establishing a valid and enforceable open space or scenic easement. *See* Gov. Code § 51097 ("Nothing in this chapter shall be deemed to prevent or restrict the right or power of any county or city to acquire by purchase, gift, grant, bequest, devise, lease or otherwise any right or interest in real property for the purpose of preserving open space or for any other purpose under any other provisions of law" (emphasis added)); § 51070 ("It is the intent of the Legislature in enacting this chapter to provide a means whereby any county or city may acquire or approve an open-space easement in perpetuity or for a term of years for the purpose of preserving and

[1]Ms. Dean cites to Gov. Code §§ 51051, 51053, 51055, and 51059 (see footnotes 10, 11, and 17) in support of several propositions, but those sections do not apply to grants of open space easements after January 1, 1975. *See* Gov. Code § 51050 ("Any city or county which has adopted a general plan may accept grants of open-space easements on privately owned lands lying within the city or county in the manner provided in this chapter, provided no city or county shall accept any grants of open-space easements pursuant to this chapter on or after January 1, 1975" (emphasis added).)

maintaining open space" (emphasis added)); § 51080 ("Any county or city which has an adopted open-space plan may accept or approve a grant of an open-space easement on privately owned lands lying within the county or city in the manner provided in this chapter" (emphasis added)). *See also* Martinez Municipal Code § 22.28.070, which excepts from its definition of "open space easement" all "easements ... which have been acquired pursuant to certain specific statutory authorities which provide exclusive termination procedures for easements created pursuant to such authority," presumably referring to the Open-Space Easement Act of 1974 and its predecessor at Government Code §§ 51050 *et seq.* (applying to grants of easements prior to January 1, 1975). Thus, open space easements created under the Act are but one type of open space easement.

C. The City May Enforce Condition of Approval No. 5 Against Mr. Freitas.

Further, it is clear that the burden created by Condition of Approval No. 5 – the dedication of a scenic easement to the City – is enforceable against Mr. Freitas as a successor-in-interest. "It is well settled that the burdens of permits run with the land once the benefits have been accepted." *Ojavan Invs. v. Cal. Coastal Com. ("Ojavan I")* (1994) 26 Cal.App.4th 516, 527, citing *County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511, and *Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78. Here, the Pine Meadows developer accepted the benefits of the subdivision map approval, with its conditions, by developing the project. As explained by the court in *Ojavan I,* "Since appellants' predecessors in interest waived their right to challenge the permit's TDC condition because they specifically agreed to and complied with the condition and accepted the benefits afforded by the permits and such predecessors in interest could not transfer or assign to appellants any legal rights greater than they themselves possessed [citations], appellants obtained the property in question with the same limitations and restrictions which bound their predecessors in interest." *Ojavan I, supra,* 26 Cal.App.4th at 527 (court held that previously recorded "Declarations of Restrictions" ran with the land and bound appellants even though they were not parties to the deed restrictions); accord, *Ojavan Investors v. Cal. Coastal Com. ("Ojavan II")* (1997) 54 Cal.App.4th 373, 384.

Likewise, in *County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511, the Supreme Court found that the successor in interest of a property subject to a conditional use permit was "subject to the limitations in the permit under which he claims, and that he can assert no greater rights therein than [the original permittee] enjoyed." The court further explained:

> [The original permittee] accepted the benefits afforded by the permit and conducted himself in accordance therewith. ... A number of cases have held that a landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit. [citations] Thus, McDougal [successor in interest] is estopped to assert that the prohibition in the [original] Simpson permit against the

sale of water for use outside the county is invalid, and he is bound by the limitation.

Id. It is worth noting that in this case, whether the conditions contained in the permit were ever recorded was not an issue.[2]

Therefore, the City may enforce the scenic easement required by Condition of Approval No. 5 against Mr. Freitas.

II. THE CITY'S POWER TO ABANDON THE SCENIC EASEMENT IS LIMITED.

A. Under State Law, the Scenic Easement Cannot Be Terminated or Abandoned.

The state Open Space Easement Act of 1974 provides detailed provisions authorizing a city to terminate open space easements that are "for a term of years." Gov. Code § 51090 ("An open-space easement for a term of years may be terminated only in accordance with the provisions of this article.") Here, since the scenic easement is in perpetuity, rather than for a term of years, it cannot be abandoned.

