

**CITY OF OAKLAND
COUNCIL AGENDA REPORT**

FILED
OFFICE OF THE CITY CLERK
OAKLAND

2005 JAN 13 PM 8:17

TO: Office of the City Administrator
ATTN: Deborah Edgerly
FROM: Public Works Agency
DATE: January 25, 2005

RE: SUPPLEMENTAL REPORT ON THE STATUS OF LEONA QUARRY
SUBDIVISION PROJECT RELATED TO COMPLIANCE WITH
CONDITIONS OF APPROVAL AND RESPONSE TO LETTERS FROM
NATURAL HERITAGE INSTITUTE REGARDING CONCERNS FROM
MILLSMONT HOMEOWNER'S ASSOCIATION ON LEONA QUARRY
SUBDIVISION PROJECT

SUMMARY

This supplemental report addresses additional questions raised at the December 14, 2004 Public Works Committee meeting regarding the Informational Report describing the status of the Leona Quarry Subdivision Project as it pertains to compliance with the Project's Conditions of Approval (COA). City staff's response to letters from the Natural Heritage Institute (NHI) is also included.

The information presented in this report is organized in the same sequence as it was requested by Committee members.

Item 1: RWQCB Letter: A copy of a letter from the California Regional Water Quality Control Board signed by Dr. Lawrence P. Kolb, regarding the Board's satisfaction with the erosion control measures at Leona is included as Attachment A.

Item 2: Defense & Indemnity Agreement: A copy of the subject agreement executed between the City and DeSilva Gates (DSG) in April 2004 according to the terms of COA #9, 19, and 11 is included as Attachment B.

Item 3: AC Transit Bus Service: City staff contacted AC Transit Service Planning Manager, Mr. Tony Brazoni, who confirmed that AC Transit has plans to include a bus stop within the Leona Subdivision on its NX4 and 56 Bus Routes. NX4 route is an express bus service that originates in Castro Valley and ends in San Francisco with Leona being its last stop before San Francisco. Route 56 is a local route. The confirmation of the bus stop location and bus operations are indicated in AC Transit letter dated August 20, 2004, which is included as Attachment G. DSG is currently in discussions with AC Transit regarding the exact location, layout, and design of the bus stop shelter, as required by Mitigation Monitoring & Reporting Program (MMRP) item A.2.a.

Item 4 – Detention Basin Liner: The liner in the detention basin consists of a 2-foot layer of clay covered by one foot of topsoil. The clay layer is protected by the topsoil layer. Plants will be introduced in the basin. The basin will be empty most of the time except during storm events.

Rain will drain through the 18” circular orifice at the lowest point in this basin within 24 – 48 hours. The integrity of this design has been reviewed by Lowney & Associates, the City’s Geotechnical Peer Review Consultant, and was found to be adequate to prevent seepage over the years of use while maintaining water quality benefits. The liner as part of the detention basin will be monitored and maintained by GHAD.

Item 5 - Swales: Vegetated swales in the Village Green area and throughout the site will be built with a minimum slope to prevent water from standing still and creating an environment for mosquitoes. The vegetated swales will improve the water quality of storm water leaving the site.

Item 6 - GHAD: Staff and City’s consultants are in the process of reviewing the GHAD startup and reserve fund allocation and preparing a resolution for City Council approval on March 1, 2005 to authorize the GHAD Board to establish assessments, reserve funds, and any requirements to fully fund the GHAD. The Project Final Map will not be approved until the GHAD is fully funded and operational.

Item 7: Traffic Improvement Fee (TIF) & Traffic Improvement Program (TIP): The City received a proposal from Fehr and Peers, a Transportation Consultant that served as the City’s Peer Reviewer during the Environmental Review. This firm is extremely familiar with the proposed improvements and the establishment of a TIF & TIP. The consultant’s fee to complete the scope of work as identified in the Leona Project COA # 26 is \$48,600. All costs associated with this study will be borne by DSG. Staff is in the process of finalizing the work scope and beginning the study.

Item 8: MMRP-B.1, Page 59: A qualified wildlife biologist, Wetland Research Associates (WRA) was hired by DSG to fulfill the requirements of this MMRP. WRA was available onsite full time during the initial grading operations and installation of the barrier fence. The City’s consultant, Essex Environmental, a subcontractor for Lowney & Associates was also available onsite on a weekly and as needed basis. Essex was responsible for reviewing fieldwork and relevant reports. Weekly reports were produced by both WRA and Essex. Due to the large volume of paperwork associated with this work, these reports were not included in December 14, 2004 Informational Report to the Public Works Committee. Staff requested Lowney & Associates to summarize their findings in brief reports to include in this report as Attachment C. Weekly detailed reports are available for review upon request.

Item 9: Sewer Line: Staff reported that along Chimes Creek between Nairobi Place and Delmont Street there are currently two sewer lines that run within City easements (see Attachment D). Line “N” runs from Nairobi Place about 600 feet along the North side of the

creek and Line "S" runs from Nairobi to Delmont a distance of 1,000 feet along the South side of the creek. Line N is 8 inches in diameter and serves about 10 homes while Line S is 12 inches in diameter and serves all properties along the South bank of the creek and properties upstream of Delmont. It is Line S that will carry flows from the future homes in the Leona Development.

Both creek banks have been eroding for at least the last 20 years. This process exposed the two sewer lines in several locations and undermined its stability as well as the stability of several homes in the vicinity. On December 4, 2004, a property owner reported a disjoined sewer main along Line N and City Maintenance crews reported immediately to the site and repaired the pipe.

City staff analyzed the capacity of Line S and determined that some sections outside the creek area will need to be upsized to accommodate the additional flow from the Leona Development. An estimate was prepared, and the DSG was charged about \$390,000 in Sewer Mitigation Fees to cover the costs associated with this work. Staff is currently preparing plans, estimates, and a feasibility analysis for alternatives that include either replacing Line S with another pipe in Hillmont Drive or building a bypass line to accommodate the extra flow from Leona. Staff plans to hold a meeting with the owners to explain that this work might affect their property, seek their input and address their concerns. Staff plans to complete the work in 2005.

Item 10: Chimes Creek: The project's EIR identified Chimes Creek as a previous site feature. Page IV.f-3 of the DEIR illustrates the former course of Chimes Creek prior to quarry excavation (Attached E). Although the creek headwater starts near the Northern edge of the Leona site, only a small portion has not been culverted or destroyed during the massive quarrying operations that occurred over a 100-year period. This segment lies at the extreme northern edge of the site and discharges into the upper detention pond. The creek and the surrounding area are not being disturbed as part of this project. Below the upper pond, the rest of the creek has been severely disturbed by the quarrying activities and was rerouted underground through a subdrainage system to a point near the Eastern edge of the Leona site near Interstate 580. The EIR concluded that the project would not disturb the creek and therefore would comply with all federal, state, and local requirements. It also confirmed that the project avoided all "waters of the United States" and "waters of the State" and no permits would be required. Both the California Department of Fish and Game and the Regional Water Quality Control Board reviewed the DEIR and the EIR and neither disagreed with its findings. Consequently, City Council certified the EIR and adopted its conclusions. No creek determination was required because Chimes Creek on the Leona Quarry site did not exist as a creek. Since 2002, the City has adopted a more stringent Creek Protection Ordinance that has a broader interpretation of what characteristics constitute a creek.

Item 11: The City's response to the Natural Heritage Institute letters dated October 25, 2004 and November 11, 2004 is included in this report as Attachment F.

ACTION REQUESTED BY THE CITY COUNCIL

Staff recommends that the City Council accept the Informational Report.

Respectfully submitted,



RAUL GODINEZ II, P.E.

Director

Public Works Agency

Respectfully submitted,



CLAUDIA CAPPIO

Director

Community & Economic Development Agency

Reviewed By:

Michael Neary, P.E.

Interim Assistant Director, PWA

Design & Construction Services Department

Prepared By:

Fuad Sweiss, P.E.

