



Town of Moraga

NOTICE OF APPEAL TO CITY COUNCIL APPEAL FORM – MUST BE SUBMITTED IN PERSON FILE WITH TOWN CLERK

FOR STAFF USE ONLY
Date Received Stamp

Appeal Fee \$ _____

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Receipt No. _____

APPELLANT INFORMATION

Choose One: Applicant Concerned Resident Business Owner

Other: _____

PROPERTY OWNER/APPLICANT FOR PROJECT UNDER APPEAL

NAME Cheryl & Rohit Sabnis	NAME Outdo Country Club Drive, LLC
ADDRESS	ADDRESS 1127 Rahara Drive
CITY, STATE, ZIP Moraga, CA 94556	CITY, STATE, ZIP Lafayette, CA 94549
PHONE	PHONE (917) 620-8829
EMAIL	EMAIL nikhil.gera@gera.in

PROPERTY ADDRESS/LOCATION: 1600, 1640 & 1660 School Street, Moraga, CA 94556

DATE OF ACTION: Verbal Vote 10/29/2024

CHOOSE ONE: APPROVED DENIED

BY WHAT DECISION-MAKING BODY? Planning Commission

DESCRIPTION – Reason(s) for appeal. (Attach additional sheets if necessary)

See attached

DATE:

November 8, 2024

STAFF USE ONLY

Scheduled for Council Meeting (date) _____ Municipal Code Section _____

Public Hearing Scheduled on (date) _____

Attachment to November 8, 2024, Notice of Appeal Filed by Cheryl Sabnis and Rohit Sabnis re October 29, 2024, Verbal Vote by Planning Commission Approving Outdo Country Club Drive, LLC’s Proposed Luxury Rental Apartment Complex at 1600, 1640 and 1660 School Street, Moraga, California

Pursuant to Section 8.12.200 of the Moraga Municipal Code (MMC), we hereby appeal the Town of Moraga Planning Commission’s October 29, 2024, verbal vote approving the 1600 School Street Housing Project, which proposes to build a four (4) story, 66-unit, luxury apartment building at 1600, 1640 and 1660 School Street, Moraga, CA, 94556 (the “Luxury Highrise Project”). The developer of the Luxury Highrise Project is Outdo Country Club Drive, LLC (“Outdo CCD”). Attached as Exhibit A is a list of individuals who requested to be identified as interested persons in support of this appeal.

With this appeal, we request the following:

1. A written decision by the Planning Commission in compliance with MCC § 8.12.150(A);
2. The opportunity to amend and/or supplement this appeal once the Planning Commission has complied with its obligation to issue a written decision pursuant to MCC § 8.12.150(A);
3. A *de novo* hearing of the Luxury Highrise Project before the Town Council where the project should be heard and considered as a new matter pursuant to MMC § 8.12.200(D).

As set forth below, we contend that the Luxury Highrise Project does **not** comply with applicable law and should **not** be approved by the Town Council as proposed. The following provides the grounds for our appeal, provided, however, that we reserve the right to present any and all authority, argument, objection, testimony, and evidence applicable to the Luxury Highrise Project in the course of this appeal.

1. The Planning Commission Is Obligated to Issue a Written Decision; Without a Written Decision, the Appeal Period Is Not Running.

Section 8.12.150 of the MCC requires the Planning Commission to issue a written decision in the form of a minute order or a resolution. MCC § 8.12.150(A). This written decision shall be accompanied by reasons sufficient to inform as to the basis for the decision. *Id.* The time to appeal runs from the date of the written decision. MCC § 8.12.180(B).

The Planning Commission has **not** issued a written minute order or resolution approving the Luxury High Rise Project. The Planning Commission / Design Review Board website states, “Minutes are available following approval.” See <https://www.moraga.ca.us/263/Planning-CommissionDesign-Review-Board>. Although the Agenda for the October 29, 2024, meeting is posted, no Minutes are posted for this meeting. In fact, no minutes are posted for **any** of the meetings the Planning Commission has held since November 29, 2022. See <https://www.moraga.ca.us/AgendaCenter/Planning-Commission-9>. As of November 8, 2024, 10-days following the October 29, 2024, meeting the Planning Commission’s website still

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characterizes the Luxury Highrise Project as “Under Review.” Below is a screen shot of the “Development Activity” section of the Planning Commission’s page on the Town of Moraga’s website as of November 8, 2024:

Project Name	Developer	Type	Location	Status
Park Street Senior Affordable Housing Apartments	Danco Communities	Multifamily Residential 49 Unit (100% below market rate affordable)	Vacant Park Street Site (APN: 255-140-052)	Under Review Design Review Board Application (DRB-02-24)
Rheem Valley Shopping Center Partial Redevelopment	Lowney Architecture	Commercial Development	Rheem Valley Shopping Center	Pre-Construction Planning Commission Meeting was held on December 12, 2023. The Project was granted an approval.
1600 School Street Apartments	Outdo Country Club Drive LLC	Multifamily Residential 66 Units (5 below market rate affordable)	1600 School Street	Under Review Design Review Board Application (DRB-07-22) Grading Permit Application (GR-04-22)

(See <https://www.moraga.ca.us/166/Development-Activity> .)

Despite the ongoing representation that **nothing** about the Luxury Highrise Project has been decided, Assistant Town Attorney Karen Murphy stated on the record at the close of the October 29, 2024, meeting that the appeal period runs from the date of the Planning Commission’s vote. Any contention that the date of a decision for purposes of an appeal is the date the Planning Commission voices its vote is incorrect and inconsistent with the plain language of the Moraga Municipal Code. The Planning Commission is **obligated** to issue a written decision. Only upon issuance of a **written** decision in the form of minutes or a resolution by the Planning Commission

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does the appeal period begin to run. It appears the Planning Commission wants to ensure that the citizens of Moraga have no idea what it is “deciding” on their behalf. This is particularly concerning given the conflict-of-interest issues raised below. At least two (2) of the most vocal proponents of the Luxury Highrise Project on Moraga’s Planning Commission are developers. It is in their interests and the interests of their employers to shoehorn developments like the Luxury Highrise Project into communities like Moraga. If you can build a highrise in a remote community like Moraga, you can build it anywhere.

This appeal is filed to ensure the preservation of our right to contest the Planning Commission’s vote in favor of the Luxury Highrise Project on October 29, 2024. We reserve the right to amend and/or supplement this appeal once the Planning Commission has complied with the written decision requirement.