B. The City Cannot Abandon the Scenic Easement Without Four Council Votes or a General Election Vote.

Even if state law does not prevent termination of this easement, under local law the City cannot abandon the scenic easement except on a four fifths vote of the Council. Section 22.28.070, subsection (B), of the Martinez Municipal Code provides, "No open space easement [as defined in subsection (A) above] may be terminated, vacated, abandoned, released, reduced, exchanged, relocated or in any other way remitted, either in whole or in part, without either the affirmative vote of four of the members of the City Council or the affirmative vote of a majority of people of the City of Martinez voting at a regular or specially called election."

Therefore, as explained in the October 3, 2007 City Council staff report, at pp. 5-6, "It should

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[2] *See also Maintain Our Desert Environment v. Town of Apple Valley* (2004) 124 Cal.App.4th 430, 444 ("[L]and use entitlements such as conditional use permits and development approvals run with the land and do not belong to the permittee."); *Malibu Mts. Rec. v. County of L.A.* (1998) 67 Cal.App.4th 359, 367-368 ("[A] CUP creates a right which runs with the land, not to the individual permittee."); *Sounhein v. City of San Dimas* (1996) 47 Cal.App.4th 1181, 1187-1188 ("Conditions of a permit run with the land, once the benefits of the permit have been accepted. ... Subsequent owners of the land have no greater rights than those of the owner at the time the conditional use permit was issued."); *Anza Parking Corp. v. City of Burlingame* (1987) 195 Cal.App.3d 855, 858 ("[I]t is widely held that a conditional use permit creates a right which runs with the land; it does not attach to the permittee.").

also be noted that the City Attorney has verified that pursuant to Municipal Code, a 4/5 vote of City Council (as opposed to the regular 3/5 vote), or general election vote, is required to replace the 'Open Space' designation with a different land use on any parcel in Martinez, irrespective of the property's ownership. While the City does not have a fee or easement 'ownership' of the 5 acres, an 'open space easement,' for these purposes is defined as '*any limitation of future use of real property by way of deed, covenant, servitude, easement or other property restriction imposed or required by the City for the purpose of preserving the natural, scenic or open character of the property which limitation results from the City's (conditional) approval of a plan amendment, zoning change, use permit, subdivision or any other entitlement permit for development'*. So while the current open space area is not within a formal 'easement,' the definition of open space easement as described above applies to this project" (emphasis in original).

III. IN GENERAL, THE CITY HAS THE AUTHORITY TO CHANGE THE GENERAL PLAN DESIGNATION AND ZONING OF THE PORTION OF THE PROPERTY ZONED AS "PRIVATE OPEN SPACE".

As discussed in my November 28, 2007 letter, my clients agree that the City has this authority, but only if it complies with the requirements set forth in *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, which I discussed at length in my November 28, 2007 letter. The principal requirement for deleting a prior mitigation measure announced in that decision is a showing that maintaining the mitigation is "infeasible."

IV. THE APPLICANT HAS NOT SHOWN THAT CONTINUING THE OPEN SPACE DESIGNATION IS INFEASIBLE.

At page 8 of her January 24 letter, Ms. Dean describes several bases as support for her assertion that continuing the open space designation is infeasible, as follows:

> 1. The City cannot require that Freitas grant a scenic easement after the final subdivision map was accepted.
> 2. The Freitas Property was not able to remain a horsey [sic] set up lot nor a grazing site because Mr. Freitas' horses and cattle were repeatedly vandalized.
> 3. The Freitas Property used to be rural and is no longer as rural as it formerly was in the 1970's. More roads and development has [sic] sprung up causing more of a burden for Mr. Freitas to maintain his property as undeveloped and the impact is less than significant.

Point one has nothing to do with whether keeping the General Plan designation of this area as open space is infeasible. The applicant does not assert, nor could he, that the City has a legal obligation to change the General Plan designation of this area from open space to residential.

Point two is also irrelevant, because there is no evidence that using the open space area for livestock was a basis for determining the mitigation measure to be feasible to begin with in 1976.

Also, Mr. Freitas's declaration states: "For the foregoing reasons it is infeasible for me to maintain my Property as a horsey [sic] set up lot and/or open space." In fact, however, his declaration only provides evidence that it is infeasible to maintain the property as a horse set up lot, not that it is infeasible to maintain it as open space.

