

Exhibit 4

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October 25, 2004

Deborah Edgerly
City Administrator
One City Hall Plaza, 3rd Floor
Oakland, CA 94612

Re: Leona Quarry Project (October 26, 2004 Agenda Item 1)

Dear Administrator Edgerly:

The Millsmont Homeowners Association writes regarding the approval of the final maps for the Leona Quarry Project, which the City Council will consider on October 26, 2004. Specifically, the City Administrator has forwarded to the Council a recommendation that it approve the "Resolution Authorizing the Director of the Public Works Agency to Enter Into a Subdivision Agreement With DeSilva Group, Inc. For Construction of Certain Improvements In a Real Estate Subdivision Entitled 'Tract 7351,' Leona Quarry Project; Approving the Final Tract Map Numbers 7351 and 7493; Fixing The Amount of the Security to Guarantee the Faithful Performance of Such Agreement and Adopting Plans and Specifications."

We understand the DeSilva Group, Inc. (developer) is ready to proceed with construction. We also understand and support the City's interest in making more affordable housing available to Oakland residents. However, the Homeowner's Association is concerned that the City has not completed its due diligence to assure that the Project will not cause improper damage to the environment downstream from the Project site, which includes Chimes Creek and riparian private properties owned by Millsmont Homeowners. We respectfully request that the City Administrator briefly defer the decision whether to approve the final maps until the City assures that the plans for the Project comply with the Conditions of Approval, as well as applicable State laws which may further condition the development.

The Homeowners Association is an unincorporated group of concerned residents who live in the Millsmont neighborhood in central east Oakland. Chimes Creek is the focal point of our community. We have interests that will be directly impacted by the proposed Leona Quarry Project.

Our letter is organized as follows. Section I provides a background of the Leona Quarry Project and its impacts on Chimes Creek. Section II contains specific comments regarding the adequacy of the final maps, including compliance with the Conditions of

Approval and state law. These comments are restated in the form of separate questions. We respectfully request that the City consider these comments and answer these specific questions, including specific citations to the record, before taking final action.

I. BACKGROUND

The project is located at 7100 Mountain Boulevard, in the Oakland Hills, on 128 acres of land within the headwaters of Chimes Creek. City of Oakland Community and Economic Development Agency, Leona Quarry Draft Environmental Impact Report (2002) (Draft EIR), p. IV.F-1. A Modified Plan for development calls for the construction of 477 residential units in Leona Quarry, along with attendant support structures for the subdivision. City of Oakland Community and Economic Development Agency, Leona Quarry Final Environmental Impact Report (2002) (Final EIR), p. III-7.

Chimes Creek is a natural creek that originates in headwaters located both above and within the Leona Quarry Project. *See* City of Oakland Museum, Lion Creek Watershed Map (1999), *available at* <http://www.museumca.org/creeks/21-OMLion.html>. Its flow is perennial. Today, the creek flows westward across the surface of the Project, both as an expression of surface water and in underground conduits. The creek is culverted as it leaves the Project area, after which it flows under Interstate 580 to form the main trunk of the storm drain network flowing through the Burkhalter neighborhood. A section of the creek daylights behind residential properties on Delmont Avenue, then goes underground to cross Seminary Avenue, and surfaces briefly on the Mills College campus. Chimes Creek then joins Horseshoe Creek to form a part of the Lion Creek watershed, which drains into the Bay. Chimes Creek is defined as “waters of the United States.” *See* Draft EIR, p. IV.B-12. The City has designated it as a Category III Creek, pursuant to the City of Oakland’s Creek Protection, Storm Water Management and Discharge Control Ordinance (Creek Protection Ordinance). *See* Oakland Municipal Code, § 13.16. For work done in and around a Category III creek, a project developer must adhere to the following:

“In addition to normal submittal requirements related to other permits that must be obtained, a site plan must be submitted that shows the relationship and distances between the Development or Work to be conducted and the Top of the Bank of the Creek. In addition, a Creek Protection Plan must be submitted for review and approval that describes the Best Management Practices that will be employed to assure construction activity will not adversely impact Creek Bank, Riparian corridor or water quality.”

Oakland Municipal Code, § 13.16.140(b).

Prior to grading work on the Project site, even while quarrying operations continued around the creek, the portion of Chimes Creek that crossed the quarry supported cattails and other reeds, fairly established willows, and other vegetation. *See* Declaration of Mark Brest van Kempen (Oct. 25, 2004), p. 2 (Attachment 1). On February 4, 2004, Mr. Brest van Kempen observed hundreds of pacific tree frog tadpoles, dragonfly larvae and damselfly larvae in the Creek on the Project site. *See id.*

On June 10, 2002, the City of Oakland issued the Draft EIR for the Leona Quarry Project. The Final EIR issued on September 23, 2002. A number of hydrology and water quality impacts were identified in the course of environmental review, including:

- Development of the project site may create localized flooding and contribute to a cumulative flooding downstream.
- Construction activities may result in soil erosion and increase levels of suspended sediments and contaminants in storm water flows, resulting in adverse impacts to downstream water quality.
- Construction dewatering may result in discharge of sediment-laden groundwater or impacts to local groundwater gradients and flow.
- Upon completion of construction activities, the proposed project may result in a long-term increase in storm water runoff contaminant levels, degrading downstream receiving water quality.

Draft EIR, p. II-19.

Given the already fragile conditions of Chimes Creek, these impacts generated concern in the neighborhood. The Draft EIR acknowledged that Chimes Creek was not capable of handling current runoff from the quarry:

“Downstream of the project site, portions of storm drainage pipes that convey Chimes Creek are inadequately sized to handle peak flows. Chimes Creek is currently not capable of handling the quantity of runoff generated by large rainfall events. Flooding ... has occurred on several occasions.... Those stretches of Chimes Creek not enclosed by storm drains have unstable creek banks, suggesting that channel capacity is inadequate to handle peak flow volume. The reach directly above Seminary Avenue was stabilized using an

underground bypass channel and surface lowflow channel. However, channel sections immediately upstream exhibited indications of bank instability and failure. The ACFC recognizes that increased discharge in the creek has led to erosion problems that degrade the creek environment, affect adjacent property owners, and contribute sediment that may interfere with downstream storm drain facilities.”

Draft EIR, p. IV.F-7.

The Homeowners Association has witnessed firsthand the degradation of the creek environment that resulted from the 1986 development of Ridgemont, which is above the quarry. Declaration of Nancy S. Sidebotham (Oct. 25, 2004) (Attachment 2), pp. 2-3. Runoff from the Ridgemont development increased the volume and velocity of flows through Chimes Creek. *See id.* The higher flows rapidly eroded the creek banks and channel. *See id.* In 1986, during the first heavy rains to follow Ridgemont construction, the high flows wreaked havoc on riparian vegetation. *See id.* Full-grown trees fell into the creek. *See id.* Below Nairobi Place, several feet of streambank simply collapsed. *See id.* The high flows exposed sewer lines that previously had been buried in the banks. *See id.* Since that time the sewer lines have ruptured every year, releasing sewage directly into the Creek. *See id.* At 6301 Hillmont Drive, the Public Works Agency supported a sewer pipe by tying it to an oak tree, a stopgap measure that has been in place since 1988. *See id.*

In January 2003, Maureen Dorsey, Burkhalter Neighbors, and Citizens for Oakland’s Open Space filed a Petition for Writ of Mandate alleging that the Final EIR did not adequately address the potential hydrological impacts of the proposed Project. *See Maureen Dorsey et al. v. City of Oakland* (Alameda Superior Court No. RG 03077607). The court issued the Peremptory Writ of Mandate and ordered the City to prepare a Subsequent EIR with regard to hydrological issues. *See id.*

The Final Subsequent EIR was issued January 14, 2004. *See City of Oakland Community and Economic Development Agency, Final Subsequent Environmental Impact Report Limited to Hydrology* (Jan. 14, 2004) (Final Subsequent EIR). The Final Subsequent EIR revised the mitigation measures required to minimize the impacts associated with increased runoff from the Project. *See id.*, p. II-1. The detention basin was enlarged to 15.6 acre-feet, and a surface drainage swale located along the western-most berm slope of the basin was added. *See id.* The Final Subsequent EIR found that constructing a storm water management system that included a larger detention basin and other mitigation measures would minimize flooding impacts to “less than significant.” City of Oakland Community and Economic Development Agency, Draft Subsequent Environmental Impact Report Limited to

Hydrology (Jan. 14, 2004) (Draft Subsequent EIR), at p. II-5. The Draft EIR predicted that mitigation measures would reduce 25-year peak flows from the Project site, into Chimes Creek, from 168 cfs to 163 cfs. *See id.*, p. IV-19.

