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File No. 65634

June 6, 2016

VIA E-MAIL

Mayor Harrison and Councilmembers
City of Fremont
39550 Liberty Street
P.O. Box 5006
Fremont, CA 94538

Re: General Plan Designation for Fremont Mission Hills Swim and Tennis Club

Dear Mayor Harrison and Councilmembers:

I write on behalf of Fremont Mission Hills, LLC (“FMH”), the owner of 10 East Las Palmas Avenue (the “Property”) in the City of Fremont (the “City”). In compliance with a court order, the City Council will soon consider the appropriate General Plan land use designation for the Property. The City Council has previously approved development of a commercial health and fitness club on the Property and the General Plan land use designation should accurately reflect what the City has approved. FMH’s surrounding neighbors, however, have been seeking to deny FMH the same ownership rights that all other similarly situated landowners in Fremont enjoy. The neighbors, operating under the sobriquet, Save Kimber Park (SKP), have tried to exert control over FMH’s private property, even though the neighbors have no right, title or interest in FMH’s land. Recognizing their lack of legal right to control FMH’s land, they have sought to employ the City’s assistance in effectively robbing FMH of its property rights. The City Council should not allow itself to be the hand maiden of SKP or to be misled into believing that SKP has a right to control this land. The City Council should see the demand by SKP to designate FMH’s land as Private Open Space for what it is—an unapologetic attempt to have the City gift to SKP and the Kimber Park homeowners control over a parcel of land they do not own. Private Open Space (POS) is not an appropriate or conforming land use designation for the Property that will be developed with a new health and fitness center.

In my April 1st and April 14th letters to the Planning Commission, I outlined the history of the Property, including how on December 4, 2012, the City Council approved a preliminary planned district zoning that allows a private fitness club, including supporting amenities such as a café, in a building between 18,000 and 24,000 square feet (the “Project”) on the Property. The City was then required by its General Plan to conform the Project’s General Plan land use designation to the Project, which it failed to do. Instead, the City allowed staff to switch the designation without any public notice or hearing. Realizing that POS as it was defined in December 2012 would not even permit the approved commercial fitness center and related

Project amenities, the City even allowed the definition of POS to be amended in an attempt to make POS conform to the Project. These shenanigans caused a Court to find the City acted improperly and to issue a writ ordering the City to do what it should have done in December 2012—conform the Property’s General Plan designation to the Project. For more information about the background of this dispute and the Court’s order, please review the April 14th letter, which is included as **Informational 6** to the City Council Staff Report. Attached to this letter is the Court’s decision.

Despite the City’s approval of the Project, including a Precise Development Plan in October 2014, City staff urges the Council to do SKP’s bidding, which is to impose the POS designation on an entire parcel of land, even though a portion of it is slated for intense investment in a new commercial development. As explained in the April 14th letter, staff, through a biased survey and staff report, undermined FMH’s ability to have a fair Planning Commission hearing about which General Plan land use designation best fits the Project.

Staff’s report to the City Council makes many of the same factual errors as the Planning Commission report. For example, staff again claims that the Property was set aside as open space in 1973, even though it has always had a General Plan designation that allowed residential uses and zoning that allowed a commercial fitness club on a portion of the Property. Staff also again asserts that even though the POS designation “restricts” commercial uses, it is somehow appropriate for the Property, which has and will continue to have a commercial use. Staff’s assertion is, at best, illogical and, at worst, a purposeful attempt to mislead this Council. Because staff’s report is so slanted, the applicant’s planner has revised it to be accurate. The revised staff report is attached as **Exhibit A**. In addition, FMH has attempted to provide clarity about the history of the Property and tonight’s action by addressing a few themes raised by many commenters in **Exhibit D**.

FMH deserves a fair City Council hearing. Since FMH does not believe it can rely on staff to present this issue accurately, in addition to directing you to its April 14th letter, it writes this letter to further explain why POS is not an appropriate land use designation for the entire Property. That designation is unsupported by the text of POS, history of the Property and the Project, or the City’s past decisions about which parcels should be designated POS. Accordingly, designating the Property POS would arbitrarily treat the Property differently than any similarly situated parcel in the City, thereby violating FMH’s right to equal protection and substantive due process.

1. Designating The Property POS Would Be Arbitrary and Capricious

Designating the Property POS would be arbitrary and capricious, and thus invalid. In reviewing a city’s designation of property under a general plan, courts consider whether the action was “arbitrary or capricious or totally lacking in evidentiary support.” (*City of Carmel-by-the-Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 238–39; see *Arnel Dev. Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 521; *Consaul v. City of San Diego* (1992) 6 Cal.App.4th 1781, 1791.) Courts employ an even “more rigorous form of judicial review” where a land use

designation applies uniquely to a single property owner. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 900 (conc. opn. of Mosk, J.); see *Reynolds v. Barrett* (1938) 12 Cal.2d 244, 251 [city cannot unfairly discriminate against a particular parcel of land].)

Here, the City's decision to designate the entire Property POS would be arbitrary and capricious because the POS designation, *by its very terms*, does not apply to the entire Property. The General Plan states that POS "typically applies to private land set aside as open space within planned communities. Private open space uses may include . . . indoor and outdoor recreation facilities With the exception of ancillary structures related to the intended open space use, other types of development are not permitted in areas with this designation." (General Plan Land Use Element at pp. 2-29-2-30.)

Neither the Property nor the Project fit the POS definition. The entire Property does not fit the POS definition because it was not set aside as open space within a planned community. According to the 1973 staff report for the development that resulted in the Property, at least 4.5 acres was to be "solely devoted" to a *commercial* enterprise, with the remaining portion of the Property to be a private park, possibly sold to a home owners association, or housing consistent with the then-assigned residential density. (Planning Commission Staff Report (June 28, 1973) at pp. 1-2.) The Property was never sold to a homeowners association, but instead purchased by a private individual who, in approximately 1974, developed the envisioned private, for-profit business, which has been operating ever since. SKP likes to pretend they have some standing as though they are a homeowners association that has expended money or acquired some title to the land to manage it for their homeowners, but they are not. They are merely an organized group of neighbors trying to bully a neighbor. Not only was the Property never set aside as open space, it was never envisioned to be set aside in its entirety; 4.5 acres has always been intended for *commercial* uses.

Moreover, the Project does not fit the POS definition because it does not propose a structure *ancillary* to an open space use, which is the only type of structure permitted under the POS designation. Instead, the remaining open space use (tennis) would be ancillary to the 23,100 square-foot fitness club and amenities. It is simply irrational to suggest that a landowner invest millions of dollars to build a first-rate athletic and recreational facility and then to turn around and designate that commercial site as though it were set aside for private use of the surrounding homeowners. Thus, even if the City disagreed about the nature of some of the Property, there should be no debate that the Project is not a Private Open Space use. Designating the Project area as POS is not conforming or appropriate.

Further, even though the POS definition does not explicitly restrict it only to commonly held parcels, the City's actions with respect to other properties it has designated POS, and those properties it carefully protected from becoming POS under the 2012 definition, demonstrates that the City interprets the POS designation to apply to commonly owned (e.g., HOA or trailer park) land set aside for the private use of the members of the trailer park or HOA. No other property in Fremont carries this restrictive designation.

The City has approximately 50 parcels that are either wholly or partially designated POS.¹ Of these, 13 parcels have something other than trees, dirt, and grass. (**Exhibit B.**) All 13 of those parcels are set aside as common open space for residents of a planned community. (*Id.*) Further, of these 13 parcels, only 4 have buildings, and in each case the building is ancillary to an outdoor use, such as an outdoor pool. (*Id.*) As this analysis illustrates, when parcels have development, the City has interpreted the POS language to apply only to those parcels maintained by a residential community for its own use where the buildings on those parcels are ancillary to open space uses.

In short, based on the plain text of POS and the City's consistent interpretation of it, the Project does not fit into the POS designation. Accordingly, a City action to designate the entire Property POS would arbitrarily single it out for discriminatory treatment.

