

**CITY COUNCIL MEETING
TUESDAY, JUNE 30, 2015
COUNCIL CHAMBERS – 7 :00 P.M.**

**Correspondence Received From Sherman Lewis on
June 25, 26, 29 and 30, 2015**

ITEM #2

- 2. Approval of Final Tract Map 8058 Related to an Approved Tentative Tract Map for a Five-Lot Subdivision on a Parcel Totaling 1.15 Acres Located between Hayward Boulevard and Hillcrest Avenue, Approximately 500 Feet West of Tribune Avenue; R.V. Esau Development (Applicant/Owner)**

Miriam Lens

From: Sherman Lewis
Sent: Thursday, June 25, 2015 9:41 AM
To: Francisco Zermeno; Al Mendall; Greg Jones; Marvin Peixoto; Elisa Marquez; Sara Lamnin; Barbara Halliday; Fran David; Miriam Lens
Subject: Tract 8058 and the Golden Oak Path
Attachments: The Golden Oak Path.pdf

--

Sherman Lewis
Professor Emeritus, CSU Hayward
President, Hayward Area Planning Association www.bayviewvillage.us

Tentative Tract Map 8058 Golden Oak II and the Golden Oak Path

Top bullet points:

- Council is being asked to preserve the path we already have rather than a less convenient one.
- People in the Home Hillcrest neighborhood have used this path for over 40 years with no problems.
- The path provides convenient access to the Cal State University campus to walk to work, classes, or entertainment at Cal State, walk dogs on campus, or catch a bus.
- The path is part of our quality of life and enhances the amenity, property values, and marketability of the neighborhood.
- One of our neighbors has a modest income and cannot afford a car; they appreciate a shorter walk to the bus.
- The path will not interfere with development. Development can proceed much as planned and will be more successful with the path.
- The path is substantially the same as other paths approved by the City.
- The Hayward General Plan and Hillside Design Guidelines strongly support such paths.
- Civil engineering experts refute claims of increased development costs and delay.
- The path does not and would not cross the adjacent private street.
- There are no liability problems due to the legal doctrine of path immunity and homeowner insurance.
- The path is not too steep or dangerous, proven by decades of use.
- Claims about paths causing riff raff to commit crimes and invade privacy are wrong.

Council is scheduled to approve Tract 8058 Golden Oak, Phase II on June 30. I can't attend the meeting, and it is probably better that I don't.

The path has become a great controversy over a small issue, a choice between two paths, one that works well and the other that works poorly. Council appears to have two choices, approve the map as is, or require that a narrow private easement on the west side be replaced by a wider public or semi-public easement on the east side.

There is a third way, but requires you to think it through to understand it. All signs point to a lack of an adequate study of a path requested by the Planning Commission many months ago. As a third option, you can approve the map with a semi-public path, creating vesting for the developer in an adjusted final map. You can have a period of time to define how the public path would work, explain the options to OHHA and people on Home and Hillcrest, and decide, with staff and neighborhood input, if you want the path. The developer may appeal your decision at the end of the period of time if he wishes. He will have a choice between a vested map that is not exactly what he wants but has an increase in value created by vesting. Or he can come back and take a chance that Council will approve the path anyway. Council will be able to do what you can't do June 30, which is to consider a well-defined path option and get input.

Procedural issues

On October 2, 2014, the Planning Commission asked for a study of a path. As of this writing eight months later on June 24, there is no study. I expect a staff report to be available this Friday, which will not allow time to develop a response. A staff report should deal with the issues discussed in this report.

The lack of a staff report has led to a difficult debate in the neighborhood, which has usually been framed as a path or no path, when the real choice is between two different paths. Furthermore, there has been no consultation with the Home Hillcrest neighborhood, which thus lacks information about how a semi-public path would work and what the real choice is.

The lack of information probably will put Council in a difficult position. Most of the testimony you are likely to hear will not be about the real issue, and Council meetings are an impossible venue for long discussions and the time it takes to give people the right information and find out what they think. You would need to ask speakers from Home and Hillcrest, which do you prefer, the easement on the west side or a semi-public path on the east side, and they won't be able to answer the question knowledgeably. In fact, Council itself does not have the right information, which is what this report is all about. Please take the time to check out anything I say.

Other procedural issues and history are discussed below.

Substantive: policy and politics

Path vs. Path

Path One: The Easement

Basically, I don't think we should have to have licenses to walk.

The developer proposes that "responsible" people who live on Home and Hillcrest could get licenses to use the easement. They would have to meet legal responsibilities such as indemnification to protect the homeowners. However, there is no known way to achieve indemnification; there are no precedents for two reasons: Paths generally don't cause problems. The immunity of public and private paths from litigation and the automatic inclusion of path liability in homeowners insurance meets the need. It may, however, be possible to sign a release of liability even when there is no liability.

The developer proposes a combination lock on each end of the path. The location is 165 feet further from common access than the east side and comes out that much further down Hayward Blvd. and further from the campus sidewalk on the other side of the street.

The developer is willing to let more people use it, but his vetting, licensing, and indemnification requirements are cumbersome. They could be negotiated and the locking system could be made easier to use. It is

There are no precedents I know of elsewhere in the world as to the workability of this idea, and it is less convenient than walking on an open path in a better alignment. The idea burdens people walking on a path more than other pedestrians based on an assumption that paths attract riffraff more than streets and sidewalks. Path users are no different from other pedestrians. We do not require special licenses of other pedestrians, or have them agree to not smoke or not have an open flame, get insured, or require them to open a lock to use a street, or change a sidewalk to an inconvenient alignment, all to prevent unlawful access to the street.

The easement is still inferior to a six foot wide public path on the east side that comes out better on Hayward Blvd. It is better than no path, if only because it could be reformed in the future, leaving only its poor location as a problem. However, we could do a good path now.

Path Two: A realigned public path of some kind

The historic path could be realigned consistent with development and to better serve the two houses proposed for Hillcrest and the neighborhood. Given the lack of a staff report and, possibly, some willingness of Council get real information, Council could either delay the approval of the map or approve the map with an east side path and allowing the developer to appeal the decision after more details could be worked out to Council's satisfaction. A design needs to balance the needs of the developer with the desirability of a convenient path.

The private easement would be abandoned. The City would require dedication of a public easement on the east side of the property. The length of the path from Hayward Blvd. to the street is 90 feet and the elevation gain is 11 feet equal to 12 percent grade. From the street to Hillcrest is 225 feet and the gain is 59 feet, for a slope of 26%. The slope has never been a problem for use. A six foot wide path will not interfere with developing five units. The path would connect Hillcrest to Hayward Blvd.; it would not exit on the private road.

Design of a semi-public path

I should not have to be writing this; the staff should have been presenting this as a possibility months ago. The idea deserves more discussion. Design of the lot area is discussed below under “cost of revising the tract map.”

The path would come down the east side, cross the private street, and then between the outfall and the side fencing on the lot 5. The path would continue as grass with a dirt tread worn in by use. The path would not provide access to private property and would not create a fire hazard. It has no hiding places, and the entire length would be visible from Hayward Blvd. and Hillcrest Ave.

There would be V gates on Hillcrest and just above the private road extension, which would discourage non-residents from using the path. A V gate would prevent motorbike use of the path. A V gate has a wide flat V-shaped fixed fence, opposite which is a gate which swings within the V, so the user pushes the gate to the far side, steps into the V, and swings the gate back.

The path would have controlled access and could be closed for cause. The doors would be sufficient to deter use but allow visibility of the path. They would be easily openable by a tap in number code and be reprogrammed if there were a need. The usual status would be open, but if problems occurred, the path could be temporarily closed to non-residents. All residents on Home and Hillcrest would be authorized unless there is some reason to do otherwise. Some informal procedure could involve the Golden Oak Association (GAO) and OHHA acting jointly or alone, and would be based on some evidence, but a balance of evidence or preponderance of evidence. If there were persistent problems, OHHA and/or GAO could request the city to end open public use until requested otherwise, so that only residents could use it. The path would have signs at both ends explaining how it works and with rules of use and risk of closure.

Even though the path has not had problems in decades of use, the above design can provide protection if problems should occur.

Cost of revising the tract map

The developer says that revising the tract map would cause excessive cost, delay, and family bankruptcy. I take this very seriously.

To verify this, I consulted with a civil engineer with many years of experience with tract maps in Hayward, whom I have identified to city staff. He said, “I have great experience as a civil engineer with tract maps. I just finished a 25 lot map in Hayward. I have reviewed Tentative Tract 8058, Golden Oak, Phase II. It is not labeled with "Vesting" and therefore does not have vesting. It shows no utilities or grading, so, unless there are other maps I've not seen, the project will need to do this detailed design work before breaking ground. Going from a Tentative Map to a Final Map is usually a trivial amount of work assuming no big changes. In the case of removing a three foot easement on one side and putting in a public path on the other, it would take a firm like mine at most a week to do it. Given modern software, it is much easier to do than in the past. If the firm has the files for the tentative, the cost for the final might run about \$3,000 to \$4,000.”