Interim Manager

Engineering Design & Right-of-Way Division

APPROVED AND FORWARDED TO THE
PUBLIC WORKS COMMITTEE:



OFFICE OF THE CITY ADMINISTRATOR

ATTACHMENT A



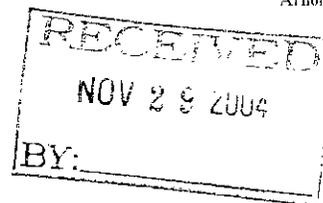
California Regional Water Quality Control Board
San Francisco Bay Region



Terry Tamminen
Secretary for
Environmental
Protection

1515 Clay Street, Suite 1400, Oakland, California 94612
(510) 622-2300 • Fax (510) 622-2460
<http://www.swrcb.ca.gov/rwqcb2>

Arnold Schwarzenegger
Governor



November 17, 2004

Mr. James B. Summers, P.E.
The DeSilva Group
11555 Dublin Boulevard
PO Box 2922
Dublin, CA 94568

Dear Mr. Summers:

This is to confirm our recent discussion concerning erosion control at your Leona Quarry project in Oakland. Keith Lichten and I inspected the property on November 12, 2004, the day after substantial rainfall, and we found that the site looked very good. There was straw and stabilizer over almost all the exposed areas, and erosion control netting was in place on the steepest areas.

We also inspected the stormwater treatment system that uses chitosan for turbidity removal, and we were favorably impressed. The current condition of the site constitutes a major improvement, and we look forward to your continued efforts to manage this demanding site through the wet season ahead.

If you would like to discuss this further, I can be reached at 510.622-2372.

Yours truly

Lawrence P. Kolb, Ph.D., P.E.
Assistant Executive Officer

Cc: Marcel Uzegbu, William Madison, and Faustino Jun Osalbo, City of Oakland
Leslie Estes, Watershed Program Supervisor, City of Oakland

ATTACHMENT B

CITY OF OAKLAND



ONE FRANK OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA 94612

Office of the City Attorney
John A. Russo
Heather B. Lee
Supervising Deputy City Attorney

(510) 238-3838
FAX: (510) 238-6500

April 8, 2004

Michael Willcoxon, Esq.
General Counsel
The DeSilva Group
11555 Dublin Blvd., Suite 201
Dublin, CA 94568

Re: Leona Quarry Project, Defense and Indemnity Agreement; Conditions of Approval Nos. 9, 10 and 11

Dear Mike:

This letter agreement ("Agreement") establishes specific details for implementation of defense and indemnification requirements contained in the Conditions of Approval Nos. 9, 10 and 11 for the Leona Quarry Project (the "Project"). For purposes of this Agreement, "Conditions of Approval" refer to the "Conditions of Approval for the Leona Quarry Project Vesting Tentative Map, Planned Unit Development Approval and Design Review" attached as Exhibit C to City Council Resolution Nos. 78358 and 78359 C.M.S., adopted on February 17, 2004. Conditions of Approval No. 9, 10 and 11 (the "Conditions") for the Leona Quarry Project establish the defense and indemnification requirements addressed in this Agreement.

The headings below are for ease of reference and are not intended to limit any of the obligations specified in the body of the text.

I. Purpose of this Agreement.

Pursuant to the Conditions, the Project Applicant (as defined in Condition of Approval No. 2) (the "Applicant") is required to defend, indemnify and hold harmless the City of Oakland, the Oakland City Council, and the City's officers, agents, employees ("Indemnified Parties") and their insurers from any and all losses, claims, damages, liabilities, judgments, causes of action or actions or other forms of legal or equitable relief (including attorneys' fees and costs) arising from or related to (1) the approval of the Project, (including, without limitation, the litigation identified as Alameda Superior Court Case No. 2003-077607 (the "Litigation"); (2) implementation of the Project (including, without limitation, the formation and operation of a Geologic Hazard Abatement District ("GHAD"), design, construction or maintenance of the Project and any private or public improvements (as specified in Condition No. 10) and (3) in the

Michael Willcoxon, Esq.
Defense and Indemnity Agreement
April 8, 2004
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case of City Council members, actions taken by such members while acting in the capacity as the GHAD Board of Directors (collectively, "DIHH Obligation").

Notwithstanding any other provision (including, without limitation, the last sentence of Condition of Approval No. 8), this DIHH Obligation shall not be released upon completion of the Project and this Agreement shall survive and remain binding upon the Applicant notwithstanding completion of the Project (except as expressly limited and authorized in Condition of Approval No. 10 with respect to City-approved assignments and certain public improvements). This DIHH Obligation is in addition to, and in no way shall be construed to limit or replace any obligation or liability that Applicant otherwise may have to any Indemnified Party.

2. *Agreement Implements But Does Not Limit Conditions of Approval and All Other Requirements.*

This Agreement implements Condition of Approval No. 11, which specifies that the Applicant shall enter into an agreement in a form acceptable to the City Attorney to establish in more specific detail the terms and conditions of the Applicant's DIHH Obligation. Nothing in this Agreement shall be construed to limit, restrict or abrogate any right or obligation specified in the Conditions of Approval; however, any failure of Applicant to fulfill any obligation herein may provide a basis for the City Planning Director or designee to determine that the Applicant or the Project is not in compliance with the Conditions of Approval and to exercise his/her authority under Condition of Approval No. 37. All Conditions of Approval, including, without limitation, Conditions of Approval No. 9 and 10, shall survive and be binding even if this Agreement or any portion thereof is extinguished, terminated, lapsed, ruled invalid by a court of law, or otherwise adversely affected.

3. *Defense of Litigation.*

As specified in Condition of Approval No. 9, the DIHH Obligation includes, among other things, payment of all direct and indirect costs associated with any City action related to the Project, specified in the Conditions of Approval. Such costs include, without limitation, City Attorney time and overhead costs and other expenses. Although the City will not duplicate efforts and will make reasonable efforts to limit its costs, the Applicants are nevertheless responsible for reimbursing the City, within thirty days of a letter invoice, for the costs and fees the City incurs (including without limitation in-house and outside counsel fees and costs).

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Defense and Indemnity Agreement
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Page Three

4. *Agreement Survives Any Extinguishment of Project Approvals or Conditions of Approval.*

This Agreement, including without limitation the DIHH Obligation, shall survive and be binding on the parties even if any Project approvals or Condition of Approval is extinguished, terminated, lapsed, ruled invalid by a court of law, or otherwise adversely affected.

5. *Confidentiality.*

This Agreement and matters relating to the defense of the Litigation or any other proceeding shall be considered to be privileged and confidential to the maximum extent allowed by law; provided, however, that this Agreement may be introduced by the parties in the event of a dispute as evidence concerning its application, interpretation, enforcement, or implementation.

The parties acknowledge and expressly intend that, to the maximum extent allowed by law, a joint attorney-client privilege and work-product privilege is created by this Agreement in order to protect from disclosure any information, analysis, and strategies shared or discussed between them with respect to the conduct of the defense of the Litigation, and in order to preserve, and not to waive, the privileged nature of such information, analysis, and strategies as against any third party seeking to obtain it; provided, however, that these shared privileges may arise only with respect to: (1) Written non-public documents containing information, analysis and strategies at the time such documents are exchanged between counsel for the parties hereto; (2) Oral communications between counsel for the parties at the time of such communication. Unless expressly agreed to by the affected party, each of the parties agrees not to voluntarily disclose to third parties any information, analysis, or strategies provided to it by the other party as described in this paragraph, and agrees to take all reasonable steps to avoid any compulsory disclosure of any of it. If one party is threatened with compulsory disclosure (for example, through receipt of a public records request, discovery request or subpoena seeking such information), that party shall immediately notify the other in writing prior to responding to such threatened compulsory disclosure.

6. *GHAD Indemnity of City and Councilmembers.*

As specified in the Condition of Approval No. 24(i) and in Resolution No 77545 C.M.S., which approved the formation of the GHAD, the GHAD is separately obligated to defend, hold harmless and indemnify the Indemnified Parties and their insurers against any and all liability, damages, claims, demand, judgments, losses or other forms of legal or equitable relief related to the formation and operation of the GHAD (including, without limitation, maintenance of GHAD-

Michael Willcoxon, Esq.
Defense and Indemnity Agreement
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owned property), and, in the case of the City Councilmembers, actions taken by such members while acting as the GHAD Board of Directors (collectively, "Indemnified GHAD Claims"). Condition of Approval No. 24(i) specifies that an agreement similar to this agreement would be entered into between the City and the GHAD within 90 days of formation of the GHAD; however, failure of any party to do so does not limit any right of the City nor any obligation of the GHAD with respect to so defend, hold harmless and indemnify the Indemnified Parties. As a result, the lack of an executed agreement between the City and the GHAD does not inhibit the City or its individual Councilmembers from seeking relief under Resolution Nos. 78358 and 78359 C.M.S., Condition of Approval No. 24(i), or any other provision.¹

Applicant's DIHH Obligation shall not be limited, restricted or abrogated by any indemnity, defense, hold harmless or other obligation of any third party (including without limitation, the GHAD) to the City or its individual Councilmembers.

7. *Effective Date.*

This Agreement is effective as of February 17, 2004.

