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January 31, 2008

City Council
City of Martinez
525 Henrietta Street
Martinez, California 94553
Via Facsimile and US Mail

Re: Application to Amend the General Plan – Supplemental Comments
Applicant: Gary Freitas
Hearing Date: February 6, 2008

Dear Council Members:

Please accept this correspondence in follow-up to my letter of January 24, 2008 regarding the above-referenced application. I understand that you did not receive the proposed findings sent as part of that submission. To follow, then, is the current iteration of our proposed findings, as well as further detail regarding the bases for our request that you adopt such findings as part of your approval for this application.

Like all projects subject to environmental review under the California Environmental Quality Act ("CEQA"), this project is not reviewed in a vacuum. Rather, it is reviewed in terms of its relationship to the larger environment. Of particular interest here is the fact that the property at issue in this application ("the Freitas Property") is discussed in the prior Environmental Impact Report ("EIR") for the Pine Meadows and Muir Oaks subdivisions ("1976 EIR").

Relationship to the prior review

In my previous comment letter, dated January 24, 2008, I set forth arguments, supported by substantial evidence in the Record, as to how the Freitas property was and was not burdened by the 1976 EIR. Such arguments can be summarized as follows:

1. Burdening the Freitas Property with a scenic easement was not a CEQA mitigation for the 1976 subdivisions. Rather, it was a condition to the approvals. (The 1976 Condition number 5 required the developer, who no longer owns the Freitas parcel, to dedicate Lot 25, now known as the Freitas property, as open space to the City.) Instead, the mitigation for the 1976 EIR was for visual impacts and it required that the houses atop of Coward's knoll be limited to a

single story. Additionally, the mitigation required that the 1976 subdivision houses be set back 250 to 300 feet from Vine Hill Way. However, such a setback does not mean that the Freitas parcel is now burdened by a perpetual easement. In other words a setback does not equate to a burden on title.

2. To the extent, if any, that the 1976 EIR requires that the Freitas property be zoned open space, such mitigation has been satisfied because the Freitas property was so zoned - as private open space. However, the assertion that zoning is the equivalent to restricting a parcel by a perpetual easement is incorrect. Rather in this case, for reasons previously articulated, the Freitas property has vested with Mr. Freitas without a scenic easement burdening his title.
3. To the extent, if any, that the 1976 EIR required that the Freitas property be locked in open space in perpetuity, such mitigation has become infeasible because among other things, the City lacks authority to now require a restriction in perpetuity. In any case, because the alleged mitigation has become infeasible, the City does have the authority to modify it now.

Resolution of the 1976 EIR question

With the above referenced conclusions in mind, the questions of whether it is necessary to modify the 1976 EIR and, if so, how are easily resolved.

The distinction between a perpetual scenic easement and mere open space zoning is critical here, because the impacts to be mitigated under the 1976 EIR were *visual impacts* not loss of open space per se. Moreover, simply converting open space to residential is not a significant impact in and of itself.¹ Thus, a 2008 determination to convert less than 3 acres of open space to productive use is not foreclosed by the 1976 zoning. Instead, the conversion is appropriate if the visual impacts identified in 1976 remain mitigated to less than significant under the current proposal, as they do.

Moreover, such an adjustment involves a minimal change when looked at from the larger view of the whole 1976 project.

A Subsequent or Supplemental EIR is not required to modify the 1976 EIR Because there are No New Substantial Changes that Requires Major Revisions to the EIR

Often times previously certified Environmental Impact Reports (EIRs) or adopted Mitigated Negative Declarations (MNDs) require changes because land use plans need to be modified and circumstances change.² A City's vision may evolve overtime.³

¹ *Skip Baldwin et al. v. City of Los Angeles et al.* (1999) 70 Cal. App. 4th 819.

² *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal. App. 4th 342.

³ *Id.* at p. 358.

Further CEQA contemplates circumstances where changes to a previous certification can be made by the preparation of a subsequent or supplemental EIR, an addendum or, as we ask here, *no further documentation at all.*⁴

A subsequent or supplemental EIR to the 1976 EIR is not required because there is not substantial evidence in the whole record that “substantial changes are proposed in the project which will require major revisions of the previous EIR ... due to the involvement of new significant environmental effects or a substantial increase in the severity of the previously identified significant effects.”⁵

As detailed below, the relevant impacts identified in 1976 are properly addressed in all of the new documentation that is already before the body for the 2008 project. To require yet another articulation of the same conclusions is simply put, overkill.