The developer has yet to complete other Final Map work and grading and utilities design. Upgrading the project to include a path is a relatively small part of this work easily executed by civil engineers. None of this should be taken to indicate lack of sympathy with the developer's financial

situation. The problem is to be realistic about what needs to be done. Development is risky and the developer has made choices that may have increased that risk. People seeking to preserve their path are not the real cause of any problems.

Another message from my civil engineer:

"Sherman, thanks for sending this over. I have reviewed the Tentative Tract Map 8058 that you sent over. Your question is about how easy is it to revise this tentative map? The tentative map is exactly what the name implies. It is "tentative". This means that you have preliminary approval to move forward from the City to process the subdivision and minor changes are still allowed as you tighten up the design. To formally create the new lots, the developer would be required to create several technical documents. This includes detailed construction documents and a Final Tract Map. If the swapping of the trail from one side or the other is desired, as long as the City does not have any major objections or deem the change would be significant enough to warrant going back to Planning Commission, is quite easy. During the Final Tract Map stage, you can make this simple adjustment while this document is created. This would mainly be some office time and should take about a day to accomplish, while the overall map is being worked on.

"The Tentative Map that you forwarded me is quite bare in terms of details. It is only a Tentative Map and not a Vesting Tentative Map. There are no details about grading, utilities, future buildings, etc. All of this seems to have not been developed and still needs to do so. This is where the time and costs for the developer really come into play. Therefore this is a perfect time to make this change. No real design seems to have been started yet and in my opinion the change of the trail would really be a trivial matter to accomplish. If the Tentative Map had been designed with a full build out, include full design for grading, utilities and houses, then I could see the change being more significant, but since this appears to not have happened as of yet, incorporating the move of the trail could easily be incorporated into the next design steps.

"As you know, we are very active in Hayward and have historically done dozens of subdivisions in the City and currently have two major ones in process, both about 35 lots. I have a long history with the City and its staff. Knowing how they operate, I see this shift of a trail from one side of the property to the other to be a minor change that if done while the next design steps are started, the change would be a minimal amount of work and very little or no time impacts to the overall project."

Tract map revised

To further see if it was easy to amend the map, I did a new map myself: First, I needed to work out the dimensions horizontally on horizontal three cross sections. (The vertical dimensions were not affected.) The developer believes he needs a total lot width of 80 feet, which is achieved.

Path tract map revised for 6 foot path

		feet						path	total
	easement	setback	footprint	setback	setback	footprint	setback		
top, lots 1 and 2									
current	3.00	5.42	67.11	8.42	8.42	67.11	8.42	0.00	167.90
proposed	0.00	8.25	65.96	8.25	8.25	65.96	5.25	6.00	167.90
loss of footprint width			1.15		1.15				

Note: the setback on the left includes the easement for an 8.42 easement. This idea is used on the right to keep the house 5.245 in from the path fence.

middle of lots 3 and 4

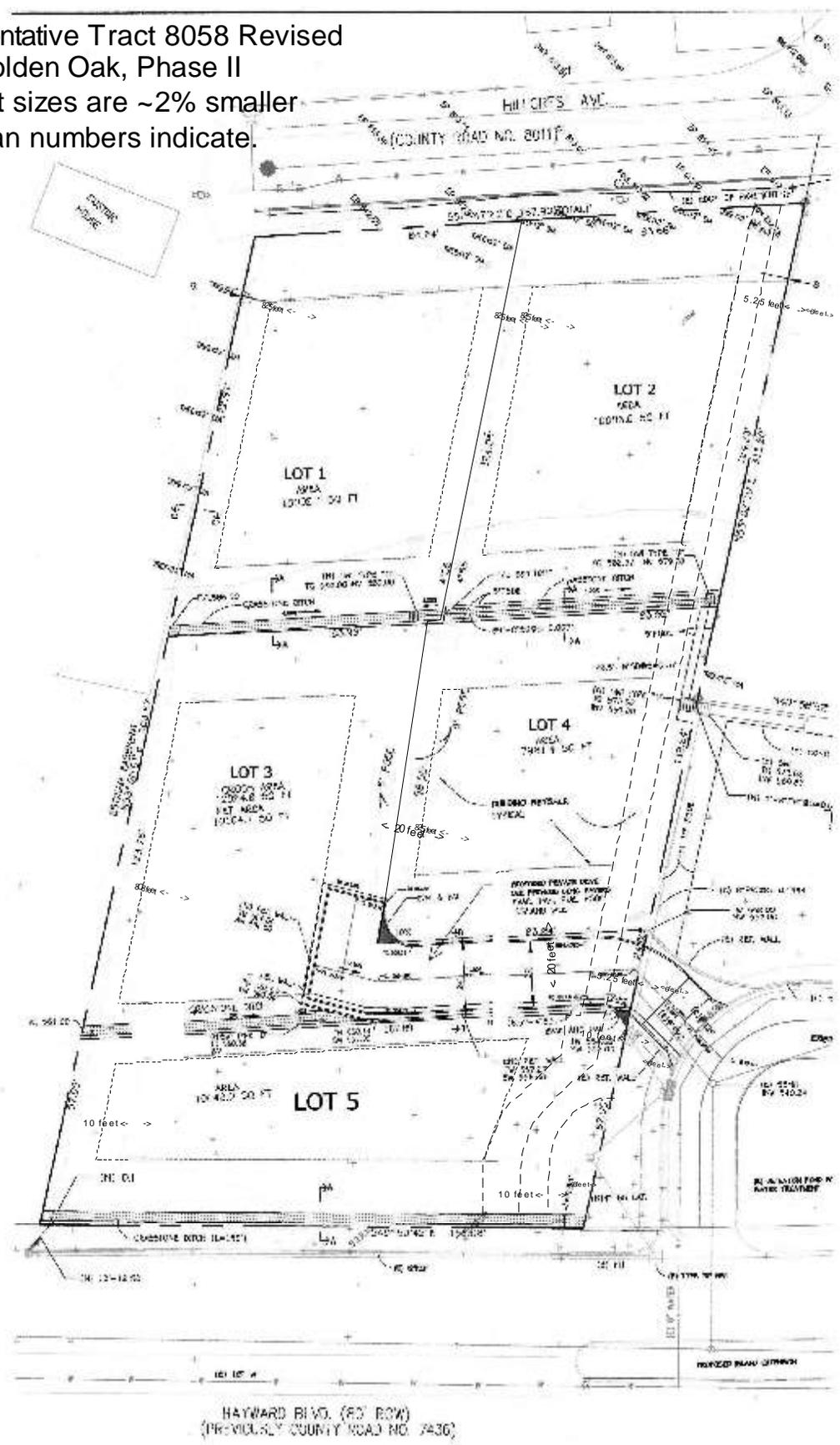
current	3.00	8.40	52.40	20.00	8.42	67.11	8.42	0.00	167.75
proposed	0.00	8.57	52.40	20.00	8.42	67.11	5.25	6.00	167.75
loss of footprint width			0.00				0.00		

middle of lot 5

		setback	footprint	setback		path	outfall	
current	3.00	17.00	127.89	2.00		0.00	18.00	167.89
proposed	0.00	10.00	123.89	10.00		6.00	18.00	167.89

The map below is not exact but attempts to use the above dimensions.

Tentative Tract 8058 Revised
Golden Oak, Phase II
Lot sizes are ~2% smaller
than numbers indicate.



If the map can be easily and quickly revised, there is no forestalling, there is no financial pressure. . It redraws some lines but has no impact on the ability to build five houses, and, for that matter, has very little impact on the tentative map itself. It absolutely does not disrupt the development, whatsoever. The Council should get expert advice to verify my findings.

Paths Increase Property Value

We believe a path will contribute to the value of the homes proposed for the property.

Experts at East Bay Parks, LSA (land use consultants), an appraiser, and Berkeley realtors report that paths, generally help property values.

East Bay Parks: “District parks, open space, and trails, by increasing the quality of life in the East Bay, enhance property values of homes throughout the District. In addition, they directly increase property values of home adjacent to the parklands due to the views and immediate access provided.”

“Two primary methodological approaches have been employed, including multi-variant regression analysis, which uses statistical analysis to isolate and measure the impact of parks, open space, and trails on property values, and survey-based assessment, which draws conclusions based on the opinions of landowners and real estate professionals.” P. 4

“Surveys of property owners and real estate professionals, however, have established that trails generally increase a property’s value, whether adjacent or nearby.” P. 14

From East Bay Regional Park District, *Quantifying Our Quality of Live; An Economic Analysis of the East Bay’s Unique Environment*, www.ebparks.org.