8. *Successors.*

Unless and until Applicant is released in accordance with Condition of Approval No. 10, this Agreement shall be binding upon the Applicant and shall remain binding upon each and all of them as defined in the Conditions of Approval, even upon a transfer of some or all of the Project site or assignment to a third party of permits associated with the Project. Applicant shall provide City with notice of any such assignment in accordance with Condition of Approval No. 10, and any Applicant shall be released from this Agreement and the DIHH Obligation only as expressly stated in Condition of Approval No. 10. Not in limitation of the foregoing or any of the Conditions of Approval, this Agreement shall be binding upon the successors, heirs, assigns, agents, lien claimants, and personal representatives of the Applicant.

¹ We would further note that the GHAD is a legal entity separate and independent of the City, and the Conditions of Approval specify that no City employees, including employees of the City Attorney's office shall undertake operations or otherwise administer the GHAD. Accordingly, while the City (and individual Councilmembers) have a right to seek indemnification under the terms of the GHAD formation resolution and the Conditions of Approval, we have no authority to advise the GHAD with respect to the terms of an indemnification agreement that would implement the specific terms of Condition of Approval No. 24(i).

Michael Willcoxon, Esq.
Defense and Indemnity Agreement
April 8, 2004
Page Five

9. *General Provisions.*

All the parties to this Agreement have participated in its drafting and had the benefit of legal counsel. Therefore, any ambiguity shall not be construed against the drafter and the parties shall be deemed to have jointly drafted this Agreement.

In addition to other remedies available at law, this Agreement may be enforced (and any dispute, claim or controversy regarding its interpretation or application may be resolved) by appropriate equitable action, including court-issued injunction, specific performance or declaratory relief.

This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument. Furthermore, this Agreement may be executed and delivered by the exchange of photocopies or facsimile copies of this Agreement, which copies may be used as originals. Each such counterpart, photocopy or facsimile copy of this Agreement shall be deemed an original, but all of which together shall constitute one and the same instrument.

Michael Willcoxon, Esq.
Defense and Indemnity Agreement
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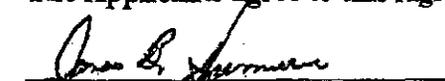
If this Agreement is acceptable, please arrange for the necessary signatures and return an original to me. Thank you for your cooperation in this matter.

Very truly yours,

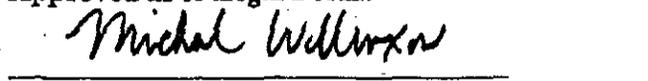

John A. Russo
City Attorney

By: Heather B. Lee
Supervising Deputy City Attorney

The Applicants agree to this Agreement:


By The DeSilva Group, LLC
4-15-04
Dated

Approved as to Legal Form:


By Michael Willcoxon, Esq., Attorney for Applicant
4/15/04
Dated

January 6, 2005
Project 1993-1

Mr. Marcel Uzegbu
City of Oakland
Public Works Department
250 Frank Ogawa Plaza
Suite 430
Oakland, CA 94612

**RE: LEONA QUARRY PROJECT
SUMMARY OF OVERSITE
ACTIVITIES**

Dear Mr Uzegbu:

For the period from May 14, 2004 through present, Lowney Associates has been providing geotechnical and environmental observation services at the Leona Quarry project. In addition, we have been reviewing submittals from DeSilva Gates, including periodic reports by Berlogar Geotechnical Consultants, Wetlands Research Associates and Engeo.

The purpose of the above-described efforts has been to document compliance with the provisions of the Conditions of Approval, Paragraphs No. 17, 22, 23, and 24 contained in the City Council Resolution passed on February 17, 2004, and with the mitigation measures specified in the Mitigation Monitoring and Reporting Program (MMRP) including, but not limited to sections A.1, B.1, B.5, B.6, B.8, D, and H.

It is our opinion that DeSilva Gates has been in substantial compliance with the above-cited conditions.

Please contact me if I can provide any additional information.

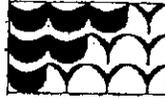
Sincerely,

LOWNEY ASSOCIATES



Scott R. Huntsman, Ph.D., G.E., CPESC
Associate, Area Manager

ATTACHMENT C



Wetlands Research Associates, Inc.

October 12, 2004

Marcel Uzegbu, P.E.
City of Oakland
250 Frank H. Ogawa Plaza, Suite 4314
Oakland, California 94612

RE: **Leona Quarry, Annual Report**
ER 01-33 SCH No. 1999042052, Condition 37

Dear Mr. Uzegbu:

This report summarizes biological construction oversight pre-construction and daily construction monitoring activities conducted by the biological construction monitor at Leona Quarry for the period of March 15 through October 15, 2004.

The biologist submitted weekly reports summarizing all monitoring activities. The biologist also attended all weekly construction meetings from March 23 through June 1, during pre-construction activities.

A pre-construction survey for nesting birds, raptors and potential bat roosts was completed on March 19, 2004 within 30 days of the onset of construction. This survey was conducted throughout the property and within 100 feet of the construction footprint. All trees tagged for removal were searched for signs of nesting birds or potential bat roosts. No nesting birds or roosting bats were detected during the initial pre-construction surveys. Alameda whipsnake surveys were also performed in all potential low quality and potential habitat areas. No whipsnakes were observed. Pre-construction surveys were also performed as needed prior to the onset of work in new areas. A summary of surveys and findings follows:

- Initial pre-construction surveys were performed on May 1, on the upper ridge adjacent to Campus Drive in preparation for roadwork and soil pit testing. Active nesting behavior was observed for several migratory birds including Bewick's wren, a special status species. Surveys were repeated until all birds fledged and left the nest. The monitor confirmed the birds had fledged and construction could begin on July 14, 2004. White-throated swifts were observed using a large crevice in the face of the North Slope rock talus where they displayed mating behavior. This area was not cleared for construction to begin until August 11, 2004.
- A nesting bird and Alameda whipsnake survey were initially conducted on June 7 on the North Slope with negative findings. The construction monitor supervised all vegetation removal on the North Slope. No direct impacts to Alameda whipsnake or other special status species occurred.
- A nesting bird and Alameda whipsnake survey were performed on June 10 and 11 in a 100 by 25 square foot area on the southwestern edge of the property along the fence adjacent to the

2169-G East Francisco Blvd., San Rafael, CA 94901 (415) 454-8868 / FAX (415) 454-0129

freeway, where additional vegetation needed to be removed. Two inactive nests were found. Findings were negative. No direct impacts to Alameda whipsnake or other special status species occurred during vegetation removal.

- Bat emergence surveys were performed on June 18, 24, and July 6, 2004, in the large rock outcroppings east of the North Slope. An initial day assessment and two evening surveys were performed using bat detectors to identify whether the potential roost site was active or not. No bats were observed leaving the rock outcrop area during either survey.
- Alameda whipsnake and nesting bird surveys were performed on June 23, with negative findings, in chaparral scrub habitat in the Lower Development Area where the existing "herp" fence was to be relocated upslope approximately 100 to 150 feet. The construction monitor supervised all vegetation removal and no direct impacts to Alameda whipsnake or other special status species occurred.
- Alameda whipsnake surveys were performed around the large rock outcrop prior to talus removal on September 9 and 10 with negative findings. Monitoring was not performed due to the dangerous conditions. The area was surveyed again on September 17, 18, and 19, 2004. No whipsnakes were observed.
- Alameda whipsnake surveys were performed on October 1 in an area adjacent to the North Slope prior to placement of an access road. The survey was performed in chaparral/oak woodland mixed grassland. No Alameda whipsnakes were found.

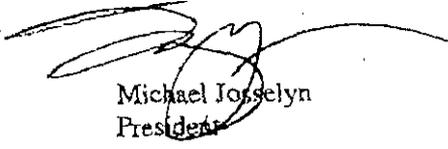
A barrier "herp" fence was installed along the northern portion of the Lower Development Area between the Undeveloped Area/potential whipsnake habitat and the footprint as prescribed in the SSSMMP and in accordance with Mitigation Measure B.1.a. and was completed on April 2, 2004. The construction monitor performed periodic monitoring of fence condition and reported necessary repairs and maintenance to the site foreman. As needed, surveys were performed in and adjacent to locations where fence failures were found (due to wind, minor landslides, etc), to ensure no Alameda whipsnakes had entered the construction footprint and no impacts had occurred.

