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January 24, 2008

City Council
City of Martinez
525 Henrietta Street
Martinez California 94553

Re: Proposed Additional Findings for the Freitas Subdivision

Dear Councilmembers:

In addition to my comment letter, dated January 24, 2008, in support of the Freitas subdivision, I have enclosed proposed findings for the Council's consideration for inclusion in the Resolution -08 in support the Mitigated Negative Declaration and Mitigation and Monitoring Reporting Program for a General Plan amendment.

Thank you for your consideration.

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January 24, 2008

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

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

Dear Council Members:

Please be advised that this office has been retained by the above-referenced project applicant and submits these comments on his behalf in support of the proposed Freitas Subdivision, located at 635 Vine Hill Way. This letter details the legal foundation supporting the proposed General Plan amendment for and future rezone of the Freitas Property (hereafter, "Property," "Project," or "Subdivision"). Additionally, we respond to the comments submitted to Council by attorney Thomas Lippe summarizing the project opponents' criticism of the Project.[1]

BACKGROUND

As you know, Mr. Freitas seeks Council approval for the subdivision of a 5.57 acre parcel, located near the intersection of Vine Hill Way and Morello Avenue. The Project would result in 4 residential parcels (R-10) and a remainder property, comprised of the existing house, located on .6 acres (R-20), as well as approximately 2 acres zoned as public open space.

The Property was discussed in the 1976 Environmental Impact Report for the Pine Meadows and Muir Oaks subdivisions ("1976 EIR".) Subsequent to the certification of the 1976 EIR, the Council amended the General Plan, changing the designation of the subject Property from public open space to so-called "permanent" private open space.

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[1] Mr. Lippe, representing an unincorporated association called "Keep Our Open Space" ("KOS") and Mark and Lorna Thompson, has submitted two letters to Council, dated November 28, 2007 and December 4, 2007.

THE CURRENT CITY COUNCIL HAS THE POWER TO CHANGE
THE LAND USE DESIGNATION FOR THIS PROJECT

The 1976 City Approvals of the Pine Meadows Subdivision Did Not Create a Designation That Could Never be Changed by Future Governing Bodies

Of critical importance to the City's proper application of CEQA to *this* Project is a preliminary determination of whether or not the 1976 City approvals of Pine Meadows required that the Property owners transfer a *perpetual* restrictive easement on the Property, preserving open space, scenery or some other environmental resource, forever as the opponents opine. Or, did the 1976 mitigation simply require that the Property be designated open space? As articulated below, the 1976 approvals expressly required that the land use designation of the property change. However, they did not entitle the City to require a scenic easement or other *perpetual* burden on title.

Opponents of the Project base their arguments largely on the fundamental assumption that the 1976 EIR and subsequent approvals perfected an open space designation at the project site and that such a designation could never be changed by future governing bodies. Close review of the mitigations as *actually* articulated in the 1976 EIR reveals that such a conclusion is plain overreaching.

More specifically, the opposition mischaracterizes the mitigation of the potential visual impacts of the 1976 Pine Meadows and Muir Oaks Subdivisions (hereafter, "1976 mitigation") by construing it as far more restrictive than may reasonably be interpreted. In short, the EIR required the Property be zoned open space, which it was. The *conditions of approval* imposed a requirement that a scenic easement be dedicated to the City.

As detailed herein, the scenic easement contemplated in Condition Number 5 was never lawfully created, because it lacks the statutory requirements for imposing a dedication of an easement, among other shortcomings. However, before addressing the issue of Condition Number 5 of the 1976 Pine Meadows subdivision, it is important to distinguish what the 1976 EIR required of the Freitas Property.

The 1976 Mitigation Does Not Require that the Freitas Property and Title Become Burdened by a Highly Restrictive Perpetual Easement

First, the 1976 mitigation measure does not specify that it requires that the Freitas Property be burdened by a restrictive scenic, or other, easement in favor of the City, the public, or a nonprofit organization, as the project opponents presume.