Avenida San Juan Partnership v. City of San Clemente (2011) 201 Cal.App.4th 1256, addressed a similar situation. There, a city amended its general plan to create "RVL" zoning, the purpose of which was to preserve open space parcels located in canyons. (*Id.* at p. 1261.) The city then downzoned a single parcel located in the middle of a residential tract from "RL" (which allowed four dwellings per acre) to "RVL" (which allowed only one residence for every 20 acres). All other parcels surrounding the subject property remained RL. (*Id.*) After the property owners sued, the city defended its decision on the grounds that the downzoning was necessary because the property was located on a slope and the action furthered the goals of "RVL" zoning. (*Id.* at p. 1270.) The court rejected this argument, noting that the property, like much of the rest of the city, was located on a slope, rather than in a canyon, and therefore the City's rationale for the RVL zoning—protection of canyons—did not apply. Instead, the court held the city illegally "singled out [the property] for discriminatory treatment independent of the reason for RVL zoning in the first place." (*Id.* at 1270–71.)

If the entire Property is designated POS, a court could easily find that the City's decision to do so illegally singled out the Property for discriminatory treatment. The City itself has recognized that the *Project* did not fit within POS, as originally defined in the General Plan, which is why in 2012, it proposed designating the portion of the Property with the commercial use General Open Space ("GOS") and the remaining portion POS. (Planning Commission Hearing Transcript (October 18, 2012 and October 25, 2012).) Indeed, the City staff reports supporting that process made clear that City staff itself recognized that POS was no long an appropriate designation after the City adopted the POS initiative.

Nevertheless, based on an irrational desire to shoehorn the Project into POS, in February 2013, the City attempted to customize the POS designation to fit the Project. Although, for the reasons stated above, the Project still does not fit into the amended definition of POS, the City's actions (illegal decision to designate the Property POS despite FMH's timely Project approval,

¹ Staff has stated that it will not assign more than one General Plan land use designation to a single parcel. As **Exhibit B** shows, this is not true. If the City so desired, it could assign the Property two General Plan land use designations.

post-hoc amendment of POS definition to try to capture project, misstatement of historical use and designation of Property despite clear public record, biased survey, and biased staff report produced for the April 14 Planning Commission hearing and the June 7 City Council hearing), constitute precisely the type of discriminatory history courts rely on when invalidating city decisions for improperly singling out a specific entity as the special target of legislation. (See *Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 970 [finding that city's change in a property's general plan designation in a final attempt to frustrate a particular developer's plans after a history of antagonism towards the property isolated the developer's property as the special object of legislation and therefore was illegal].)

Nor does SKP's baseless claim that the entire Property was intended to be community open space, repeated in SKP's attorney's May 9 letter, make the decision to designate the Property POS less arbitrary. This rationale was expressly rejected in *Ross*. There, the City of Yorba Linda contended that neighborhood opposition to construction on nearby private property could itself serve as a rational basis for a local government body to forbid the construction. The court emphatically rejected this position, finding that such "argument, carried to its logical conclusion, would be fundamentally destructive of the basic rights guaranteed by our state and federal Constitutions. If public opinion *by itself* could justify the denial of constitutional rights, then those rights would be meaningless." (*Ross*, 1 Cal.App.4th at p. 964; see *id.* at 968 ["[N]either a municipal corporation nor the state legislature itself can deprive an individual of property rights by a plebiscite of neighbors."]; see also *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 63 ["[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."].)

The City, unlike the City of Yorba Linda, should not let itself be misled by SKP. Although SKP may have wanted a community open space, the members of SKP did not establish a homeowners association, pay dues or purchase the Property, or pay dues to support Property maintenance for the past forty years. SKP does not have the City's interests in mind and has demonstrated no regard for FMH's private property rights, instead insisting that they have a right to dictate how FMH holds its property. SKP's selfish motives are quite clear, even going so far as to suggest that one option would be to have FMH fall into bankruptcy, presumably so SKP could attempt to purchase the Property at a discount from a bankruptcy trustee sale. Designating the entire Property POS because SKP wants that outcome thus is not only arbitrary, but illegal.

2. Designating the Property POS Would Treat FMH Differently Than All Similarly Situated Property Owners

In addition to being arbitrary, designating the Property POS would violate FMH's right to equal protection because designating doing so would treat FMH differently from similarly situated property in the City. (See U.S. Const., 14th Amend, § 1; Cal. Const., art. I, § 7(a); see also *Allen, supra*, 234 Cal.App.4th at p. 63 [equal protection under the federal and California Constitutions requires equal treatment of persons similarly situated]; *Walgreen Co. v. City and*

County of San Francisco (2010) 185 Cal.App.4th 424, 434 [“The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.”].)

For example, where a property owner is subject to special restrictions not applicable to similarly situated properties, as in the case of so-called spot zoning, that restriction generally will be found to be invalid. (See, e.g., *Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 338; *Ross*, 1 Cal.App.4th 954, 960-63 [“It is obvious that by a zoning ordinance a city cannot unfairly discriminate against a particular parcel of land.”]; *Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330, 336-37.) Here, although the City’s decision will change the Property’s General Plan designation as opposed to its zoning, designating the Property POS would irrationally single it out for lesser rights than similarly situated property, raising the same concerns as illegal spot zoning. (See *Avenida San Juan Partnership, supra*, 201 Cal.App.4th at 1268 [“The essence of spot zoning is irrational discrimination”]; see also *Ehrlich, supra*, 12 Cal.4th at p. 911 (conc. & dis. opn. of Kennard, J.) [stating that while a city may have “a legitimate governmental interest in the promotion of private recreational facilities . . . , [it] may not single out individual landowners or small groups of landowners to bear a disproportionate share of the burden”].)

Such unequal treatment of the Property is perhaps best exemplified by the City’s recognition in summer 2012 that properties “owned privately or by a corporate entity,” as is the Property, should not be POS. In particular, prior to summer 2012, the City’s General Plan had a POS designation that was relatively general and afforded a landowner with property designated POS the same rights as any other landowner to seek re-designation of his or her property. In spring 2012, however, SKP sponsored a City-wide initiative to grossly restrict the uses and flexibility of land designated POS. SKP’s motive was clearly to restrict FMH’s property, but presented publicly as a city-wide effort. After receiving this initiative, the City immediately recognized how inappropriate the POS designation would be for any parcel that either already had been developed or had any future development potential, however remote.

In response, the City did two things. First, it added the GOS land use designation to its General Plan “to recognize use of private property in a manner that allows for viable use of property consistent with the open space character and constraints of individual properties.” (City Council Staff Report (July 17, 2012) at p. 2.) Second, it changed the land use designations of a number of properties from POS to GOS (or some other appropriate designation). (*Id.* at p. 3.) Ultimately, those properties found to be inconsistent with the POS designation included a variety of uses ranging from cemeteries, to single family homes, to commercial enterprises. (*Id.* at p. 4; see **Exhibit C**.) In identifying such parcels, the City focused on those properties either owned privately or by a corporate entity, such as FMH. (Planning Commission Hearing Transcript (June 28, 2012) at pp. 6:11-12; see City Council Hearing Transcript (July 17, 2012) at p. 15:16-18 [“So all the properties that are proposed for a map change tonight are owned by individuals not in common interest.”]; see also *id.* at p. 22:16-22 [recommending privately held parcel not be POS].) Any property with development potential of even a limited use was removed from the

POS designation. (Planning Commission Hearing Transcript (June 28, 2012) at p. 9:1-17.) Had the Property been designated POS before June 2012, and had the City declined to protect the Property in June 2012 like other similarly situated properties, the City would have clearly violated FMH's right to equal protection under the law.