However, in April 2004, we began to notice that the creek was clouded with silt originating from pre-construction grading and dewatering activities on the Project site. *See* Sidebotham Declaration, p. 7, Attachment 2; Declaration of Chiye Azuma, (Oct. 25, 2004), p. 4 (Attachment 3). The City did not fine the developer in response to a number of complaints filed with the Public Works Agency. *See id.*

On August 4, 2004, the Public Works Agency did cite and fine DeSilva Gates for “an illicit discharge to the Chimes Creek.” Letter to DeSilva Gates Construction, LP, from Ronald Ward Oakland Public Works (Aug. 4, 2004). DeSilva was cited again on August 5th and 6th for “continuous illegal discharge to the City’s storm drain system,” which constituted a violation of the Oakland Creek Protection Ordinance. Letter to DeSilva Gates Construction, LP, from Ronald Ward, Oakland Public Works Agency (Aug. 5, 2004), *see also* letter to DeSilva Gates Construction, LP, from Ronald Ward, Oakland Public Works Agency (Aug. 6, 2004). Further, the notice of violation stated:

“The temporary sediment pond located at the south side of the project site is discharging turbid water into the City’s storm drain. This sediment pond was addressed in a letter to you dated July 1, 2004. The improvements requested in that letter have not been implemented. This discharge could have been avoided with prudent attention to the matter by DeSilva Gates.”

Id.

Given the findings of the Subsequent EIR that downstream impacts would be “less than significant” after mitigation measures were implemented, the Homeowners Association is surprised and alarmed that Marcel Uzegbu, City Engineer, told us at a meeting held on August 10, 2004 that the City likely will condemn private properties along the creek in order to accommodate the increased flows from the Leona Quarry Project. *See* Sidebotham Declaration, pp. 8-9, Attachment 2 (“We will probably have to take some of your land to widen the channel because I don’t think Chimes Creek can handle the volume of water that will be generated from the development.”). In addition, Mr. Uzegbu said the City would likely have to replace the sewer lines that run along Chimes Creek because the current lines were not large enough to carry the additional volume of wastewater the Leona Quarry Project is expected to generate. *See id.* Mr. Uzegbu was unwilling to estimate at that meeting how much property would need to be condemned in order to widen the channel *and* install larger

sewer lines. *See id.* We have requested a meeting to discuss the widening of the creek further, but Mr. Uzegbu has not responded. *See id.*

II. **COMMENTS ON ADEQUACY OF FINAL MAPS**

The Homeowners Association is concerned that the final maps for the Project are not ready for the City Council's approval. The Homeowners Association requests that the City Administrator briefly defer the Council's decision regarding the final maps until the following outstanding issues are resolved.

A. The Final Maps May Not Conform to the Use Permit.

The Agenda Report for the Leona Quarry Project states: "The subdivider will be required to adhere to best management practices during project construction. Measures to control erosion, contamination of storm water runoff, dust, noise, and heavy equipment emissions will be required." Oakland Public Works Agency, Agenda Report (Oct. 13, 2004) at pp. 2-3. We do not believe the record the City has compiled and provided to the public to date supports this statement. For this purpose, City Record means: the permit file for the development, City correspondence with regulatory agencies, and City responses to public comments.

The final maps should incorporate all the requirements listed in the Conditions of Approval. To date, City staff have not responded to our requests for confirmation that the final maps do indeed incorporate all the requirements listed in the Conditions of Approval.¹ *See* Azuma Declaration, pp.3-12, Attachment 3. Members of the Homeowners Association have not been allowed to see the most recent final maps; the City has not made a copy of the final maps available to us since July 2004. *See id.*, p. 2. Chiye Azuma, one of our members, has requested to view the most recent final maps in both written document requests and phone calls to City officials. *See id.* Based on our inspection of the site, it appears that a number of the hydrology-related conditions either have not been fulfilled, or necessary preparations have not been undertaken to ensure that conditions will be fulfilled in a timely manner. *See id.*

Conditions of Approval, paragraph 23, describes the Hydrology and Drainage Requirements for the Project. It requires that final grading and improvement plans for the Project include the following information, analysis, and requirements:

¹ Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments, as required by CEQA. *See* CEQA Guidelines § 15126.4.

- a. “A master site drainage and grading plan that: (i) incorporates one of the following detention basin system, (ii) meets the published design criteria set forth in ... “Hydrology and Hydraulics Criteria Summary for Western Alameda County” (1989) ... (iii) is consistent with the information, standards and requirements as set forth in the MMRP ...
- b. The Project Applicant shall meet the revised Clean Water Act requirements as established by the Regional Water Quality Control Board ...
- c. The final plan for the detention basin (Parcel A) shall incorporate: detailed landscaping and other specifications so that a water treatment area can be established within the basin including a planting plan based on the recommendations of a qualified hydrologist and biologist regarding contours that can support the proposed planting and not interfere with the design and detention capacity.
- d. Other specifications for the detention basin (Parcel A) ... including measures for sediment storage, design of fencing, access, and clean out maintenance specifications, liner monitoring specifications and repair procedures....
- e. The site drainage plan shall include detailed measures to detain storm water run-off to the maximum feasible degree, given geotechnical and other constraints through infiltration opportunities, bio-swales or grassy swales, and creating a vegetated swale in the Village Green area.
- f. A hydrologic review and confirmation of seasonal wet weather conditions for conveyance of the storm water.
- g. A review and recommendations pertaining to the creation of a perennial creek through the site that drains into the lower detention basin, consistent with condition of Approval No. 19.
- h. A geotechnical investigation, including soil borings as necessary, of the stability of the detention basin (Parcel C-C)....
- i. Applicant shall fund the cost to prepare detailed construction documents and all construction costs to redirect existing storm drainage in Ridgement Drive

away from the Leona Street basin and to connect it to the Project's drainage system.

j. Provisions for an inspection, monitoring, certification and maintenance process throughout the course of grading, construction and post construction to assure that the approved drainage plan and other measures are functioning properly....”

The City Record does not confirm that the primary detention basin has been constructed to industry standards, consistent with Conditions of Approval, paragraph 23, sub-section (a).

As a result of the first seasonal rainfall, the inside slopes of the detention basin partially have “melted away.” *See* Azuma Declaration, at p. 7, Attachment 3. This is inconsistent with the requirement that the detention pond be lined with an impermeable clay liner, and then hydroseeded to prevent erosion. On October 19, 2004, after the first major storm, Chimes Creek was again running “muddy.” *See* Brest Van Kempen Declaration, at p. 1, Attachment 1. Mr. Brest van Kempen called Jun Osalbo, and accompanied him on a site inspection. *See id.* They found that a great deal of silty water was being released from the detention pond directly into the City's storm drain system, and then into Chimes Creek. *See id.*, at p. 2. A large percentage of the hydroseed washed away, several large swaths of wattle were compromised by mudslides and excessive wash-out, and the baker tanks that were previously used to filter runoff were overflowing. *See id.*; Azuma Declaration, at p. 8, Attachment 3; Brest van Kempen Declaration, at p. 2, Attachment 1.

The City Record does 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, consistent with Conditions of Approval, paragraph 23, sub-section (e). *See* Azuma Declaration, at p. 8, Attachment 3. Grassy swales had not been adequately incorporated in the final maps when one of our representatives was allowed to inspect them in July 2004. *See id.*

The City Record does not confirm that a review and recommendations regarding the creation of a perennial creek have been completed, consistent with Conditions of Approval, paragraph 23, sub-section (g). *See id.*

The City Record does not confirm that an effective inspection, monitoring, and maintenance program is in place, consistent with Conditions of Approval, paragraph 23, sub-section (j). *See* Azuma Declaration, p. 3 Attachment 3; Brest van Kempen Declaration, p.2, Attachment 1. Given the number of complaints from the community, and the fact that

investigations only seem to be initiated in response to complaints, it appears that the City has not implemented an effective monitoring, inspection, and maintenance program.

Question 1. Has the City performed a comprehensive review of work on the Project, including onsite inspections and review of correspondence and reports to date, to ensure that the Project is in compliance with each and every requirement listed in the Conditions of Approval? If yes, please describe the City's specific findings.

Question 2. Has the City reviewed the final maps to ensure that they conform to the requirements contained in the Conditions of Approval, CEQA Mitigation Monitoring and Reporting Plan, and the Storm Water Pollution Prevention Plan? If yes, please describe the City's specific findings.

Question 3. How will the City require the developer to adhere to best management practices during Project construction? What is the City's standing policy for site inspections to ensure compliance with the Conditions of Approval?

B. It Is Premature to Approve the Final Maps Prior to the Issuance of All Necessary Permits Required by State Laws.

The City Record does not confirm that the Project has obtained all the necessary permits. It is premature for the City to approve the final maps prior to regulatory agencies with jurisdiction over public resources exercising their statutory authority. Neither the Final EIR nor the Subsequent Final EIR provide a rational basis for allowing the Project to proceed without necessary permits. Some of the permits that appear to be missing from the City Record would otherwise require additional mitigation conditions for the Project.