2. The Luxury Highrise Project Does Not Qualify for the Requested State and Town Density Bonuses and the Waiver of Height and Story Requirements Requested by Outdo CCD and It Does Not Comply With Affordable Housing Design Requirements.

Section 65915 of the Government Code (“Section 65915” or the “State Density Bonus Law”) requires a city to grant “one density bonus” to an applicant provided they satisfy certain minimum affordable housing standards. Gov. Code § 65915(b). For purposes of Section 65915, the term “density bonus” means “a density increase over the otherwise maximum allowable gross residential density as of the date of application by the applicant [...]” Gov. Code § 65915(f).

Subdivision (b) of Section 65915 mandates certain minimums which must be complied with in order to obtain a density bonus. In the case of the Luxury Highrise Project, Outdo CCD seeks a density bonus pursuant to subdivision (b)(1)(B) of Section 65915, which requires that at least five percent of the total units of a housing development be for rental or sale to very low income households. Gov. Code § 65915(b)(1)(B). Housing developments that meet the requirement of Section 65915(b)(1)(B) may receive a density bonus calculated according to the table set forth in Section 65915(f)(2). Additionally, housing developments that meet the requirements of Section 65915(b), may also request specific incentives or concessions, a waiver or reduction of development standards, and parking ratios. Gov. Code § 65915(b)(1); *see also* Gov. Code § 65915(d), (e), and (p).

In addition to the density bonus provided by Section 65915, Outdo CCD also seeks a supplemental density bonus pursuant to Resolution No. 96-2022, adopted by the Town of Moraga (the “Town”) on December 14, 2022 (the “Development Incentives Policy”).¹ The Development Incentives Policy provides a supplemental Town density bonus if a project satisfies the requirements of the State Density Bonus Law as well as the requirements set forth in Moraga’s Affordable Housing Ordinance. (Development Incentives Policy, pp. 3-4.)

Moraga’s Development Incentives Policy also permits applicants who meet the 10% affordable housing requirement on-site to receive automatically “one concession or incentive.”

¹ See the Development Incentives Policy at <https://www.moraga.ca.us/DocumentCenter/View/8017/Development-Incentives-Policy-for-Affordable-Housing-PDF?bidId=> .

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The Policy provides, “[o]nly one incentive may be requested unless deeper levels of affordability are provided.” (*Id.* at p. 7.) Pursuant to Section 65915 and the Development Incentives Policy, Outdo CCD also seeks an incentive, concession, and/or waiver of development requirements as follows: (a) waiver of the 45-foot maximum height limit for the MCSP MU-OR zoning district (the “Zoning District”) to permit a building height of 49 feet; and (b) waiver of the maximum three (3) story limit for the MCSP MU-OR zoning district to permit the building of an unprecedented 4-story building on School Street. MMC § 8.42.050.A.

The Zoning District permits a base density of 24 dwelling units per acre (DUA). The Luxury Highrise Project is proposed for development on just over two (2) acres. Without the density bonuses provided in Section 65915 and the Development Incentives Policy, Outdo CCD may build **only** a 48-unit complex on the School Street site. Outdo CCD is asking for a density bonus and height and story waivers that will permit it to build 18 rental units beyond the 48 units permitted by existing zoning requirements.

Outdo CCD claims that it should be granted these 18 additional rental units and a waiver of height and story requirements because it will agree to limit five (5) units to Very Low Income households² (the “VLI Units”) for a period of 55 years.³ Five (5) VLI Units in a 48-unit complex equates to 10.4% of the total units that could be built under existing zoning restrictions. Pursuant to Section 65915(f)(2), allocating 10% of units as VLI Units permits a developer to seek a 32.5% density bonus. Applying a 32.5% density bonus to the 48-unit limitation for a 2-acre parcel translates to a bonus of 15.6 additional units (48 units * 32.5% = 15.6 units).

Additionally, pursuant to the Development Incentives Policy, Outdo CCD is seeking a 5% **supplemental** density bonus or the addition of 2.4 units (48 units * 5% = 2.4 units) beyond the added units available under Section 65915.

When the state and local density bonuses are added together, the overall density bonus for this 2-acre parcel with five (5) VLI Units is 66 units. As outlined below, Outdo CCD’s Luxury Highrise Project should **not** be awarded the density bonus or the requested height / story concessions/waiver as the Project does not comply with even the most basic affordable housing requirements.

a. The Luxury Highrise Project Does Not Dedicate 10% of the Total Units to Very Low Income Housing.

Outdo CCD’s Luxury Highrise Project is proposed as a mix of 1-, 2- and 3- bedroom rental units. The October 29, 2024, Staff Report to the Planning Commission characterizes this mix of units as follows: “The project proposes sixteen 1-bedroom, thirty-five 2-bedroom, and fifteen 3-

² As of May 2024, in Contra Costa County, the median family income (“AMI”) is \$155,700. (See <https://www.contracosta.ca.gov/DocumentCenter/View/77517/2024-State-Income-Limits?bidId=>.) For a household of 4, the Very Low Income limit is \$77,850. (*Id.*) For a household of 1, the Very Low Income limit is \$54,500. (*Id.*)

³ Pursuant to Section 65915 and MCC § 8.180.070(A), the minimum term of affordability for a rental unit is 55 years. Gov. Code § 65915(c); MCC § 8.180.070(A).

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bedroom units ranging in size from 599 square feet to 1,456 square feet.” (See <https://www.moraga.ca.us/DocumentCenter/View/9403/School-Street-Staff-Report> at p. 3.)

However, Outdo CCD’s Affordable Housing Plan does **not** dedicate 10% of total units to Very Low Income renters. It proposes to make only four tiny 1-bedroom units and one cramped 2-bedroom unit available to Very Low Income renters, as follows:

- Floor 1 – 1 BR – 599 sq. ft.;
- Floor 1 – 2 BR – 865 sq. ft.;
- Floor 2 – 1 BR – 605 sq. ft.;
- Floor 3 – 1 BR – 605 sq. ft.; and
- Floor 4 – 1 BR – 605 sq. ft.

(See <https://www.moraga.ca.us/DocumentCenter/View/9392/F-Affordable-Housing> @ p. 2.) Notably, Outdo CCD has **not** designated **any** 3-bedroom units as VLI Units. When pressed on this issue at the October 29, 2024, meeting, a representative for the Luxury Highrise Project balked at the notion that a 3-bedroom unit should be a VLI Unit.⁴ This is inconsistent with the spirit and the letter of Section 65915 and the Development Incentives Policy. If the Luxury Highrise Project consisted of, for example, 47 one-bedroom units and 19 two-bedroom units, the proposed allocation of VLI Units to four (4) one-bedrooms and one (1) two-bedroom might not be problematic. Outdo CCD must be required, at a minimum, to allocate the VLI Units as follows: one 1-bedroom unit, three 2-bedroom units, and one 3-bedroom unit.