Refusing to protect the Project site today violates FMH's right to equal protection just as it would have in 2012. As discussed above, a review of the properties currently designated as POS confirms that no developed, commercial property is designated POS. Of the approximately 50 POS areas depicted on the City's General Plan Land Use Diagram (amended February 16, 2016), 37 of them are green spaces that appear to have no development aside from a few footpaths. Of the remaining 13 POS areas, which are identified in **Exhibit B**, nine have practically no development at all. Improvements on these nine parcels principally consist of some combination of paved walkways, a few wooden bridges, picnic benches, landscaping, and/or assorted playground equipment. Thus, in both scale and scope, these areas are nothing like the Property.

Only four of the 13 commonly-owned parcels appear to have larger-scale recreational facilities—such as a tennis court, basketball court, or pool—or a building of any kind. None of these areas, however, has development potential like the Property because they are all land set aside as open space within various planned communities (or, in the case of the mobile home park, the equivalent thereof). The County Assessor's website identifies the use of these properties as "Planned Development Tract, Common Area or Use," which is unlike the Property's identification as "Other Recreational Activity." (See **Exhibit B**.) This fact shows that POS is intended as a designation for community common areas for use only by residents in the same community, and not for areas owned by a private, for-profit commercial entity and operated as a commercial club open to anyone who pays the membership fee, regardless of where they reside.²

In his May 9, 2016 letter, SKP's counsel, Mr. Stuart Flashman, argues that POS does not require land to be owned by a homeowner's association and therefore is appropriate for the Property. This argument misses the point that the City has interpreted POS to apply only to land owned by HOAs, or, in the case of the mobile home park, similarly situated land. The City has never applied the POS land use designation to a parcel owned by a private individual and developed in part with a commercial use.

No parcel similar to the Project site located anywhere in the City has been designated POS. Any similar parcel that had been POS before June 2012 was redesignated in June 2012 to protect them from being ensnared in the City's adoption of the POS initiative. No precedent exists within the City for designating the entire Property as POS. Accordingly, were the City to

² For example, when FMH's representative visited the Southlake Mobile Home Park to determine if it was like the Property, he was informed by the owner there that the recreational facilities are for mobile home residents only, and that he was trespassing and should leave.

designate the entire Property POS, it would irrationally single the Property out for unequal treatment, in violation of the FMH's equal protection rights.

3. Designating the Project Area POS Would Interfere With FMH's Investment Backed Expectations

As explained in the April 14 Letter, designating the Project area POS interferes with FMH's investment backed expectations for two reasons. First, it lowers the Property's value, making it hard for FMH to obtain construction financing to carry out the approved Project. Second, when FMH purchased the Property, it had a General Plan designation that allowed several uses, including low-density residential. Indeed, if the City changes the Property's General Plan designation to POS, it would be the first time since the parcel was created that no residential or commercial uses would be allowed on it.

In his May 9 letter, Mr. Flashman argues that any plans FMH may have had to redevelopment the property based on the Property's pre-2011 General Plan land use designation and zoning are entitled to no consideration by the City. Case law says otherwise. (See, e.g., *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 627–628, 631 [explaining how the investment-backed expectation prong should be applied].) The City itself acknowledged that after the POS initiative was adopted it would interfere with owners investment-backed expectations in July 2012, when it carefully redesignated any parcel with development potential to a land use designation other than POS. The fact that POS now allows the recreational facilities ancillary to an intended outdoor use does not change the fact that the POS designation interferes with investment backed expectations by devaluing property, thereby making it hard to obtain financing to improve it, and making an indoor recreational facility not ancillary to an open space use possibly nonconforming. And it specifically interferes with FMH's well-founded investment backed expectations that it would have a land use designation with similar restrictions on amending it to the one in place when it purchased the property and to other properties with commercial enterprises.

4. The Property Should Be Designated General Commercial Or General Commercial And GOS

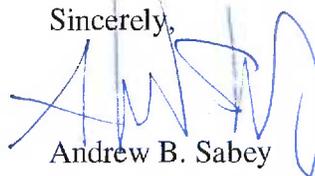
Rather than designate the Property POS, FMH believes the GOS land use designation is most consistent with the Property and the Project. In addition, at least the commercial portion of the Property is consistent with the General Commercial land use designation, which "applies to low-scale commercial, service, and office uses located along the City's arterials and collector streets" and includes "businesses meeting the day-to-day needs of Fremont residents." (General Plan at p. 2-24.) The Property is close to Mission Boulevard, a City arterial, and the Project is a business that meets the day-to-day exercise and fitness needs of Fremont residents. Moreover, based on a review of the privately owned fitness clubs in the City, the majority of them are located on land with a commercial or industrial land use designation, and *none* is on land designated open space. Designating the Property GOS or GOS and General Commercial would be most consistent with how the City has treated other similarly situated parcels.

What the City should not do is designate the entire Property POS. At most, only the undeveloped area could be designated POS, with the remainder designated as GOS or General Commercial.

Contrary to SKP's claim, FMH's desire not to have the entire Property designated POS has nothing to do with a secret scheme to construct housing. FMH's approved zoning prohibits residential development, and FMH is under no illusion that it could ever obtain a zone change. Moreover, FMH is proud of the recently approved Project and wants to move forward with it. FMH worked extremely hard, and carefully considered the neighbors' input, to design a club that has the possibility of being financially successful while still fitting into the surrounding community. That is what the City told FMH it must do to avoid having the Property designated POS. Now, it appears the City is poised to designate the entire Property POS anyway, needlessly threatening the financial feasibility of the very club it just approved.

For the reasons stated above, designating the entire Property POS would violate the law and engender further litigation. Please do not hesitate to contact me if you have questions about the above issues.

Sincerely,



Andrew B. Sabey

cc Harvey Levine, City Attorney (via email: hlevine@fremont.gov)
Debra Margolis, Deputy City Attorney (via email: Dmargolis@fremont.gov)
Kristie Wheeler, Planning Manager (via email: kwheeler@fremont.gov)

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EXHIBIT A: Corrected Staff Report



SCHEDULED

STAFF REPORT (ID # 2731)

Sponsors:
DOC ID: 2731

KIMBER STUDY AREA - 10 East Las Palmas Avenue - PLN2016-00148 - Public Hearing (Published Notice) to Consider the Planning Commission's Recommendation to Approve a City-initiated General Plan Amendment to Change the Land Use Designation of a 12.72-acre Property at 10 East Las Palmas Avenue in the Mission San Jose Community Plan Area from Kimber Study Area to **Private Open Space an Appropriate Designation(s) and Remove References to Kimber Study Area in the Text of the General Plan, and to Consider a Finding that No Further Environmental Review is Required Pursuant to the California Environmental Quality Act (CEQA) as a Final Environmental Impact Report (EIR) (SCH#2012052065) was Previously Certified and None of the Conditions Requiring a Subsequent or Supplemental EIR Stated in Section 15162 of the CEQA Guidelines are Present.**

Contact Persons:

Name:	Joel Pullen	Kristie Wheeler
Title:	Senior Planner	Planning Manager
Div/Dept:	Planning	Planning
Phone:	510-494-4436	510-494-4454
E-Mail:	jpullen@fremont.gov	kwheeler@fremont.gov

Executive Summary: The City has initiated a General Plan Amendment to change the land use designation of a 12.72-acre property located at 10 East Las Palmas Avenue (the "Property") from Kimber Study Area to an appropriate designation as required by the Kimber Study Area text and ~~due to~~ the outcome of a lawsuit that was resolved in the fall of 2015. The lawsuit between the Property owner and the City resulted in a court decision that the City must reinstate the Kimber Study Area designation. The court also stated that if the City chose to change this General Plan designation, it must initiate a formal General Plan Amendment process to do so. On April 14, 2016, the Planning Commission held a public hearing to consider the proposed General Plan Amendment and staff's recommendation that the subject property be designated Private Open Space. After receiving public testimony and discussing the proposal, the Planning Commission voted 5-1-1 (with one Commissioner absent) to recommend approval of staff's recommendation to the City Council.