An amendment to the SSSMMP was prescribed on April 12, which addressed worker safety during vegetation removal in accordance with Mitigation Measure B.1.a. The amendment recommended removal of vegetation using hand methods should only be prescribed under conditions where it is safe to do so and otherwise be performed by machine. Other clarifications were outlined pertaining to monitor safety and vegetation and/or debris removal. Tree and vegetation removal was conducted from April 2 through April 28, 2004. The construction monitor supervised all tree felling and vegetation removal and ensured removal did not impact potential whipsnake habitat wherever possible. Furthermore, the construction monitor surveyed vegetated areas prior to and during felling/grubbing to ensure no direct mortality to Alameda whipsnakes occurred. No Alameda whipsnakes were observed. No direct impact to Alameda whipsnake or other special status species occurred.

Pre-construction training was provided on June 11, for all personnel working in proximity to or within the North Slope repair work, which occurs in potential Alameda whipsnake habitat. Pre-construction training met all specific guidelines according to the SSSMMP. All workers received an Alameda whipsnake sighting/response card their first day on the job. The procedure for responding to an Alameda whipsnake sighting was covered.

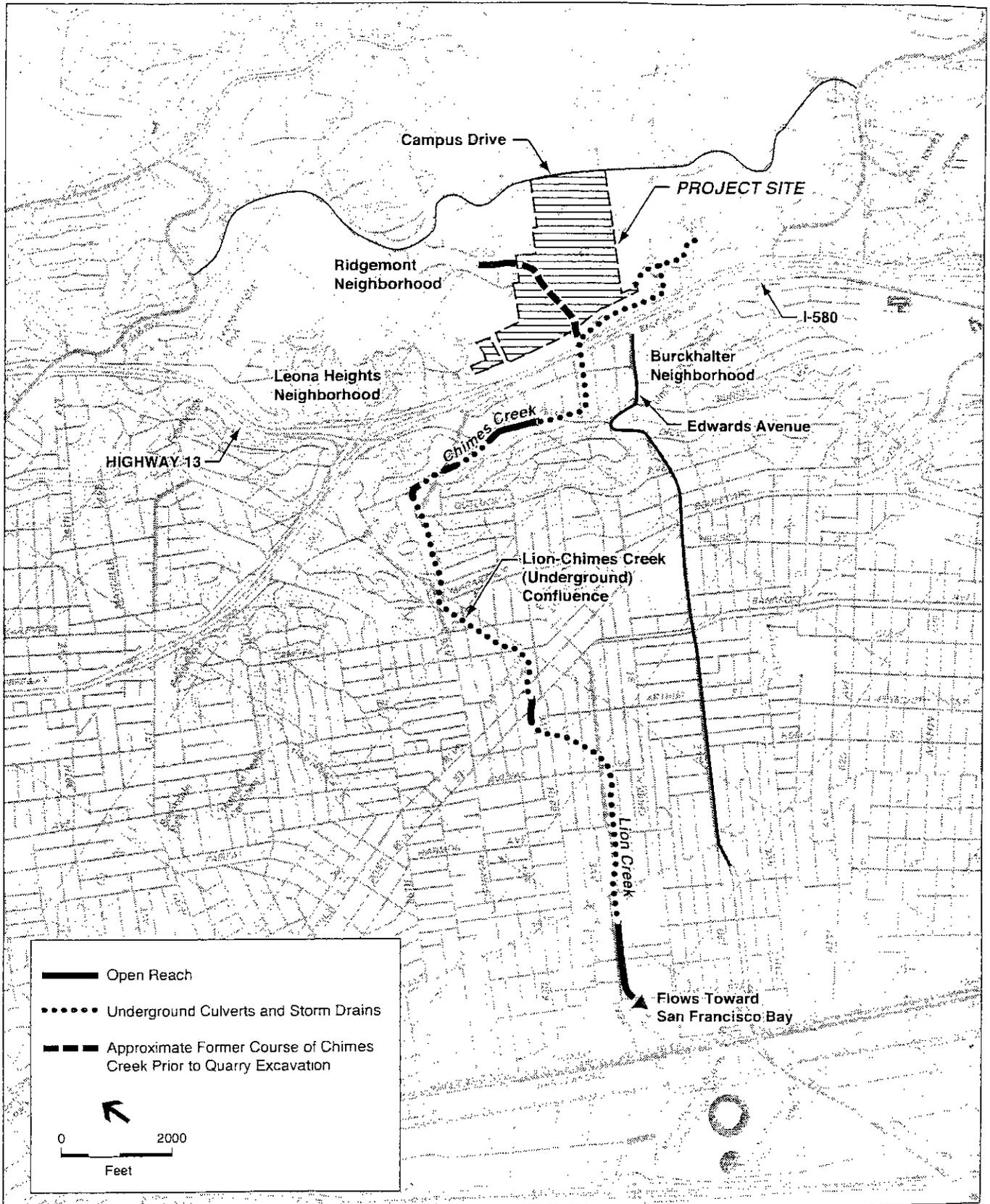
The construction monitor also assisted with air quality, wind, noise, and water monitoring. The monitor recorded levels and turned in daily measurements to the project engineer. The monitor alerted the foreman and engineer to any above normal reading and recommended any action to be taken.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Josselyn", is written over the typed name. The signature is stylized with a large, sweeping initial letter.

Michael Josselyn
President

ATTACHMENT E



SOURCE: USGS, Environmental Science Associates

Leona Quarry / 201088 ■

Figure IV.F-3
Chimes Creek Drainage Area

CITY OF OAKLAND



DALZIEL BUILDING . 250 FRANK H. OGAWA PLAZA . SUITE 4314 . OAKLAND . CALIFORNIA . 94612

TEL: (510) 238-6257

FAX: (510) 238-223

January 13, 2005

Natural Heritage Institute
2140 Shattuck Avenue, 5th Floor
Berkeley, CA 94704-1222
Attention: Richard Roos-Collins

Subject: Response to Your Letters dated October 25, 2004 and November 11, 2004 Related to Leona Quarry Subdivision Project

Dear Mr. Roos-Collins:

This is a follow-up to our letter dated November 15, 2004, which acknowledged your letters of October 25, 2004 and November 11, 2004. Your letters requested that the City defer the approval of the final maps for Leona Quarry Subdivision project until the City confirms that the project will comply with the Conditions of Approval. Also, your letters contained several other issues and concerns from the members of the Millsmont Homeowner's Association (HOA) that require research and detailed responses. We have completed the research, and have addressed the issues and concerns as enumerated in the responses shown in italics. The order of responses reflects the order in your letters.

A. Final Map

1. **You indicated that the records compiled or provided to public do not support the statement that "the subdivider will be required to adhere to best management practices (BMPs) during project construction. Measures to control erosion, contamination of storm water runoff, dust, noise, and heavy equipment emissions will be required".**

Staff has provided HOA with all the documents they requested. The condition of approval for the grading permit requires the contractor to adhere to BMPs. Before approval of the grading plan a Construction Management and Phasing Plan was reviewed and approved. This plan included standards and operating practices for traffic, noise and dust control. There are four dust-monitoring locations of the site. The dust and noise levels are monitored daily and reports are submitted to the City weekly for review. The water quality is monitored hourly, and reports are submitted to the City. The City will continue to monitor the project construction to ensure that the subdivider will continue to apply the best management practices during construction in accordance with project conditions of approval. The City has an approved Storm Water Pollution Prevention Plan in accordance with the project conditions of approval. A copy of the

original SWPPP was provided to HOA. A copy of the revised SWPPP is available to the public upon contacting Marcel Uzegbu at (510) 238-6257.

2. You requested that “City defer the approval of the final map until the City assured that the plans for the project complied with the Conditions of Approval, as well as applicable State laws which may further condition the development. You further required that the final map incorporate all the requirements listed in the conditions of approval and an assurance that the final map incorporates all the requirements listed in the conditions of approval. Your other reasons are that members of the HOA have not been allowed to see the most recent final maps, and that based on your inspection of the site, it appears that a number of hydrology-related conditions either have not been fulfilled, or necessary preparations have not been undertaken to ensure that the conditions will be fulfilled in a timely manner”.

Based on the above request, it appears that HOA assumes that all conditions of approval apply to final maps. All the conditions of approval for the project are not applicable to final map approval. There are specific conditions of approval pertinent to the final map including COAs 30, 3, 17, 18, 19, 32, 24, 25, 27, 36, 13f, regarding such things as posting the necessary security for the public improvements, GHAD, and CC&Rs. The final map related conditions have either been met or will be met before the approval and recordation of the final map.

The City deferred presenting the approval of the final maps at the November 16, 2004 Council meeting. However, staff intends to present the final maps to the City Council in early 2005 for action, upon confirmation that all applicable conditions and requirements have been met.