1. Water Quality Permits

The City Record confirms that the developer has not obtained a dredge-and-fill permit under Clean Water Act (CWA) section 404, 33 U.S.C. 1344, or a water quality certification under CWA section 401, 33 U.S.C. § 1341, as implemented by the San Francisco Regional Water Quality Control Board (RWQCB) under the Porter-Cologne Act, Cal. Water Code §§ 13000-14958 (2002). The developer has also not obtained a waiver.

The people own the State's waters. *See* Water Code § 102. Use of that water is of public concern. *See id.* § 104. All waters shall be managed for the greatest public benefit. *See id.* § 105. Chimes Creek is public waters. According to the San Francisco Regional Water Quality Control Board (RWQCB):

“Should the [Leona Quarry] project include work in jurisdictional waters of the United States, ... then it could likely require a [dredge-and-fill] permit ... pursuant to Section 404 of the federal Clean Water Act (CWA). Such permits also require a project proponent to apply and receive Water Quality Certification from the Water Board pursuant to Section 401 of the CWA.”

Letter from Keith H. Lichten, Water Resource Control Engineer, RWQCB, to Claudia Cappio, City of Oakland (Dec. 4, 2003). In response, the City asserted that while Chimes Creek is a “water of the United States,” it does not meet the federal definition of wetlands. Final Subsequent EIR, p. IV.E-1. The City concluded that a CWA Section 404 permit was not necessary for the Project. Since the RWQCB has permitting jurisdiction under CWA section 404, it must decide whether this development requires such a permit. The Homeowners Association has not been able to find any record of the City requesting the RWQCB to make such a determination, or requesting the RWQCB to concur with the City’s determination.

Similarly, the decision regarding applicability of CWA section 401 certification lies exclusively with the RWQCB. We have not been able to find any record of the City requesting the RWQCB to make such a determination regarding the applicability of section 401 to the Project, or requesting the RWQCB to concur with the City’s determination.

Question 4. Has the City requested that the RWQCB determine that section 404 permitting requirements do not apply to the Project, or requested that the RWQCB concur with the City’s conclusion that section 404 does not apply? If the City did not request such determinations, under what authority was the City acting when it decided a section 404 permit was not required?

Question 5. Has the City requested that the RWQCB determine that section 401 permitting requirements do not apply to the Project, or requested that the RWQCB concur with the City’s conclusion that section 401 does not apply? If the City did not request such a determination, under what authority was the City acting when it determined that a section 401 certification was not required?

2. Fish and Game Code Section 1603 Streambed Alteration Agreement

The City Record does not confirm that the developer has obtained a Fish and Game Code section 1603 Streambed Alteration Agreement.

The Department of Fish and Game (DFG) has jurisdiction to regulate taking of fish and wildlife, and modifications of their respective habitats. *See* 14 CCR § 783.1.

“The protection and conservation of the fish and wildlife resources of this state are hereby declared to be of utmost public importance. Fish and wildlife are the property of the people and provide a major contribution to the economy of the state as well as providing a significant part of the people’s food supply and therefore their conservation is a proper responsibility of the state.”

Fish and Game Code § 1600. To fulfill this purpose, DFG has authority to regulate any diversion or obstruction of natural flow or other modification of a streambed. *See id.*, at § 1603. Section 1602 of the Fish and Game Code requires that a project sponsor notify DFG before commencing any substantial diversion or obstruction of the natural flow of a stream, or any substantial change to the streambed, bank, or channel. If DFG determines that such modification will substantially divert or obstruct natural flow or substantially change the bed, channel or bank of any river, stream or lake, the owner and DFG will undertake to reach an agreement which includes any measure necessary to protect fish and wildlife. *See id.* The activity may commence only after the agreement is final.

For purposes of DFG’s jurisdiction, a stream is defined broadly as, “a body of water that flows at least periodically or intermittently through a bed or channel having banks and supports fish or other aquatic life. This includes watercourses having a surface or subsurface flow that supports or has supported riparian vegetation.” *See* 14 CCR § 1.72. Fish is defined broadly to include, wild fish, mollusks, crustaceans, invertebrates, or amphibians, including any part, spawn, or ova thereof. *See* Fish and Game Code § 45. It appears that the surface flow from the Chimes Creek headwaters that crossed the quarry prior to construction, and supported cattails, reeds, willows, frogs, and damselflies, meets these criteria. *See* Brest van Kempen Declaration, p. 1.

We have been unable to confirm whether the City has required the developer to contact DFG regarding the effects of earth-moving activities on the portions of Chimes Creek in the Project area. Based on our review of DFG’s comments on the Draft EIR, it does not appear that the applicability of Fish and Game Code section 1603 was ever addressed. *See* letter to Claudia Cappio, Oakland Community Economic and Development Agency, from Robert W. Floerke, DFG (July 16, 2002).

Question 6. Has the City required the developer to contact DFG regarding the effects of earth-moving activities on the portions of Chimes Creek in the Project area? If not, what is the basis of the City’s decision not to include such a requirement?

3. Creek Protection Permit

In addition to permitting requirements under State laws, the developer must comply with all City of Oakland rules and regulations. *See* Draft EIR, at p. II-20. The City Record does not confirm that the developer has complied with the Oakland Creek Protection Ordinance, which prohibits non-storm water discharges and increases in flow to the City storm sewer system. *See* Oakland Municipal Code, § 13.16.070(A). It also prohibits any person from “commit[ting] or caus[ing] Development or Work within the boundaries of a creekside property, or within the public right of way fronting a creekside property, unless a Creek Protection Permit has first been obtained from the Chief of Building Services.” *Id.*, § 13.16.120. Thus, under the Creek Protection Ordinance, the developer must (1) obtain a Category III Creek Protection Permit for construction on the project site, and (2) submit a Creek Protection Plan to the City to ensure continued preservation of the creek. *See* Draft EIR, at p. IV.B-23. De Silva’s Creek Protection Plan must be submitted for review and approval, and include a description of the Best Management Practices that will be employed to assure construction activity will not adversely impact the creek bank, riparian corridor, or water quality. *See* Oakland Municipal Code, § 13.16.140(c).

Approval of a Creek Protection Permit, as required for the Leona Quarry Project, is contingent on the following considerations:

- (1) Whether the proposed activity may discharge Pollutants into the Creek;
- (2) Whether the proposed activity may result in modifications to the natural flow of water in the Creek;
- (3) Whether the proposed activity may deposit new material into the Creek or cause bank erosion or instability; and
- (4) Whether the proposed activity may result in the alteration of the capacity of the Creek.

See id., § 13.16.200(a). In addition, the project may not result in the following: (1) Degradation of the visual quality and natural appearance of the riparian corridor; and (2) Danger to public or private property. *See id.*, § 13.16.200(c), (e).

For Category III Creeks, the Creek Protection Ordinance requires permit applicants to post notices of their applications “in clear public view on the subject property and within a 300

foot radius of the subject property,” “ten calendar days before a decision is made on the application.” *See id.* at § 13.16.180. The Creek Ordinance also requires the Oakland Chief of Building Services to issue a written decision granting or denying a Creek Protection Permit. This decision must be mailed to “each Person who commented on the application,” and who provides necessary postage. *See id.* at § 13.16.210.

We have not been able to confirm that the City has issued a Creek Protection Permit for the Project. The Final EIR and Final Subsequent EIR do not contain reference to a Creek Protection Plan, and we have found no record of a Creek Protection Permit on file. Given the increased sedimentation and flows in the creek since work at the Project began, it would appear that any Creek Protection Plan that may have been submitted is not adequate to prevent degradation prohibited by the Creek Protection Ordinance. *See* Azuma Declaration, pp. 2-3, 5, Exhibit 3; Brest van Kempen Declaration, pp. 1-2, Exhibit 2. Further, we have found no record of public notice regarding the issuance of a Creek Protection Permit.

Question 7. Has the City issued a Creek Protection Permit to the Leona Quarry Project for work done in and around Chimes Creek? If yes, did the City comply with the public review comment procedures for such a permit application?

C. The CEQA document Does not Address Foreseeable Impacts and May Need to Be Supplemented.

Under the California Environmental Quality Act (CEQA), an EIR should address identify significant impacts on the environment of a project that are reasonably foreseeable. *See* Pub. Resources Code § 21002.1. A lead agency is required to recirculate an EIR when significant new information is disclosed after public review. *See* CEQA Guidelines § 15088.5.

The draft Resolution finds, “the actions authorized by this Resolution will not involve any new or more severe significant impacts, there are no substantial changes with respect to the circumstances under which the project was approved that involve new or substantially more severe significant environmental impacts, and no significant new information has come to light that would indicate new or more significant impacts” Based on Mr. Uzegbu’s statements at the August 10, 2004, meeting, we disagree.