The impact of trails on property values is extremely important for the trails movement. The Rails-to-Trails Conservancy has done extensive research on this issue as well as the related liability issues mentioned above. The Rails to Trails Conservancy at <http://www.railstotrails.org/search?q=property+values> cites 30 studies on the issue. “A large majority of trail opponents find that their fears about the trail never materialize, and numerous studies refute that rail-trails increase crime, lower property values or introduce new liability claims. In fact, adjacent residents almost invariably become enthusiastic trail users and supporters within a few years of a trail’s creation.” <http://www.railstotrails.org/build-trails/trail-building-toolbox/outreach/working-with-opposition-and-neighbors/>

In its publication, *Economic Benefits of Trails and Greenways*, Trail-to-Trails reports great economic benefits from the low millions of dollars to hundreds of millions from trails. *Economic Benefits...* reports that trails “have been shown to bolster property values and make adjacent properties easier to sell.” The report gives the examples of Central Park in New York City and the Mountain Bay Trail in Wisconsin. Rails to Trails reports that the Farmington Heritage Canal Trail and Hampshire and Hamden Canal Trail have had a positive effect on home values in north central Connecticut. “Donald [president of the Farmington Trails Council] notes there has even been a noticeable boost in housing prices near the trail.” (Spring 2007, pp. 18-19)

A 2002 survey by the national associations of realtors and home builders found that trails ranked second on a list of 18 community amenities. Also, a housing developer in North Carolina added \$5,000 to the price of 40 homes by a greenway, and those homes were the first to sell. Other research documents that paths create an amenity that increases or has no effect on housing value. A report on property values and public safety by Colorado State Parks found that real estate agents believed that trails were an amenity helping sell property, and frequently used trail access in advertising. Most agents thought that of two otherwise very similar homes, the one adjacent to a trail would sell for more. Most homeowners thought a trail would make a home easier to sell. Pluralities thought the trail increased the value of the home, were influenced to buy a home by a trail, and that there were no public safety problems. Police officers also believed trails were safe and had no

particular crime problems. A small part of the sample reported perceived downsides, but there was no evidence that trails had any negative effect on any homes. “The effect of a trail on the neighboring property is beneficial, rather than detrimental.” (Colorado p. 7)

More criminal activity occurs using public streets using vehicles. Based on decades of experience, the path benefits the neighborhood. We don’t have lockable gates on streets or paths; they encumber use and are not needed.

The Golden Oak Path will help property values for good reasons. The path property is under half a mile from Cal State Hayward, recreation and bus transit. If gas prices keep going up, the path will make reaching the bus stop more important. The path would facilitate the new homeowners become part of the Home-Hillcrest neighborhood, one of the best in Hayward; otherwise three of the homes will be socially isolated. The people of Home and Hillcrest have created, from what was once a low income area in the 1960s, one of the highest property value areas in the City of Hayward.

Neighborhood Paths Elsewhere

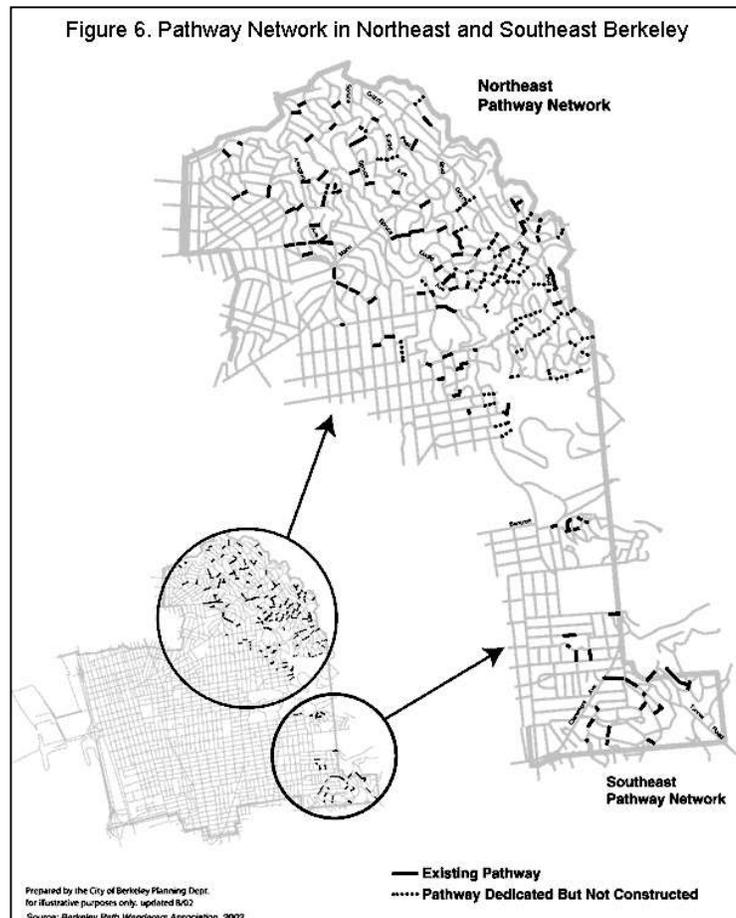
Paths elsewhere have no important privacy problems and increase property values according to the people I talked to. Many of these paths get only occasional use.

Berkeley

Berkeley has about 135 paths between houses, many similar to the one I propose (See map, “Figure 6,” from City of Berkeley, Office of Transportation, “Pedestrian Pathways in Berkeley,” <http://www.ci.berkeley.ca.us/transportation/maps/walkingpaths.html>, accessed March 31, 2007). The Berkeley website reports that Berkeley has a unique network of pedestrian pathways. These pathways provide pedestrian access in the hill areas between streets, quiet resting places, panoramic viewpoints, and a critical evacuation alternative to the often narrow and winding streets in the hills. Some paths are City-owned and others are owned by the surrounding property owners.

“Pedestrian Pathways in Berkeley,”

<http://www.ci.berkeley.ca.us/transportation/maps/walkingpaths.html>, accessed March 31, 2007). The Berkeley website reports that Berkeley has a unique network of pedestrian pathways. These pathways provide pedestrian access in the hill areas between streets, quiet resting places, panoramic viewpoints, and a critical evacuation alternative to the often narrow and winding streets in the hills. Some paths are City-owned and others are owned by the surrounding property owners.



Elsewhere

Oakland and Piedmont have paths. The Greenbrook area of Danville has private greenbelt and paths next to houses used by the public. Gale Ranch in San Ramon has greenbelt and trails.

Elsewhere in the Bay Area, new home developments with prices often over \$1,000,000

College Community Plan, Berkeley Style

"One of Berkeley's romantic treasures, Orchard Lane is the formal pedestrian entrance to the Panoramic Hill residential neighborhood. The walk and Classical staircase, complete with pillars, balustrades, concrete benches, and an overhanging bower of trees, was built by Warren Cheney, who developed Panoramic Hill. In 1904 Cheney, the former editor of the literary magazine *The Californian*, purchased the land. In 1909 he commissioned Henry Atkins to design the stairway that still links residences with the University and town and other walkways that climb the hill."

—Berkeley Historical Plaque Project 1998

advertise trails near houses. Alamo Creek by Shapell in San Ramon, for example, has a website with a site plan showing houses and trails, and a picture of a trail. Many access points to the greenway go by houses. Gale Ranch 1 and 2 have trails and greenways. When I called the sales office for The Pointe, part of Gale Ranch, the person said trails added to the amenity of the project. Its website proclaims "Parks, hiking trails and schools are also just a short walk away." The website of Montecito at Windermere by Lennar, with houses \$987,000 and up, lists trails as an amenity.

Many homes in the hills of the East Bay have adjacent paths and high property values.

Leslee Alexander, *The Effect of Greenways on Property Values and Public Safety*. A joint Study by The Conservation Fund and Colorado State Parks, State Trails Program., November 1994 and March, 1995

Rails-Trails Conservancy, *Economic Benefits of Trails and Greenways*, www.trailsandgreenways.org, downloaded March 2007.

Hayward General Plan and zoning authority

General Plan

The Circulation Element of the General Plan strongly supports paths of this type: see pages 3-10 to 11, 3-14, 3-17 to 18, and 3-24 to 26. The Plan supports more efficient access to bus service, walking for recreation, exercise, and commuting, walking as an alternative to driving, pathways between residences and other destinations, short cuts through blocks, improving walking around the Cal State Hayward campus, and integration of transportation and land use planning. The Plan supports Smart Growth in street design in coordination with sidewalks and explains how blocks patterns can help or hinder walking. The Plan calls for a sidewalk width of six feet. The Plan calls for promoting alternative transportation modes and considering the needs of pedestrians.

Ordinances

Article 3 Subdivision Ordinance SEC. 10-3.000 CITATION AND AUTHORITY. This article shall be known and may be cited as the Subdivision Ordinance of the City of Hayward and is adopted pursuant to the Subdivision Map Act (Title 7, Division 2, Government Code) as a "local ordinance" as said term is used in said Act, and is supplemental to the provisions thereof. ...

SEC. 10-3.010 PURPOSE. The purpose of this article is as follows: ...

g. To provide sidewalks and, where needed, pedestrian ways, biking paths, and equestrian and hiking trails for the safety, convenience, and enjoyment of the residents of new developments.

The zoning is RSB6, Residential Single Family with 6,000 square feet minimum lot size and 60 feet minimum lot width. Front and back yard minimum setbacks are 20 feet, and side yard is a minimum of 5 feet, a maximum of 10 feet, and, in between, 10 percent of the lot width. A path can easily be accommodated.

Hillside Design Guidelines

The following uses Part I of the City handout. Page 5 says, “7. Pedestrian access should be facilitated by providing an attractive, safe, and convenient network of walkways throughout the development site. Connections to public facilities (e.g., school site, park site, and open space trails) should be provided where applicable.” Page 5 has a drawing of a path between houses labeled “yes” and one without a path labeled “no.” The guidelines support having a path.