City staff, consultants and the Regional Water Quality Control Board (RWQCB) are working together to ensure that the subdivider complies with the erosion and sediment control measures required in the project's conditions of approval in accordance with the time frame required. The monitoring reports are available upon request. The water quality monitoring reports were provided to the HOA earlier. As noted above, all documents the HOA requested have been provided.

The City's review indicates that the hydrology related conditions and the conditions cited on pages 7 and 8 of your letter dated October 25, 2004 are associated with the grading permit and have been met. Before the approval of the grading permit, the City staff and their hydrologic and geotechnical consultants reviewed the grading plan and confirmed that all applicable conditions had been met.

In addition, the letter from the project sponsors, Attorney Marie A. Cooper of Bingham McCutchen, provides further clarification on final map and project requirements.

3. You indicated that City records do not confirm that the primary detention basin has been constructed to industry standards, consistent with COA 23a.

The City's hydrologic consultant conducted a site inspection of the detention basin on October 6, 2004 and confirmed in their letter dated October 20, 2004 that the detention basin is near completion, is constructed consistent with COA 23a and is consistent with the improvement plans, PWA recommendations and other conditions of approval. An as-built survey of the detention basin is required when the grading activity is

complete to verify that the actual capacity meets the required 25 acre-feet standard with an additional capacity to meet the 3 acre-feet water quality requirements. It is a standard industry construction practice to require as-built plans at project completion. Based on the letters we received from the City's hydrologic and geotechnical consultants the detention basin slopes meet engineered slope stability standards.

The detention basin is lined with an impermeable clay liner and has been hydroseeded. It is not an accurate statement to suggest that the slopes of the detention basin "melted away" after the first rain.

4. You had concern that the City records did not confirm the existence of any correspondence or other documentation that grassy swales or other bio-filtration measures have been incorporated into the final maps, as required by COA 23e.

The landscape, drainage and improvement plans depict a basin with 25 acre-feet of stormwater detention capacity, and water quality vegetation at the bottom of the basin. In addition, they show a vegetated swale at the Village Green. The landscape plans and the improvement plans have been given to HOA. These features, along with the provisions of COA 23e, are requirements of the project, not the final map.

5. Records on Perennial Creek

Documentation on the feasibility of creating a perennial creek was given to HOA in response to their letter of October 11, 2004.

6. You had concern about the storm water discharges that may cause or constitute pollution, contamination or nuisance.

City staff, their consultants and the State Regional Water Quality Control Board (RWQCB) have been diligently monitoring the project to minimize impacts to the storm drainage system and downstream. The subdivider has completed implementation of the Erosion and Sediment Control measures required in the approved Storm Water Pollution Prevention Plan (SWPPP). The subdivider recently received a letter from the RWQCB expressing satisfaction with the progress of the erosion control measures onsite. The subdivider recently installed a water filtration system to further filter the water from the detention basin. This system provides a measure of effectiveness that exceeds the requirements of the original SWPPP because it was necessary in order to address actual sediment conditions once the rainy season began.

7. You requested opportunity to review the technical report and revised SWPPP the City required Desilva Group to submit by November 15, 2004.

DeSilva Group has submitted the revised SWPPP in accordance with the City's request. The document has been reviewed by the City's consultants and approved by the City. A copy of the revised SWPPP is available upon request. Please contact Marcel Uzegbu at (510) 238-6257 to obtain a copy.

8. You asked if the Leona Quarry project is subject to requirements contained in Clean Water Act (CWA) section 401 and 404.

The RWQCB is monitoring storm water management at the site according to the requirements of the General Permit for Construction Activities and the Clean Water Act. The City staff has been working with the RWQCB and the consultants to ensure that the site complies with the provisions of the Clean Water Act. Also, the project condition of approval number 23b requires the subdivider to comply with Clean Water Act requirements. The condition also requires the proposed detention basin to meet the new Alameda County NPDES permit provisions. On November 15, 2004, City staff met with Dale C. Bowyer of the RWQCB to discuss whether the project construction is in compliance. Mr. Bowyer confirmed at that meeting that he is satisfied with the water quality provisions related to the design of detention basin.

9. No Condemnation for Widening of Chimes Creek or Enlargement of Sewer Infrastructure is Contemplated for Leona Quarry.

The Millsmont Home Owners Association claims that Mr. Uzegbu advised its members that the City plans to condemn private properties to widen Chimes Creek and enlarge the sewer system, all to serve the Leona Quarry project. This is an incorrect characterization of Mr. Uzegbu and there are no City plans for condemnation of property along Chimes Creek.

Mr. Uzegbu indicated that staff had a meeting with some members of the HOA to share the plan for a proposed replacement of the deteriorated sewer line located within an easement that crosses Chimes Creek. The City proposed to replace the existing sewer line with the same pipe size within the existing public easement. However, the HOA requested staff to incorporate Chimes Creek restoration as part of the project. Staff informed the HOA that creek restoration was not part of the project and that it was not included as part of the project's requirements. When the HOA suggested that DeSilva pay for the creek restoration, they were told that there was not a sufficient relationship between the impacts of the project and the requirement to restore the creek. The City's threshold of significance does not require the subdivider to perform the creek restoration. Rather, the City's measure of significance is based on whether Chimes Creek would be significantly altered by the project. The analysis in the subsequent EIR determined that the project would have a less than significant impact in this regard. HOA was also informed that the City could not impose additional conditions on the project because the DeSilva Group has an approved vesting tentative map.

10. EIR concerns

Please refer to the responses provided by Marie A. Cooper of Bingham McCutchen in the attached letter.

11. BMPs

The City staff has been working diligently with its consultants and the RWQCB to monitor the effectiveness of the project BMPs. It is not an accurate statement that the City's actions on the project are complaint driven. Although there have been some complaints, it is important to note that before the beginning of the project construction a SWPPP was approved. Further changes and BMPs have been implemented in response to storm events, as expressly contemplated by the General Permit and the project SWPPP. As the project progresses, more BMPs may be implemented to ensure compliance with COA.

The project is being monitored by a City inspector, a City hired geotechnical engineer, and Biologist, as well as the subdivider's experts all in compliance with project COA and other applicable requirements. Also, the City hired, a Landscape Architect to peer review the landscape plans. These experts continuously monitor the situation and conduct site visits, and do not wait for a complaint. The City staff and the consultants are working diligently to minimize the water quality impacts of the project downstream.

12. Response to Questions Contained in the October 25, 2004 letter

Question 1 Response

The City staff and City consultants reviewed the plans prior to grading and construction of improvements and continually monitor the construction of the project to assure compliance with applicable conditions and requirements. City staff established a master compliance chart that tracks each condition of approval. In addition, the City inspector keeps a daily log of the project activities.

The subdivider is required to submit weekly reports related to various items of the grading activities such as water quality monitoring reports, compaction reports, hydrology reports, geotechnical reports and biology reports. There are weekly meetings with the subdivider, consultants and contractors to reinforce and reiterate certain conditions of approval.

There were issues with water quality at the beginning of the grading activity, but the City has worked with its consultants and the PWQCB to address these issues to comply with grading ordinances and administer the applicable COA to ensure that the subdivider is in compliance. In addition, further measures, as required by the City, have been installed to reduce sedimentation. The City continues to monitor the situation and demand compliance by the developer. As noted, both the City and the Regional Board are satisfied with the current BMPs and construction operations.

Question 2 City Review of final maps

Both City and consultants have been reviewing the final maps (Tract Maps 7351 and 7493). The provisions of Subdivision Map Act only require that the final maps be consistent with the approved vesting tentative map. The City engineer will certify that the final map complies with the approved vesting tentative map and that it is technically correct before the map is approved. Also, the subdivider will be required to comply with the COA and MMRP pertinent to final maps.

Question 3 Enforcement of BMPs and City's Policy on Site Inspections

The grading activities are governed by City's Grading Ordinance. The ordinance requires the subdivider to provide an engineer-in-charge of the grading project. The engineer-in-charge will be responsible for ensuring that the project is constructed in accordance with the approved plans. Although the City has this ordinance, Leona Quarry is different in terms of complexity and requires more experts to manage and address hydrology issues, geotechnical issues and other issues. The City Council recognizes the complexity of the project and authorized staff to hire experts to ensure that the project COA is met. The City staff therefore hired a hydrologist, a biologist, a geotechnical engineer and a landscape architect to peer review the plans and monitor various aspects of the work. The City requires the subdivider's experts

to provide reports as noted above, which are peer-reviewed by the City's experts, to assure the City that the subdivider is complying with the COAs.