According to Mr. Uzegbu’s statements, it appears the City has been aware for some time that the Project will result in flows that exceed the current capacity of Chimes Creek and the sewer system. *See* Sidebotham Declaration, p. 8. His statements are inconsistent with the Draft Subsequent EIR finding that mitigation measures would reduce 25-year peak flows from the Project site, into Chimes Creek, from 168 cfs to 163 cfs. *See* Draft Subsequent EIR, p. IV-19. The possibility of widening the creek to accommodate higher flows generated by the

Project was not disclosed in three years of environmental review; it was not mentioned in the four iterations of the EIR that were prepared for the Project. Similarly, the possibility of installing larger sewer lines to accommodate increased volume of wastewater from the Project was not disclosed. *See* Sidebotham Declaration, p. 8. Both are significant impacts that should have been vetted in environmental review.

Based on Mr. Uzegbu's statements at the August 10, 2004 meeting, it appears that the City may be allowing the developer to proceed without requiring proper management of storm water and wastewater from the Leona Quarry Project. If this is the case, it would seem that the City is impermissibly protecting the rights of upstream private property owners, both future Leona Quarry property owners and current Ridgemont property owners, at the expense of the public trust in Chimes Creek and of downstream property owners.

Question 8. Did the EIRs disclose that the City may need to condemn private property in order to widen the channel of Chimes Creek so it could accommodate the increased runoff from the Leona Quarry Project?

Question 9. Did the EIRs disclose that the City may need to condemn private property along Chimes Creek in order to install larger sewer lines that will be necessary to handle the increased wastewater from the Leona Quarry Project, why was this action not disclosed during environmental review?

Question 10. Given the City staff's belief that the Leona Quarry Project will be the direct cause of the increased storm water into Chimes Creek and wastewater into the City's sewer system, who will be responsible for paying to widen the creek and/or install new sewer lines, taxpayers or DeSilva Gates?

Question 11. Is condemnation of downstream private property, in order to accommodate increased flood flow or to install larger sewer pipes for the benefit of upstream private property, a potentially significant impact under CEQA?

CONCLUSION

We respectfully request that the City Council DEFER APPROVAL OF the final maps for the Leona Quarry Project until the City resolves the issues raised in this letter, and specifically confirms that the Project will comply with the Conditions of Approval and other applicable requirements of law. We request that the City convene a meeting of the developer, RWQCB, DFG, and the Neighborhood Association in an effort to collaboratively resolve the issues raised by this letter.

Administrator Deborah Edgerly
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Thank you for considering these comments. If you have any questions regarding the content of this letter, please contact Nancy Sidebotham, (510) 635-2678, Chiye Azuma, (510) 632-6210, or Mark Brest van Kempen, (510) 568-6889.

Respectfully submitted,

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Oakland, California 94612

By Mail:

Dale Bowyer, Supervising Water Control Resources Engineer
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
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Robert W. Floerke, Regional Manager, Central Coast Region
California Department of Fish and Game
P.O. Box 47
Yountsville, CA 94599

Kent Peyton, Project Manager
DeSilva Gates Construction

Administrator Deborah Edgerly
October 26, 2004
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11555 Dublin Boulevard
P.O. Box 2909
Dublin, CA 94568

Attachment 1

DECLARATION OF MARK BREST VAN KEMPEN

I, MARK BREST VAN KEMPEN, declare the following:

1. The facts stated herein are known personally to me.
2. I have been a resident of the Oakland Hills area for four years. Chimes Creek runs through my backyard and my property extends on both sides of the creek.
3. I closely monitor Chimes Creek. I also have closely monitored work at the Leona Quarry Project site since it began in April 2004. I have attached photographs that I have taken of both the Creek and the Project site to this declaration. I can provide color copies of the photographs upon request. I have provided captions for the photographs attached to my declaration, which describe the scene as I perceived it.
4. Prior to the grading and pre-construction activities for the Project, there was surface flow from the Chimes Creek headwaters that crossed the Quarry. The flow was perennial, not intermittent. It supported a great deal of cattails *Juncus* and other reeds, as well as fairly well established willows and other vegetation. *See* photographs 1 and 2. On February 4, 2004, while documenting the watershed for a presentation, I observed hundreds of pacific tree frog tadpoles, dragonfly larvae and damselfly larvae in that section of the creek. There were also *Gambusia* (mosquito fish) in the creek, which were probably planted by the county for mosquito abatement.
5. When grading began on the project, Chimes Creek below the site became full of silt. This silting up of the creek would continue through working hours, gradually clear after grading activities stopped at night, and silt up again the next morning when work continued. I called and emailed photos of these violations to City inspectors daily for approximately two months. During that time, inspectors acknowledged that the creek was unacceptably silty, but

said that they were unable to find the source. Finally, in frustration, neighbors contacted the Regional Water Quality Control Board (RWQCB). The same afternoon we contacted the RWQCB, the City inspectors found that the developer was “illicitly discharging into city storm drains.” I do not know if the City inspectors would have cited the developer had it not been for our call to the RWQCB. The developer was not fined for the two months of discharge prior to the inspector’s discoveries.

6. On October 19, 2004, we experienced the first significant rainstorm of the season. Following the rains, Chimes Creek rose consistent with past storm events but then it suddenly turned very silty. *See* photograph 3. I called Jun Osalbo, Oakland inspector for the Leona Quarry Project, to report the problem. He agreed to meet me for a site inspection of the Project area. We found that a great deal of silty water was being released from the detention pond directly into the City’s storm drain system, and then into Chimes Creek. This appeared to be a clear violation of the Conditions of Approval for the Project. It also was inconsistent with the assurances my neighbors and I had received from the Project contractors that the detention pond was not releasing any water.

7. After this first storm event, it appeared that all of the measures to prevent dirty water from entering the storm drain system and Chimes Creek had been overwhelmed and/or failed. The rains had washed away a large percentage of the hydroseed. *See* photograph 4. Several large swaths of wattle had failed. The capacity of the baker tanks had been exceeded, causing them to overflow. *See* photograph 5.

8. Later this same day a City Inspector informed a neighbor concerned about the Creek that the discharge was not coming from the Quarry site. This was after I had witnessed him being informed of the discharging water from the detention pond.

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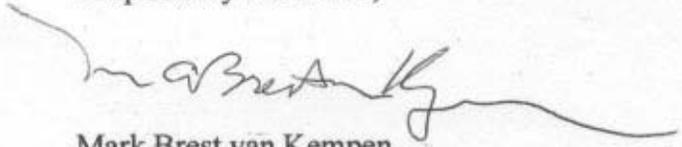
9. From this one day of rain the detention pond had filled up past the point at which it could treat any water from the site. *See* photograph 6. The developers have assured both the City and the community that contaminates introduced onto the site by the hundreds of cars and the activity of hundreds of residents on the site will be treated by the detention pond. This storm showed that this system, as currently constructed, will be wholly ineffective – any contaminates on the site will be carried by storm water directly into Chimes Creek.

10. I have been disappointed repeatedly by how this Project has proceeded. I am extremely concerned with how the Project will proceed in the future. I have been assured repeatedly by both the City and the developers that this Project won't have any negative impact on the Creek, but I have documented numerous events that I consider to be clear violations of the Project's permits, events that I feel the City has not addressed adequately.

11. I declare under penalty of perjury of the laws of the State of California and the United States of America that the foregoing is true and correct and that this declaration was executed the 25th day of October, 2004 at 3835 Delmont Ave., Oakland, CA, Alameda County.