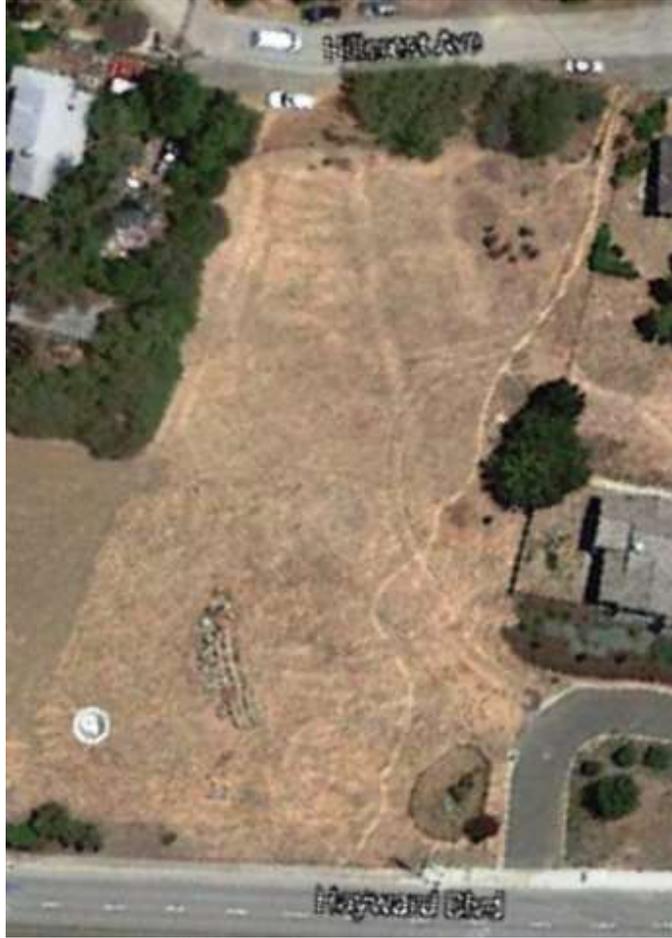
City policies could not possibly be clearer in supporting a path. It is not clear why staff ignored them.

Historic Use

Historically, people living on Home Ave. and Hillcrest Ave, have had use of a path from Hillcrest to Hayward Blvd. across a vacant lot, APN parcel 081D165500802. I have used the path since I moved here in 1971. We chose to live on Hillcrest so I could walk to work, which I did until 2004. We have years of pictures of the path using Google Earth and City property map GIS. Every year the grass grows and a new tread is walked in. Every year, the grass is mowed, and the tread is worn in again. Decades of successful use are strong arguments to keep the path.

Every year people use the trail with no particular safety hazards and no complaints that we know of. Here are the latest pictures:





Lower photo is from 2007

How much use is enough?

Relatively few people use and would use the path, and some people value having it there without necessarily using it. It will help property values a bit, and continue to connect the neighborhood to the campus. I myself can't use it much due to a bad heel. The question then is to balance amount of use with all the other considerations. How many people have to use a path? It obviously gets enough use to wear in a tread every year for decades. The question is similar to how many people have to use a road? We don't close low-use roads--or paths. Is there some disamenity to others? The evidence, despite claims to the contrary, is that paths do not have adverse effects on those who don't use them. Many neighborhood paths in Berkeley get little use, but are highly valued. See Paths Increase Property Values above.

Developer's claims about people who walk on paths

...this path would create a public nuisance, allow criminal activity, undue liability and in general be detrimental to the neighborhood. ... What I am against is letting every Tom, Dick and Harry have unfettered access to the path and my clients homes. My clients need to know that only responsible people are using this path and not one of the five known sex offenders in the area. ... unfettered access to undesirable elements. ... I was against the riffraff not the neighbors. ... allow undesirable elements access to this pathway ... the path would create an unacceptable loss of privacy. Any bedroom or bath located adjacent to the path would allow strangers to come extremely close to the homeowners and would cause extreme hardship for the occupants as they would be unable to keep windows open and still enjoy a feeling of privacy and safety. The path would allow for potential criminal activity including direct access to the new homes, drug and alcohol use by minors and night time sleeping locations for transients.

Paths in general are not a source of these problems. "Riffraff" have much more access to houses using streets and sidewalks than by paths.

I grew up in Oakland and went to school in Berkeley and I know exactly what occurs on these paths.

The developer's experience growing up seems to have shaped his opinions on paths. The developer clarified his concerns in an email to me. A path from Pinewood Rd. up to Fairlane Drive worked well, but one from Contra Costa Court down to Broadway Terrace worked poorly: too close to houses, and attracting drinking, drug use and other illegal activity. These are fair points, but the setbacks proposed for the path would be the same on the east side as now planned for the west side, and the kinds of problem cited have never occurred on the existing path (and do not occur on most paths).

There can be no denying how strongly the developer feels about paths. If the City agrees with him, then it should change the city's policies and close all paths. To the limited extent we have problems, they come from bad actors driving in on streets we don't close.

Procedure for approving a path

The City approves paths like it approves streets, and has already approved paths elsewhere in the city. Examples include the path in the Highlands from Hayward Blvd. to beyond Skyline Dr. and the path off of Ziele Creek Dr. into Garin Park.

The issue before the City is not about creating a new path but about which path is best.

Planning Commission: Study a path

If I had known that the study would not be forthcoming on time, I would have appealed the Planning Commission decision on the basis that the study would not be forthcoming. However, I was naïve and thought the study would be made on time.

Relevant Planning Commission Minutes for Oct. 2, 2014:

Development Services Director Rizk noted that there was still an unresolved matter regarding the potential public trail easement along the eastern boundary of the project site which still had to cross through an adjacent property that was not owned by the applicant, in order for this path to fully connect with Hayward Boulevard. He stated that if the public trail easement along the eastern boundary of the property is approved, then this easement would become the City's liability.

Chair McDermott offered a motion to approve the project with direction that the applicant work with staff to add conditions of approval to preserve the views from Hillcrest Avenue of current residents by taking into consideration the height of the homes proposed in the project, the placement of trees, and other landscaping issues; and, that staff further study the feasibility of having a public trail easement along the eastern boundary of the property. Commissioner Enders seconded the motion.

Commissioner Lavelle did not favor the motion on the floor. She stated that staff's recommendation was the approval of a tentative tract map and that the request for building the development was not being proposed yet. She commented that any decisions about a future path along the eastern boundary could be considered later on in the process once the development plans were more defined adding that this would need the approval of the Planning Director or the Planning Commission.

The motion passed with the following vote:

AYES: Commissioners Enders, Trivedi, Parso; Chair McDermott

NOES: Commissioners Faria and Lavelle

ABSENT: Commissioner Loché

ABSTAIN: None

Politics

Rational policy argument at best plays a small role in politics. Council might think that the path is a good idea, but, with developer and some neighborhood opposition, vote to close it anyway. It would be the wrong policy decision but the right political decision, possible using some incomplete or biased staff report as cover.

The claim is made that "...it is a Sherman matter only!" The first question is whether it is an OHHA matter or a Home Hillcrest matter. I consider it to be a Home Hillcrest matter. Already in support of a public path are myself, Alison Lewis, Joy Rowan, Bruce Barrett, Kathy Lord, Lora Lowman, Mark Lowman, Sal Etu, Soane Etu, and Boots Bond. Additional email:

From: Lodema Epperson <lodema@epperson.com>

To: Sherman Lewis <sherman@csuhayward.us>

I remember that path, I use it to get home after taking the bus to the campus from BART. I didn't have to do extra walking up the hill toward my home. I'm very much in favor of having a path there. Even though I don't use it anymore, but other can.

Lodema"

Two more owners on Hillcrest are in favor of a locked path with access for Home and Hillcrest only. I am seeking clarification of their idea and am willing to support it as better than the easement; it is a version of the semi-public path concept.

That makes 13 people. I suspect there are more who would support once they understood the issue as a choice between two paths.

I am aware of four owners who oppose the path as a violation of private property rights. Two of them have used the path. I suspect there are more who would oppose due to property rights or fear of student parking.

I suspect there are some who would oppose it if presented one way, and support if presented another way. I encourage Council to take the time to get a deeper than usual understanding. The path is a small matter but the decision will last a long time.

A second political issue is whether Council feels comfortable allowing a developer's claimed financial situation preempt its authority to make an informed decision. As suggested, there is a way for Council to meet the developer's need for a final map while getting the time it needs for a path proposal and neighborhood input. Or you can set a precedent for developers to claim financial distress to get approvals.

A third political issue involves the role of the Planning Commission. The lack of a timely staff report after many months shows, I think, a lack of respect for the Commission. Council has power over the Commission and thus has responsibility to decide if staff can ignore its decisions.

Red herrings, etc.

Red herring: something misleading that is used to stop people from noticing or thinking about contrary information

Other procedural issues and history

One claim is that path proponents did not raise the issue in a timely way and now it is too late, too last minute. The claim is that there has been ample time to reach a settlement. I think it is fair to say the issue has been raised at every opportunity for years and it was not possible to settle, so the Council needs to think.

On Nov. 8, 2006, I talked to Arlyne Camire and emailed her to put HAPA on the notice list for hill developments and requested support for a path.