BACKGROUND: In 1973, the City Council adopted Planned District P-73-1, which approved a residential community commonly referred to as Kimber Park. Kimber Park included an ~~open-space~~ parcel within the development to serve the surrounding residential community's recreational needs through the provision of open space and private, commercial facilities. Consistent with City practice at the time, the underlying General Plan designation for all of the Kimber Park development, including the open space parcel, was Low-Density Residential with specific allowable uses for parcels particularly defined through zoning in Planned District P-73-1. As envisioned, the ~~open-subject space~~ parcel would include a private recreational facility, a lake, and potentially a restaurant. The tennis club with seven courts and a lake were established on the site shortly after development of the surrounding residential neighborhood. According to staff reports, the lake, both during and after construction, would not hold water, and was eventually eliminated due to this infeasibility. The restaurant was never constructed. The tennis club was expanded by five courts in the late 1990s. Over time, this ~~open-space~~ parcel has come to be known as Kimber Park.

In 2009, the current Kimber Park Property owner applied for a Preliminary Review Procedure to build 44 residential units on the eastern portion of the parcel, including the area with the five newest tennis courts. During review of the project, staff ~~determined that~~ informed the owner that although the underlying General Plan land use designation for the project site was Low-Density Residential, the actual allowable uses of the parcel were governed by its zoning ~~designation~~, P-73-1. Staff advised the owner that residential development of the site was not a permitted use under P-73-1. As part of the recent General Plan Update, staff proposed that the land use designation of the Kimber Park parcel be revised to Private Open Space to reflect the precise zoning approved for the site and to eliminate any further applications for housing on the site ~~ambiguities over the land use designation~~.

In the fall of 2011, the City Council held public hearings on the General Plan Update, including the proposed redesignation. The property owner argued that the project site should retain its residential designation and the City should allow the development application, which at that time, had been revised to propose 26 residential units. Neighboring property owners ~~and residents~~ supported the City's proposed redesignation to Private Open Space because they objected to any future residential development. The City Council ultimately voted to establish the Kimber Study Area designation on the site for a period of one year to allow time for engagement between the neighborhood and property owner and to allow ~~review of a modified residential development application~~ the property owner to attempt to submit an application that had neighborhood support. The City Council resolution adopting the General Plan Update provided that if an application for ~~residential~~ development was approved during the established one-year timeframe, the City would conform the General Plan Land Use Map to reflect the approved designation. If an application for ~~residential~~ development was not approved, the site would be designated Private Open Space without further action. (Note that the Court expressly rejected the City's attempt to add "residential" to the Kimber Study Area text.)

Initially, a Preliminary Planned District application was submitted to allow development of 18 residential units and a Draft Environmental Impact Report (EIR) was prepared for the proposed project pursuant to the requirements of the California Environmental Quality Act (CEQA). However, during the 45-day public review period for the Draft EIR, the applicant submitted a revised project for a new private swim and tennis club with no residential development, which was one of the CEQA required alternatives studied in the Draft EIR. In December 2012, the City Council approved a Preliminary Planned District for the proposed swim and tennis club expansion (with no residential development), including the establishment of regulations and design guidelines for the future facility. ~~Subsequent to~~ Despite the timely Preliminary Planned District approval and ~~based on~~ the City Council resolution that adopted the General Plan Update and Kimber Study Area designation, the City quietly conformed-changed the site's land use designation to Private Open Space; ~~consistent with the approved land use~~. As the court found, this action violated the plain meaning of the resolution that adopted the General Plan Update and Kimber Study Area designation. Moreover, at the time staff changed the land use designation to Private Open Space, Private Open Space did not allow recreational facilities and therefore did not conform to the Preliminary Planned District approved in December 2012. As a result of the court's decision in fall 2015 which generally agreed with the Property owner, the City administratively set aside the Private Open Space designation and reinstated the Kimber Study Area designation. In addition, the City initiated a formal General Plan Amendment process.

On September 16, 2014, the City introduced an ordinance approving a Precise Planned District and also approved a Conditional Use Permit for the expansion of the swim and tennis club. The ordinance was adopted on October 14, 2014. The proposed project included an expansion of the facility by 17,400 square feet over three phases, for a total development of 23,100 square feet. At full build-out, the existing clubhouse building would be expanded by 2,450 square feet to provide additional club services, and two new buildings would be constructed—a 6,900-square-foot mini-gym, and an 8,150-square-foot fitness and swim center.

~~Following the City Council's approval of the Preliminary Planned District in December 2012, the City conformed the land use designation of the Property to Private Open Space. The Property owner then sued the City on the basis that it had not engaged in a formal General Plan Amendment process with public notice and hearing. As a result of the court's decision in fall 2015 which generally agreed with the Property owner, the City administratively set aside the Private Open Space designation and reinstated the Kimber Study Area designation. In addition, the City initiated a formal General Plan Amendment process.~~

Planning Commission Meeting

On April 14, 2016, the Planning Commission held a public hearing to consider the proposed General Plan Amendment and voted 5-1-1 (with one Commissioner absent) to recommend approval of staff's recommendation to designate the subject property Private Open Space. A total of 14 people spoke during the public hearing, with 13 individuals supporting staff's recommendation and one individual, legal counsel for the property owner, not supporting staff's recommendation.

Legal counsel for the property owner submitted a letter the afternoon of the Planning Commission meeting that presented three primary points, including: (1) questioning the objectivity of the staff report; (2) alleging that the report falsely equates the property with HOA lands; and (3) stating that a designation of Private Open Space would reduce the property value significantly. The letter also included a full edit of the Planning Commission staff report with alternative analyses generally reflecting the applicant's preferred wording, a copy of the court order, and property tax and market trend information. Staff reviewed the letter, and offers the following response:

1. Regarding the letter's discussion on objectivity, staff believes the report is objective in that it carefully analyzes all possible General Plan land use designations, and explains the relative compatibility of those designations. Planning Commissioners expressed opinions that drew from various portions of the report and public input when articulating the reasons for their support of the motion to recommend approval of the Private Open Space designation to the City Council.
2. Regarding the property ownership, the property is owned by a private entity, which disqualifies it from certain General Plan land use designations restricted to public land. However, the Private Open Space land use designation, which may also apply to land owned by HOAs, is not limited to public land. It is relatively common for recreation facilities planned in neighborhood contexts to be open to the public for a fee, as is the case here. City staff reviewed the available land use designations, and determined that the Private Open Space designation was most compatible.
3. Regarding property value, the Private Open Space land use designation permits a private recreational facility and its expansion of the type sought by the applicant and approved by the City. The property owner's attorney argues that the Private Open Space designation would deprive the owner of significant value. While a land use designation can affect a property's value, in this instance the property owner is not being deprived of all economically viable use of the property in that the proposed designation of Private Open Space would permit the existing recreational facility and its expansion under the approved planned district.

See Information Enclosure 6 for a copy of the above letter.

Following the Planning Commission hearing, legal counsel for the community group, Save Kimber Park, provided a letter to the City responding to the points in the above referenced letter. That letter is attached as Informational Enclosure 7.

DISCUSSION/ANALYSIS:

Project Description

The proposed General Plan Amendment would change the land use designation of a 12.72-acre property at 10 East Las Palmas Avenue from Kimber Study Area to Private Open Space as shown in Exhibit "B." In addition, this action would remove all references to the Kimber Study Area from the City's General Plan text, which consists of deleting the errata added to the General Plan after the resolution of the lawsuit, as shown in Exhibit "A."

Project Analysis

General Plan Conformance

In order to determine the appropriate land use designation for the Property, staff reviewed the purpose and use profile of each designation, and compared them to the characteristics of the property in question. Below is an analysis of the General Plan land use designations considered followed by an analysis of the applicable General Plan goals and policies for the proposed designation.