Moreover, the Staff Report’s generalized description of the Luxury Highrise Project as having sixteen 1-bedroom, thirty-five 2-bedroom, and fifteen 3-bedroom is disingenuous, at best. Several of the 1-bedroom and 2-bedroom units include a “den” in addition to “bedrooms.”⁵ (See <https://www.moraga.ca.us/DocumentCenter/View/9401/O-Plans>, at pp. 13-16, 23-27.) The breakdown of units, when the added “den” is taken into account, means that there are **far fewer** 1-bedroom units than claimed in the Staff Report, and **far more** 2- and 3-bedroom units in the Luxury Highrise Project. The **true** breakdown of units in Outdo CCD’s unprecedented four (4) story, Luxury Highrise Project is as follows:

⁴ Representatives for the Luxury Highrise Project claim they care deeply about providing affordable housing so that teachers and others to work in our communities can live in Moraga with their families. Such claims are laughable when one takes the time to study the plans for the Luxury Highrise Project. The Plans suggest that VLI household members should be relegated to tiny/cramped 1-bedroom units with no in-unit laundry. If anything, Outdo CCD’s Project treats VLI households as second-class citizens who should not have basic amenities like in-unit laundry, while its luxury renters dwell in spacious apartments with unobstructed 3- and 4-story views of the surrounding Moraga Valley.

⁵ To be sure, anyone renting a unit with a “den” will not be prohibited from using the den as a bedroom.

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Floor No.	Number of 3BD Units	Number of 2BD Units “with Den”	Number of 2BD Units (no Den)	Number of 1BD Units “with Den”	Number of 1BD Units (no Den)	Total Units
Fourth	7	1	7	1	1 (VLI Unit)	17
Third	3	1	11	2	4 (1 VLI Unit)	21
Second	3	1	11	2	4 (1 VLI Unit)	21
First	2	1	2 (1 VLI Unit)	1	1 (VLI Unit)	7
TOTALS	15 (0 VLI Units)	4 (0 VLI Units)	31 (1 VLI Units)	6 (0 VLI Units)	10 (4 VLI Units)	66
	19 Units with 3 Bedrooms (Zero VLI Units)		37 Units with 2 Bedrooms (1 VLI Unit)		10 (4 VLI Units)	

This when the **true** allocation of 1-, 2-, and 3- bedroom units with and without “dens” is considered, the proposed allocation of VLI units to four 1-bedrooms (no den) and one 2-bedroom (no den) wholly fails to satisfy the 10% VLI Unit requirement. Because the project does not satisfy the requirements Section 65915 and the Development Incentives Policy, it does not qualify for the requested density bonuses, nor does it qualify for the height and story concessions / waivers requested by Outdo CCD.

b. The Luxury Highrise Does Not Comply with the Town’s Affordable Housing Ordinance (MCC § 8.180.070(B)(2)).

To comply with Section 65915, the Town enacted an Affordable Housing Ordinance. *See* MCC § 8.180.010, *et seq.* Pursuant to this Ordinance, in a rental residential development, “[a]t least 10 percent of the rental units shall be inclusionary units for occupancy by low-income households.”⁶ MCC § 8.180.040(A)(1). “Incentives, as specified in Section 8.180.080 shall be available to applicants meeting the inclusionary requirements on-site.” MCC § 8.180.040(C).

The Affordable Housing Ordinance makes clear that its requirements are mandatory, as follows:

⁶ For purposes of this Ordinance, “‘Inclusionary unit’ means a dwelling unit developed pursuant to an affordable housing agreement that will be offered for-sale or rent to very low-, low- and moderate-income households, at an affordable rent or affordable sales price, as applicable, pursuant to this chapter.” MCC § 8.180.030.

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Any town action approving a residential development subject to this chapter shall contain conditions sufficient to ensure compliance with the provisions of this chapter. **No building permit or final inspection shall be issued, nor any development approval granted which does not meet the requirements of this chapter.**

MCC § 8.180.050(A) (bold added). The Affordable Housing Ordinance establishes the following design requirements:

B. Design. The following requirements shall apply:

1. Inclusionary units should be **reasonably dispersed throughout the entirety of the residential development.**
2. Inclusionary units should **be comparable in terms of bedroom count to the market-rate units**, excluding ADUs. However, on-site rental units may be up to twenty (20) percent smaller than the market-rate units in the residential development project and on-site for-sale units may be up to thirty (30) percent smaller than the market-rate units in the residential development.
3. The exterior design and character of the inclusionary units shall be substantially consistent with that of the market-rate units in the residential development.
4. Interior Finishes. Inclusionary units may have different interior finishes than market rate units so long as the interior finishes are durable, of good quality and consistent with current state building code standards for new housing.
5. **The inclusionary units must have access to all amenities available to the market-rate units.**

MCC § 8.180.070(B) (bold added). The Luxury Highrise Project does **not** comply with these affordable housing design requirements in several respects.

First, the units are not reasonably dispersed throughout the entirety of the development. MCC § 8.180.070(B)(1). Based on the Affordable Housing Plan provided by Outdo CCP, the five (5) VLI Units are relegated to street or building facing views on the south wing of the complex. (See <https://www.moraga.ca.us/DocumentCenter/View/9392/F-Affordable-Housing>, at pp. 4-6 (VLI Units are called out in blue / white)). Figures 3(a) and 3(b) below show the VLI Units relegated to the south wing of the complex. (See <https://www.moraga.ca.us/DocumentCenter/View/9401/O-Plans>, at pp. 13-6.)

