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Litigation looms over 53 Rheem easement

By Sora O'Doherty

Although the city of Orinda appears determined to reopen the easement across 53 Rheem Blvd., Associate Planner Adam Foster admits that litigation appears likely. The city once again adopted the easement that allows children to walk to Glorietta Elementary School at its Oct. 30 meeting, after staff found that some modifications were needed to the resolution approved by the council on Oct. 16.

According to Foster, the council "again voted to accept the public pedestrian trail easement connecting Rheem Boulevard and Parkway Court." Foster added that "staff is working to promptly record this resolution with the County," in an email sent to interested parties. He also attached an exchange of letters between attorneys related to the city's acceptance of the trail. There are three parties involved: the property owners, Kent and Dawnelle DeSpain, their neighbors, and the city.

Foster says that the city remains committed to reopening the trail to the public and is currently evaluating its legal options. Eric Shaffer, who represents a group of interested neighbors, also has urged the DeSpains to work cooperatively with the neighbors and the city to open the easement trail. However, the DeSpains appear to have abandoned the idea of working with the city. In an Oct. 30 letter to city attorney Osa Wolff, the DeSpains' attorney, Nathan Scheg, stated, "The DeSpains are done. They are done with the bullying. They are done with the lies. They are done with the City's disingenuousness." Scheg says that the city and the residents of Orinda should be ashamed of themselves for the falsehoods they have spewed. He continued on to warn the city "not to attempt 'self-help' regarding removing the DeSpains' private gate." Scheg's legal arguments have been refuted by Schaffer, as well as by Wolff, who continues to assess the city's legal position. Scheg argues that the easement does not exist because it was rejected by the city and that the trail was never heavily used, as can be demonstrated, he says, by trail logs kept by the DeSpains from the time they moved in. Further, the DeSpains rely upon a representation by a former Orinda employee that the DeSpains could not be legally required to keep the trail open to the public.

An alternative argument offered by Scheg is that the easement is covered by a portion of the California Government Code that deals with public access to the bank of a waterway, river, or stream and the public easement along a portion of the bank, requiring such an easement to be accepted within three years of the approval of a final subdivision map.

Wolff disagrees. She wrote to Scheg, "The creek you reference is private, not public. Moreover, the trail easement accepted by the City provides a pedestrian connection between Rheem Boulevard and Parkway Court, its purpose is not access to or along the banks of the creek. Additionally, although City acceptance of the trail easement does not legally depend on there being direct benefit to the residents of Subdivision MSO 05-951, such benefit is present here." Schaffer has said that "while creative, this argument fails on its face for two irrefutable reasons," which he explains are that San Pablo Creek is not included in the statutory definition of a public waterway and that the easement is not a public route to the banks of the creek, but provides pedestrian access between Rheem Boulevard and Parkway Court, neither of which, Shaffer states, are public waterways. "Your legal arguments are simply flawed," Shaffer concluded; ". . . the city is well within its legal rights to formally accept the dedication of the trail easement."

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