Analysis of General Plan Designations

Existing General Plan Designations:

The City has 22 General Plan land use designations within four broad categories—Commercial/Mixed Use, Industrial, Residential, and Open Space/Public. Three designations within the Open Space/Public category are not applicable for land in private ownership, such as the subject property. These designations are: Park, Resource Conservation/Public, and Public Facility. Since 10 East Las Palmas Avenue is privately owned, this reduces the available designations to the remaining 19 Commercial/Mixed Use, Industrial, Residential, and Open Space/Public designations, which are discussed further herein.

Commercial/Mixed Use Designations:

Of the six Commercial/Mixed Use land use designations, three have geographical restrictions that make them inapplicable to the subject site. These are the City Center, Town Center, and Innovation Center designations. In addition, the Regional Commercial designation is reserved for large-format retail uses on major arterials or freeways, and Mixed Use designation allows higher-density residential uses in combination with commercial uses, targeted in transit-oriented development areas and along major traffic corridors. Thus, these two designations are also inapplicable to the subject Property given that it is located within an existing low-density residential neighborhood set back from Mission Boulevard.

The remaining General Commercial designation allows low-scale commercial, service, and office uses, and could be applied on the subject site because all adjacent streets are classified as collectors. ~~However, The appropriateness of this designation to land in this area is shown by the fact that the area is already well-served by General Commercial uses that exist nearby along Mission Boulevard near Las Palmas. Additionally, a floor area ratio (FAR) of 0.30 is allowed in General Commercial, which would be consistent with the approved Precise Development Plan, as that plan allows a lesser FAR. could result in development that would be out of scale with the surrounding neighborhood, and would not be appropriate due to local traffic patterns.~~

For the reasons stated above, staff does not recommend any of the Commercial/Mixed Use General Plan land use designations.

Industrial Designations:

There are three Industrial General Plan land use designations (General, Tech and Service Industrial), which are oriented toward the production, distribution and repair of consumer goods. Industrial land uses often involve the use of hazardous materials, have the potential to generate noise, vibration and odor impacts, and result in truck traffic. An industrial designation, with its associated characteristics, would not be appropriate within an existing low-density residential neighborhood. Therefore, staff does not recommend any of the Industrial General Plan land use designations.

Residential Designations:

There are five Residential General Plan land use designations, graduated based upon allowable density. The City's 2011 General Plan Vision was for the City to become strategically urban, placing higher residential densities within proximity of transit stations and major corridors, and maintaining the character of existing neighborhoods. Three of the Residential designations (Low-Medium, Medium and Urban) would not be appropriate for the subject property given the allowed density range for those designations (8.8-14.5, 14.629.9 and 30-70 units per net acre, respectively) and the surrounding neighborhood character, which is that of a large-lot single-family development set between Mission Boulevard and the eastern hills. The subject property is in a central location near the entrance to the neighborhood. In the 2011 General Plan Update, the City maintained the Residential-Low designation, and added a new designation, Hillside Residential, allowing subdivision into 20,000-square-foot lots or greater, when the property is not located within a subdivision. Either the Hillside Residential or Residential-Low land use designations could, therefore, be applied to the subject Property.

A Residential-Low designation would allow 2.3 to 8.7 dwelling units per acre on the site and uses compatible with a residential neighborhood, such as parks, schools, and religious institutions. A Hillside Residential designation would allow no further subdivision based upon the site's location within a subdivision. However, there is strong community opposition to residential development at any density on the site, and neither the original 1973 Planned District, nor the more recent subsequent Planned District approvals in 2012 and 2014, have permitted residential development of the property, although they do permit a use compatible with residences. Conditions of approval for the Precise Planned District and Conditional Use Permit to expand the existing swim and tennis club include a restriction against residential development and require maintenance of landscaping on the site. Furthermore, the subject property is centrally located in the neighborhood and provides a natural break in residential development from the steeper hillside to the east to the primary entrance to the neighborhood. Adding residential development in this location would replace open space that was originally intended to provide passive and active recreational opportunities to residents and, thus, would negatively affect the balance of uses and character of the neighborhood. Thus, staff does not recommend a Residential General Plan land use designation.

Open Space/Public Designations:

As previously mentioned, three of the eight Open Space/Public designations are only applicable to publicly-owned land. Two others, Hill Face and Hill (beyond ridgeline) have geographical restrictions for property above the Toe of the Hill preventing them from being feasibly applied to the subject property. This leaves Hillside (Measure A), General, and

Private Open Space.

Hillside Open Space (Measure A) applies to rural parcels lying easterly of Mission Boulevard up to the Toe of the Hill. Compatible uses include passive outdoor recreation, agriculture, and rural residential development at a density of no more than one to four units per acre, depending upon whether, and where, the land is constrained. Because Hillside Open Space permits only passive outdoor recreation, which would be incompatible with the existing and approved recreational facility and because it permits residential development on the site, staff does not recommend the Hillside Open Space (Measure A) General Plan land use designation.

General Open Space

The General Open Space land use designation was added to the General Plan in 2012 to recognize use of private property in a manner that allows for viable use of large-sized properties consistent with the open space character and constraints of individual properties. In July of 2012, various properties within the City ~~meeting the characteristics of the new designation~~ were redesignated as General Open Space.

The General Plan notes that the "General Open Space land use designation applies to private lands with an open space character that may be vacant or contain a previously-established use. Properties within this designation may be subject to constraints of soil instability, property access, water and flood levels, landslides, fault zones, or slopes in excess of 30 percent that restrict the use of the property with structures. Allowable uses for this designation include cemeteries, public facilities, recreation facilities, quasi-public facilities, one single-family home on a legally-established lot, grazing, and small-scale cultivation. New lots require a minimum of 20 acres. Undeveloped portions of property within the General Open Space designation should be set aside for conservation purposes."

The General Open Space designation would allow a recreation facility such as the existing swim and tennis club as it is proposed to be expanded. ~~Although the~~ The subject Property is not a new lot ~~in the sense that it is not being subdivided, it is 12.7 acres in size and like other property designated General Open Space in July 2012,~~ would not meet the 20-acre minimum size ~~contemplated for new General Open Space lots. Furthermore, this~~ designation would permit a residential use, ~~but such use would be prohibited by which is inconsistent with the approved Precise Plan on the site which prohibits residential uses and is not supported by staff for the reasons discussed in the analysis above. Many parcels designated General Open Space also have zoning that do not allow residences.~~ Therefore, staff does not recommend the General Open Space land use designation.

Private Open Space

The General Plan describes Private Open Space as a designation that "typically applies to private land set aside as open space within planned communities. Private open space uses may include natural areas, passive use areas, indoor and outdoor recreation facilities, clubhouses, community amenities, such as playgrounds and picnic areas, and some agricultural uses, such as livestock grazing, orchards, and small scale cultivation of crops. With the exception of ancillary structures related to the intended open space use, other types of development are not permitted in areas with this designation."

The Private Open Space designation was the subject of a citizen-sponsored initiative entitled "The Protect Fremont Private Open Space Initiative of 2012" (Initiative) (see full text below under Analysis of General Plan Goals and Policies). The Initiative, which prohibits a change in the land use designation of property from Private Open Space to another designation

without a vote of the people except under certain limited conditions specified below, was prepared by residents of the neighborhood surrounding the subject Property with the intent to apply it to the Property and other similar properties citywide in order to protect and preserve open space within the City of Fremont. The Initiative applies to contiguous areas of at least two acres in size that are designated as Private Open Space and not within a Transit Oriented Development overlay established by the General Plan. The City Council chose to unanimously approve the Initiative on July 17, 2012, rather than submit it to the voters. The private open space designation adopted by the City Council, however, did not include a minimum lot size of two acres.

On July 9, 2013, the City took action to redesignate properties within the City meeting the characteristics identified in the Initiative to Private Open Space. Properties that met the following criteria were redesignated as Private Open Space:

1. The property was located within a residential Planned District.
2. The property was set aside as part of a final approval for private open space use and was two or more contiguous acres.
3. The property was not within a TOD.