Figure 3(a) – Rendering of VLI Units on 1st Floor

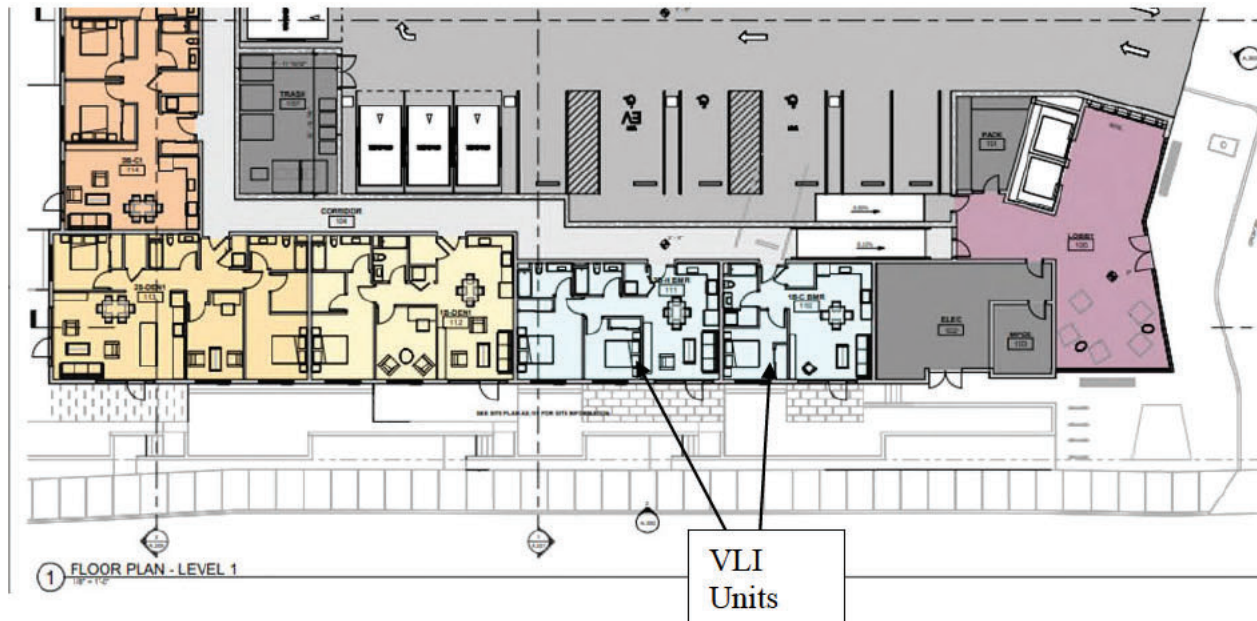
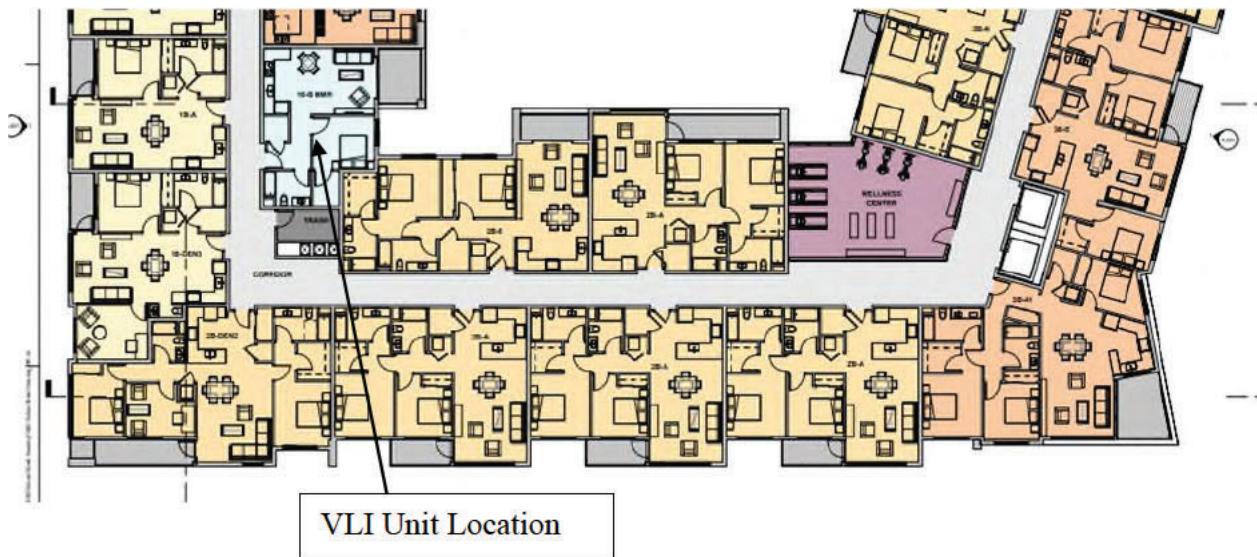


Figure 3(b) – Rendering of Location of VLI Units on 2nd, 3rd, and 4th Floors



Moreover, the VLI units are located in the **most undesirable** parts of the building, *i.e.*, next door to the trash rooms on the 2nd, 3rd and 4th Floors or fronting a busy street while also next door to the Lobby, Electrical Room and Elevators. Who wants to live next to the trash or a noisy lobby and utility room? Do we really think teachers, healthcare workers, and first responders will be eager to rent such tiny, subpar units? The Luxury Highrise Project fails to provide a single VLI Unit that could comfortably accommodate a family.

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Second, as already noted above, the VLI units are **not** comparable in terms of bedroom count to the market-rate units. MCC § 8.180.070(B)(2). There are no 3-bedroom VLI Units in the development, nor are there any 2-bedroom VLI Units with a den, or 1-bedroom VLI Units with a den. At a minimum, based on the existing plans, there should be at least one 3-bedroom VLI Unit, three 2-bedroom VLI Units, and one 1-bedroom VLI Unit.

Third, the VLI Units are far more than 20% smaller than the market-rate units. MCC § 8.180.070(B)(2). (See <https://www.moraga.ca.us/DocumentCenter/View/9401/O-Plans>, at pp. 23-26.) There are six (6) different 1-bedroom unit plans in the Project:

Unit Type	Square Footage	Number of Units
1B-C BMR	599 SF	1 (All VLI)
1B-B BMR	605 SF	3 (All VLI)
1B-A	743 SF	6
1B-DEN3	879 SF	2
1B-DEN1	1,061 SF	1
1B-DEN2	1,106 SF	3
Total Units		16

(*Id.* at p. 23.) When compared to the largest 1-bedroom unit (1B-DEN2), the 1-bedroom VLI Units are 54% and 55% the size (or 46% and 45% smaller, respectively). The average market-rate 1-bedroom unit is approximately 947 sq. ft. When compared to the average size of a market-rate 1-bedroom unit, the VLI Units are 63% and 64% the size (or 37% and 36% smaller, respectively). It appears that Outdo CCD created a particularly small set of market 1-bedroom units – all of which sit on the west-facing side of the 2nd Floor, where newly planted shrubbery will do little to mitigate the view of Saklan School’s side and playground.⁷ The 1-bedroom VLI Units should be **no more than 20%** smaller than the market rate units. Outdo CCD is gaming the system by contending that VLI units which are 20% smaller than the **smallest** market rate unit is sufficient. This is wholly inconsistent with Moraga’s Affordable Housing Ordinance, which limits the size reduction in FLI units to 20% of the “market rate units.” If Moraga had intended the benchmark for “market rate” to be the smallest market rate unit, it would have and could have said so in its Affordable Housing Ordinance. It did not. To apply Moraga’s Affordable Housing Ordinance in the manner proposed by Outdo CCD is to misread and misapply the Ordinance in service of a for-profit developer’s greed.⁸ If anything, the proposed 1-bedroom VLI Units are more akin to **studio apartments** with

⁷ It should be noted that the placement of the Luxury Highrise Project requires destruction of 39 trees, including the 10 redwood trees that exceed 50 feet in height. Among those to be removed at the 50+ foot redwood trees that form a natural privacy screen between Saklan School and the west side of the Luxury Highrise Project.