Second, the EIR determined that (a) "planning" a particular land use designation, (b) setting the 1976 subdivision back, and (c) saving oak trees were adequate mitigations to

<u>bring the levels of significant impacts to less than significant</u>.[2] This was done in 1976. Any objection to the mitigations as written then has long since been waived.[3] The opposition cannot now rewrite the 1976 EIR to create mitigations and significant impacts that were not a part of the actual EIR as certified over 30 years ago.

Thirdly, the City used the term "easement" when it actually meant "designation." Even though the 1976 conditions of approval used the term "easement," which can mean an interest of the property, it is not reasonable to construe that is what the City meant that in this context, because 1.) there are exceedingly few, if any, of the requirements to describe or timely transfer an easement; and 2.) the Martinez Zoning Code also refers to open space as an "easement."[4] In other words, the Code refers to easements when it actually means *land use designations*.

Moreover, other references in the 1976 EIR define the 1976 mitigation as a zoning change, not as a restriction on property that would run with the land forever, or in perpetuity. For example, the 1976 mitigation required that the Freitas Property be <u>zoned</u> "open space." The 1976 EIR states that one of the mitigations for the Pine Meadows subdivision was to <u>zone</u> "a similar sized area from "single-family development" to "planned open space."[5]

Conservation easements in the United States have been used since 1880.[6] If the 1976 City Council had wanted to permanently restrict (not just zone) the Freitas Property, it would have done so by meeting the requirements necessary to acquire such an interest in the land.

Interestingly, in 1974, just prior to the approvals of the 1976 subdivision, the California state legislature passed the Open Space Easement Act of 1974[7]. This act enabled counties or cities to acquire or approve an open space easement and described the procedure for doing so. As such, actual open space easements[8] (as the opposition advocates) could be obtained by cities and counties, but the Act required that certain

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[2] 1976 EIR, page 9.
[3] PRC §21167(b) (c)
[4] See Martinez Municipal Code §22.28.070 stating zoning of open space includes "open space easements."
[5] 1976 EIR, page 20.
[6] The first American conservation easements were written in the late 1880s to protect parkways in and around Boston, according to a history of easements published by the Land Trust Alliance in 1985;(*See* http://findarticles.com/p/articles/mi_m1016/is_n1-2_v100/ai_15143332, last visited January 15, 2008.)
[7] Government Code §51070 *et seq.*
[8] Open-space easement" means any right or interest in perpetuity or for a term of years in open-space land acquired by a county, city, or nonprofit organization pursuant to this chapter where the *deed or other instrument* granting such right or interest imposes restrictions which, through limitation of future use, will effectively preserve for public use or enjoyment the natural or scenic character of such open-space land. An open-space easement *shall contain a covenant* with the county, city, or nonprofit organization running with the land, either in perpetuity or for a term of years, that the landowner shall not construct or permit the construction of improvements except those for which the right is expressly reserved in the instrument....(Government Code §51075 (d) (*Emphasis added.*)

procedure take place and that particular findings be made by the City, including but not limited to:[9]

> (a) That the preservation of the land as open space is consistent with the general plan of the county or city; and
>
> (b)That the preservation of the land as open space is in the best interest of the county or city and specifically because one or more of the following reasons exist:
>
> > (1) That the land is essentially unimproved and if retained in its natural state has either scenic value to the public, or is valuable as a watershed or as a wildlife preserve, and the instrument contains appropriate covenants to that end.
> >
> > (2) It is in the public interest that the land be retained as open space because such land either will add to the amenities of living in neighboring urbanized areas or will help preserve the rural character of the area in which the land is located.
> >
> > (3) The public interest will otherwise be served in a manner recited in the resolution and consistent with the purposes of this subdivision and Section 8 of Article XIII of the Constitution of the State of California.

The subject 1976 approvals did not follow the required procedure nor make the required findings. Thus, no perpetual scenic or open space easement was created by the 1976 approvals.