Visual impacts identified in 1976 are still mitigated in the new plan

Here, the primary mitigation for the visual impacts of the 1976 subdivisions was that the houses atop Coward’s Knoll be limited to “single story construction above street grade.”⁶ The discussion pertaining to the visual impact of the 1976 project focuses on the visibility of the houses on top of Coward’s Knoll. “The greatest impact would be at the crest of the hill on Vine Hill Way.” A second area of impact is on several of the knoll top units in the Vine Hill townhouse project, who have an excellent view of the present knoll and to whom the knoll top house will be most visible. (See Fig. 2).⁷ Figure 2 shows that the “mitigation” is to “restrict to one-story above street level construction” Lots 29 through 36 and Lots 99 -111.

The narrative portion of the mitigation measure additionally mentions that there is “mitigation already incorporated into the plans (in the nature of moving lots away from Vine Hill Way, reducing cuts and saving an oak tree).”⁸ Because the project mitigations largely maintain the protections required, even considering the 1976 EIR’s discussion of moving lots away from Vine Hill Way, the proposed Project’s conversion of less than 3 acres of open space is not a substantial change that require a major revision of the previous EIR.

Coward’s Knoll Remains as required in 1976

Furthermore, there is not a “substantial increase in the severity of the previously identified significant effects.” This is because the designation of the Freitas property as a scenic easement was *not the primary mitigation* measure to the Visual Impacts of the 1976 project. Therefore, changing the designation of a portion of the Freitas property

⁴ Guidelines §15162(b) (Emphasis added.)

⁵ PRC §21166; See also Guidelines §§15162(a)(1) and 15163(a)(1).

⁶ p. 9, 1976 EIR.

⁷ *Ibid.*

⁸ *Ibid.*

from open space to residential does not increase the severity of the visual impacts identified in the 1976 EIR. Moreover, the proposed Project does not eliminate the open space of the Knoll. Rather, the proposed Project provides more protection for the Knoll than what it currently has because it will be preserved in perpetuity, as opposed to a mere land use designation of open space.

No major revisions are required

Second, a subsequent or supplemental EIR would be required if “substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects.”⁹

In this case, modifying the 5.57 acres of open space designation to 2 acres of open space preserved in perpetuity, which includes the environmental landmark of the actual Knoll is not a “substantial change with respect to the circumstances.” Rather, such a change does not trigger further CEQA analysis because modification of less than 3 acres of open space is does not make the previous mitigation measure ineffective such that the mitigation for visual impacts is reduced to less than significant levels.

Moreover, such change does not require a “major revision in the previous EIR ... due to an involvement of new significant environmental effects or a substantial increase in the severity of the previously identified significant effects.” Instead, the 1976 EIR focused on the preservation of the Knoll. This Project preserves the Knoll in perpetuity, as opposed to the current land use designation of mere zoning the Knoll property as open space. In fact, the current Project more effectively implements the 1976 mitigation to preserve the Knoll in perpetuity, thereby making the impacts of the 1976 subdivision less severe.

There is no substantial new information regarding the visual impacts

Third, there is no “new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete.”¹⁰ On the contrary, the Visual Impacts to Coward’s Knoll were analyzed and disclosed at the time of the circulation and certification of the original 1976 EIR. There is no new information of substantial importance. This is because the elimination of less than 3 acres out of the 4 large parcels that were designated as open space for the 1976 project is not of substantial importance. On the contrary, the primary mitigation that the houses atop of Coward’s Knoll remains in tact.

⁹ Guidelines §§15162(a)(2) and 15163(a)(1).
¹⁰ Guidelines §§15162(a)(3) and 15163(a)(1).

An Addendum to the Previous EIR May be Adopted Where, as Here, the Test for A Supplemental EIR is Not Met.¹¹

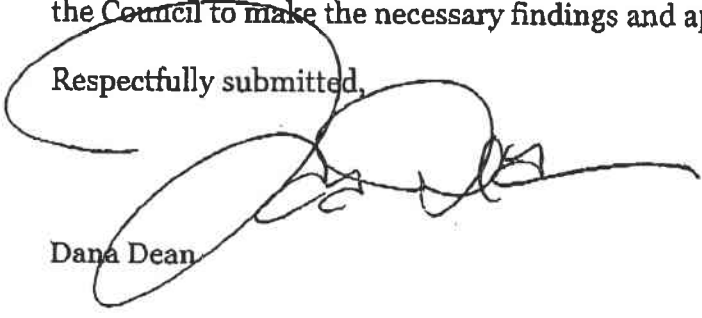
As noted, the change requested is not of a size or scope for which a supplemental EIR is required. *At most*, to whatever extent the current Project requires a change in the 1976 EIR an addendum to the 1976 EIR is the appropriate level of environmental review¹² Though we believe the 1976 impacts are properly addressed in the 2008 documentation, out of an abundance of caution, the Council may choose to accept an addendum to the 1976 EIR in the course of approvals for this Project. As such we have prepared the attached proposed addendum. Additionally, our proposed findings include reference to the addendum that may be adopted or excluded depending on the Council's determination to require an addendum or not.¹³