11/8/2006 email:

Specifically I would appreciate Planning support for a public pedestrian easement that has existed *de facto* since at least 1971 connecting Hillcrest with Hayward Blvd. Given the elevations and road layout of the area, this path is a great convenience connecting the neighborhood community to the university. It can be narrow; I would guess 6 feet would be plenty. The side fencing would use the fencing for the residential lots. The ends would be gated to discourage motorcycles but allow walked bicycles. Foot traffic would hold down much of the weeds. The city could occasionally rent a goat for other maintenance, my preferred solution, but less smelly alternatives should also be considered.

My hope and expectation would be that this path would not reduce the number of lots. I would like to avoid litigation for an easement. I'm hoping Planning will see enough public benefit that you will support the idea and find a way to make it work.

This email was never answered. I quote it because I have never wavered from advocating an adjusted path, and have never received any substantive comment from the city about it.

On Feb. 14, 2007, I emailed Arlyne Camire about the development application by Dung Chong Lau and Wai Yow Lau, the previous owners. She replied the City had records only of

complete applications, so evidently any application of theirs was not complete. She also said that Public Works was completing research on pedestrian paths.

In January 2007 a developer purchased the path property and has made numerous claims against having a path.

The path is more convenient, more pleasant, and safer than using a longer street route with traffic, or a narrow, locked, double-gated private easement on the far side.

I requested the City require a path in an email to the City on 11/8/2006 and never received an answer. Other email to staff on the issue went unanswered. I expected the path to be recognized and realigned to help the development.

Litigation

The path will help the property value of the development, so the opposition surprised me. Only when that failed was I forced to go to court as a last resort. The developer opposed any path and I litigated to at least save a private path. I talked to the developer on the phone on January 22, 2007, to explain my interest in a public path. He presented problems a path would cause for his development. I understood he would submit a subdivision map in mid-February, which I would then study to see how a path could be accommodated. On January 25, the developer recorded the Grant Deed, completing his purchase. On Jan. 28 I used the path. On February 1, when I went to use the path, I found a chain-link fence across it near Hillcrest Ave. I interpreted this fence to be hostile to my use of the path and concluded that the developer was not interested in discussion or negotiation. Instead of talking about the map and trying to work things out, he blocked the use of my easement.

Because I have used the path for so long, I have a legal right to keep using it. I have many aerial photos over the years showing a path, and three eyewitnesses are willing to say they saw me using it. I used the path openly, regularly, unhindered by fences or “no trespassing” signs, and without permission of the owner. There are more legal details I could go into, but basically under California law I have quiet title to a prescriptive easement.

I had, thus, no choice but to go to court. If I had not taken action, I would have risked losing my easement. I conferred at length with an attorney, Michael Brown of Alameda, a specialist in property law. As I had assumed all along, I verified in detail every aspect of the law and the facts and concluded I was on solid legal grounds. On February 26 Mr. Brown filed my complaint in Alameda County Superior Court. A lis pendens was recorded in the county property records, notifying title searchers that litigation is pending on the property. A protracted and expensive pretrial period led to a settlement just before trial.

I now have a right to an inconvenient, difficult-to-use narrow private easement on the west side recorded on the property, which I accepted on advice of attorney or face an even more expensive trial. I hoped to get a path in a better location that everyone can use.

Next

The next opportunity to request recognition of the historic path was to the Planning Commission, which decided to ask staff for a study of the path. The next step is for a staff report and then a decision by the City Council.

In October and November 2010, based on a planning postcard, I emailed John Nguyen to get the map fixed. I never heard back from him on this but I've been told it has been fixed but not seen the fixed map. On Sept. 29, 2014 I emailed him advocating that the tract map include a public path, and he thanked me for my comments and the map was not changed.

In October the Planning Commission decision indicated there would be a report. I became concerned that there would be too little time to deal with the issues in a report. On Oct. 2, 2014, I requested of staff a chance to review the staff report, with additional email to Carl Emura, Arlyne Camire, and others on 12/9/2014, 12/10/2014, 5/11/2015, . I tried to get the report released, but it turned out the report did not exist.

About a number of neighbors emailed complaints about not being informed about the development.

On May 28 David Rizk visited the site with me and Joy Rowan, a Hillcrest resident. I appreciate his taking the time, but did not get a sense of what his concerns were, except for liability and steepness.

The Golden Oak Association

The Golden Oak Association is the home owners association for Golden Oak Phase I. (The name on the letterhead is not Golden Oaks Homeowners Association.) It sent letters to the City on October 8, 2014 and Dec. 16, 2014. They were signed by Bob Selders, President, whose company, Brisbane Holdings, is developing vacant lots at 2670 and 2680 Tribune. The other board members were Sukhwinder Singh of 2688/2690 Tribune, a duplex) and Ron Esau. The Home Owners were Mike Azamet, Jagjit Singh, Ray Ching (2599 Hillcrest), and Brisbane Holdings II. The City's Hayward Map Property Identification can identify owners. Mike Azamet is probably Sayed Azamey of 2650 Tribune and Jagjit Singh is probably Jagjit Sandhu of 2660 Tribune. The area has six owners and 2615 Hillcrest owned by Jeff Tuttle, VCO Properties LLC was not listed. The letter makes six claims:

- *An easement for this same purpose was previously granted and recorded to the benefit of the individual requesting this new easement and others, providing direct access from Hillcrest Ave to Hayward Blvd.*

The easement is not for the same purpose. The easement serves a short list of licensees in an inconvenient way on a poor alignment on three foot width. The existing path serves and would hopefully continue to serve if not closed by the City, the public, particularly on Home and Hillcrest Aves., on a convenient alignment, with no encumbering procedures.

- *The requested new easement is duplicative and does not connect to Hayward Blvd.*

The private easement would be abandoned so there would be no duplication. A previous proposal did not connect, but the current proposal does connect to Hayward Blvd, similar to how the path is used now.

- *The new access way will require a person to enter the existing Golden Oaks I, private street and the private property of the owner of Lot No. 7 at 2650 Tribune Ave., in order to gain access to Hayward Blvd.*

As stated, this is no longer true.

- *Neither the HOA nor owner of Lot no. 7 have an obligation or inclination to grant an easement over common area, and Lot 7.*

No easement is being sought.

- *Providing a public access will significantly increase the potential use of the access way increasing security risks to adjacent parcels, and increasing liability to the City and HOA.*

There is no reason to think that use will increase; use is likely to continue much as it has for last 44 years. There is no reason to think that the security risk would increase for the same reason. Paths have less security risk than streets. There is no liability due to path immunity, documented elsewhere. Are these claims speculative and unsubstantiated fear mongering?

- *Providing this public access way will increase HOA maintenance costs and liability insurance with no benefit to the Association.*

Such access is not being proposed. Costs and liability would not change from the current situation.

Sherman Lewis, sherman@csuhayward.us, 510-538-3692

“...they would have to use a private driveway to access Hayward Blvd.

“The private driveway belongs to the first phase and public access is not allowed and signs will be posted accordingly. As such there is no means by which a person can reach Hayward Blvd. without either trespassing on the private homeowner’s property or by use of the private driveway. Any permissive use of the private driveway or a portion of a homeowner’s lot for public access, recreational or otherwise, would constitute an unacceptable level of civil liability for which the homeowner’s and the homeowner’s association would be ultimately liable.”

The Golden Oak I development has driveways off the street. The path would not use the driveways even with permission. The development has a private street that looks like, and has been used like, a public street for several years. It is used without permission like an ordinary street with no problems. Preventing public use would require a gate and fencing. Signs are not yet posted at this time.

In any event, the path would not use the street either; it would be entirely on Golden Oak Phase II.

Liability and insurance

The developer claims “The path would also create extreme and undue civil liability to the individual homeowners, the homeowner association and other parties.”

According to expert reports, insurance agents and lawyers, there is no such extra liability for the developer, the homeowner, a homeowners association, or the owner of a private easement. There is no reason to believe this path has any unusual general liability issues. Liability in this case refers to bodily injury and property damage to third parties occurring on a private property, while the path is a public path protected by path immunity.

“Pathway immunity” for public paths is based on California Government Code Section 831.4 and a litany of cases interpreting the statute. Two pertinent cases are Farnham v. City of Los Angeles (1998) 68 Cal.App.4th 1097 and Amberger-Warren v. City of Piedmont (2006) 143 Cal.App.4th 1074. Few suits are filed; none are won. My attorney, Michael Brown, sent a letter to the City Attorney on the issue. The City has more liability for streets and sidewalks.

The path creates no liability for property owners of HOAs. The City with its current paths, East Bay Parks, and HARD have many paths with no liability problems.

For general information, go to Hugh Morris, *Rail-Trails and Liability; A Primer on Trail-Related Liability Issues & Risk Management Techniques*, Rails-to-Trails Conservancy in cooperation with National Park Service, Rivers, Trails and Conservation Assistance Program, September 2000, available on the Rails-to-Trails website.

With or without a path, the developer should have Commercial General Liability (CGL) insurance, although some developers may have only Builders Risk if that is all the First Deed lender requires. Assuming the developer has CGL, he is insured for the path as much as for the whole property.