Even absent the statutory failures the most basic requirements to convey an interest in land were never met. An easement is an interest in land. Conveyance of such an interest has very particular requirements. To the extent there was an actual interest in the title, if any, that was supposed to be conveyed, the City failed to perfect it. The City cannot now, especially more than 30 years later, require that an easement actually burden the Property. Any attempt to assert an easement now exists is plagued by problems including:

- There is no deed transferring such an interest, no money allocated by the City or developer to pay for an easement,
- There is no description of the extent that the easement will burden the Property,
- No entity is identified as that who or which is to own the easement,

[9] Government Code §51084.

- There is no signed instrument from the owner of the burdened land that would purport to conveying the easement.

The necessary elements have simply not been met in accordance with basic contract or property law.[10] Additionally, there has been no acceptance by the City of a dedication of an easement.[11]

Considering the foregoing, it appears plain that the opposition is trying to use 30-year-old zoning designations to lock up the subject property forever. However, the law is settled that zoning is not permanent.[12] Zoning does not give the City authority to treat the Freitas Property as if it were "permanently" zoned open space. The opposition argues that, in essence, that the City, or the public, gained a restrictive easement, which runs with the Freitas Property in perpetuity, despite the fact that no such a restrictive easement is discussed as a required mitigation in the 1976 EIR and despite the fact that there is no scenic, conservation, or other similar easement that has ever been recorded on the Freitas Property title.

Carrying the opposition to its logical conclusion, designations could never change in the face of changing needs of a community, regardless of such things as population pressures, technological advances, and the like. Such a position runs completely counter to the realities and progressions of land use in the 21st century.

As a result, the opposition has not met its burden to make a fair argument based on substantial evidence that the Project may have a significant effect on the environment. Rather, substantial evidence supports a City determination that the previous 1976 mitigation does not require that the Freitas Property be permanently burdened by a highly restrictive easement.

To The Extent the Property Was a Part of the 1976 Mitigation, Such Mitigation Has Been Fulfilled

Based upon the above analysis, it is clear that the 1976 mitigation did not require that a restrictive scenic easement burden the title of the Property. It is, however, apparent that 1976 mitigations did apply to the Property. The Record shows that, at most, it was the intention of the City to plan to designate the Property as open space. As is further explained below, such mitigation has long been fulfilled because the Property was zoned open space.

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[10] See Government Code §§51051 and 51075 (d).
[11] See Government Code §§51055, 51059, 51083 and 51087
[12] See *Selmi and Manaster* 2007 California Environmental Law and Land Use Practice (1998) §60.73(3)(c)(i).

The 1976 mitigation was proffered to mitigate potential significant visual impacts created by the Pine Meadows subdivision.[13] The mitigation was to visual impacts of the project on surrounding views, such as from Muir Oaks and the Townhouses. In particular, the description of the visual impact emphasizes that the visual impact at the top of Coward Knoll as a result of locating houses on it above the Subject Property. [14]

Here, it is important to note that the visual buffer contemplated in 1976 will remain largely intact under the Freitas project, because 2 acres +/- of open space will continue on the west side of the Property which faces Muir Oaks as part of the Project. Therefore, the City should limit its inquiry to the change in visual impacts in light of the 2 acres +/- that remains open space.

The opposition is incorrect in describing the Project as "deleting the open space mitigation."[15] At most, it could be argued that the Project modifies the mitigation measure. However, even that argument fails, because of the opposition's overreaching characterization of the 1976 mitigation.

The first time the 1976 documents actually discuss a "scenic easement" is *only* in the conditions of approval, after the 1976 EIR was certified. Any reference to a "scenic easement" was not required as part of the CEQA mitigation for the subdivision to bring the impacts to less than significant levels. The actual mitigation to bring the potentially significant visual impact of the 1976 subdivision was 1.) primarily to require that the houses on Coward's Knoll be only one story; 2.) to plan for a 250 foot wide scenic and open space on the Property; 3.) to save an oak tree; 4.) to move the 1976 subdivision away from Vine Hill Way and 5.) to zone the property "planned open space."[16] All of these mitigations were fulfilled.

The EIR states nothing of a restriction on the Property and its title that would run with the land, forever in perpetuity. Such distinction is important. In this case, the 1976 mitigation did not rise to the level of City's acquiring a restrictive easement over the Freitas Property.