Point three is not valid for several reasons. First, the letter states, "The Freitas Property used to be rural and is no longer as rural as it formerly was in the 1970's. More roads and development has [sic] sprung up ...." Ms. Dean implies that the area changed from rural to suburban *after* the Pine Meadows subdivision was built. In fact, however, there has been very little development in the area since the Pine Meadows subdivision was built. Indeed, the principal change from rural to suburban character occurred *as a result of the Pine Meadows subdivision*, which is why the open space mitigation measure was required in the first place. Certainly the town homes across Vine Hill Way most affected by the visual impact of the Pine Meadows subdivision were already there.

Second, the letter states, "More roads and development has [sic] sprung up causing more of a burden for Mr. Freitas to maintain his property as undeveloped ...." Even if there were more development in the area since the Pine Meadows subdivision was built, the letter does not specify why or how that could have increased the "burden" for Mr. Freitas to maintain his property as undeveloped. Moreover, the additional loss of rural land to development would provide even more reason not to change the open space designation, because the loss of rural scenic values would have become even more acute over time.

Third, the letter states "... and the impact is less than significant". Whether the impact is "significant" is a different issue than whether keeping the area in open space is feasible. The *Napa Citizens* court was sensitive to the possibility that a later elected body might second guess an earlier elected body's judgment that an impact is significant, stating: "[T]he 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. Therefore, the court did not suggest that a prior mitigation measure could be deleted any time a legislative body changed its judgment regarding the significance of an environmental impact.

MS. DEAN'S JANUARY 31, 2008 LETTER

In her January 31 letter, Ms. Dean suggests that the City can (1) ignore the Mitigated Negative Declaration already circulated for public comment; (2) determine that a supplemental or subsequent EIR is not required under Pub. Res. Code § 21166; and (3) adopt her proposed "Addendum" to comply with section 21166. This is absurd for several reasons.

V. THE CURRENT PROPOSAL TO AMEND THE GENERAL PLAN IS A "NEW PROJECT".

Ms. Dean utterly fails to discuss the key issue, which is that section 21166 only applies to a change in a project for which an EIR or Negative Declaration has already been certified or adopted; it does not apply to a new project. *See, e.g., Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288:

> The question under Public Resources Code section 21166 and Guidelines section 15162 is whether changes in a project or its surrounding circumstances introduce new significant environmental impacts. However, a threshold question is whether we are dealing with a change to a particular project or a new project altogether. Public Resources Code section 21166 and Guidelines section 15162 apply to the former but not the latter. Despite the City's self-serving statements in the Addendum that the Gateway Project is a modification of the North Point Project, the totality of the circumstances proves otherwise.

Id. at 1301.

The Court in *Save Our Neighborhood v. Lishman* identified the key circumstances on which it based its holding that the project was "new" as:

- "The City originally prepared the 2004 IS/MND for the Gateway Project. .... Only after the City met resistance from Save Our Neighborhood did it decide to treat the Gateway Project as a modification of the North Point Project."

- "Although planned for the same land and involving similar mixes of uses, the North Point Project and the Gateway Project are different projects nonetheless. They have different proponents ...."

- "[T]here is no suggestion the latter project utilized any of the drawings or other materials connected with the earlier project as a basis for the new configuration of uses."

Id at 1300.

Similarly, here the project proponent now is different than the Pine Meadows developer; the City originally prepared a Negative Declaration; the Addendum is an eleventh hour reaction to neighborhood opposition; and "there is no suggestion the latter project utilized any of the drawings or other materials connected with the earlier project." Perhaps more important, Pine Meadows was not just approved at an earlier time – construction was completed over 25 years ago.

In somewhat similar circumstances, the Court of Appeal held that a proposed change in land use to "mining" of an area designated "agricultural" in a previous project and Program EIR was a "new project," and therefore, section 21166 did not apply, stating:

> Syar argues that here, its proposed activity was not a separate project, but was instead a part of or a minor modification of the single large project already studied in the ARM Plan. We cannot agree, as Syar sought permission to engage in terrace mining on land which was specifically designated in the Plan as an agricultural resource. Syar attempts to minimize the significance of that designation by asserting that it was based on nothing more than then existing ownerships; according to Syar, those areas owned by mining companies when the Plan was prepared were designated as a mineral resource, and the remaining areas were designated for agricultural use. But that claim simply ignores the Plan itself, which states that lands in the "Managed Resource: Agriculture" category were "proposed for preservation for their value as both an agricultural resource and as groundwater recharge." n10 Under these circumstances, the evidence does not support a determination that Syar's proposed site-specific project was either the same as or within the scope of the project, program, or plan described in the program EIR. (See Guidelines, § 15168, subd. (c)(5).) Therefore, section 21166 was inapplicable ....