For the homeowner, standard insurance covers paths along with everything else at no extra cost. Paths exist in many older, higher-income hill areas of the East Bay. Homes next to paths routinely get insurance all over the Bay Area. Paths don’t make any difference; they have no risk different from a sidewalk or driveway. The liability is included in a normal policy at a normal

premium. Insurance agents I talked to had a hard time understanding the question because it is such a non-issue, and said paths made no difference.

For the homeowners association, affordable insurance is also available. Greenbrook in Danville, for example, has extensive public use of private greenbelt and trails and no liability issues. Greenbrook signs the area as private property, limiting its exposure to insignificance, comparable to other liability for the overall project. The agent in Foster City, who sells this insurance and is familiar with Greenbrook, would like to sell some insurance to the developer.

Student parking

Students don't park on Home and Hillcrest. It is too inconvenient and likely to remain so after restrictions are implemented on Parkside and Rainbow. Also, parking is very limited. Nevertheless, some residents are afraid of student parking. The path, however, is not really related to student parking. Students can park with or without a path. The path is not the cause of student parking. In either case, parking restrictions may be wanted.

Pre-sold lots?

The developer says that he has sold the lots and more specifically that he has pre-sold the lots. A pre-sale is not a true sale, but a promise to sell after the final map is approved. With the path, lots 1 and 2 lose a few square feet, lots 3 and 4 remain the same size, and lot 5, a very long lot, gets a few feet shorter. The lots are still large enough for large houses and well over the 6,000 square foot minimum zoning. Hillside Design Guidelines seem to require "stepped or pier and grade beam foundations" so no grading is needed except under the house and between the house and the street. I talked to Brad Switzer, a local construction consultant with over 25 years' experience, about the buildability of these lots and based on the information I gave him, he thought they were buildable.

The path makes no substantial changes in how development would proceed; it is just too small to matter.

A pre-buyer has no reason not to purchase a tweaked lot which is 3 feet further north; their alternative is not to get a lot they basically want. If not, the lot can be sold for a similar or higher value, given that the lots really exist. Selling lots lacking approval is another way to put pressure on Council to bail out the developer without considering detailed alternatives than can work for both the developer and the path. I do sympathize with the developer's situation. He has worked with staff to meet city requirements and has made a significant investment of funds to get this far. My proposal respects his need for a final map.

The Loan

The developer takes two positions on his loan from the bank. 1) Current banking regulations required the loan to be paid by Jun3 1. 2) The bank is allowing time for map recordation and close of escrow. The second is probably true, and the City should ask the bank what it means by "allowing time." According to my civil engineer, there is little difference in the time needed for file a final map from the tentative, or tweaking the tentative for a final with a better path. Check it out.

Privacy

Developer "...the path would create an unacceptable loss of privacy. Any bedroom or bath located adjacent to the path would allow strangers to come extremely close to the homeowners and would cause extreme hardship for the occupants as they would be unable to keep windows open and still enjoy a feeling of privacy and safety. The path would allow for potential criminal activity including direct access to the new homes, drug and alcohol use by minors and night time sleeping locations for transients."

A house wall too close to a path would be a problem. However, the path can have the same setbacks on the east as the current map has on the west, as shown in the tentative map above.

The path will not cause any loss of privacy compared to a sidewalk, just as the existing path has not intruded on the privacy of the homes now next to the path. One side of three houses would be next to a path by the property line with windows above path level. A person on the path would be behind a six foot fence and looking up. The views are not to the east but in other directions.

The drawing in the Hillside Design Guidelines shows no windows on the slope side of the house. The top house, if City hillside guidelines are followed, would have bedrooms on the lower level, where the wall next to the path would be partly below grade and have no view. The bedroom windows would logically face south, with only a wall facing the path. The middle house would have bedrooms on the second floor, out of view from the path.

People using the path, like people using the sidewalk, are going from A to B and do not go staring into people's houses. Talk on the path is unlikely to be heard inside a house because most people are walking along or not talking. To be heard inside, one would have to raise one's voice much louder than needed to be heard by another path user close by. In practice, people rarely talk to each other on the path because they rarely go use the path at the same time. If going up are too out of breath to talk, and if going down have to watch their step, and in either case are going single file because it is narrow and not conducive to talking. Occasionally, people meeting on the path will have a brief conversation and go on their way. There is no difference between the path and the street in front or an adjacent yard.

The path would be fenced from the houses and would not provide "direct access." Unauthorized use cannot be prevented, but the same is true for entry walks, driveways, and yards. The path has much less direct access than the front walk and driveway at the front of the house. Since the houses will be fenced from the path, there is less loss of privacy than from a sidewalk to the front door, which allows "strangers" to get much closer than the path. Access to the front of the house could, then, cause more "extreme hardship" than a fenced-off path. An intruder could jump the fence, but could more easily approach a house from the street.

Paths, in fact, are associated with less social problems because of "natural surveillance," that is, the social network of friendship among neighbors keeps a better eye on things than a car-dominated environment. The people using the path will be Home-Hillcrest neighbors, not strangers, based on decades of experience with this path. Our social network helps stop crime, and what little crime we have is committed by outsiders coming into the neighborhood by car. Criminals mostly use cars due to the difficulty of carrying stolen objects, kidnaped persons, and dead bodies while walking and riding a bus.

Drug and alcohol use by minors does not occur on this path. When I talked to the police they didn't know where the path was and had no knowledge of any problems. Drug and alcohol use is more likely to occur on a street, not on a steep narrow path where it can be so easily discovered and reported.

The path will not provide night time sleeping locations for transients because it is steep and narrow and they would be too easily disturbed by path users. Transients sleep in places where they are not likely to be discovered, such as the trees south of the north end of Bunker Hill, the trees on the north west side of the Bee Quarry, Garin-Dry Creek Park, the open space above Foothill south of Grove Way, and the rail right of way south of the Hayward Amtrak station. Any knowledgeable homeless person would dismiss the path as completely unacceptable.

Obstacles to walking, erosion

Developer: "Due to the required infrastructure including the detention pond which will be located at the southeast corner of the subdivision, the drainage V ditches and storm water inlets, a

large engineered retaining wall at the private driveways and other site improvements, any individual using the path would be forced to navigate all those obstacles as well as the slippery slope while walking straight downward, not at an angle...”

Path users have already beaten in a path around the fence of the detention pond. Ditches and storm inlets do not cause problems. Going straight down the slope is easy.

The slope is hardly ever slippery and is not too steep. I used it for decades with no problems except occasionally muddy shoes. There is no erosion problem due to clay soils and grass cover. Most rain drains off the east side of the path and causes no problems for use. After long or heavy rain the path can be slippery in spots for up to a day.

Attractive nuisance, illegal crossing

Developer: “By creating a recreational pathway or trail on private property all parties involved would be creating an attractive nuisance which would be effectively condoning and encouraging the illegal crossing of Hayward Blvd. without benefit of pedestrian cross walks or traffic controls.”

Paths do not create nuisances any more than sidewalks or streets do. The dirt path going uphill to a small neighborhood is not and has never been an attractive nuisance. East Bay Parks, HARD, and neighborhoods have paths and trails that are not nuisances. The path is in plain sight of Hayward Blvd. and from Hillcrest.

The path provides access to Hayward Blvd., but so does the private street of the Golden Oak Phase I for its residents and so would development of the path property. Other developments along Hayward Blvd. and Parkside Dr. mean that a few dozens of pedestrians are crossing every day. There are marked crossings available at Tribune and Campus Drive for safety when wanted, but also no reported problems from other crossings.

According to the Vehicle Code and Hayward Police Department, it is legal to cross Hayward Blvd. if not close to a crosswalk. Jaywalking, which is illegal, is crossing mid-block between intersections controlled by a traffic signal. It applies to city areas with a short distance between intersections and where pedestrians can comply without much inconvenience.

Crossing Hayward Blvd. from the path to the campus is not jaywalking. There is another section of the Vehicle Code which applies, section 21954 (a), which says “Every pedestrian upon a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway so near as to constitute an immediate hazard.” It is legal to walk across roads.

If a child

Developer: “...if child utilizes the path and then attempts to cross Hayward Blvd. and is struck and killed by a motorist all parties involved will be subjected to civil action. ...the cost of human life is too great a price to pay for this trail.”

Does that mean if a child from the development is killed, the cost is too high to pay? Does it mean if a child from a house on the private street uses it to cross Hayward Blvd., etc., the developer, the homeowner, and possibly others will be sued? Housing already built along Hayward Blvd. could also have a child who tries to cross the road. Following this logic, the property should not be developed and the existing housing should be torn down.

There is no real risk of civil action based on the existence of a path, street, or house in the normal course of events, or else homeowners insurance would be prohibitively expensive. Property owners do not have liability for pedestrians crossing a public street. People living on the north side of Hayward Blvd. frequently cross it to reach the campus, and there is no liability to property owners there. On the campus side across from the path property is a paved cross walk from

Hayward Blvd. to the East Loop Road. If this were a liability problem for the campus it would have been closed long ago, along with other entrances from Hayward Blvd.