Additionally, the City considered issues such as public ownership, location above the Toe of the Hill, whether newer subdivisions had obtained final maps, and the shape and the configuration of the open space. As a result of the above analysis, the City redesignated the following four properties within Planned Developments to Private Open Space:

1. Meadows at Mission Hills HOA (Paseo Padre Parkway)
2. Rancho Coronado Garden HOA (Coronado Drive)
3. Southlake Mobile Home Park/Papillon Apartments (Auto Mall Parkway)
4. Vineyard Hills of Fremont HOA (Cougar Drive)

~~Like Unlike~~ the subject Property, the above properties are all ~~privately~~-owned by the HOAs developer of their respective subdivisions or landlord, and set aside as private open space for use only by community residents. Three contain recreational amenities. The Rancho Coronado Site contains a playground. The Vineyard site contains swim and tennis facilities, and the Southlake site contains a pond, sport courts, and pools, with through access from adjacent neighborhoods. None contain a private, commercial fitness club similar to that approved for the site by the City in 2014 ~~Thus, they are all similar to the subject Property in many ways.~~

Staff believes that the Private Open Space designation would be the most appropriate land use designation for the subject Property ~~because even though~~ it is ~~more-less~~ like the properties that are currently designated Private Open Space than the properties that are currently designated General Open Space or Commercial. While the property would be subject to the Initiative restrictions, staff has interpreted the Private Open Space designation ~~would still to~~ allow both the existing and the approved expanded use of the property, including its commercial aspect, even though the use is not ancillary to an intended open space use, and thus is contrary to the plain language of Private Open Space. The designation is not restricted to property owned by a homeowner association or similar entity and the property owner would still have viable economic use of the property.

In summary, the Private Open Space designation would not permit the existing swim and tennis club, and its approved expansion, ~~because it in a manner most consistent with the framework of the Property's approved development plans and conditions,~~ restricting residential and commercial uses, and the club is a commercial use. Thus even though it would maintaining the open space character of the Property, and would be the land use designation most compatible with the surrounding neighborhood, ~~and Staff~~

recommends that the Property be redesignated Private Open Space, such a designation does not conform to the commercial use of a portion of the Property.

Analysis of General Plan Goals and Policies

The proposed General Plan Amendment to redesignate the entire subject property from Kimber Study Area to Private Open Space would not be in conformance with the General Plan, and with the following goals and policies outlined in the Land Use Element:

Land Use Goal 2-1: City Form and Structure. A city transformed from an auto-oriented suburb into a distinctive community known for its walkable neighborhoods, dynamic city center, transit-oriented development at focused locations, attractive shopping and entertainment areas, thriving work places, and harmonious blending of the natural and built environments.

Analysis: The subject Property is immediately adjacent to the hills toward the east, is within a large-lot single-family neighborhood, and is characterized by an existing swim and tennis club planned for balanced expansion within a natural setting. Applying the Private Open Space General Plan land use designation would ~~strengthen-weaken~~ the fabric of the established neighborhood ~~while because it would not accommodate~~ing the approved expansion of the club, which is a commercial use not ancillary to an intended open space use, although it would preserveing open space and conserveing natural resources, and may be appropriate for the open space portion of the Property. ~~and providing for the longstanding use of the site to continue and expand.~~

Land Use Policy 2-3.1: Neighborhood Diversity. Sustain a diverse array of neighborhoods in Fremont, ranging from semi-rural hillside neighborhoods to dense urban neighborhoods that are oriented around transit stations. The positive elements that define each neighborhood should be protected and enhanced in the future.

Analysis: The Property's character and current and future approved uses are key elements in the design of the surrounding neighborhood of which it is a part. The Private Open Space General Plan land use designation on the club portion of the Property would make the proposed club expansion infeasible, as it is not clearly consistent with the club and lowers the Property value, and therefore would not ~~most~~ closely maintain the neighborhood's character.

Land Use Policy 2-3.2: Neighborhood Reinvestment. Encourage continued reinvestment in Fremont neighborhoods by the public and private sectors. While the basic land use pattern in many neighborhoods is already set and will be maintained, their improvement and evolution should be viewed as an important part of the City's sustainability initiatives.

Analysis: The Private Open Space General Plan land use designation would discourage reinvestment in the site, as the Property owner has made it clear that the approved project is not feasible if the entire Property is designated Private Open Space. ~~closely mirrors the approved development proposal on the site, representing a balanced reinvestment in the neighborhood while maintaining its basic land use pattern.~~

Land Use Policy 2-3.7: Green Neighborhoods. Integrate open space, parks, street trees, landscaping, and natural features into Fremont's neighborhoods to enhance their visual quality and improve access to nature and recreation. The maintenance and

improvement of Fremont's parks, greenbelts, medians, flood control channels, urban forest, and other "green" features should be seen as an important part of the City's efforts to address climate change by utilizing trees to sequester carbon from the atmosphere. The City strongly encourages tree planting on private property. Trees are recognized as contributing to the attractiveness and livability of the City. They are an effective buffering tool for adjoining land uses and will be an important part of Fremont's climate strategy.

Analysis: Maintaining and improving the private open space uses and character of the Property would support the City's efforts in this regard. The Property owner has stated that improving the open spaces of the Property would not be possible without improving the commercial club, which is not permitted under the Private Open Space designation.

Land Use Goal 2-6: Open Space. An open space "frame" around Fremont, complemented by local parks and natural areas, which together protect the City's natural resources, provide opportunities for recreation, enhance visual beauty, and shape the City's character.

Analysis: Designating the Property Private Open Space would not contribute to a network of open space, including private open space uses such as recreational facilities within established neighborhoods, that would enhance the City's character and meet the recreational needs of its residents while protecting the natural environment because the Property owner has made it clear that she would not undertake improvements to the commercial club if the Property is entirely designated Private Open Space because Staff has stated that commercial uses are incompatible with the Private Open Space designation and that designation lowers the Property value, making it hard to obtain construction financing. If the Property owner does not proceed with the approved improvements, she would not have to record the deed restriction that prohibits development on approximately two-thirds of the Property and prohibits subdivision. The deed restriction would support Land Use Goal 2-6.

Land Use Policy 2-6.8: Private Open Space. Generally require that areas more than one acre in size be dedicated as "open space" as part of a development project be formally designated as Open Space on the General Plan Land Use Map. Binding agreements with the City such as open space easements or deed restrictions should be used to permanently protect such areas. Vegetation in such areas should be managed consistently with the City's water conservation, fire protection, aesthetic, and sustainability goals.

Analysis: The Property, which was originally set aside during the 1973 subdivision of the neighborhood as commercial and open space, but is now proposed to be designated Private Open Space, as if it were maintained for the community rather than open to the general public. ~~and~~ The binding agreements with respect to deed restrictions and vegetation management have been made conditions of the previous entitlement for the swim and tennis club expansion, but the owner has stated that she would not proceed with those improvements, and would therefore not have to abide by the conditions of approval, if the entire Property is designated Private Open Space.

Land Use Policy 2-6.9A: The Protect Fremont Private Open Space Initiative of 2012.

- A. Land designated as private open space, either by the general plan, through zoning, or through approval as part of a planned development, shall not have its open space use changed to another use except under one of the following two circumstances:
1. Through approval of a ballot measure by the voters of Fremont at a regular municipal election, or

2. Through the approval of the change by the Fremont City Council, after prior review by the Fremont Planning Commission and receipt of its recommendation, and based on the City Council findings that failure to redesignate the land would result in the taking of private property for public use without just compensation. Any such approval shall be limited to the minimum amount of development required to avoid a taking of private property.
- B. The findings required under subsection A.2 of this policy must be supported by clear and convincing evidence.
 - C. The determinations of the City Council under subsection A.2 of this policy must be unanimous.
 - D. This policy shall only apply to contiguous areas of at least two acres in size that are designated as private open space and are not within a transit oriented development overlay area as defined by the General Plan.
 - E. Within one year of the passage of this measure, the land use designations in the generalplan, zoning, and planned development plans within the City shall be brought into conformity in accordance with the provisions of this policy.