The City of Oakland is one of the cities within Alameda County that participates in Clean Water Program.

B.

Question 4 Response

The approval of the final map is not subject to the jurisdiction of regulatory agencies. The main finding is that the final map is consistent with the approved tentative map. The subdivider is required to comply with the permit from the Regional Board. A dredge-and-fill permit is not a condition of the Regional Board permit or required by the Clean Water Act in these circumstances. Please see response letter from Marie A. Cooper dated November 19, 2004.

Question 5 Response

Condition of approval 23b requires the subdivider to meet the revised Clean Water Act requirements. The COA also requires that the detention basin shall meet the new Alameda County NPDES permit provision C3 requirements. Staff met with Dale Bowyer on November 15, 2004 and he confirmed that the detention basin design met the NPDES permit C3 provisions. The City did not have to make the determination. The Regional Board made the determination through the NPDES permit they issued to the subdivider.

Question 6 Response

DFG does not have jurisdiction over the Leona Quarry site with respect to streambed alteration or permit requirements because there is no proposal that would affect a streambed to develop in or near a creek.

Question 7 Response: Creek Question

The storm drain system within the project site has been culverted through a pipe system over many years of Quarry activities. There are headwaters above the Leona Quarry site, which will not be impacted by the project. The Creek and Watershed Map of Oakland and Berkeley by Janet M. Sowers confirmed that there is no creek within the development footprint of the site, and, therefore, a creek protection permit is not legally required. However, given the existence of the creek upstream and downstream, staff has assured that the intent and requirements of the Creek Protection Ordinance were complied with before recommending that the Council approve and re-approve the Leona Quarry project. The Council's findings address all physical impacts related to the creek in part for this reason.

C. No condemnation of Private Property

See discussion under #9, above. The City does not plan or propose to condemn private property for a sewer line.

Questions 8, 9, 10 and 11

This is not applicable because each statement claimed by HOA never occurred. Please refer to the attached letter from Marie A. Cooper for the specific response to this issue. We thank you for bringing the concerns to our attention. If you have any further questions, please contact Marcel Uzegbu at (510) 238-6257. Thank you.

Sincerely,



RAUL GODINEZ II, P.E.
Director, Public Work Agency

Sincerely,



CLAUDIA CAPPIO
*Development Director, Community
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November 19, 2004

Via Facsimile and U.S. Mail

Members of the City Council
City of Oakland
City Hall
One Frank H. Ogawa Plaza
Oakland, CA 94612

Re: Leona Quarry Construction Activities

Dear Councilmembers:

I am writing on behalf of the DeSilva Group to respond to allegations made by the Millsmont Homeowners Association regarding the Leona Quarry Project.

A. Summary.

The HOA asks you not to approve the final map. The final map approval is ministerial, and many of the issues the HOA raises are belated and time-barred attacks on the original EIR this Council certified in 2002.

Other issues pertain to temporary construction impacts on drainage. DeSilva is addressing drainage issues vigorously by implementing further Best Management Practices ("BMPs") above and beyond those specified in the original Storm Water Pollution Prevention Plan ("SWPPP") and Erosion Control Plan for the site. These further BMPs exceed those typically required for a construction project, and they performed remarkably well during the storms last week. Representatives of the Regional Water Quality Control Board ("RWQCB") conducted two site visits last week, commenting that they were "favorably impressed" with the storm water treatment system, that site conditions were "a major improvement," and that

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even "the day after substantial rainfall, we found that the site looked very good." The RWQCB confirmed its satisfaction with the BMPs in the attached letter.¹

DeSilva submitted an amended SWPPP on November 12th to the City and the RWQCB. City staff confirmed at the Council hearing on November 16th that DeSilva has implemented all the BMPs in that amended SWPPP. Accordingly, issues relating to storm water management and water quality during construction have been resolved, and there is no allegation of continuing noncompliance.

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The ultimate solution is, of course, construction of the entire project, including its sophisticated stormwater management system and water quality protection measures. The stormwater detention capacity of the basin DeSilva is constructing is 25 acre feet. DeSilva agreed to construct such a basin despite the fact that it is much larger than is necessary to control storm flows from the Leona Quarry project, as determined by both the City's independent peer reviewer and the Supplemental EIR this Council certified. Delaying the project during the grading phase would only delay construction of these permanent solutions, and prolong the temporary construction impacts identified in the EIR. We request the Council to approve the final map as required by law, and to permit and encourage DeSilva to proceed with both implementation of further best management practices and construction of the project.

B. The Only Issue Properly Before the Council Is Whether The Final Map Conforms To The Tentative Map.

Approval of a final map is ministerial. The Map Act requires approval of the final map so long as it is in substantial compliance with the tentative map, and the subdivider has satisfied the conditions of approval attached to the tentative map. *Youngblood v. Board of Supervisors*, 22 Cal. 3d 644, 656 (1978); *see also* Gov't Code § 66474.1. New or altered conditions may not be imposed, particularly those that are of a technical nature. *Anthony v. Snyder*, 116 Cal. App. 4th 643, 660, 664 (2004) (finding that the developer has a right to rely on the conditions established during tentative map approval). Also, because final map approval is

¹ Attached is a copy of correspondence dated November 17, 2004 from RWQCB Assistant Executive Officer Lawrence P. Kolb, Ph.D., P.E., which is unsigned only because we received it electronically.

ministerial, there is no occasion for additional CEQA review. Guidelines 15162(c), 15268(b)(3). The Leona Quarry EIR, as supplemented and revised by the Supplemental EIR, is conclusively deemed adequate. Pub. Res. Code § 21167.2.

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The validity of the prior EIR is especially indisputable here, since the EIR has been validated by court judgment. The Council certified the EIR for Leona Quarry in 2002. Maureen Dorsey and others sued. The Court rejected every argument raised by the petitioners, but found the EIR inadequate on a ground it identified on its own initiative. The Court held that the City did not properly address potential conflicts of opinion between the EIR hydrologists and PWA, the hydrologists the City retained to peer review the EIR work. The Court issued a writ ordering preparation of a Supplemental EIR on stormwater management issues. It did not find any deficiencies in the water quality analysis or the analysis of wetlands. The City prepared a Supplemental EIR addressing the hydrology issues, which the Council certified in February of this year. The time to challenge even that Supplemental EIR expired in March without a single challenge being filed. The Supplemental EIR was presented to the Court to demonstrate compliance with its prior order. The Court agreed that the City had complied with CEQA and discharged the writ.

Accordingly, the only question properly before the Council is whether the project is complying with conditions of the tentative map. In making that determination, the Council must be guided by the Conditions of Approval and the Mitigation Monitoring and Reporting Program (MMRP) it approved in connection with the Leona Quarry Project. The MMRP specifies the timing of the mitigation measures, indicating when each must be in place. The measures that are not required until project buildout are not at issue here; the only relevant conditions are those that impose requirements during grading and construction.

C. DeSilva Is Complying With All Requirements Regarding Silt Runoff During Grading and Construction.

The Millsmont HOA is concerned that silt from grading activities has been transported by stormflows and carried into Chimes Creek. DeSilva is fulfilling every relevant condition of approval and the requirements of law by employing measures designed to minimize erosion and silt in stormwater runoff. Compliance with the law is measured by whether the developer is implementing Best Management Practices that are reasonable in light of site conditions. In addition to employing BMPs in accordance with the SWPPP and Erosion Control Plan already approved for the site, DeSilva has implemented further BMPs in

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response to the extreme and unexpected conditions presented by last month's storm events. DeSilva's initial measures, and its prompt implementation of further BMPs in response to site conditions, comply fully with the conditions of approval of the Leona Quarry Project relevant to construction activities, and with the Clean Water Act and General Construction Permit.

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The details are as follows. The EIR this Council certified for the Leona Quarry project explains the regulatory scheme relevant to water quality:

The San Francisco Bay [Regional Water Quality Control Board] RWQCB monitors and enforces the National Pollutant Discharge Elimination System (NPDES) stormwater permitting for the region. The [State Water Resources Control Board] SWRCB administers the NPDES Permit Program through its General NPDES Permit. Construction activities of five acres or more are subject to the permitting requirements of the NPDES General Permit for Discharges of Storm Water Runoff Associated with Construction Activity (General Construction Permit). The project sponsor must submit a Notice of Intent to the SWRCB in order to be covered by the General Permit prior to the beginning of construction. The General Construction Permit requires the preparation and implementation of a stormwater pollution prevention plan (SWPPP), which must be prepared before construction begins. Components of SWPPPs typically include specifications for best management practices (BMPs) to be implemented during project construction for the purpose of minimizing the discharge of pollutants in stormwater from the construction area. In addition a SWPPP includes measures to minimize the amount of pollutants in runoff after construction is completed, and identifies a plan to inspect and maintain project BMPs and facilities.