Cost and necessity

Developer: "...a path would be costly and unnecessary. The actual cost to the property owner for the square footage of the path is \$69,840.66 which includes purchase and improvement costs. This cost would be born [sic] by a small builder for something which is not necessary. The time it takes to use public streets and proper cross walks for anyone located on Hone Ave. or Hillcrest Ave. is a matter of as little as three minutes and a maximum of seven minutes additional walking time to reach the same destination as would be accomplished by using this path."

The cost of the property to the owner should not be prorated to an easement or public works requirements of any kind required by the City. A path allows land for profitable development and a path is consistent with other city conditions for approval. The city has required path dedications in other developments.

City requirements often have expense and are often simply desirable rather than absolutely necessary. The path is desirable, an amenity, a convenience, part of the quality of life of the neighborhood. The path is shorter, safer and more pleasant than walking a longer distance along a street with traffic.

Fire and weeds

There has never been a fire problem with the field and the path across it. Over the years, disking has suppressed the fire danger. Development would eliminate the danger.

ADA requirements

Some may claim that ADA requirements would make the path too expensive and spacious to allow development on the property.

ADA does not apply to this path. Application of ADA requirements would make it impossible to develop the property. I consulted with ADA experts at East Bay Regional Parks and at LSA [Julie Bondurandt, LSA Assoc. 2215 Fifth Street Berkeley, CA 94710 540-7331 (540-7344 fax)]. Title 24 ADA compliance is not required because it is a recreational route, not a direct commute route, and because the damage to the environment and use of the property would be destroyed if ADA requirements for urban development were implemented. ADA is not rigid; it balances access with environmental values. I was also given the name of Michael Jones, Alta Planning. 540-5008 x100, but was unable to reach him.

10,000 square foot lots

Developer: "The lot width is important because the parcel is located in the Hayward Wildland Interface Zone which is described as all property located east of "D" Street and north of Mission Blvd. New residential construction in which a new lot is formed by application of parcel or tentative map, must be at least 10,000 square feet if any portion of the proposed lot has a slope of 25% or greater. In this case that application is mandatory..."

The Hillside Design & Urban/Wildlife Interface Guidelines have guidelines, not mandatory requirements. Page 5 says "Where new single family lots will be allowed on steep terrain over 25% slope, larger lot sizes (minimum 10,000 square feet) and wider setbacks between structures (minimum 20 feet) should be provided." The tract map has an 8,000 square foot lot and much smaller setbacks, so it seems this guideline is not being strictly applied. Guidelines are not mandatory, and the revised tract map would have lots 1 and 2 just a little under 10,000 square feet on 26% slope.

Personal attacks

I have something against the developer or the development. I don't support property rights.

All false.

I am a stubborn and obsessive.

All too true. I need to get a life.

Documents available:

Complaint and related legal documents; Cal. Real Estate 3D Easements pp. 15-120 to 15-135 filling a banker box.

APN map, Grant Deed, Deed of Trust, Chandra Grant Deed, and Lau Grant deed relating to Hillcrest Ave.

Personal photographs, City of Hayward aerial photographs, Google aerial photograph.

Letter from Ron Esau to Michael Brown, 2/9/07

Letter from Ron Esau to Rob Simpson, 3/23/07

Letter from Byron Date, attorney, to Ron Esau, no date, probably early Feb. 2007.

Path petition signed by neighbors

Experts Consulted:

Civil engineers, architects, property insurance agents/underwriters for contractors, homeowners, and homeowner associations, property insurance lawyers, appraisers of East Bay hill area houses, police, HARD and EBRPD trail staff, Rails-to-Trails staff.

Note: Berkeley path map on web is also fuzzy.

Sherman Lewis

June 2015

Miriam Lens

From: Sherman Lewis
Sent: Thursday, June 25, 2015 4:57 PM
To: Francisco Zermeno; Al Mendall; Greg Jones; Marvin Peixoto; Elisa Marquez; Sara Lamnin; Barbara Halliday; Fran David; Miriam Lens
Subject: The Path

Please take this item off the consent calendar and discuss the issues involved. I've worked hard on this issue for years and many people are interested in it. It may be a small issue but it is a serious one for us and deserves attention.

So far no staff report is on the web site.

--
Sherman Lewis
Professor Emeritus, Cal State Hayward
President, Hayward Area Planning Association

www.bayviewvillage.us

Miriam Lens

From: Sherman Lewis
Sent: Friday, June 26, 2015 8:57 PM
To: Francisco Zermeno; Al Mendall; Greg Jones; Marvin Peixoto; Elisa Marquez; Sara Lamnin; Barbara Halliday; Fran David; Miriam Lens
Cc: David Rizk
Subject: the path

----- Forwarded Message -----

Subject: Re: the path
Date: Fri, 26 Jun 2015 18:28:54 -0600
From: Michael S. Brown
To: Sherman Lewis
CC: Elsie Matsuno

Sherman,

I reviewed portions of the June 20,2015 memorandum to the city council by the development services director. Like occurred earlier on the city's liability concern , notwithstanding immunity, the director is raising another non-issue by asserting the path condition would constitute condemnation since the developer objects.

This assertion is patently incorrect in that the city subdivision ordinance and the Subdivision Map Act authorize the city to provide for a path as a condition of the subdivision approval where the path is for the convenience, safety and enjoyment of the residents.

As I mentioned , my partner and I are not in the office today so we are not in a position to provide you the specific citations to refute the condemnation argument but the city attorney knows the law as shown by his response to me on the immunity issue. It appears the director has no compunction in using hyperbole to obfuscate the law.

Please apprise me if you wish for me to contact again the city attorney to rectify the misstatement. As an alternative , you can raise the problem with the director directly who should correct the record with an amendment to the above-referenced memorandum.

Michael

Sent from my iPad

On Jun 25, 2015, at 11:51 PM, Sherman Lewis wrote:

This staff report in the pdf just came out for a Council meeting Tues at 7pm. The path report was requested in October and delayed till now even though staff knew the important points long ago. There is probably too little time to deal with all the issues raised that were kept secret until now.

Nevertheless the report has findings I would appreciate your comment on or referral to some attorney with specialized knowledge of the ability of a city to require a trail as a condition of approval. The argument about an unwilling owner looks like a red herring to me--irrelevant.

From the city web site:

Ordinances

Article 3 Subdivision Ordinance SEC. 10-3.000 CITATION AND AUTHORITY. This article shall be known and may be cited as the Subdivision Ordinance of the City of Hayward and is adopted pursuant to the Subdivision Map Act (Title 7, Division 2, Government Code) as a "local ordinance" as said term is used in said Act, and is supplemental to the provisions thereof. ...

SEC. 10-3.010 PURPOSE. The purpose of this article is as follows: ...

g. To provide sidewalks and, where needed, pedestrian ways, biking paths, and equestrian and hiking trails for the safety, convenience, and enjoyment of the residents of new developments.

Other findings also looked ginned up to do a biased report. I suspect there's not much I can do.

--

Sherman Lewis

Professor Emeritus, Cal State Hayward

President, Hayward Area Planning Association

www.bayviewvillage.us

<Tract 8058.pdf>

Miriam Lens

From: Sherman Lewis
Sent: Monday, June 29, 2015 12:45 AM
To: Francisco Zermeno; Al Mendall; Greg Jones; Marvin Peixoto; Elisa Marquez; Sara Lamnin; Barbara Halliday; Fran David; Miriam Lens; David Rizk
Subject: Comments on staff report for Tract Map 8058
Attachments: rebuttal to staff on path.pdf

Ms. Lens: Please distribute to the Planning Commission.

--

Sherman Lewis
Professor Emeritus, Cal State Hayward
President, Hayward Area Planning Association

www.bayviewvillage.us

Comments on staff report on path

Tract Map 8058, June 30, 2015

For decades people on Home and Hillcrest have enjoyed a little path and now the Council will decide if that special amenity will be snuffed out forever. Approving the Tract Map as proposed will close the path, perhaps the first path closure in the history of the City. Therefor the staff report needs to be closely examined.

Be prepared for more rhetoric than I usually use. I can't be at the meeting, and I'm glad, because I am really disgusted by what is going on. The lack of time to respond is really unfair. I'm having to do these comments in two days while staff took over eight months, and has still not studied the path. Under the pressure of time I don't have time to make this shorter.

I have to write this because I have to do whatever I can for a cause that I have committed myself to, a convenient path for my neighborhood which will also benefit the development. More details are in the report previously sent.

Check it out.

So far everyone believes the developer and no one is paying attention to what I am saying. And I keep saying it: check out what the developer is saying, and check out what my attorney, my civil engineer, and I am saying. Try to understand the kind of thinking I am trying to deal with. A person can say something forcefully and enthusiastically, believe it to be true, and persuade others. However, it may not check out. I've done my reality check and the City should do one, starting with the report I've already sent. I am not asking you to agree with me; I am asking, repeatedly, that you check out what I say. Please don't claim you've done some study you can't show me. If you support a good path, the developer may be outraged, but he will have a better project.

The Policies.

Quotes of excerpts from staff report in italics.

Per State law, tentative and final subdivision maps are required for all subdivisions creating five or more parcels. A Tentative Tract Map is required to ensure that any proposed subdivision of land complies with the Subdivision Map Act; ... the City Subdivision, Zoning, and Building regulations; the Hayward General Plan and Neighborhood Plans;...