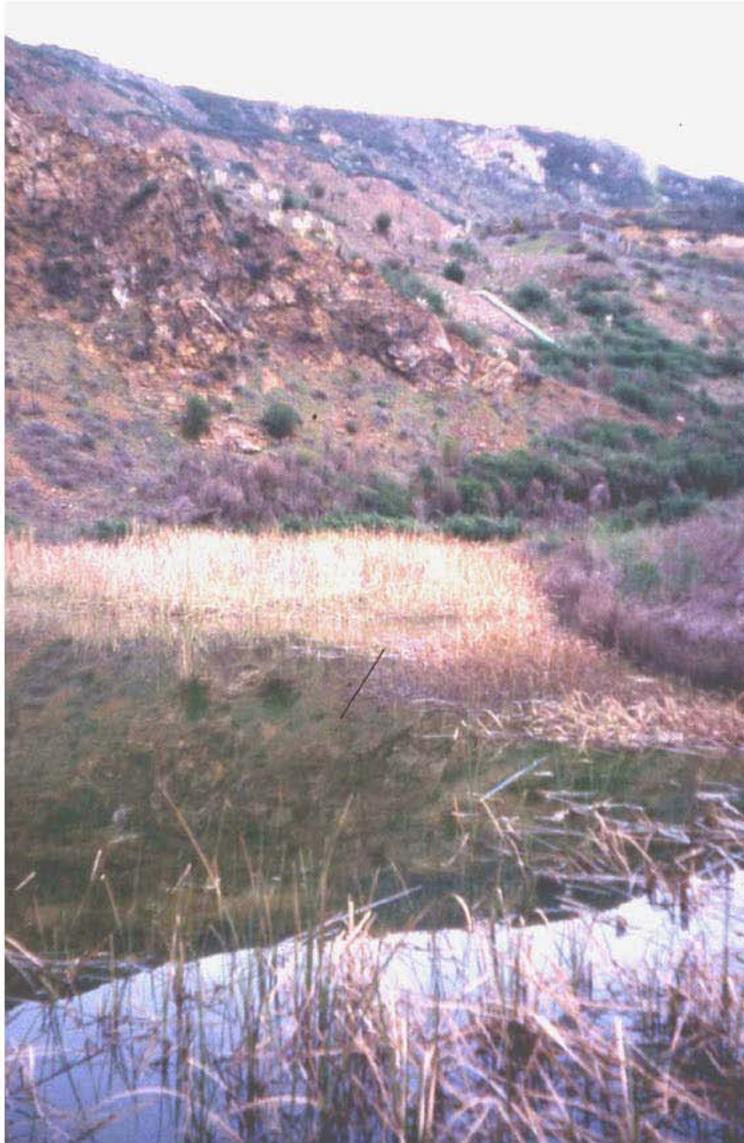
Dated: 25 October 2004

Respectfully submitted,



Mark Brest van Kempen

Photograph 1



Leona Quarry on Feb 4 2004, before grading began.
This photograph shows portion of Chimes Creek that
was destroyed by grading activity.

Photograph 2

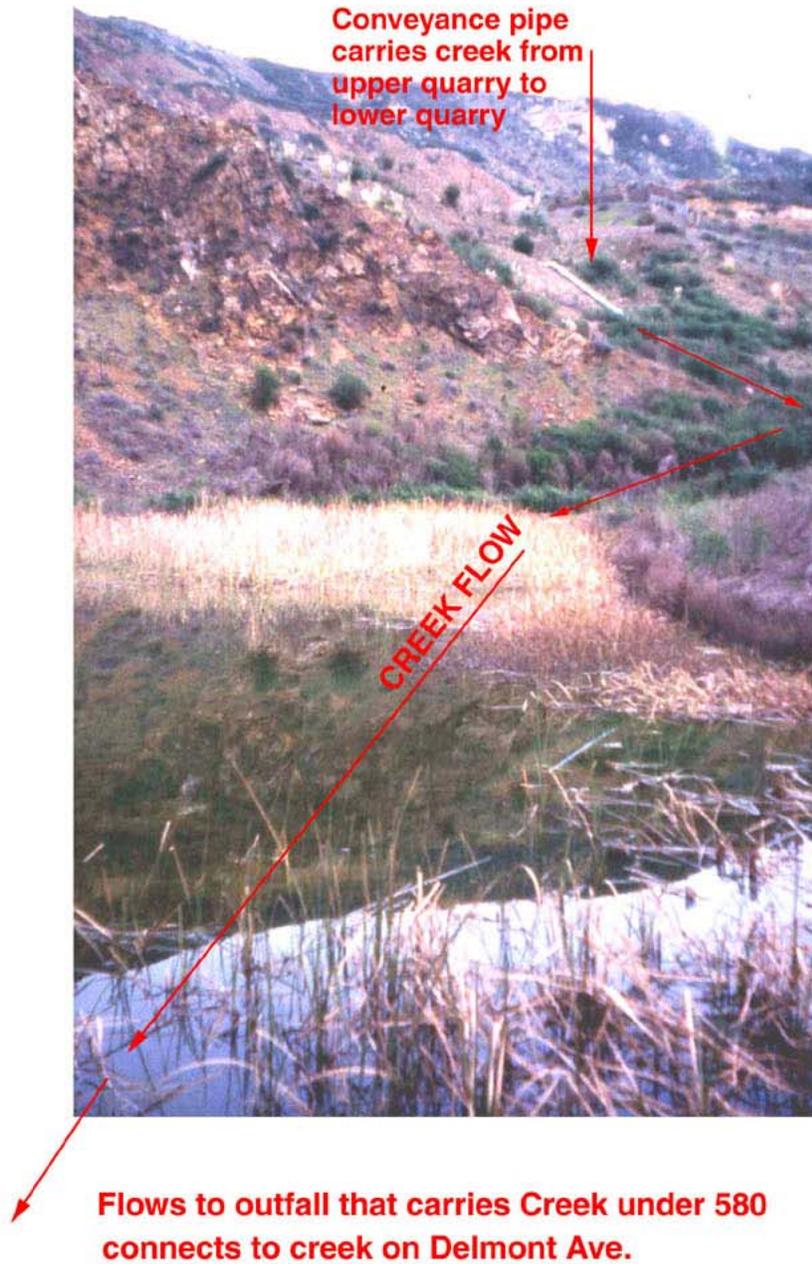


Diagram showing water flow of Chimes Creek in lower Quarry.

Photograph 3



Chimes Creek as it appeared on October 19 2004.

Photograph 4



Leona Quarry on Oct 19 showing failures of erosion prevention measures.

Photograph 5



Silty water entering City storm drain on Oct 19, 2004.



Same storm drain showing discharge during previous rain in July 2004.

Photograph 6



Detention Pond on Oct 19, 2004 showing section of pond where water is supposed to flow through aquatic plants for treatment completely submerged after one day of rain.

Photograph 7



Chimes Creek flowing onto Quarry site on Oct 19, 2004.



Chimes Creek flowing onto quarry site after being graded over.

Photograph 8



Photographs showing existing problems with Chimes Creek.
Above: Flooding damaging house in 2002.
Right: Sewer Main eroded by excessive run off.



DECLARATION OF NANCY S. SIDEBOTHAM

I, NANCY S. SIDEBOTHAM, declare the following:

1. The facts stated herein are known personally to me.
2. I have been a resident of the Oakland Hills area for 24 years of years. I own five pieces of property adjacent to Chimes Creek on the western side located on Hillmont Drive.
3. When I moved to my current residence in 1980, I could hear many frogs and crickets. I could stand at the bottom of my property and see the clear water, and hear the gurgling noise of the creek.
4. Chimes Creek flows all year long. My understanding, based on conversations with long time neighbors of the area, Kenneth T. Lass of Alameda County Public Works and Flood Control (ACFC), and discussions with City of Oakland staff over the years is that the headwaters of the creek are located above the Leona Quarry. Once the Creek leaves the Quarry, owned by Gallagher and Burk, it is channeled by culverts under Altamont Avenue, turning NW near the western end on Altamont and Hillmont, then daylights at Hillmont and Delmont. In the 1940's the Quarry, culverted the stream and channeled the water runoff into holding ponds, which previously served to keep the heavy flows during the rainy season prior to the Ridgemont Development in 1982. The storage ponds were necessary because the base of the Quarry was at bedrock and when the rains came there was no percolation. The quarrying continued up until approximately 13 years ago.
5. In the early 1980's, Oakland approved the Ridgemont Development. When the City of Oakland approved the development of Ridgemont they allowed the runoff to be channeled into Chimes and Lion Creeks. The channeling into Chimes came through the Leona Quarry, culverts and holding ponds and into the culvert to Chimes. It was at this time that I

began to observe drastic changes to Chimes Creek. The flow of water was heavier, faster, and wider. The frogs and wildlife disappeared. Within three years after moving to the area I began to notice significant erosion of the creek banks, and a deepening of the channel.

6. In 1986, the Ridgemont Development was nearly complete. When the heavy rains arrived, the effects of the increased runoff from Ridgemont into the creek were devastating. I witnessed trees fall into the creek due to the increased erosion of the banks: a full-grown acacia tree just dropped into the creek. The added runoff from Ridgemont and the heavy rainfalls in 1986 caused drastic erosion and the undermining of at least one mature acacia tree which fell straight down into the creek and changed the channel flow of the creek to the Hillmont side.

7. After the first major storm event in 1986, neighbors attempted to get help from the City of Oakland and Alameda Flood Control, but we were not successful. Some of my neighbors even built retaining walls, but because of lack of assistance and/or knowledge, these failed and had to be removed because they were contributing to the worsening erosion problem. Others had rocks brought in to try to stop the erosion and stabilize the sides of the creek.