Sierra Club v. County of Sonoma (1992) 6 Cal.App.4th 1307, 1320-1321. Similar to *Sierra Club v. County of Sonoma,* here the current project is to change the land use of an area previously preserved as open space to residential use.

For these reasons, the entire January 31 letter is irrelevant.

VI. EVEN IF THE PROPOSED GENERAL PLAN AMENDMENT WAS NOT A "NEW PROJECT", A SUPPLEMENTAL OR SUBSEQUENT EIR WOULD BE REQUIRED UNDER PUB. RES. CODE § 21166.

Even if section 21166 applies, a supplemental or subsequent EIR is required for the same reasons the Negative Declaration does not comply with CEQA. As discussed in my December 4, 2007 letter, since the impact from loss of this open space was found significant in 1976, it is still significant. Therefore, proposing to delete the open space mitigation measure requires preparation of an EIR.

VII. THE PROPOSED MND AND ADDENDUM BOTH USE AN INAPPROPRIATE ENVIRONMENTAL BASELINE.

The environmental "baseline" is a crucial component of environmental review. "Before the impacts of a project can be assessed and mitigation measures considered, an EIR must describe the

existing environment. It is only against this baseline that any significant environmental effects can be determined." *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952 (absence of baseline information rendered EIR an inadequate informational document on which to conclude project would have no significant impact). The court underscored "the importance of an adequate baseline description, for without such a description, analysis of impacts, mitigation measures and project alternatives becomes impossible." *Id.* at 953.

Here, both the proposed MND and the Addendum use an inappropriate environmental baseline against which to assess the impacts of the current project. Both use the views from the town homes across Vine Hill Way as the baseline, as did the EIR for the Pine Meadows subdivision. Things have changed, however, now that the Pine Meadows subdivision has been built and occupied and the residents there have enjoyed the visual and open space values of the area for over two decades.

VIII. MISCELLANEOUS POINTS.

Ms. Dean concedes that the 1976 EIR identified designating the "open space" in question as a mitigation measure to reduce an identified significant effect. January 24, letter, bottom of page 5. She argues, however, that the mitigation measure of preserving the "private open space" was not a "primary" mitigation measure. January 31 letter, bottom of page 3. First, as a matter of fact, this is false. Setting the houses back 250 to 300 feet from Vine Hill Way was incorporated into the project as "mitigation." *See* 1976 EIR pp. 5, 9, and 36, and October 3, 2007 City Council staff report, Attachment H, p. 2 of 8.

Second, CEQA does not categorize mitigation measures as "primary" vs "secondary." The purported distinction is legally meaningless. They were all identified as necessary to substantially reduce the significant visual impact identified in the EIR.

Finally, Ms. Dean argues that the impact mitigated in 1976 was a "visual" impact, not an impact from the loss of "open space." This is a distinction without a difference because the type of visual impact identified is the replacement of open space with houses.

IX. CONCLUSION

The applicant and his attorney have apparently decided to gird for litigation by throwing the legal equivalent of the "kitchen sink" at the City Council. As this response shows, the applicant raises many immaterial issues and is incorrect in his analysis of those issues. The City has the right to enforce the scenic easement. Under local law, the City cannot abandon that scenic easement except on a four fifths vote of the Council. Under the state Open Space Easement Act of 1974, since the scenic easement is in perpetuity, it cannot be abandoned at all. And under CEQA, the Council may not delete this open space mitigation measure since it is not infeasible. Therefore, the

City should reject the proposed General Plan Amendment.

Apart from these legal considerations, my clients question why, as a policy matter, the City would want to give up this open space. The Pine Meadows developer traded the open space for his project approval. Mr. Freitas purchased with full knowledge of the open space zoning of the property. No legitimate reason has been presented to rescind the original agreement. It is understandable that Mr. Freitas wants to make more money from this land, but that is not a good reason to renege on a deal made over 30 years ago that still benefits the citizens of Martinez. The fact that the City and the Pine Meadows developer apparently failed to follow through on all the formalities of recording the scenic easement is not a good reason. This is especially true where, as here, the City would be vulnerable to legal challenge if it approves the General Plan amendment.

Thank you for your attention to this matter.

Very truly yours,

Thomas N. Lippe

cc: Dana Dean, Applicant's Attorney
Veronica Nebb, Assistant City Attorney
Don Blubaugh, City Manager
Karen Majors, Community Development Department

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