Conclusion

The City's determination not to prepare a subsequent or supplemental EIR for the 1976 EIR must be supported by substantial evidence. The foregoing analysis, as well as the previously discussed mitigations proposed for this project, provides such substantial evidence. Specifically here, the proposed Project's protection of the Knoll in perpetuity is substantial evidence of better environmental protection for the Knoll, the previous mitigation measures to preserve the Knoll and keep certain Lots as single story remain in tact, and the proposed Project does not create substantial changes that require major revisions to the previous EIR.¹⁴

For all the foregoing reasons and the reasons set forth previous correspondence, we ask the Council to make the necessary findings and approve the application before it.

Respectfully submitted,


Dana Dean

¹¹ An addendum does not require recirculation. Instead a brief explanation of the decision not to prepare a subsequent EIR should be included in the addendum, findings or the Record (Guidelines §§15162(c).)

¹² Guidelines §15164.

¹³ Guidelines §§15162(a) and 15163(a)(1).

¹⁴ Guidelines §§15164(a) and (e).

[Proposed] Addendum to the 1976 Environmental Impact Report for Tract 4744 and 4774
Pine Meadows and Muir Heights Subdivisions

The Martinez City Council has previously certified an Environmental Impact Report for Tract 4744 and 4774 (Pine Meadows and Muir Heights subdivisions) ("1976 EIR"). In accordance with CEQA Guidelines §§15162(b) and 15164 the City Council hereby amends the 1976 EIR with this addendum.

The 1976 EIR discusses a portion of Lot 25, which is now known as "the Freitas Property," which is the subject of a current proposed General Plan amendment currently pending before City Council. This addendum modifies the 1976 EIR to the extent that the 1976 EIR discusses the Freitas property as "a 250 to 300 foot wide scenic and open space easement." (pages 9 and 36 of the 1976 EIR). Council now wishes modify part of the land use designation of the Freitas property, such that approximately 3 of the 5.57 acres of the Freitas Property is re-designated by the General Plan and Zoning Ordinance from open space to residential (R-10).

The City Council adopts this addendum to make such modification rather than a subsequent report because the subject changes to the 1976 EIR does not invoke any of the conditions requiring a subsequent report as set forth in the Public Resources Code.¹

First, there are not substantial changes requiring a major revision of the 1976 EIR. Rather, the changes are *de minimus* because the City of Martinez retains a substantial portion of open space and the 1976 Project also retains a substantial portion of open space. Moreover, the primary mitigation for the visual impacts of the 1976 subdivisions was that the houses atop Coward's Knoll be limited to "single story construction above street grade" because, "[t]he greatest impact would be at the crest of the hill on Vine Hill Way."² Such primary mitigation to restrict the houses to a single story remains.

Furthermore, changing the designation of a portion of the Freitas property from open space to residential does not increase the severity of the visual impacts identified in the 1976 EIR.³ On the contrary, the proposed Project does not eliminate the open space of the Knoll, rather the proposed Project provides more protection for the Knoll than what it currently has because it will be preserved in perpetuity, as opposed to a mere land use designation of open space. Therefore,

¹ Public Resources Code §21166: Changes necessitating subsequent report. When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

² page 9, 1976 EIR.

³ CEQA Guidelines §15162(a)(1).

by amending the 1976 EIR, the Council is doing so in part because such amendment will allow the opportunity for the Knoll, which sits on private property, to be designated as open space in perpetuity. As part of the General Plan amendment the property owner is agreeing to burden the title of his property such that the approximate 2 acres containing the knoll is preserved as open space in perpetuity.

Second, there are not substantial changes with respect to the circumstances which will require major revisions in the 1976 EIR. Rather, circumstances have not changed such that major revisions are required of the 1976 EIR. The Freitas Property is a very small percentage of all of the open space within the City of Martinez, and a small percentage within the 1976 subdivision.

Third, there is no new information, which was not known and could not have been known at the time that the 1976 EIR was certified. Rather, the proposal of the Freitas subdivision, and the corresponding change of approximately 3 acres of open space is a relatively new development. The Visual Impacts to Coward's Knoll were analyzed and disclosed at the time of the circulation and certification of the original 1976 EIR. There is no new information of substantial importance. This is because the conversion of less than 3 acres of open space out of the 4 large parcels (over approximately 20 acres) that were designated as open space for the 1976 project is not of "substantial importance." Rather, it is only a *de minimus* change. On the contrary, the primary mitigation that the houses atop of Coward's Knoll be limited to a single story remains in tact.

Additionally, the City Council has made the following findings pertaining to the feasibility of the 1976 mitigation measure requiring a 250 to 300 foot wide scenic and open space easement.