As noted above, the mitigations stated in the 1976 EIR describe what is required to bring the potentially significant impacts to less than significant levels. Such mitigations have been implemented and satisfied. The Conditions of Approval for the 1976 subdivision, in so far as they exceed the mitigations, are not required by CEQA to mitigate the impacts to less than significant levels

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[13] The 1976 EIR states, "Adverse visual impacts are expected to occur in two locations – along Vine Hill Way (and from some of the Vine Hill Townhouses which overlook a portion of the site) adjoining the projects and from several lots within Muir Oaks overlooking the subject projects." (1976 EIR, page 9.)
[14] 1976 EIR, pages 9 and 36.
[15] Thomas Lippe correspondence, dated December 4, 2007, page 1).
[16] 1976 EIR, pages 9, 20, and 36.

At any rate, the City has not required nor acquired a scenic easement discussed in the Condition. Further yet, the Final Map was accepted without the City's acquisition of the scenic easement.[17] The City can not now require that the scenic easement be dedicated.

The Statue Of Limitations Has Long Since Run On The Opposition's Untimely Objections To The 1976 EIR Mitigations And The Final Subdivision Map

The opposition's complaint is really that the 1976 EIR should have required something more than zoning, moving the lots away, and planning open space. But, the opposition should have complained in 1976 for a stronger mitigation. Now, the statute of limitations on such a complaint has long since run. Additionally, when the words "scenic easement" were eliminated from the Final Map, the opposition could have (again) sought administrative and judicial relief, but failed to do so.

The opposition's complaint comes too late, as the statute of limitations has long since run by more than 30 years. Having missed both opportunities to timely file objections and legal actions to maintain the theory that the mitigation required the City to obtain an easement, the opposition cannot now object to changes to the 1976 project.

THE CURRENT CITY COUNCIL HAS THE POWER TO MODIFY PREVIOUSLY ADOPTED MITIGATIONS

Even If the City Determined That The Property Is Subject To A Scenic Easement, the Mitigation Restricting the Freitas Property can be Changed Because It Is No Longer Feasible

Previous mitigations for CEQA projects *can be changed* so long as CEQA is properly applied.[18] For example, deletion of previous adopted mitigation measures requires two findings: "a governing body must state a legitimate reason [like infeasibility] for deleting an earlier adopted mitigation measure, and must support that statement of reason with substantial evidence. [19] The City must "undertake or require the undertaking of any feasible mitigation measures specified in the prior [EIR] relevant to a significant effect which the project will have on the environment."[20]

Thus, even if the Council determines that the 1976 EIR did require mitigation that continues to affect the Freitas Property over 30 years later, only some of the mitigation is changed under the current proposal. The record related to this project plainly

[17] See also Government Code §51055, stating, "No instrument described in Section 51051 shall be effective until it has been accepted by resolution of the governing body of the city or county and its acceptance endorsed thereon." Zoning the property as open space was a mitigation for a term of over 30 years The Open Space Easement Act permits dedications of easements for terms of 20 years or more. Government Code §51053.

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

[19] *Id.* at p. 359.

[20] PRC 21083.3(c)

demonstrates this applicant's careful consideration and crafting of appropriate protections.[21]

The opposition's main argument is that the Freitas Property must be encumbered by a restrictive easement because such was mitigation for the Pine Meadows Subdivision. As detailed above, that is not true. Nonetheless, the requirements for changing such a mitigation in the event it did exist are met here. This is so because there is substantial evidence supporting the governing body's determination that such mitigation is no longer feasible. [22]

Specifically, the alleged mitigation to dedicate the land to the City is no longer feasible for the following reasons:

1. The City cannot require that Freitas grant a scenic easement after the final subdivision map was accepted.[23]
2. The Freitas Property was not able to remain a horsey set up lot nor a grazing site because Mr. Freitas' horses and cattle were repeatedly vandalized. [24]
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 sprung up causing more of a burden for Mr. Freitas to maintain his property as undeveloped and the impact is less than significant.