8. With the development of Ridgemont and the rechanneling of runoff waters from the development through the Quarry and into Chimes Creek along with the rains of 1986 caused property below Nairobi, between Oakdale and Hillmont, to erode to the point where one of my neighbors, Richard Rodriguez of 6149 Hillmont Drive, lost 110 feet of his backyard. The County of Alameda held a neighborhood meeting at Burbank Elementary to discuss measures to mitigate the erosion problems to the Creek. Mr. Rodriguez ended up bringing a suit against the City in 1987 or 1988 and won. Repairs were made to the Nairobi section and below by the County and the City around 1989-90. Neighbors at the Nairobi section of Chimes Creek have told me they continue to have significant problems with overflow into their yards.

9. Sewer lines became exposed. The Nairobi sewer line became exposed around 1986. When sewer lines were installed, Chimes Creek was the lowest point on the topography of the area and the City sunk two sewer lines on either side of the Creek between Delmont and Hillmont. All the street storm drains were configured to also dump into Chimes Creek down an easement along the side of 6391 Hillmont and the property across from it on Delmont.

10. After the first incident in 1986, the sewage lines continued to rupture periodically and dump raw sewage into the creek. I would get phone calls about discoloration and foul odors coming from the creek. Public Works would come up once or twice every winter.

11. In the winter of 1988, there was a major break sewer line behind 6311 Hillmont Drive and wash out of nine feet of land and fencing at 6301 Hillmont Drive. . The City's Public Works Agency came and attempted to fix the problem by tying the sewer pipe to an oak tree, but this caused further erosion. Since that time, the City has come out every year to repair the same break; land continues to be lost, and the sewer line is still tied to the oak tree. On December 14, 1999, the City sent letters to neighbors of Chimes Creek stating that the City was going to rehabilitate the sanitary sewers above Nairobi Place. To date the City has not performed this work.

12. In 1999, Mike Neary and a representative from ACFC came out in the pouring rain and we stood out under the bay tree behind 6391 Hillmont Drive and watched the massive flow of water and how it was over shooting the banks. Mike Neary basically said that the City couldn't do anything because the problem was located on private property. The county representative just looked on and deferred to Mike.

13. Up until the lawsuit brought by Mr. Rodriguez, Kenneth T. Lass with ACFC Public Works came every year and maintained Chimes Creek. Ken and his crew cleaned, cut

vegetation, and removed debris that impacted the flow of the creek. After the lawsuit, ACFC refused to take any responsibility for the creek, and the City assumed this role.

14. The City previously had not been involved with the maintenance of the Creek. Despite what may have been good intentions on the part of the City, the community did not approve of the City's initial maintenance measures. It appeared the City had little experience with maintaining small, urban creeks. First, the City tried bulldozing a creek. This disturbed a good section of the wildlife habitat and riparian vegetation. The year following the bulldozing, the City sprayed pesticides to remove weeds, and not surprisingly, harmed riparian vegetation and wildlife.

15. Property owners continued to try to get the City and County to take effective action to stop, or at the very least stem, the erosion problems for the entire stretch of the daylighted Chimes Creek. Mike Neary, who is the Chief City Engineer today, and was an engineer in the 80's and 90's, stated that there was nothing the City could do because the creek was on private property. This seemed to become a standard response to our requests for help.

16. For the next several years, the pattern of erosion and flooding steadily worsened. Occasionally there would be severe, isolated events. For example, in 2000/2001, there was a massive break in one of the holding ponds located on the Quarry. The water flooded down and across Interstate 580 unto some of the backyards of homes on Sunnymere.

17. The history of the problems with Chimes Creek is well documented by the City of Oakland's Public Works Department, Environmental Services, and ACFC. I understand that former Councilperson Carter Gilmore, and County Supervisor Nate Miley, a former Councilperson, have extensive notes and documentation of the erosion problems that had plagued Chimes Creek since the Ridgement development. Back when the County was still

maintaining the Creek, I met with Carter Gilmore, Terry Roberts, Mike Neary and other City staff to discuss why there had not been additional oversight over the impacts the Ridgemont development would have on Chimes Creek. They promised me that they would look into the problems, Nate Miley even joked about the volumes he had on the Chimes Creek problems. I never saw any results of their investigations, and cannot confirm that they ever did look into the problems.

18. In 1998 the Drainage Task Force (DTF) was formed. In 1997, prior to the DTF, Nate Miley asked the Public Works Department to make Chimes Creek a priority and add it to the Planning and Review Division of Public Works. Under the supervision of then City Engineer Mike Neary, the Public Works Department made two site visits to photograph and survey the damaged properties. In 1998, Mike Neary, two Public Works staffers, and two representatives from ACFC walked the creek in a very heavy rainstorm. Again, I am not aware that these efforts lead to any tangible changes in the City's management of the Creek.

19. On July 17, 1999, the Service Delivery Team held a public meeting at Rainbow Recreation Center to discuss community concerns. Over 50 neighbors of Chimes Creek showed up to the meeting to discuss the creek's problems and ask for assistance. In August 1999, Joseph Levine, Construction Inspector Supervisor for Public Works, representing the SDS Team for District 5, walked the creek with me, took pictures, and promised to take some action. I am not aware that this visit resulted in any action by the City.

20. Leslie Estes, City of Oakland's Environmental Service, came out a couple of times, the last being 2001, to walk the creek and document the problems. To my knowledge those visits did not result in any actions by the City.

21. In the summer of 2002, the Zoning and Planning Department, headed by Leslie Gould and Calvin Wong, took a bus ride around the City to identify major problems. Chimes Creek was one of their stops. To my knowledge this visit did not result in the City taking any actions to resolve the problems at Chimes Creek.

22. I, as well as a number of my neighbors, have attended numerous City meetings. We have spoken to public servants such as: Carter Gilmore, Nate Miley, Elihu Harris, Terry Roberts, Mike Neary, Kenneth Lass, Calvin Wong, Leslie Gould, Leslie Estes, Claudia Cappio, to name a few, over the years, all working for the City of Oakland or County of Alameda. I have appreciated them taking the time to listen to our concerns and visit the site, and appreciated their acknowledgement of the seriousness of the problems with Chimes Creek. However, I am frustrated that ten years have passed and neither the City nor the County have developed a plan for preventing further degradation to Chimes, Creek, let alone a plan for restoration.

23. Today the Creek is deeper, the channel wider. The trees look like they are in the swamp areas of the deep south, with their roots completely exposed. The trees are falling over from lack of soil.

24. I am concerned the Leona Quarry Project will worsen this bad situation. I have closely followed the project since it was first proposed. I understand that in addition to the increased runoff from the Leona Quarry Project, the development plans call for all of Ridgemont's runoff to be channeled down through the quarry via the new development's culverts into a new 14-acre holding pond, and then on to Chimes Creek.

25. Since April 2004, when the grading for the Leona Quarry Project started, there has been constant runoff and dumping into Chimes Creek. In the first major rain in September

2004, the rain caused a major washout at the Project site, and some of my neighbors lost about a foot of land.

26. I expect the problem with exposed sewer lines breaking to occur this winter. As far as I know, the City has not resolved how to repair the pipe and secure it so it does not hang in mid air. I was asked this last winter to put yellow dye down my toilet so that City employees could find out where the break was down the line.

27. On August 10, 2004, I attended a meeting with Marcel Uzegbu, City Engineer overseeing the Project, a sewer department staff member from Public works, and neighbors Chiye Azuma, Mark Brest van Kempen and Paul Richards from Friends of Two Creeks and Mills College. We were told that the City was going to put in new sewer lines along either side of the Creek. We were told we have no choice because the City has an easement. The work will be done by outside contractors and they will come on each of our properties to do this. We were told that the new lines were needed because the current sewer lines were too old and not large enough to carry the additional volume that the City expects Leona Quarry Project to generate. Putting in the sewer lines and digging up on either side of the creek would only add to the weakening of the channel and add to the erosion problem. So, we asked, if the City were to redo the sewer lines, wouldn't it be prudent to also integrate creek reclamation at the same time?

28. At the August 10th meeting, I asked Marcel Uzegbu if the City was going to go back to the City Council and tell them that they (City Staff) had made a mistake on the original analysis about the impact the quarry development and the re-channeling of all of Ridgemont's runoff would have on Chimes Creek. Marcel then turned to me and stated, "We will probably have to take some of your land to widen the channel because I don't think Chimes Creek can handle the volume of water that will be generated from the development." I was shocked. I

stated, "Over my dead body and a lot of money." I have requested to meet with Marcel and discuss the City's plans to widen the creek and replace the sewer lines in order to accommodate the storm water runoff and wastewater from the Project, but he has not responded.

29. This had been a major focal point at all of the public meetings as well as the Planning Commission meetings, regarding the sewer capacities and whether Chimes Creek could handle the impact of this development and Ridgemont. There are letters in the EIR questioning the impact on both the sewers and Chimes Creek. Yet, these impacts have still not been addressed.