To any extent, if at all, that the mitigation measures for visual impacts in the 1976 EIR have not been satisfied by the previous land use designation of the Freitas Property as open space, the City Council finds that there are legitimate reasons for modifying the mitigation measures in the 1976 EIR as described below. The 1976 mitigation measures pertaining to the Freitas property have become infeasible for the following reasons:

- a.) A "scenic easement" has not been offered by the landowner of the Freitas property, nor accepted by the City. Imposing a scenic easement more than thirty years after the fact is not capable of being accomplished in a successful manner within a reasonable period of time;
- b.) The final subdivision map for the Pine Meadows subdivision omitted any reference to a scenic easement over the Freitas property and the City cannot legally require the landowner of the Freitas property to dedicate his land to the City;
- c.) To require the landowner of the Freitas property to encumber his land as if it is burdened by a scenic easement is disproportionately uneconomical to the landowner because s/he must continue to bear the economic burden of preserving undeveloped land, while land is developed into residential in the near vicinity;

- d.) Purchasing a scenic easement on the Freitas property is not economically feasible for the City because the City does not have funds to purchase open space such as this that does not preserve particular resources such as wetlands;
- e.) Maintaining the Freitas property as a horse set up lot can not be accomplished in a successful manner because the landowners' livestock have been injured, shot at, and molested in the past;
- f.) The "open space mitigation" no longer is as effective as it was in 1976 because the rural nature of Vine Hill Way is not as rural as it once was, but rather there are far more houses and roads now than was present in 1976; and
- g.) The Freitas property is not as valuable as open spaces that preserve particular resources, such as wetlands, natural waterways, or other areas of environmental sensitivity. Rather, the Freitas property does not contain such values identified for the protection of open space.

**Additional Findings For The Resolution Of The City Council Of The City Of Martinez For
The Draft Mitigated Negative Declaration For the Freitas General Plan Amendment**

NOW, THEREFORE, BE IT RESOLVED by the Martinez City Council that:

1.) The City Council finds that mitigation measures for visual impacts in the 1976 Environmental Impact Report for Tract 4744 and 4774 (Pine Meadows and Muir Heights subdivisions) ("1976 EIR") pertaining to the Freitas property have been satisfied because the Freitas property was planned to be zoned open space and the 1976 subdivision was moved away from Vine Hill Way.

2.) To any extent, if at all, that the mitigation measures for visual impacts in the 1976 EIR have not been satisfied, the City Council finds that there are legitimate reasons for modifying such mitigation measures as is described below [and as set forth in the Addendum to the 1976 EIR].¹ The 1976 mitigation measures pertaining to the Freitas property have become infeasible for the following reasons:

- a.) A "scenic easement" has not been offered by the landowner of the Freitas property, nor accepted by the City. Imposing a scenic easement more than thirty years after the fact is not capable of being accomplished in a successful manner within a reasonable period of time;
- b.) The final subdivision map for the Pine Meadows subdivision omitted any reference to a scenic easement over the Freitas property and the City cannot legally require the landowner of the Freitas property to dedicate his land to the City;
- c.) To require the landowner of the Freitas property to encumber his land as if it is burdened by a scenic easement is disproportionately uneconomical to the landowner because s/he must continue to bear the economic burden of preserving undeveloped land, while land is developed into residential in the near vicinity;
- d.) Purchasing a scenic easement on the Freitas property is not economically feasible for the City because the City does not have funds to purchase open space such as this that does not preserve particular resources such as wetlands;
- e.) Maintaining the Freitas property as a horse set up lot can not be accomplished in a successful manner because the landowners' livestock have been injured, shot at, and molested in the past and the land itself has been mistreated;
- f.) An "open space mitigation" is no longer as effective as it was in 1976 because the nature of Vine Hill Way is not as rural as it once was, but rather there are far more houses and roads in the immediate vicinity than were present in 1976; and

¹ For inclusion in the event an addendum to the 1976 EIR is adopted.

- g.) The Freitas property is not as valuable as open spaces that preserve particular resources, such as wetlands, natural waterways, or other areas of environmental sensitivity. Rather, the Freitas property does not contain such values identified for the protection of open space.

Accordingly, the City Council hereby modifies the mitigation measures of the 1976 EIR such that the Freitas property shall no longer be deemed a 250 – 300 foot wide scenic and open space easement.

- 3.) For the foregoing reasons, the City Council hereby modifies condition of approval number 5 for the 1976 subdivision such that a “scenic easement” shall not be dedicated to the City for Lot 25 (covering part of the Freitas property).
- 4.) Despite the project’s proposed conversion of approximately 3 acres of land zoned open space to residential, sufficient open space remains in the City of Martinez remains such that the project complies with the General Plan.