⁸ It also bears noting that a new construction 737 SF, 1-bedroom (1-bath) apartment at 1776 Grant Street in Concord, CA (just one mile from the intersection of Highway 242 and Concord Avenue) is being offered for lease at the monthly rate of \$2,860 to \$4,022. (See <https://thegrant.com/floorplans/a5/#jd-fp-body>.) Imagine the rent Outdo CCD will charge for its market rate 1-, 2-, and 3-bedrooms in Moraga.

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an inconvenient internal wall – not 1-bedrooms consistent with the market rate 1-bedroom units throughout the Luxury Housing Project.

The single 2-bedroom VLI Unit fares no better when compared with the market 2-bedroom units. There are 11 different 2-bedroom unit plans in the Project:

Unit Type	Square Footage	Number of Units
2B-H BMR	865 SF	1 (All VLI)
2B-B2	1,046 SF	3
2B-A	1,058 SF	18
2B-D2	1,069 SF	1
2B-C2	1,106 SF	2
2B-E	1,123 SF	3
2B-C1	1,130 SF	2
2B-D1	1,138 SF	1
2B-DEN2	1,237 SF	2
2B-DEN3	1,336 SF	1
2B-DEN1	1,350 SF	1
Total Units		35

(*Id.* at p. 23.) When compared to the largest 2-bedroom unit (2B-DEN1), the single 2-bedroom VLI Unit is 64% the size (or 36% smaller). The average market-rate 2-bedroom unit is approximately 1,159 sq. ft. When compared to the average size of a market-rate 1-bedroom unit, the VLI Unit is 75% the size (or 25% smaller). Again, the 2-bedroom unit should be no more than 20% smaller than the “market rate units.”

Fourth, the inclusionary units do **not** have access to all amenities available to the market-rate units. MCC § 8.180.070(B)(5). The plans for the Luxury Highrise Project indicate that **none** of the 1-bedroom VLI Units will have laundry in the unit. All other units have in-unit laundry. Figure 1 below depicts the floorplan for each of the market rate 1-bedroom units. The in-unit laundry is depicted by a square in a closeted area.

Figure 1

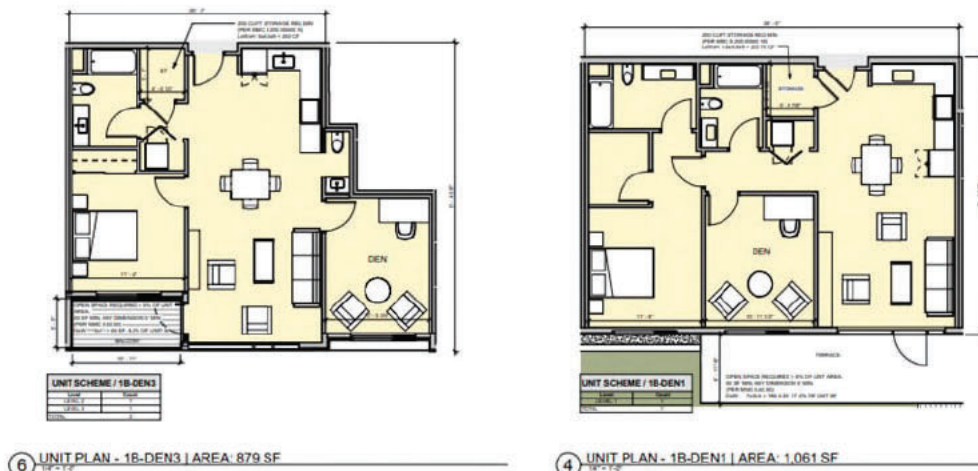


Figure 1 (cont.)