Analysis: The Protect Fremont Private Open Space Initiative of 2012, which was brought forward by neighbors of the Property, would apply to the site should it be redesignated to Private Open Space. The development approvals for the project site reflect uses that would not be compatible with the proposed designation, as this designation restricts commercial uses. The portion of the site to be set aside as open space would be compatible with the Private Open Space designation.

FISCAL IMPACT: None.

ENVIRONMENTAL REVIEW: On November 20, 2012, a Final Environmental Impact Report (EIR) (SCH#2012052065) was certified for the proposed expansion of the swim and tennis club. None of the conditions requiring a subsequent or supplemental EIR stated in Section 15162 of the CEQA Guidelines are present, in that the General Plan designation was contemplated in the previous EIR, no changes to the approved development project are proposed herein that would result in a greater environmental impact, and no new or additional impacts would therefore occur as a result of this action to redesignate the site to Private Open Space and to delete the references to the Kimber Study Area. Therefore, no further environmental review is required.

PUBLIC NOTICE AND COMMENT:

Community Meeting and Open City Hall

The City held a community meeting at the Fremont Community Center in Central Park on March 17, 2016. The City mailed flyers to each of the properties within original Planned District P-73-1, as well as within 300 feet of the project site at 10 East Las Palmas Avenue. Approximately 120 people were in attendance. After a short presentation by staff, members of the public turned in speaker cards and were called upon to comment. The community members present who submitted cards to speak expressed a strong preference for Private Open Space as the appropriate land use designation for the site.

The City received letters from the owner's legal and planning representatives, and from Save Kimber Park, who was also a party to the previous lawsuit between the Property owner and the City. These are attached as Informational Enclosures 1 through 3, numbered in the

order in which they were received. Save Kimber Park supports Private Open Space, the Property owner's legal representative supports General Commercial on the west and General Open Space on the east, and the Property owner's planner supports General Open Space for the entirety of the site.

Additional written correspondence from the general public received at the meeting and thereafter is included as Informational Enclosure 4. Following the community meeting, the City provided an opportunity for community members to participate via an online forum—"Open City Hall." The City received 1,153 responses through the end of the forum on April 21, 2016. See Informational Enclosure 5 for a summary of Open City Hall responses.

ATTACHMENTS:

- Draft Resolution- Kimber Park
- ExhibitA_General Plan Text Amendment
- ExhibitB_General Plan Map Amendment
- Informational1_December 2015 Letter From Save Kimber Park
- Informational2_March 2016 Letter From Dwane Kennedy
- Informational3_April 01 2016 Letter From Andrew Sabey
- Informational4_Additional Correspondence
- Informational5_Open City Hall Summary
- Informational6_April 14 2016 Letter From Andrew Sabey
- Informational7_May 2016 Letter From Stuart Flashman
- Informational8_2016 04 14 Draft Planning Commission Minutes
- Informational9_May 24,2016 Letter from Andrew Sabey

RECOMMENDATION:

1. Hold public hearing.
2. Find, based on the City's own independent judgment, that no further environmental review is required pursuant to the California Environmental Quality Act (CEQA) as a Final Environmental Impact Report (EIR) (SCH#2012052065) was previously certified and none of the conditions requiring a subsequent or supplemental EIR stated in Section 15162 of the CEQA Guidelines are present.
3. Find that the General Plan Amendment is consistent with the General Plan and, where the amendment is to the text of the General Plan, ~~it~~ but is not consistent with the other policies and chapters in that it would be consistent with the goals and policies of the Land Use Element as described in this staff report.
4. Find that the General Plan Amendment does not furthers the public interest, convenience and general welfare of the City by allowing the existing swim and tennis club, and its approved expansion, in a manner most consistent with the framework of the property's approved development plans and conditions, restricting residential and commercial uses (which is a portion of the Property's current and proposed use), and maintaining the property with an open space character consistent with the surrounding neighborhood.
5. Do not a Adopt a resolution approving the General Plan Amendment redesignating the property at 10 East Las Palmas Avenue from Kimber Study Area to Private Open Space as shown on Exhibit "B" and to remove General Plan references to the Kimber Study Area as shown on Exhibit "A".

EXHIBIT B: Private Open Space Parcels With Development Compared to the Property

APN	Address	GP	County Assessor's Use Code	Development
525-1298-6-1* 525-1250-63* 525-1653-77	Durham Rd.	POS	Mobile Home Park Parcel with Improvements	Southlake Mobile Home Park: 2 pools, hot tub, 80 sq. ft. building, 1,000 sq. ft. building, 3,800 sq. ft. building, 5,900 sq. ft. building, basketball court, 6 volleyball courts, swing set
543-417-60	33783 Whimbrel Rd.	POS	Planned Development Tract, Common Area or Use ("Common Area")	Parking lot, 3 tennis courts, pool, 2,900 sq. ft. building, playground**
543-394-147	35867 Fremont Blvd.	POS	Common Area	Paved path
501-80-210	4567 Balboa Way	POS	Common Area	Paved path, playground
501-566-29-2	Roselle Commons	POS	Common Area	Paved path
525-1662-54	Bernie Ln.	POS	Common Area	Paved path
525-1662-55	Bernie Ln.	POS	Common Area	Paved path, wooden bridge, rock landscaping
525-1662-90 525-1662-56	Bernie Ln.	POS	Common Area	Paved path, wooden bridge
525-1662-89	Invaldi Ct.	POS	Common Area	Paved path
525-1681-1*	Railroad Ave.	POS	Common Area	Playground, parking lot, half basketball court, 900 sq. ft. building
513-738-20 513-738-58 513-738-19* 513-738-9 513-738-17*	Beretta Dr.	POS	Common Area	Playground, picnic benches
519-1704-4 519-1706-32 519-1706-2	Ram Ct.	POS	Common Area	Tennis court, picnic area, 3,100 sq. ft. building
519-1726-30*	Avalon Heights Terrace	POS	Common Area	Paved path with dumpsters
525-312-50	10 East Las Palmas Ave.	K-S	Other Recreational Activity	23,100 square foot commercial building, surface parking, paved paths, tennis courts

* These APNs have more than one General Plan designation in addition to POS.

** "Playground" refers to play equipment that includes a slide.

EXHIBIT C: Property Changed from POS to Another Designation

APN	Owner	Address	GP	County Assessor's Use Code	Description
513-401-21	Roman Catholic Bishop of Oakland	43266 Mission Blvd.	GOS	Church	Cemetery
519-1410-11	Masuru & Kyoko Hatsushi	Crystalline Dr.	GOS	Rural property in transition to a higher use	Vacant parcel; possible development potential for one home; numerous land constraints (fault zone)
507-356-2	Fred & Joyce Okimoto	38289 Ford Lane	GOS	Single family residential homes used as such	2 sets of railroad tracks, residential home
507-356-3	Roxanne & Michael Franco	38290 Ford Lane	GOS	Single family residential homes used as such	Residential home
519-1080-51-1	Fremont Cemetery Corporation	48730 Warm Springs Blvd.	GOS	Cemetery	Cemetery
519-1610-14	John & Teresa Shilling	2076 Estates Terrace	OS HF	Rural property used for agriculture, 10+ acres	One existing home; change to be consistent with Measure T
519-1699-12	Andy & Sylvia Luong	2024 Estates Terrace	OS HF	Rural property used for agriculture, 10+ acres	Vacant parcel; development potential of 1 home; change to be consistent with Measure T
519-1704-2	First American Title Guaranty Co.	Mission Blvd.	OS RCP	Planned development tract, common area or use	Undeveloped remnant parcel (about 8,222 square feet) between Mission Boulevard, Lynx Drive, and Antelope Drive