Moreover, using a Mitigated Negative Declaration to designate a land use from open space to residential complies with CEQA.[25] As in *Baldwin,* the City of Martinez has sufficient open space such that the re-designation of 3 +/- acres of open space to residential will not have a potentially significant impact.

Thus, the City is supported by substantial evidence that it has legitimate reasons for altering the mitigation measure. The opposition has not met its burden proving that there is a fair argument that an EIR must be done for this Project based on the purported fact that the Property was burdened by a perpetual easement. There is no reasonable interpretation that the 1976 EIR required it and even if it did, requiring a scenic easement has become entirely infeasible for legal and economic reasons.

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[21] In particular, the proposal includes the preservation of 2 acres +/- of open space on the west side of the Project which continues to buffer the visual impacts identified in 1976.

[22] The City must "undertake or require the undertaking of any feasible mitigation measures specified in the prior [EIR] relevant to a significant effect which the project will have on the environment." PRC 21083.3(c)

[23] See Martinez Planning Commission Staff Report, dated January 10, 1079.

[24] See Declaration of Gary Freitas, dated January 22, 2008.

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

THE ENVIRONMENTAL REVIEW CONDUCTED FOR THE PROJECT SATISFIES THE REQUIREMENTS OF CEQA

Mitigation Measures For Potentially Significant Impacts From The Project Are Adequate

The opposition complains that the future application of the NPDES permit (C.3 permit) issued by the Regional Water Quality Control Board is inadequate because "there is no particular reason that applying for and obtaining the permit before project approval is 'infeasible.'"[26] However, applying for an NPDES permit at this time is infeasible and completely unreasonable. The Project proponent is applying for a General Plan amendment and a future rezone, which will determine if the site may be developed. It is uneconomical for the Project proponent to finalize his development plans prior to obtaining these approvals.

Furthermore, future action as mitigation is acceptable where, as here, the City possesses "meaningful information" reasonably justifying an expectation of compliance with the mitigation measures.[27] The NPDES permit has specific standards associated with it and the City is justified in its expectation that the Project proponent will comply with the permit conditions.[28]

The opposition also complains that the future application of the Stormwater Pollution Prevention Plan (SWPPP) must be submitted to the City prior to approval of the grading plan. Again, the approvals specify meaningful information and are reasonably justified in relying on its expectation of compliance. In particular, the SWPPP requires education of on-site personnel, regular tailgate meetings, a monitoring program, compliance with SWRCB resolution No. 2001-046, and particular best management practices, such that it complies with CEQA.

Next, the opposition complains that the utilization of Integrated Pest Management (IPM) to reduce the potential sources of pollution is inadequate and defers mitigation. . On the contrary, the mitigation measure provides meaningful information, including but not limited to the designation of an IPM certified applicator in the Operations and Maintenance Plan. The mitigation has been sufficiently described such that it is meaningful and enforceable because the developer must "designate an IPM certified applicator in the Operations and Maintenance Plan." Foreseeable protections to the environment will flow from application of IPM and the mitigation measures may be reasonably relied upon by the City.

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[26]Lippe correspondence dated, November 28, 2007, page 4.

[27] *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 77, fn. 5 and *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 309.

[28] For example, the C.3 NPDES permit requires numeric sizing criteria for pollutant removal treatment systems; operation and maintenance of treatment measures and a limitation on increase of Peak stormwater runoff discharge rates. (Initial Study, page 13.)

The opposition further complains that the mitigations for potentially significant impacts to aesthetics. However, the substitute mitigation measure AES-2 does provide meaningful information upon which the City can rely (as did the circulated AES – 2). This is because there are specific standards associated with such mitigation, including, but not limited to limiting the maximum height of roof peaks to the 305 foot elevation, stepping back of second stories, and using shed and hips rather than gable roofs and as previously circulated.

Accordingly, the opposition has failed to make a fair argument based on substantial evidence that the Project requires an EIR because the mitigation measures are inadequate. Instead as demonstrated, substantial evidence supports the determination that the Project's mitigation measures do mitigate any potentially significant impacts to less than significant levels. .