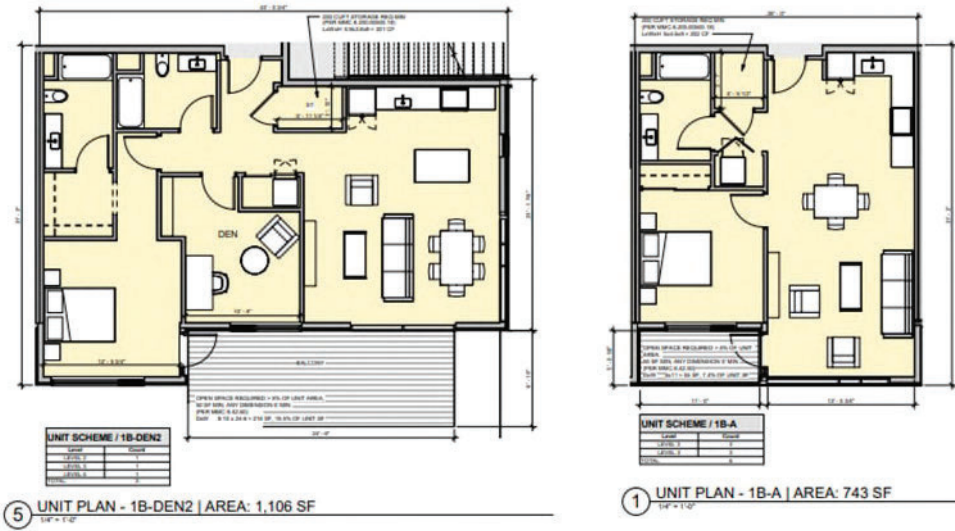
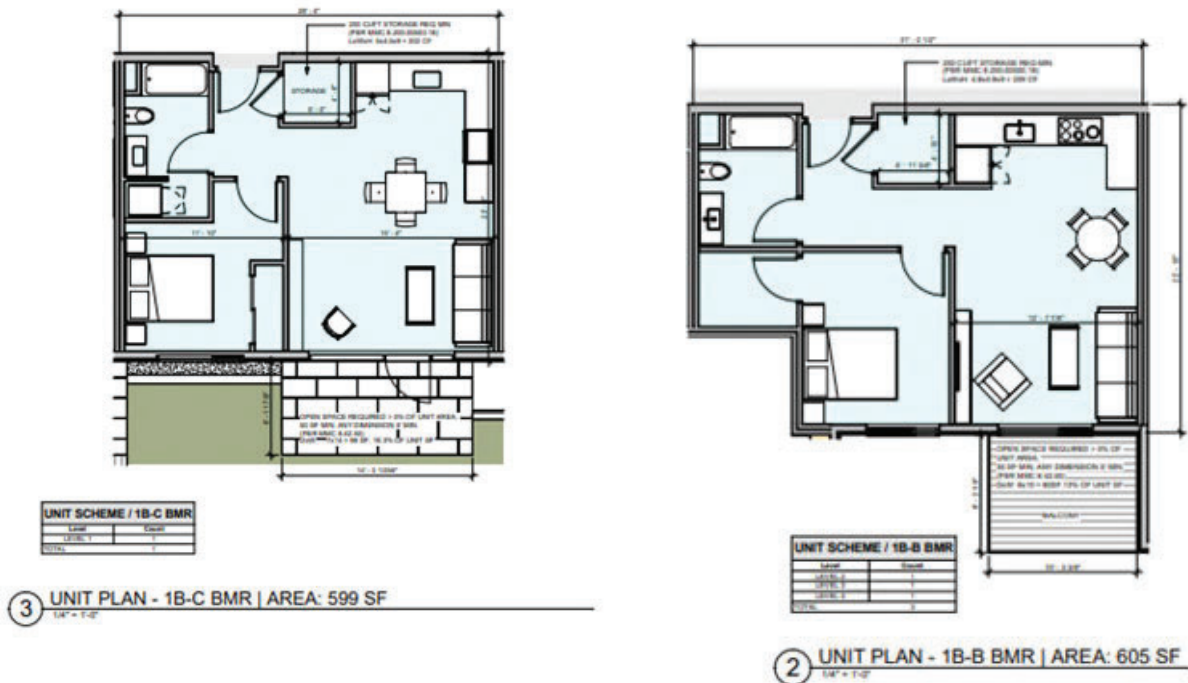


Figure 2 below depicts the two different layouts of the four 1- bedroom VLI Units.⁹ Neither of them includes any provision for in-unit laundry (*i.e.*, no “square” in a closet).

Figure 2



⁹ See <https://www.moraga.ca.us/DocumentCenter/View/8852/1600-School-Street>

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This failure to provide in-unit laundry – one of the most basic amenities in a dwelling – violates Moraga’s Affordable Housing Ordinance MCC § 8.180.070(B)(5). This failure also violates MCC § 8.200.050.A.19, which provides: “In multi-family residential projects, a laundry area consisting of a place for an automatic washing machine and clothes dryer shall be provided in each unit unless common laundry facilities are provided.” Section 8.200.050.A.19 requires in-unit laundry for **all** of the VLI Units. Sadly, it appears Outdo CCD gave no thought to providing laundry amenities to the VLI Units as it has not even provided a shared laundry room in the plans submitted to the Planning Commission.

In short, any claim by Outdo CCD that it cares deeply about providing affordable housing so families can move into Moraga are mere lip service. Outdo CCD has **not** complied with the **bare minimum** of standards required to qualify for the rich density bonuses and height/story waivers it seeks. In no way does the Luxury Highrise Project comply with the spirit, much less the letter, of the affordable housing laws they are trying to take advantage of.

Based on the plans submitted to the Planning Commission, Outdo CCD appears to have gone to pains to create (1) the tiniest VLI Units possible, (2) in the worst parts of the complex, (3) with none of the views proposed for the luxury market units, and (4) without even the laundry amenities the market rate units have. Outdo CCD does not care about bringing VLI families into Moraga.

Finally, it bears noting that the Luxury Highrise Project does little to help Moraga satisfy its low income Regional Housing Needs Allocation (RHNA) as set forth in the Housing Element for the 6th Cycle adopted in January 2023. (See <https://www.moraga.ca.us/DocumentCenter/View/7695/Adopted-Housing-Element-PDF>.) The following table sets forth Moraga’s current RHNA for 2023-2031 (6th Cycle):

Table 1-1: Regional Housing Needs Allocation, 2023-2031 6th Cycle

Income Category	Town of Moraga	
	Number	%
Very Low Income (<50% of AMI)	318	28.4%
Low Income (50%-80% of AMI)	183	16.4%
Moderate Income (80%-120% of AMI)	172	15.4%
Above Moderate Income (>120% of AMI)	445	39.8%
Total	1,118	100%

Source: Association of Bay Area Governments.

The Luxury Highrise Project, which sets a 4-story precedent and will tower over everything that surrounds it, grants Outdo CCD a rich luxury rental opportunity that proposes to add only 5 VLI Units, or 1.57% of the RHNA for Very Low Income housing. The Town must **not** grant density bonuses, concessions, incentives, and waivers to developers who fail to comply with the basic affordable housing requirements required to earn those bonuses, concessions, incentives, and

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waivers. Doing so simply rewards profiteering developers who will fill remaining building sites with unaffordable, luxury housing, leaving no space on which to build the affordable housing required to meet RHNA requirements over the next seven years.

3. The Staff Report’s Conclusion that the Proposed Luxury Highrise Project Would Have Less Than Significant Impacts on Evacuation or Emergency Response Plans Is Erroneous

The Staff Report states that:

[t]he Comprehensive Advanced Planning Initiative (CAPI) Draft EIR considered the addition of 1,118 housing units and concluded that development facilitated by the housing element would not impair implementation or physically interfere with evacuation or emergency response plans, and impacts would be less than significant. (citing Page 4.8-18 of the CAPI DRAFT EIR (SCH #2022020106)) The proposed 66-unit apartment building represents approximately 6% of the housing anticipated under the CAPI Draft EIR.