DEIR, pp. IV.F-10 to IV.F-11. Thus, the ultimate goal of this regulatory scheme is to minimize silt runoff through implementation of a SWPPP, which is revised as necessary to respond to site conditions. The law does not prohibit silt runoff, as it would not be possible to achieve that goal where grading has occurred. The law anticipates that a SWPPP may need revisions, and it focuses on BMPs rather than absolute prohibitions.

The EIR, and the Resolution this Council adopted to approve the project, impose mitigation measures requiring DeSilva to comply with this regulatory scheme. Mitigation measures F.2a-b, F.3a and F.5a pertain to water quality issues during grading and construction.² They are reflected in the Mitigation Monitoring and Reporting Program (MMRP), at pages 24 to 28. The mitigation measures list potential BMPs, with the final selection and configuration of all BMPs to be detailed in a SWPPP and a final grading and master site drainage plan. The MMRP required DeSilva to prepare, and the City to approve, a SWPPP and final grading and master site drainage plan before approval of the grading and improvement plans. MMRP, p. 27. The MMRP also required, consistent with the Clean Water Act and the General Construction Permit, that the SWPPP be updated as needed to reflect changes in the project design and site conditions. MMRP, p. 28. Condition 23a imposes these mitigation measures as an enforceable condition of approval, as CEQA requires. Guideline 15126.4.

DeSilva has complied with all of these requirements. It prepared, and the City approved, a SWPPP and a final grading and master site drainage plan prior to issuance of the grading permit. The SWPPP incorporated applicable and feasible BMPs, including BMPs to control erosion and reduce silt in stormwater. DeSilva implemented the SWPPP. DeSilva has also supplemented and improved the BMPs, as contemplated by the SWPPP, to enhance erosion control and further reduce silt in runoff as warranted by developments in site conditions.

Specifically, flows from the upper area of the site are drained through two detention ponds, or are directed to the upper bowl where the flows permeate a rocky soil, enter a gravel filtered underdrain system and are treated by a Baker tank system. Large areas of the site were stabilized with mulch and hydroseed. Earthen roads all had straw wattles, ditches, and/or straw bale erosion control methods applied. These measures directed runoff to protected inlets, then to a sediment basin to allow settling of silt before discharge to the storm drain.

² The HOA also references the requirements of mitigation measures F.1a, F.4a, F.4b and certain aspects of F.5a. These are measures designed to ensure that the project will comply with the Clean Water Act *after it is built out*. The MMRP does not require that these measures be in place throughout construction. See section I.D below.

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It became apparent after last month's unusually heavy and sudden storms that the BMPs specified in the SWPPP, although customary for construction sites of this nature, were not adequate to fully address last month's early and extreme storm events. Cloudy water was observed entering the storm drain. DeSilva itself reported the discharge. The RWQCB issued a notice of non-compliance identifying issues to be addressed in light of these storm events.

DeSilva is cooperating fully with the RWQCB and, in fact, initiated measures to improve erosion control even before requested to do so. DeSilva has been working with the City and RWQCB to implement additional BMPs, which DeSilva incorporated into the amended SWPPP it submitted on November 12th. The advanced measures include installation of an improved riser in the permanent detention basin to enhance separation of silt from stormwater before it discharges to the storm drain system. DeSilva has also installed gravel on project roadways, even those under construction. It has arranged for cutting edge filtration equipment to be brought on site and used. DeSilva has repaired inlet protection devices, installed additional inlets and inlet protection on 'H' Street, placed slope drains on the north slope and between 'C' and 'H' streets on the uncompleted slope, lined the ditch on the north slope with plastic, installed temporary piping from the Ridgmont basin, again hydroseeded the slopes, added straw wattles at the top of slopes, and intalled erosion control blankets on 2:1 slopes even though the RWQCB recommended doing so only for slopes steeper than 2:1. As noted above, the RWQCB has expressed complete satisfaction with these measures.

Neither the Clean Water Act, the General Construction Permit, the EIR nor any applicable regulations anticipate or require that there will be no impact to water quality during construction. Instead, the General Construction Permit provides that, during construction, the project seek to achieve water quality objectives to "the maximum extent practicable" through the implementation, supplementation and refinement of BMPs during construction activities. General Construction Permit, provisions C.2 and C.3. The EIR this Council certified, and the CEQA findings it adopted for this project, recognize this principle. This Council concluded that, after implementation of the mitigation measures, less than significant impacts would remain. MMRP, pp. 24, 26, 28.

These facts establish that DeSilva has fulfilled requirements for stormwater management and the protection of water quality during grading, and is undertaking additional protective measures identified following last month's storm events, as contemplated by the Clean Water Act and the General Construction Permit. Assistant Executive Officer Kolb's November 17 letter confirms the RWQCB's satisfaction with the adequacy of these measures. There

is no basis for finding a failure of conditions. Accordingly, the final map should be approved.

D. Claims Regarding Measures Required Only For Project Buildout Are Not Relevant.

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The HOA confuses the mitigation measures that must be in place when homes are sold and occupied with those that pertain to grading and construction. The HOA seems to assume that implementation of *every* mitigation measure imposed on the entire project is required prior to final map approval. The Mitigation Monitoring and Reporting Program adopted by this Council pursuant to CEQA clearly provides otherwise.

The HOA references mitigation measures F.1a, F.4a, F.4b and certain aspects of measure F.5a. These reference water quality control measures such as construction of berms, grassy swales, the water quality functions of the lower portions of the detention basin, and vegetation throughout the site. These also reference “roof drains to natural surfaces of swales where feasible,” and “permanent energy dissipaters.” Clearly, these measures are required for buildout, not for construction impacts. The MMRP recognizes this fact by requiring only that such items be shown in the final grading and master site drainage plans, to be reviewed by the City prior to issuance of the grading and improvement plans. MMRP, p. 27. The measures were shown in these plans, which were approved by the City. However, because the project itself is not yet constructed, these permanent measures are likewise not yet constructed. Nothing in the MMRP or CEQA does, or could, require that permanent measures, which are to be constructed as part of the project, be in place during project construction.

Some of the measures to which the HOA refers are required as permanent aspects of the detention basin. The appropriate time for the City to determine whether the detention basin has been properly constructed is during the final inspection for the detention basin. Accordingly, the measures are not presently required.

Nonetheless, the permanent detention basin is well under way. The basin has been graded, the clay liner installed, and the outlet structures are now complete. Only the vegetation, which cannot have been planted and grown yet, remains to be completed. Also, even though PWA determined that a basin of approximately 18 acre-feet of stormwater detention capacity will accommodate stormflows generated by the project under even the most conservative assumptions, DeSilva has agreed to construct and is constructing a 25-acre-foot basin that will provide even greater stormwater management benefits to the area.

DeSilva is working diligently towards installing all the permanent measures. It is installation of these permanent measures that will provide the best solution to the stormwater management and water quality concerns the HOA raises. The surest means of ensuring this protection is for the Council to deny the HOA's request for delay, and facilitate the continuation of the work DeSilva is doing.

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E. Claims Regarding Chimes Creek and Wetlands Are Time-Barred Attacks On The EIR Certified In 2002.

The EIR addressed wetlands and potential impacts on Chimes Creek extensively. Its conclusions were based upon a wetlands delineation prepared by Wetlands Research Associates. This work was supplemented with a field-level reconnaissance survey by biologists on staff with ESA, the firm the City retained to prepare the EIR. As explained in the EIR, Wetlands Research Associates also analyzed Chimes Creek. DEIR, p. IV.B-10. The EIR concluded that the only onsite portion of Chimes Creek still in existence is the natural watercourse leading from the northern edge of the site to the existing upper pond, all in the Undeveloped Area the project will not disturb. DEIR, Figure IV.B-3. This natural creek drainage north of the pond comprises the only onsite potential jurisdictional waters of the United States, the only onsite location of a narrow band of riparian vegetation, and the only onsite location of the aquatic habitat provided by Chimes Creek. DEIR, Figures IV.B-2 and IV.B-3, pp. IV.B-3, IV.B-7 and IV.B-10.