30. I declare under penalty of perjury of the laws of the State of California and the United States of America that the foregoing is true and correct and that this declaration was executed the 25th day of October, 2004 at 6375 Hillmont Drive, Oakland, CA, Alameda County.

Respectfully submitted,

Dated: 25 October 2004

Nancy S. Sidebotham

Attachment 3

DECLARATION OF CHIYE AZUMA

I, CHIYE AZUMA, declare the following:

1. The facts stated herein are known personally to me.
2. I have been a resident of the Oakland Hills area for two years, with this coming winter being my third rainy season by Chimes Creek. My property is located at 3829 Delmont Avenue, between Hillmont Drive and Nairobi Place, on the hillside of Delmont Avenue. Chimes Creek flows along the rear of the property, about ten feet (10') from the property line.
3. The presence of this creek was a very important part of our decision two years ago to purchase this property. The creek provides a small but lush riparian corridor that supports a number of native oaks and willows, as well as acacias, ivy, and other shrubs along its banks. The creek is also host to a group of acrobatic squirrels, various species of birds, and in years past, frogs and tadpoles. The gurgling sound of the creek water is a welcome respite from the urban sounds, most notably the roar of the 580 Freeway, which bounces off the hills onto the Millsmont neighborhood. Not only is the creek an attractive, lovely feature of our Delmont Avenue neighborhood, it is also a common thread that has brought the neighbors together.
4. I am currently employed by the City of Fremont as a Landscape Architect in the Engineering Division of the Development and Environmental Services Department. I am a state-licensed Landscape Architect, with more than 10 years of professional experience. I manage park development and maintenance projects. In addition to design and project management duties, I spend about 40 percent of my time reviewing tract development plans, as well as site development plans submitted to the City of Fremont for Building Permit Review. For Building Permit review, I am part of a team of reviewers, typically consisting of a planner, engineer and landscape architect.

*Declaration of Chiye Azuma
Leona Quarry Project*

5. In recent years, and especially over this past year, I have had an expanded role in these plan reviews because local agencies have been exploring landscaping techniques which help to implement the National Pollution Discharge Elimination System (NPDES). I have been reviewing and commenting on plans prepared by civil engineers and architects relating to site development. These plans often incorporate biofiltration techniques (e.g., bioswales, vegetated infiltration areas, and modifications to the site design) to minimize pollution and erosion from stormwater runoff.

6. In addition to contacting City officials and staff, I carefully reviewed the following documents, which were prepared for the Project: (1) Mitigation Monitoring and Reporting Program (MMRP); (2) Conditions of Approval (COA) for Leona Quarry Project, and (3) the revised Stormwater Pollution Prevention Plan (SWPPP) dated April 23, 2004. I was also able to obtain a copy of the Improvement Plans (Preliminary Plans dated July 8, 2004) for Tract 7493 and Tract 7351 Leona Quarry. I have not been able to see any subsequent versions of the Improvement Plans or its details, despite my repeated requests to do so.

7. Based on my review of these documents I am concerned that onsite stormwater management during the past 6 months has not been implemented as required in these documents. Furthermore, these documents describe specific studies, reviews and checks that need to be undertaken prior to finalizing key elements of the site development. From the information that has been made available to the public to date, I have seen little evidence that this project has met these requirements.

8. Per MMRP paragraph F.4a, the approved Improvement Plans should show where Best Management Practices (BMPs) have been incorporated in the site design. The required BMPs include grass strips and grassy swales throughout the development, roof drains that drain

*Declaration of Chiye Azuma
Leona Quarry Project*

to natural surfaces or swales, permanent energy dissipaters for drainage outlets, design details for the detention basin that provide effective water quality control measures, maintenance schedules that will ensure the long term effectiveness of the detention basin. I have not been able to obtain a copy of or even view the Improvement Plans that the City Council is scheduled to approve on October 26, despite my numerous requests. On July 26, 2004, Mr. Uzegbu did provide me a set of the Improvement Plans dated July 8, 2004. The July plans do not adequately integrate site BMPs such as grassy swales and vegetated swales; moreover, the details of the main detention pond remain sketchy and unclear.

9. Per MMRP paragraph D5a, the project applicant is required in all phases of construction to implement BMPs to reduce and eliminate soil erosion. The Erosion Control Plan submitted as part of the Grading Permit show a number of erosion control measures including hydroseeding, straw wattles/rolls, etc. However, during the first phase of site work and particularly during the site dewatering stage, not many of these measures were in place, resulting in slope failures and frequent discharge of sediments and contaminants to Chimes Creek.

10. Per MMRP paragraph F.2, mitigation measures require, “BMPs selected and implemented for the project will be in place and operational prior to the onset of major earthwork on the site.” However, these BMPS were not installed in April or May. In early April 2004, after work at the Project began, I noticed that Chimes Creek had turned reddish-brown in color, and at times would surge as if being pumped.

11. On April 2, 2004, I contacted William Madison, City of Oakland Environmental Services Division, to report the water quality problems at the creek. On April 10, 2004, I attended a Town Hall Meeting held by my local Councilwoman, Desley Brooks. In response to my concerns regarding the effects of Project activities on the creek, Ms. Brooks told me that I

*Declaration of Chiye Azuma
Leona Quarry Project*

was “confusing apples with oranges,” and, “that is how the creek normally appears.” She claimed the activities taking place at the Quarry were just “regular quarrying business.” I explained to her that it could not possibly be “normal quarrying activity,” because the Quarry had already removed a number of its facilities, including the asphalt parking area at the base of the Quarry.

12. At this time, Ms. Brooks assigned her assistant, Toni Cook, to help with my complaint. We agreed to visit the site so that Ms. Cook could understand what was happening. On April 24, 2004, Ms. Cook and I visited the Quarry site together where we observed grading activities in progress, and the dewatering of the holding pond.

13. During the months of April and May of 2004, my neighbors and I observed muddy, sediment laden water flowing down the creek. I contacted William Madison, Lesley Estes, Marcel Uzegbu, and Jun Osalbo in an effort to correct the problem.

14. William Madison of the City’s Environmental Services Division has a record of complaints he received regarding sediment-laden water in Chimes Creek; he maintains a chronological file entitled, “Chronology of Chimes Creek Illicit Discharge Investigations.” His record contains reference to complaints filed on April 6th, 9th, and 29th. He also conducted investigations in response to complaints made on May 6th, 17th, 19th, 20th, 21st, 26th, 27th, and 28th. This “Chronology” was prepared in response to my Public Records Request for a “Complaints log regarding pollution in Chimes Creek, starting from first call to Environmental Services, William Madison, on April 2, 2004, to present.”¹ From his documented responses, it appears that Mr. Madison had access to the construction site only for the first two complaints in early April. On April 6, he wrote that he “observed clean water violations on the construction

¹ Copies of my written correspondence with City and regulatory officials and their responses are available upon request.

site, and turbid water flowing off the site. Issued an Order to Abate to DeSilva Group.” On April 9, he wrote, “City staff required DeSilva Group to implement a creek diversion plan on the Quarry construction site.” From this point on, however, Mr. Madison’s investigations were limited to the stormdrain system and manholes in the Burkhalter and Millsmont neighborhoods (Sunnymere, Altamont, Hillmont, and Delmont Streets). I recall a frustrating telephone conversation that I had with Mr. Madison during this time, in which he said, it was “out of my hands,” meaning the City had determined that the silty contamination was coming from some source other than the Quarry, and Mr. Madison no longer had access to the construction site.

15. In addition to notifying William Madison, I placed phone calls to Jun Osalbo, the designated Construction Inspector for the project. On May 14, 2004, Mr. Osalbo came to Delmont Avenue where he observed the muddy flow in the creek. He invited my neighbor, Mark Brest van Kempen, and me to go to the site later that day to see what was happening. However, when he returned that afternoon, Mr. Osalbo informed us that we could not go. Instead, we reviewed the stormdrain map that he brought with him. It is still not clear why he did not wish to visit the site with us that day.

16. On May 20, I had an extended phone conversation with Mr. Uzegbu. He repeatedly denied that the two black drainpipes could be the source of the contamination because they were completely sealed, and were “diverting” the creek that was coming down in the large corrugated pipe from the headwaters above. A few days later Mark Brest van Kempen photographed these black pipes coiled at the bottom of a muddy trench, which was all that remained of the former holding pond.

17. The developer and City staff repeatedly denied this dewatering activity was taking place. The denials continued until we circulated these photos showing drainpipes pumping out

muddy groundwater directly into the stormwater manhole, and contacted the RWQCB for additional oversight. *See* email to Keith Lichten, San Francisco Bay RWQCB, from Chiye Azuma (May 28, 2004). In support of my request for additional RWQCB oversight, I attached a record of the violations of which I was aware. *See id.*

18. In late May, I prepared a list of questions based on the Conditions of Approval for the project, and requested the help of Councilwoman Brook's office to get a written response from Mr. Uzegbu, the Overseeing Engineer for the Leona Quarry Project. Shortly thereafter, I received a call from Mica Miro, Councilwoman Brooks' assistant, who told me Ms. Brooks' office would not help us in getting this information, and that I should stop "nitpicking" and "looking over their shoulder." Ms. Miro said the City had "experts" working on this, and she went on to question my motives for requesting this information.