(School Street Staff Report (Emergency Evacuation) at p. 17, <https://www.moraga.ca.us/DocumentCenter/View/9403/School-Street-Staff-Report>) (emphasis added). However, Section 4.8, as cited by Staff and which includes “Impact HAZ-9 on page 4.8-18, is entitled “Hazards and Hazardous Materials” and “analyzes potential impacts relating to hazards and hazardous material in the soil, groundwater, and existing structures associated with development facilitated by the Planning Initiative” and not natural hazards such as wildfire. (CAPI Draft EIR at Section 4.8, <https://www.moraga.ca.us/DocumentCenter/View/7387/Draft-Environmental-Impact-Report-PDF?bidId=>). This Section itself states that “Natural Hazards”, including Wildfire, are discussed in Section 4.17 of the Draft EIR. (CAPI Draft EIR at Section 4.8.1(d), p. 4.8-5). As such, Staff’s broad conclusion stated in the Staff Report that the proposed 66-unit Luxury Highrise Project, as 6% of the housing anticipated under the CAPI Draft EIR, would have less than significant impacts is erroneous at best.

4. The EIR Consistency Analysis as to Evacuation and Emergency Response Plans in the Event of a Wildfire is Conclusory and Unsupported

According to Exhibit M of the Staff Report, and in a purported effort to satisfy CEQA, Staff conducted an:

analysis (EIR Consistency Analysis) that compares the proposed 1600 School Street Apartment Building (Project) to the program Environmental Impact Report (EIR) for the Comprehensive Advanced Planning Initiative (CAPI), which includes the sixth cycle Housing Element and the CEQA adopted on January 25, 2023 (Town Council Resolution 08-2023) by the Moraga Town Council. The sixth cycle Housing Element was certified by the State Department of Housing and Community Development on September 14, 2023. The purpose of this analysis is to determine whether the Project is within the scope of the CAPI EIR including whether the Project is consistent with the CAPI EIR and whether the Project would result in any potential impacts resulting from construction/operations of the Project that were not previously analyzed in the CAPI EIR.

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(1600 School Street Apartment Project Comprehensive Advanced Planning Initiative Program Environmental Impact Report Consistency Analysis (CEQA Guidelines Section 15183) October 23, 2024, Ex. M at 1). The EIR Consistency Analysis concludes that the Luxury Highrise Project has been determined to be consistent with the certified CAPI EIR because it “would not result in any new environmental impacts, or exacerbate any previously identified environmental impacts, and therefore the proposed project is exempt from further environmental review...”

Table 1 of the EIR Consistency Analysis, with respect to Wildfire Impacts, notes that CAPI Impact WFR-1, “[d]evelopment facilitated by the Housing Element would be in and near an SRA or Very High FHSZs. Compliance with applicable State and location regulations relating to evacuation would reduce the extent to which the project would impair emergency response and evacuation. Nonetheless, this impact would be significant and unavoidable.” (emphasis added). Similarly, Impact WFR-3 states that “[d]evelopment facilitated by the Housing Element would expose project occupants and structures to wildfire risks for sites located in or near Very High FHSZs. Wildfire risk would be significant and unavoidable.” The “1800 School Street Project Analysis” for both impacts merely states that “[t]he project site is mapped with a FHSZ of “Urban Unzoned” and more than 2,000 feet from the nearest Very High FHSZ. The Project will comply with all California Building Code and Moraga Orinda Fire District requirements.”

However, the apparent conclusion that the Luxury Highrise Project would not exacerbate any previously identified environmental impacts is not adequately explained in the EIR Consistency Analysis. While the analysis simply appears to conclude there would be no exacerbation because the project is mapped “Urban Unzoned” and is more than 2,000 feet from the nearest Very High FHSZ it does not explain how these alone are mitigating factors. This is especially true given that Section 4.17 of the Draft EIR states, in finding that development facilitated by the Housing Element would have a significant impact on wildfire evacuation and emergency response, that:

[d]evelopment facilitated by the Housing Element would accommodate future population growth that would incrementally increase traffic congestion, which could result in delays on evacuation routes in the Town, and into the cities of Lafayette and Orinda and to State Route 24. The Housing Opportunity Sites would be accessed by preexisting roadways and would generally rely on Moraga Way, Moraga Road, or St. Mary’s Road for potential evacuation.

...

Population growth because of the Housing Element could also result in adverse effects related to the implementation of emergency plans due to burdened evacuation routes and other emergency response resources in the event of a wildfire.

...

However, future development under the Housing Element may substantially impair an adopted emergency response plan or emergency evacuation plan.

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(CAPI Draft EIR at Section 4.17.3(b.), pp. 4.17-18). Accordingly, the analysis does not establish consistency because it fails to show that the addition of residents in conjunction with the project would not exacerbate emergency and evacuation plans as noted above.

5. Even if the Proposed Luxury Highrise Project is Consistent with The EIR New Information Shows That Impacts Will Be More Significant Than Described in the Prior EIR

Under CEQA, if a development project is consistent with an updated general plan and an environmental impact report (EIR) was prepared for that plan, the CEQA review for the project may be limited to the parcel-specific impacts of the project or impacts that new information, arising since adoption of the general plan, shows will be more significant than described in the prior EIR. (Pub. Resources Code, § 21083.3; CEQA Guidelines, § 15183). Here, there is significant new information that has arisen since adoption of the General Plan showing the impacts of a wildfire on evacuation and emergency response will be more significant than those set out in the CAPI Draft EIR.

First, there is no indication that the Town has, since January of 2023, considered the effects that new housing will have on the ability to safely and efficiently evacuate residents as required by the 6th Housing Element which provides:

6.1.3: Goal 3: Ensure Access to Opportunity and Safety

Ensure that all Moraga residents, regardless of income, have access to high-quality housing, excellent services, and safe neighborhoods without risk of displacement. This includes sustained efforts to address wildfire hazards and maintain high levels of emergency preparedness and response.

(See <https://www.moraga.ca.us/DocumentCenter/View/7695/Adopted-Housing-Element-PDF>, 6-12.) Pursuant to this Goal, the Sixth Housing Element states the following Policy:

H3.2 Evacuation Capacity. Consistent with the General Plan Public Safety Element, the Town shall consider the effects of new housing on the ability to safely and efficiently evacuate residents in the event of an emergency, including residents with special needs such as seniors and persons with disabilities. Ongoing efforts should be made to improve emergency preparedness and reduce the potential for injury and loss of life in the event of a wildfire or other disaster.

(*Id.*) (emphasis added).

The Town has provided no indication that it has undertaken any significant analysis of the impact of new housing on evacuation during the almost 2 years since the Sixth Housing Element was adopted. The fact that the Town has not engaged in this analysis is new and substantial information indicating that the impacts from new development will be more significant than those considered in the CAPI Draft EIR. Indeed, the current Moraga Evacuation Plan is several years old. It predates the rezoning of the parcel at issue, which increased density from 20 to 24 dwelling units per acre. It predates the addition of the “Country Club Drive” development that is nearly across the street, and which is the benchmark that Outdo CCD wants to outdo. It also predates the

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changes to the law permitting substantial density bonuses such as the 32.5% bonus sought in this case.