The Proposed Approval Does Not Segment the Project

The opposition complains of improper segmentations - that the environmental review of the project must consider both the General Plan amendment, along with the rezone, *and* the tentative subdivision. That is wrong. Segmentation is analyzing parts of a project separately to avoid proper environmental review by breaking a project into smaller segments. Here, the MND analyzes the whole of the Project, not its separate parts. Moreover, the Project proponent has complied with CEQA by undertaking environmental review at the earliest possible commitment to the issue.[29] The MND analyzes the underlying activity – changing the land use designation from open space to residential – in the General Plan and in the Zoning Ordinance.

The opposition's argument that the General Plan amendment must be considered at the same time as the tentative subdivision map is completely impracticable and infeasible. Why would an applicant go to the expense of creating a tentative subdivision map before obtaining the necessary and preliminary approvals? CEQA does not require irrational development. On the contrary CEQA requires that the whole of the project is analyzed, not the individual project approvals.[30]

The opposition also complains that the future implementation of mitigation measures, such as to AES-2, HYD-1 through HYD-4 illegally segment the Project. Again, the opposition is incorrect in its analysis of what CEQA requires. The Project may be subjected to other governmental approvals, which is to say that future having to obtain future approvals (such as the tentative subdivision map, the SWPPP, the NPDES permit, etc.) In and of itself future consideration does not illegally segment the Project, because the whole of the Project has been sufficiently analyzed in the documents in support of the MND.

[29] Guidelines §15352 (b).
[30] *Committee for a Progressive Gilroy v. State Water Resources Control Board*, 192 Cal. App. 3d. 847, 863 (1987). Guidelines 15378(c).

Here again, the project opponents have failed to meet their burden to prove that there exists a fair argument based on substantial evidence that an EIR is required. Rather, the City's determination is supported by substantial evidence that the Project is properly analyzed and potentially significant impacts disclosed, mitigated and/or avoided through the MND already prepared and circulated.

The Proposed General Plan Amendment is Consistent with the Martinez General Plan as well as the Contra Costa County General Plan Open Space Element

As reflected in the record the project is consistent with the Martinez General Plan. Moreover, the County General plan goals for Open Space are well met.

The County General Plan Open Space Element states that the overall open space goals are to preserve and protect the ecological, scenic and cultural/historic, and recreational resource lands of the County.[31] The subject Project continues to meet such goals because the subject property has no important ecological attributes – there are no wetlands, natural waterways, or other areas of environmental sensitivity. Instead, the subject site is surrounded by development and consists primarily of nonnative grasses. Additionally, there are no cultural or historic resources that have been identified at the site. The subject Project will promote the recreational use of the Project because the remaining 2 acres will be dedicated to public use, rather than remain solely for private use.

The County General Plan identifies that the scenic resources include: isolated hilltops, rock outcroppings, mature stands of trees, lakes, reservoirs and other natural features. However, the subject Project eliminates none of these resources. They exist on the subject site, if at all, is on the far western portion the Freitas Property, where sits what the portion of Coward Knoll that was not developed under the 1976 plan and which will be preserved as part of this Project.[32] Similarly, none of the scenic resource goals are violated – no area of "high scenic value or major scenic ridges or the scenic qualities of the San Francisco Bay/Delta estuary system or the Sacramento-San Joaquin River/Delta shoreline will be altered in any way whatsoever by this Project.[33]

The City is Not Required to Re-circulate the MND

The MND was prepared and circulated for public comment prior to the Planning Commission's hearing in July 2007. Subsequent to that circulation, two of the proposed mitigation measures addressed the need for design refinements to preserve the relatively semi- rural aesthetic of Vine Hill Way. The changes in the mitigation measure

[31] Contra Costa General Plan 2005-2020, page 9-3.
[32] The Freitas Property is not considered as an existing open space area. (Contra Costa General Plan 2005-2020, Figures 9-5, 9-6 and 9-7.)
[33] See Contra Costa General Plan 2005-2020, page 9-5.

have not presented new significant information. As such, MND does not require recirculation or corresponding public comment review.