19. Mica Miro, Assistant to Councilwoman Desley Brooks, informed me, "Unfortunately, I will not be able to send notes from the weekly construction meetings, as these are private meetings between the City and the Contractors." *See* email to Chiye Azuma from Mica Miro (July 29, 2004). Later on, in response to my Public Records Request for notes or minutes from the weekly construction meetings, Mr. Uzegbu, on behalf of Councilwoman Brooks and Planning Director Claudia Cappio, responded, "The agenda of the meetings from April 2004 to September 2004 showing the action points discussed at the meetings are attached. There are no minutes." I find this response difficult to believe. For a project of this scope and public controversy, it would seem appropriate for Mr. Uzegbu, as the Overseeing Engineer, to maintain notes or minutes to keep track of the issues and actions discussed during this critical phase of this project.

20. Ms. Miro also informed me, "The City's role at this point is to ensure that all of the conditions of approval are met (you can find full text of the Conditions of Approval at <http://www.oaklandnet.com/exchange/>). As Marcel said at the meeting, both City staff and three independent consulting teams hired by the City are working diligently to see that this is done. The City will not push for any modifications that are not required under the conditions of approval." See email to Chiye Azuma from Mica Miro (July 29, 2004). This was a puzzling statement from Ms. Miro, as I had talked to her a number of times by then, each time clarifying that all we were asking for was confirmation that the Conditions of Approval were being met, and that local, state and federal codes and requirements were being followed. I asked Ms. Miro and Councilwoman Brooks to please let us know what it was of our requests that they considered "modifications not required under the Conditions of Approval." See email to Mica Miro from Chiye Azuma (July 30, 2004). I never received a response from either Ms. Miro or Councilwoman Brooks.

21. In addition to the unmitigated discharge of groundwater during dewatering, there were two major incidents in which the lack of adequate erosion control measures on site resulted in great damage to the downstream environment. The first of these events occurred on July 10, 2004 when the Quarry site was flooded with a broken water main from the hills above.

22. The second incident took place on September 19, 2004 after a short, but sudden, downpour left the intersection of Mountain and Edwards at the 580 Freeway onramp flooded with mud and creek banks scoured by a rapid current.

23. I have not been able to confirm that the Applicant has complied with MMRP paragraph F.3a, which requires the applicant to, "obtain a discharge permit from ACFC or the RWQCB," prior to discharge of groundwater generated during site dewatering activities. Nor

have I been able to determine whether the City required the Applicant to submit a construction dewatering plan. As stated previously, during the months of April and May, while the holding ponds were being drained and groundwater was being disposed of through unfiltered drain pipes, residents along Chimes Creek repeatedly notified the City of muddy, sediment laden water and periodic surges in the creek

24. COA 23 (g) requires the Developer include in the final improvement plans a “review and recommendations pertaining to the creation of a perennial creek through the site that drains into the lower detention basin, consistent with condition of Approval No. 19.” I have requested this information from Mr. Uzegbu on a number of occasions, including twice in a Public Records Request on behalf of the Millsmont Homeowners Association. Mr. Uzegbu initially told me that this item was superseded by the “Settlement,” which was strongly denied by Maureen Dorsey, one of the plaintiffs in this lawsuit. Later on, during our visit to his office on August 10, 2004, Mr. Uzegbu declared that Item 23 was superseded by Item 22 (Geology, Seismicity, and Mineral Resources) in the COA. To clarify this in writing, however, Mr. Uzegbu promised to provide a written response to this question by September 13, 2004, as he was scheduled for a vacation the following week. I did not receive any such communication by September 13, as promised, and in the documents package delivered on October 5, 2004, Mr. Uzegbu listed “Item 2. The recommendations from Berloger pertaining to the creation of perennial creek are enclosed.” This item was, however, missing from the package.

25. The Developer was expected to submit a revised SWPPP to the City by September 23, 2004. *See* email to Councilwoman Nancy Nadel from Mike Neary, Assistant Director, Design and Construction Services Dept., City of Oakland (September 21, 2004). I have no confirmation that the Developer complied with the City’s request. On August 25, 2004, I

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requested a copy of the revised SWPPP from Mr. Uzegbu. In a phone conversation I had with Keith Lichten, RWQCB, in June, after Laurie Taul's visit to the site, I was told that the RWQCB has requested a revised SWPPP. However, the copy made available to me on October 5, 2004 was dated April 23, 2004. Mr. Neary stated, "once the revised SWPPP is prepared, reviewed and accepted by the City, I would like to provide a summary of it on the website for information." *See id.* To my knowledge this information has not been posted to date. The SWPPP that is posted at the City's Leona Quarry website (<http://www.oaklandnet.com/leonaquarry/>) remains dated April 23, 2004 according to its Amendment Log. Section 200, SWPPP Amendments (Page 8) of the COA, clearly states, "This SWPPP shall be amended:

- If any condition of the Permits is violated or the general objective of reducing or eliminating pollutants in storm water discharges has not been achieved. If the RWQCB determines that a Permit violation has occurred, the SWPPP shall be amended and implemented within 14-calendar days after notification by the RWQCB;
- Annually, prior to the defined rainy season."

26. On July 19, 2004, the RWQCB requested that the developer provide a "detailed update regarding the corrective actions taken" after the July 10, 2004 water main break. *See* email to David Chapman and Kent Peyton, DeSilva Gates, from Laurie Taul, San Francisco Bay RWQCB (July 19, 2004). I have not been able to confirm with any of the staff at RWQCB or with the City that the developer responded to this request. With regard to the monitoring requirements that the RWQCB requested from the developer during the June 8th inspection, Mr. Uzegbu had assured us that he would provide us this information "as soon as it became available." Mr. Uzegbu has not provided this information to date.

27. On Tuesday, October 19, as I was driving home on I-580, I could see that the inside slopes of the detention basin had melted away from the runoff from the first rainfall of the

season. Much of the hydroseed had washed away, and the “impermeable” clay liner did not look as if it was holding up very well either. The photos that Mark Brest van Kempen took at the site on October 19 show a corrugated standpipe in the detention pond next to the outlet riser. The standpipe had multiple perforations from which the muddy water was discharging into the storm drain. This pipe was not included in the Site Improvement Plans of July 2004. According to the site inspector, Jun Osalbo, the addition of this pipe and its design was recently approved by Marcel Uzegbu, the Overseeing Engineer, City of Oakland. By allowing the water to drain through the holes in the standpipe, the purpose of the detention pond appears to be defeated. What is the purpose of this low standpipe? Was there a peer review and approval of this design by PWA? Why do Mr. Uzegbu and the DeSilva Gates Project Manager Kent Peyton continue to assert that there is no runoff escaping from the detention basin when it has been visually confirmed that it is otherwise? How do these anomalies comply with Item 23 of the Conditions of Approval?

28. By Saturday, October 23, 2004, we could see from the Millsmont neighborhood that the slopes in the Quarry had been re-hydroseeded to replenish the previous application that had washed away. Given that it will take a couple weeks, if not more, for the seeds to germinate, and perhaps another month or so for the roots to develop to work as an effective erosion control measure, why did the Developer wait until just before the start of the rainy season to apply the hydroseed? Mike Neary wrote to Councilwoman Nadel, “none of the hydro seeding had been done prior to this past weekend, since they are not required yet. The hydro seeding ... will be complete by October 15.” Email to Councilwoman Nadel from Mike Neary, Oakland Assistant Director for Design and Construction Services (September 21, 2004). Is this scheduling and definition of “completion” consistent with the list of works that should be

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completed under Construction Phase B (Site Preparation), page 11 of the COA, and with COA 23 (c) which states, “The final plan for the detention basin (Parcel A) shall incorporate: detailed landscaping and other specifications so that a water treatment area can be established within the basin including a planting plan based on the recommendations of a qualified hydrologist and biologist regarding contours that can support the proposed planting and not interfere with the design and detention capacity.” It would appear that the detention basin, as it stands now, is far from completion and its functionality very questionable. I have not been able to confirm the existence of any reviews or recommendations of a qualified hydrologist and biologist regarding the interface of the planting and the design and detention capacity of the detention pond.

29. I declare under penalty of perjury of the laws of the State of California and the United States of America that the foregoing is true and correct and that this declaration was executed the 25 day of October, 2004 at 3829 Delmont Avenue, Oakland, CA, Alameda County.

Respectfully submitted,

Dated: 25 October 2004

Chiye Azuma