EXHIBIT C: Property Changed from POS to Another Designation

513-502-3	Ohlone Indian Tribe	Washington Blvd.	GOS	Cemetery	Cemetery
525-685-1-3	R&S Bros. Cemetery Corp.	41001 Chapel Way	GOS	Cemetery	Cemetery
501-814-72	Roman Catholic Bishop of Oakland	Central Ave.	GOS	Cemetery	Cemetery
501-1426-12-4	Centerville Presbyterian Church	37218 Fremont Blvd.	GOS	Cemetery	Cemetery
537-601-16-2	San Francisco Radio Assets LLC	Thornton Ave.	OS RCP	Rural property with significant commercial use	Radio tower;
525-375-6	Terry & Shamim Ritter	Sabercat Rd.	GOS	Vacant residential land, zoned 4 units or less	Vacant parcel; possible development potential for one home; land constraints (steep slopes)
525-375-5-2	Sabercat Holdings LLC	43450 Sabercat Rd.	GOS	Rural property in transition to a higher use	Vacant parcel; possible development potential for one home; land constraints (steep slopes)
513-714-5	John Luu	43450 Sabercat Rd.	GOS	Rural property in transition to a higher use (portion of economic unit)	One existing home
513-714-4	John Luu	43450 Sabercat Rd.	GOS	Rural property in transition to a higher use (portion of economic unit)	Vacant parcel; possible development potential for one home; land constraints (steep slopes)

EXHIBIT C: Property Changed from POS to Another Designation

525-1390-6-13	PG&E Co. 135-1-64-E-2	Fremont Blvd.	OS RCP	Property owned by a public utility	Bushes and other plants in rows, shed and planting supplies, two transmission towers
525-1390-6-12	PG&E Co. 135-1-64-E-1	43970 Fremont Blvd.	OS RCP	Property owned by a public utility	Transmission tower
525-1390-6-11	City of Fremont	Fremont Blvd.	OS RCP	Exempt Public Agency	Multiple transmission towers
513-614-3-5	Roman Catholic Bishop of Oakland	Mission Blvd.	GOS	Cemetery	Cemetery
519-1196-166	NormanBrown & Susan Ormsby	Gable Drive	GOS	Vacant residential land, zoned for 4 units or less	Trees and bushes

EXHIBIT D: Clarification of Issues Raised by Numerous Commenters

1. A General Plan Land Use Designation and Zoning Are Not the Same

A General Plan land use designation and zoning are not the same thing. The General Plan land use designation is more general than the zoning and therefore usually allows more uses and larger amounts of development than the zoning. The zoning can never be less restrictive than the General Plan land use designation, and often is much more restrictive. While a General Plan designation typically does not consider the specifics of a particular parcel, zoning does.

For example, from the 1970s to 2011, the property at 10 East Las Palmas Avenue (the “Property”) had a General Plan land use designation of Low-Density Residential. That General Plan designation allows “multiple zoning districts,” including residential and zoning for uses compatible with residences, such as schools, child care centers, parks, and religious facilities. During the same period in time, the Property’s zoning allowed a commercial swim and tennis club and a private park, both of which are facilities that are compatible with residential development. Accordingly, even though the zoning did not allow residential uses, it conformed to the Low-Density Residential General Plan land use designation.

2. The City Council Action Would Not Change the Property’s Zoning

The City Council is being asked to consider the General Plan land use designation that best conforms to the Property’s zoning. Accordingly, regardless of the General Plan land use designation the City Council chooses, it would not change the Property’s zoning.

Since 2014, the Property has been zoned to allow an up to 24,000 square foot swim and tennis club, tennis courts, parking, and landscaping. As a condition of constructing a new club, the owner must enter into a landscape agreement and restrict development on two-thirds of the Property. This would remain the case no matter what the General Plan land use designation is.

3. The Property Has Never Been Designated “Private Open Space” and Has Always Been Partially Zoned For A Commercial Recreation Facility

The Property has never been designated Private Open Space (“POS”) except for when the City illegally designated the Property POS in 2012. As noted above, the Property has, except for a short period of time, always been designated Low-Density Residential.

The map that many commenters mention that shows areas of “Private Open Space” is a map that was not adopted as a formal approval nor recorded. Nevertheless, the zoning for the Property, which is the planned development approval, allowed only the development of a commercial swim and tennis club on approximately 4.5 acres of the Property. The zoning for the Property has never permitted residential development. Contrary to what many commenters have written, a part of the Property has always been zoned for a commercial recreational facility and associated uses. A successful development on part of the Property was (and still is) needed to finance the maintenance of the open space on the remainder of the Property since no

homeowners association was established to do so. The open space would be protected by the deed restriction that is a condition of approval of the proposed new swim and tennis club.

4. A General Plan Land Use Designation Other Than POS Would Not Permit Residential Uses On the Property

As explained above, what a person can and cannot construct on a particular parcel is governed by the zoning. Accordingly, if the City Council designated the Property General Open Space or General Commercial, the zoning would continue to prohibit residential development. Any residential development would require a new planned development district, which would require environmental analysis and would be subject to public review. A particular General Plan land use designation thus is not needed to prevent residential development on the Property.

5. The Property Owner Was Not On Notice Of Unrecorded Promises Made By The Original Developer

Many comments state that the current owner, Fremont Mission Hills, LLC ("FMH") had notice that the Property could not ever be developed, but this is not the case. When a person purchases property, she examines the recorded deed, the chain of title, and the property's general plan land use designation and zoning. A purchaser does not examine old staff reports showing an idea for a property that was never approved. A purchaser also does not ask surrounding property owners if anyone ever made any promises to them about the subject property that did not result in a land use entitlement or recorded document.

When FMH purchased the Property, it saw that the past owner had valid title to the Property, the Property's General Plan designation was Low-Density Residential, and the Property's zoning allowed a commercial swim and tennis club and park. It thus reasonably believed that the Property would be treated like other similarly zoned Property located in a residential neighborhood. FMH had no idea the original developer of the Kimber Park neighborhood promised residents the entire Property would be a park for their exclusive use. Such a promise is akin to a mother remarking to a daughter that she will inherit her childhood home, but then deciding to sell the home rather than leave it to her daughter. The daughter cannot knock on the door of the new owners of the home and demand that the new owner vacate the house because forty years earlier, her mother promised that she would inherit it. And the new owners would not be expected to know her mother ever made such a promise. The same principle applies here. FMH should not be held accountable for statements that a prior developer made, particularly because they are unrecorded and the City did not act on those statements when approving the Property's original planned development permit.

Although not required to by the California Environmental Quality Act or another law, and although not required to by any promise the original property owner may have made, FMH has agreed to record a deed restriction limiting development on approximately two-thirds of the Property and restricting subdivision if it can redevelop the current swim and tennis club. A recorded deed restriction would give notice to future potential buyers of the Property that a large portion of it must remain open space and the Property cannot be subdivided into separate parcels, which is much more protection for the open space portion of the Property than given by the original developer's approvals.

CCLerk

From: Robin Chen <rchen95134@yahoo.com>
Sent: Tuesday, June 07, 2016 3:29 PM
To: Bill Harrison; Lily Mei; Vinnie Bacon; Suzanne Chan; Rick Jones
Cc: CCLerk; Marian Wu
Subject: please save Kimber Park as open space

Dear consult members,

I am a long time resident of kimber park neighborhood , please save kimber park as an open space as it was originally.

And please don't be fooled by the developer's (Jim Chu) claim that Chinese American has difficult doing business (see the link below in a Chinese newspaper), I am also a Chinese American, this is simply a greedy developer trying to make a few bucks without regard to the environment, and this has nothing to do with race at all.

<http://www.worldjournal.com/3908549/article-%E8%8F%AF%E8%A3%94%E6%89%80%E8%B3%BC%E5%B1%B1%E6%9E%97%E5%9C%B0-%E7%88%AD%E8%AD%B05%E5%B9%B4-5%E6%9C%88%E8%A1%A8%E6%B1%BA/>

Sincerely yours,
Shen-yung Chen