Below the upper pond, the EIR explained, the flow of Chimes Creek had been "severely disturbed" by quarrying activities. The creek "flows underground before leaving the Undeveloped Area [and does not resurface until] the property edge near Interstate 580." DEIR, p. IV.B-3. The "lower reaches of the stream have been altered in the past by the construction of a large berm and other modification to route the stream underneath quarrying activities." DEIR, p. IV.B-12. In fact, the quarrying activities and the routing of the creek underground had left so little evidence of the former surface creek that its original course could only be approximated based on historical topography. DEIR, Figure IV.F-3.³

³ The HOA submitted photocopies of photographs supposedly showing a creek in the lower portion of the site. The photographs appear to depict only a siltation basin constructed to remove silt from surface water during the quarry operations,

The EIR recognized that the project would not disturb the creek, including the fact that grading would occur only downstream of the site where the surface creek ceases its flow. It accordingly concluded that the project would comply with all federal, state and local requirements, and result in no impacts. It likewise concluded the project would not result in any fill within the creek or any indirect impact to its flow. DEIR, p. IV.B-12. Accordingly, it determined that no wetlands permits (Section 404 permits) or streambed alteration agreements (Section 1603 agreements) were required.

The EIR was presented to both the California Department of Fish and Game and the Regional Water Quality Control Board. Both agencies commented on the DEIR. The RWQCB noted that *if* jurisdictional waters were impacted, certain requirements would apply. In fact, the EIR explained, the project development avoided all “waters of the United States” and “waters of the State” and no fill permits were required or applied for. Neither the CDFG nor the RWQCB disagreed with the EIR conclusions noted above, and neither asserted that any additional permits or approvals were required for any aspects of the project relating to Chimes Creek. Based in part upon this lack of objection from these resource agencies, this Council certified the EIR, adopting its conclusions. CEQA Findings, ¶ 23. The Council also made findings indicating that all requirements of the City’s Creek Protection Ordinance had been met, despite serious questions about the application of that ordinance to grading that occurs only downstream of where the creek surface flows cease to exist.

The HOA is now belatedly challenging these conclusions. After not just one but two rounds of environmental review, after the project has been approved – twice – by the Council, and after the Court has validated the EIR’s adequacy and the Council’s findings, the HOA questions whether the City should have required additional permits. In essence, the HOA asks the Council to determine that it was wrong to adopt its findings and certify the EIR.

It is far too late to bring such a claim. As explained in Section A above, the EIR is now conclusively deemed valid, and the Council’s findings are likewise beyond

(Footnote continued from Previous Page.)

not a creek. As established in the EIR, Chimes Creek did not flow over the ground surface within the quarry.

challenge. There are no discretionary decisions at issue that would enable the Council to consider whether further CEQA review is warranted. And, even if there were, there would be no basis for further review; the HOA presents no significant new information that could not have been discovered when the EIR was being prepared, or when the Supplemental EIR was being prepared. Pub. Res. Code § 21166, Guideline 15162.

If the HOA had legitimate concerns about wetlands or riparian habitat, it would have raised its questions in comments on the DEIR prepared for this controversial and highly publicized project, or it would have participated in the lawsuit over that EIR or, at the least, it would have raised its concerns in comments on the SEIR. Its timing indicates a last-ditch effort by newfound project opponents to stop or delay the project long after it was approved. In any event, there are no issues regarding wetlands or the onsite portion of the Creek that are open for Council consideration.

**F. No Condemnation For Widening of Chimes Creek Or
Enlargement Of Sewer Infrastructure Is Contemplated For
The Leona Quarry Project.**

The HOA claims that Mr. Uzegbu advised its members that the City plans to condemn private property to widen Chimes Creek and enlarge sewer infrastructure, all to serve the Leona Quarry project. The HOA was surprised at this announcement because this condemnation was not addressed in either the EIR or the SEIR.

DeSilva would also be surprised to learn that the City is planning to condemn property to serve the Leona Quarry project. However, Mr. Uzegbu has assured me both that this is not the case, and that he never made any such statements to representatives of the HOA.

The EIR and SEIR demonstrate that the project will reduce stormflow rates below preproject levels. The EIR also determined that offsite sewer infrastructure has adequate capacity to handle project flows. Accordingly, there is no need to condemn property to accommodate facilities for the Leona Quarry project.

G. Conclusion.

The Leona Quarry project has undergone one of the most extensive environmental and hydrological reviews seen in Oakland. The DeSilva Group promptly and cooperatively addressed stormwater management issues that arose during last month's storms, and the issues are resolved to the satisfaction of the RWQCB.

City Council
City of Oakland
November 19, 2004
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Continued work on the entire project is needed to implement permanent solutions regarding stormwater management and water quality protection. The Council should approve the final map and allow DeSilva to proceed apace with these tasks.

Bingham McCutchen LLP
bingham.com

Sincerely yours,

A handwritten signature in black ink, appearing to read "Ma AL" with a long horizontal flourish extending to the right.

Marie A. Cooper

cc: Claudia Cappio
Marcel Uzegbu
Heather Lee
James Summers
David Chapman



California Regional Water Quality Control Board

San Francisco Bay Region



Terry Tamminen
Secretary for
Environmental
Protection

1515 Clay Street, Suite 1400, Oakland, California 94612
(510) 622-2300 • Fax (510) 622-2460
<http://www.swrcb.ca.gov/rwqcb2>

Arnold Schwarzenegger
Governor

November 17, 2004

Mr. James B. Summers, P.E.
The DeSilva Group
11555 Dublin Boulevard
PO Box 2922
Dublin, CA 94568

Dear Mr. Summers:

This is to confirm our recent discussion concerning erosion control at your Leona Quarry project in Oakland. Keith Lichten and I inspected the property on November 12, 2004, the day after substantial rainfall, and we found that the site looked very good. There was straw and stabilizer over almost all the exposed areas, and erosion control netting was in place on the steepest areas.

We also inspected the stormwater treatment system that uses chitosan for turbidity removal, and we were favorably impressed. The current condition of the site constitutes a major improvement, and we look forward to your continued efforts to manage this demanding site through the wet season ahead.

If you would like to discuss this further, I can be reached at 510.622-2372.

Yours truly

Lawrence P. Kolb, Ph.D., P.E.
Assistant Executive Officer

Cc: Marcel Uzegbu, William Madison, and Faustino Jun Osalbo, City of Oakland
Leslie Estes, Watershed Program Supervisor, City of Oakland

ATTACHMENT G



Alameda-Contra Costa Transit District

Nancy Skowbo, Deputy General Manager
Service Development

August 20, 2004

Mr. Marcel Uzegbu
Engineering & Design Services
Public Works Agency
250 Frank Ogawa Plaza, Suite 4314
Oakland CA 94612

Dear Mr. Uzegbu:

This letter is in reference to your meeting with the DeSilva Group/DeSilva-Gates concerning AC Transit's requirements for providing transit service to the new Leona Quarry housing project near Edwards and Mountain Boulevard. This meeting was held on July 28 and was attended by Anthony Bruzzone of our planning staff and Cesar Pujol, our traffic engineer.

AC Transit agrees with the placement of a bus stop at the intersection of the Emergency Vehicle Access (EVA) road and Road "A." (This location is about 300 feet east of Mountain Boulevard). The stop will be nearside on the EVA road, and it will accommodate a 60-foot bus. The sidewalk must be extended for the full 60 feet of the bus stop, and it must be eight feet wide. At least the forward 45 feet of the sidewalk curb must be tangent – this allows the bus to position against the curb and eliminates any gap between the bus door and the sidewalk.

Bus operations will be as follows: The NX4 will exit the I-580 freeway at Keller, then via Mountain, right on EVA road to new bus stop nearside at Road "A." Then left on Road "A" to I-580 on ramp at Edwards. Reverse: bus will exit I-580 at Edwards, left on Edwards, right on Mountain, left on EVA road to bus stop nearside at Road "A." Then left on Road "A," left on Mountain to Keller on-ramp to I-580.

The 56 route may use the same routing arrangement from Edwards, right Mountain, left on EVA road to the bus stop and then returning. We note that the continuing operation of either route is, of course, dependent upon adequate use.

Please note that the EVA road should be designed to accommodate the loads of our MCI buses, which have a Gross Vehicle Weight of about 48,000 pounds.

Finally, we endorse the placement of a shelter at this location and would suggest that the developer make arrangements with Adshel to use the standard Oakland shelter with an appropriate arrangement for maintenance.

Mr. Marcel Uzegbu
Public Works Agency
Oakland, CA
August 20, 2004
Page 2 of 2

Thank you for your interest in our operations. Please contact either Anthony Bruzzone (510/891-7175) or Cesar Pujol (510/891-4839) should you have any questions or need further information.

Sincerely,



Nancy Skowbo
Deputy General Manager
Service Development

NS/cit

cc: Anthony Bruzzone
Cesar Pujol