Planning Staff concluded that the substitute mitigations were merely "technical refinements and clarifications, rather than substantial changes that would require re-distribution." CEQA Guidelines §15073.5 provides guidance as to how a MND should be re-circulated prior to its approval—recirculation is required when (1) the identification of a new, avoidable significant effect that can be reduced to a less-than-significant level only through the adoption of mitigation, and (2) a determination that originally proposed mitigation is not sufficient to reduce a project's impact to a less-than-significant level, and that additional mitigation or project revisions are necessary.

In this case the circulated AES-2 mitigation measure mandates that an 18 feet maximum from grade would be allowed. The substituted AES-2 mitigation measure clarifies that the maximum height of roof peaks and ridges are to the topographical elevation of 305 feet. This change clarifies that maximum roof height, despite grading or filling, which is a more objective means by which to describe the mitigation, which was achieved using either the circulated or the substituted mitigation measure. There is no determination that the circulated mitigation measure was not sufficient, only that the substituted mitigation measure is clearer, more objective and better for the environment.

Here then, recirculation is not required because (1) the modifications to the mitigation measures are clarifications, (2) there is no new avoidable significant effect that may only be reduced to less than significant levels through the adoption of a new mitigation measure, and (3) the City has not made a determination that the original mitigation measures are not sufficient to reduce a project's impact to less than significant levels. The opposition has failed to provide a fair argument based upon substantial evidence that recirculation is required. Rather, substantial evidence supports the City in that recirculation of the MND and associated documents is not required.

CONCLUSION

Council determinations (1) to grant the GPA and future rezone; (2) that the previous mitigation has been satisfied or does not apply; (3) that the mitigations are adequate; and (4) that the environmental review was adequate for this MND are all well supported by substantial evidence in the Record of these proceedings.

In addition to the record before the body and the foregoing legal arguments, a measure of fairness to the land owner and to the community is a good guide for Council action. The community has no right to require or expect that 1970's zoning of the Freitas Property would remain static forever, especially with the changing times and land use planning trends toward infill rather than sprawl. Moreover, as noted in the Record, Mr. Freitas has worked diligently for nearly 2 decades, including obtaining judicial relief in 1999 to modify the CC&R's of the Pine Meadow subdivision, to create development that

will respect community aesthetics and provide useful development. As indicated in this application, he has done so.

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

Respectfully submitted,

Dana Dean

<u>Declaration of Gary Freitas</u>

I am Gary Freitas. I have personal knowledge of the facts contained herein, and if called upon to testify would do so competently. At all relevant times, I have resided at 635 Vine Hill Way (hereafter, "Property"). I have lived there for nearly 30 years. Additionally, I grew up in Martinez since 1941 and I have witnessed the general change in the area of my Property going from rural to residential. In particular, my Property is now surrounded by custom homes, subdivisions and roads.

At all relevant times, there has never been a scenic easement recorded on my Property.

The current zoning allows for up to 6 horses on the Property. Since 1978 periodically I have pastured horses and cattle on the Property.

I have experienced several problems with the keeping of livestock on my Property including, but not limited to the following:

a.) Due to the easy access of the Property the general public tends to feed the horses without permission of the owners, which is dangerous to the public feeding the animals, dangerous to the animals, and it creates unreasonable liabilities to me;

b.) Due to the easy access of the Property the neighbors and the general public have caused dogs to be turned loose on my Property, which is incompatible with the keeping of livestock;

c.) Additionally, the neighbors on Meadowvale and the general public have routinely thrown trash into my Property, resulting in a dangerous situation to animals that keep. For example pieces of sharp conduit create a hazard for the livestock and the horses owners had to obtain veterinary treatment for at least two horses that injured their legs as a result of being cut from trash.

d.) Neighbors have hit numerous golf balls into my Property, creating a nuisance to livestock and humans using my Property.

e.) I have also pastured steers on the Property, but neighbors have shot in the general direction of the steers, which caused me to move the steers off of the Property.

f.) The general public has taken down my fences, which is incompatible with the keeping of livestock.

For the foregoing reasons it is infeasible for me to maintain my Property as a horsey set up lot and/or open space.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on January 22, 2008 at Benicia, California.

Gary Freitas