Second, recent and new information further demonstrates that the impacts of new development could impact evacuation and emergency response more than considered in the CAPI draft EIR. For example, at the October 29, 2024, meeting, Fire Chief King, who has responsibility for overseeing Moraga's evacuation plan conceded that – given the very minimal roads leading out of Moraga – if many evacuation zones need to evacuate at once in a wildfire situation, residents will not be able to evacuate. (<https://www.youtube.com/watch?v=sOcyzpQ5Duo&t=5870s>, at 1 hour, 30 minutes). However, Moraga residents know that even when only very limited portions of the population utilize Moraga Way or Moraga Road at the same time during everyday conditions, such as school drop offs and pick up/commuting times, the traffic on these roads is congested. The prospect of residents attempting to evacuate during an emergency, when people are panicked, is grim.

As a more specific and recent example, on September 11, 2024, a sod truck turned over on Highway 24 just outside the Caldecott Tunnel in Oakland at 5 a.m. blocking westbound lanes. According to one news report, “for hours, rolls of lawn and dirt lay spilled all over the highway and drivers were being diverted to Highway 13.” (<https://www.ktvu.com/news/big-rigs-snarl-traffic-highway-238-caldecott-tunnel>). At least some commuters diverted thru Moraga for their westbound commute creating gridlock in Moraga and leading one vehicle to crash along Canyon Road. See below:



Photo 1 - St. Mary's Road 9.11.2024, 8:15 a.m.



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Figure 2 - Canyon Road 9.11.2024, 8:42 a.m.

This real-world experience, not available at the time the CAPI EIR was certified, demonstrates that any excess of vehicles traveling in the same direction in an attempt to evacuate Moraga during a wildfire could be disastrous.

Chief King further noted during the October 29, 2024 meeting that if there was a significant wildfire, evacuation would not be possible and that a much less desirable shelter in place type option would need to be implemented. (<https://www.youtube.com/watch?v=sOcyzpQ5Duo&t=5870s>, at 1 hour, 30 minutes). However, and as experienced on September 11, 2024, it is now unclear that a more significant or substantial wildfire would necessitate shelter-in-place contingencies.¹⁰ Indeed, it appears that such “bad” options may need to be taken even if only a few town zones needed to evacuate at the same time. In addition, the California Attorney General has clearly stated in CEQA guidance to local agencies that agencies should:

[a]void overreliance on community evacuation plan identifying shelter-in-place locations. Sheltering in place, particularly when considered at the community planning stage, can serve as a valuable contingency, but it should not be relied upon in lieu of analyzing and mitigating a project’s evacuation impacts.

(*Best Practices for Analyzing and Mitigating Wildfire Impacts of Development Projects Under the California Environmental Quality Act*, California Department of Justice at p. 11, October 10, 2022, <https://oag.ca.gov/system/files/attachments/press-docs/Wildfire%20guidance%20final%20%283%29.pdf>). But, and with all due respect, the Moraga Police Department and the Planning Commission have done exactly what California’s Attorney General has rejected by relying on an outdated evacuation plan while failing to analyze the evacuation impacts of the project at issue. Accordingly, a project specific and/or supplemental EIR is required for the proposed project.

6. Conflict of Interest on the Planning Commission

At least two proponents of the Luxury Highrise Project who sit on the Planning Commission appear to have the potential to be self-interested in permitting unfettered development in communities like Moraga. This possible self-interest in ensuring communities like Moraga permit development for development’s sake represents an appearance of impropriety and/or conflict of interest.

Chair Nick Polsky: Moraga Planning Commission Chair Nick Polsky works for Sunset Development and serves as First Vice President of Leasing for Bishop Ranch. In June 2024, Sunset Development and Avalon Bay Communities garnered approval to build a 457-unit

¹⁰ While Chief King provided the Merrill Fire as an example of a successful evacuation, it must be noted that this fire was at the edge of Town and required only residents living in the Sanders Ranch area to evacuate and permitting them to evacuate on relatively clear roads as they traveled to the Town center where residents were not required to evacuate. (<https://www.youtube.com/watch?v=sOcyzpQ5Duo&t=5870s>, at 1 hour, 30 minutes). A wildfire impacting the Town center along with outlying areas would provide no such luxury.

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apartment complex at Bishop Ranch, a business park being turned into a \$5B retail village in San Ramon. (See <https://therealdeal.com/sanfrancisco/2024/06/26/sunset-development-avalonbay-to-build-housing-in-san-ramon/> .)

Planning Commission Member Ben Helber: Ben Helber has been with Toll Brothers for 12 years and has served as its Division Vice President since 2017. Toll Brothers is a publicly-held, Fortune 500 company, and holds itself out as the nation's leading builder of luxury homes. <https://www.linkedin.com/company/toll-brothers/about/>

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Exhibit A – Individuals Who Requested To Be Identified As Interested Persons In Support Of This Appeal

1. John Bergen	1409 De La Cruz Way
2. Chris and Meredith Avant	1866 School Street
3. Yank Eppinger	126 Hazelwood Place
4. Bill and Elizabeth Lee	
5. Geoff and Rose Baxter	
6. Stephen Matsumoto	
7. Michael and Mariela Gagnon	
8. Adam and Kristen Williams	1321 Hazelwood Place
9. Conor and Joel Flannery	
10. Marcus and Tatiana Dutra e Mello	
11. Scott Druskin	
12. Tisa Kelly	
13. Emily Bergfeld	118 Oxford Drive
14. Charles Walmann	118 Oxford Drive
15. Deborah Bergfeld	215 Sheila Court
16. James Bergfeld	215 Sheila Court
17. Michael Bergfeld	1105 Larch Avenue
18. Monique Barnes-Bergfeld	1105 Larch Avenue
19. Kathy and Colin Taylor	120 Hazelwood
20. Stefanie and Jeff Frese	
21. Lucina and Jorge Vernazza	225 Sheila Court
22. Derrick and Kristy Webster	
23. Mick and Scott Coane	
24. Marcia Trial	207 Sheila Court
25. Dan Spisak	207 Sheila Court
26. Daniel Spisak	207 Sheila Court
27. Andrey and Angelica Falko	1900 School Street
28. Jacqueline Barnes	1785 School Street
29. Julie and Robert Stagg	
30. Michael and Regina Almaguer	