General Plan, Land Use, p. 3-11: "Low density; Supporting Use ...trails"

p. 3-58: "Hayward contains a number of unique hillside neighborhoods and hillside developments. This goal and its supporting policies are designed to preserve the rural and natural character of hillside development areas. The policies in this section support hillside developments that are sensitively located and designed to retain natural slopes, ridgelines, and sensitive habitat areas. They also **require developments to provide connections to adjacent open space** and trail networks." [Emphasis added. The open space is the campus, Research Foundation, and Garin Dry Creek Park, which I jogged through many times in the old days—down the path, along Harder, up to the bench east of the halls, across the saddle, etc. Even more frequently I went down Parkside, around the campus, and back up on the path. Soane Etu is doing some of that now, as well as walking to the campus for his MA in Kinesiology. The Etus also need to catch the bus and have signed the petition.]

General Plan, Mobility: "Rather than focusing on automobile transportation, the Mobility Element seeks to create a balanced transportation network that supports and encourages walking, bicycling, and transit ridership." "A multimodal approach to transportation is intended to create an

integrated transportation and circulation system that allows for opportunities to travel by any mode of travel (e.g., walking, bicycling, transit, and automobiles) to reach key destinations in a community and region safely and directly.” “...improve health by allowing people to walk...” “...projects that increase ...walking in order to reduce air pollution, energy consumption, and greenhouse gas emissions.” “The City is served by a network of pedestrian facilities that include sidewalks, paths, and recreational trails. Walking is the most basic form of transportation and is an important part of healthy and active lifestyles. In Hayward, with its temperate climate, extensive transit services, and many activity centers, walking is used for both transportation and recreation.”

All of Goal M-5, which says in part, “The City shall consider pedestrian needs, including appropriate improvements to crosswalks, signal timing, signage, and curb ramps, in long-range planning and street design.”

“The City shall strive to create and maintain a continuous system of connected sidewalks, pedestrian paths, creekside walks, and utility greenways throughout the City that facilitates convenient and safe pedestrian travel, connects neighborhoods and centers, and is free of major impediments and obstacles.” “The City shall develop safe and convenient pedestrian facilities that are universally accessible, adequately illuminated, and properly designed to reduce conflicts between motor vehicles and pedestrians.” “The City shall strive to improve pedestrian safety at intersections and mid-block locations by providing safe, well-marked pedestrian crossings, bulb-outs, or median refuges that reduce crossing widths, and/or audio sound warnings.”

Hillside Design Guidelines: “7. Pedestrian access should be facilitated by providing an attractive, safe, and convenient network of walkways throughout the development site. Connections to public facilities (e.g., school site, park site, and open space trails) should be provided where applicable.” Page 5 has a drawing of a path between houses labeled “yes” and one without a path labeled “no.”

City policies could not possibly be clearer in supporting a path. The Tentative Map does not comply with these policies, it violates them.

The Authority.

– *Staff has concluded the change in location of the trail as requested by Dr. Lewis is not feasible for the following reasons:*

Unwilling Property Owner – ... the California Code of Civil Procedures...

Wow. That took my breath away. That conclusion is totally fallacious. The civil procedure code is totally irrelevant. The path is about the subdivision map act, a different law that cities use to condition development. . Remember this from the staff report, quoted again here: *A Tentative Tract Map is required to ensure that any proposed subdivision of land complies with the Subdivision Map Act; ... the City Subdivision, Zoning, and Building regulations...*”

Now try to get a grip on what you know, and here is a clue that will help; here is what the City Subdivision regulations say:

“SEC. 10-3.010 PURPOSE. The purpose of this article is as follows:

...

g. To provide sidewalks and, where needed, pedestrian ways, biking paths, and equestrian and hiking trails for the safety, convenience, and enjoyment of the residents of new developments.”

Some things to notice before we work on the logic: 1) The ordinance explicitly puts pedestrian ways on a par with sidewalks. 2) Need is defined to include convenience and enjoyment. OK, here is the logic: Can the City compel an applicant to provide a sidewalk? Yes. If an applicant is unwilling, does that mean the City cannot require a sidewalk? No, it can still require one. Can the City compel

an applicant to provide a pedestrian way? Your answer here _____. If an applicant is unwilling, does that mean the City cannot require a pedestrian way? Your answer here _____.

I could not believe what I was reading, but I wanted to make sure I was right, so I once again consulted with my attorney. Read the email that I forwarded to you. I don't think your City Attorney is going to deny that you have the authority to place conditions on development. Once developer objections prevent application of the subdivision laws, we're toast.

I have so far established two facts: **City policies** strongly favor paths of the type being requested, and the City has the **authority** to condition development on providing one.

You have to understand this before you can consider the path on its merits. Your choice, and it is a simple one, is between a narrow cumbersome path on the west side and a better path on the east side. The choice is not path or no path, but which path, and your decision will last a very long time. This simple choice has become entangled in the biggest mess of obfuscations I've ever seen.

Neighborhood Plan.

Staff argues that the lack of path shown on the neighborhood plan would prevent eminent domain. As explained above, development is controlled by the subdivision map act and related City ordinances, not eminent domain law. Neighborhood plans, however, are supposed to implement the General Plan, not be used as reasons to thwart it.

What is cute about this paragraph is its emphasis on trespassing rather than the fact that extensive, long term use shows the need for a path. How do we know people want to use the path? Because they trespassed for decades. Well, let's waggle our collective fingers at them for trespassing and ignore the fact they are walking on a path, which is precisely what City policy claims to support.

Fear of Liability.

The subject site is steeply sloped, with slopes approach twenty-five percent, particularly near Hayward Boulevard. Staff is concerned with liability associated with users falling and injuring themselves on such steep slopes, particularly during inclement weather.

This could only be written by someone who knows hardly anything about paths. Lots of great paths have sections with steeper slopes, and they get wet! Even in Hayward! The path near Hayward Blvd. could actually be over 25%, but if you look at the picture in my previous comments, you see that people angle west to reduce the slope. Surprisingly enough, when people walk on paths, they look at the ground and adjust for the situation. This is such a non-problem there are no statistics for it. I used the path from 1971 onward and, you know, I did fall down a couple of times. It was really annoying because I got mud on my pants. And sometimes pushing a bicycle up a wet path, I tell you, it was something that did not make me think about suing the City.

While staff acknowledges that law exists to immunize the City from lawsuits associated with trails (path immunity law), such law would not preclude an injured user from suing the City, which will entail staff resources to defend and/or settle.

Of course it does not preclude a suit! Nothing precludes a suit. Anybody can sue the City anytime they feel like it. Fear of lawsuits is a reason to do nothing, except you could be sued for not doing anything. If you have a General Plan supporting paths and you actually have paths, you could be sued. The possibility is not a reason to cut off a path. I read this stuff and I have ask myself, what is going on here? Other City paths have similar hazards, yet staff is not recommending closing them. This is totally bogus, designed to create fear among the ignorant.

What part of immunity does not actually mean immunity? It obviously includes slip and fall in wet weather. The record shows plaintiffs have never won such lawsuits, so they hardly ever even try.

My lawyer did the research and sent you the case law. Clue: immunity means immunity. There is no stronger protection than path immunity.

Something else: If such a lawsuit were to occur, you would have every park district in the state insisting that you not settle. The immunity law is the major reason we have paths at all, and Hayward should not even think of screwing that up.

The City is facing lawsuits all the time for all kinds of reasons. How many cases has the City been involved with over the last five years and how many involved paths? My guess: hundreds and none. Your risk from streets and sidewalks is far greater—you don't have immunity. Your litigation risk from a paving project you recently approved is greater than from any path.

This fear of liability is being ginned up as one more hit on the path. Fear of litigation can be an excuse for paralysis which, in this case would increase dependency on autos and reduce walking.

Also, the public trail would lead to a location along Hayward Boulevard that is not signalized or demarcated with a crosswalk to the CSUEB campus.

That is very true. A whole stretch of Hayward Blvd. is like that, mid-block, with people crossing it all the time. So are we going to blame the city for approving the developments that make people cross the road between intersections? Do we blame the path for a problem that is not even on the path? Evidently, staff believes that people will walk dangerously across a street if a walkway (path) heads into it instead running along beside it (sidewalk). This speculation ignores the evidence.

I have an idea. Let's look the General Plan. Turns out it says "The City shall strive to improve pedestrian safety at intersections **and mid-block locations...**" It turns out Hayward has already approved a path up the road that comes out mid-block. I perceive a contrast between "close down a historic path with no known safety problems" and "improve safety."

Approving the path is not going to increase the number of pedestrian crossing Hayward Blvd.; it would continue to be the trickle it is now.

The volume of traffic along Hayward Boulevard will increase over time as more development occurs at Stonebrae and other areas that use Hayward Boulevard for access.

Is this a reason to cut off a path? Staff is obviously arguing that an increase in traffic on a street should preclude any path from crossing that street. Staff wants to cut off pedestrians because of problems created by cars.

Claims of a safety problem are speculative and fly in the face of decades of safe use. I do not mean to make light of safety problems, but if you care about it, you log all accidents, auto and pedestrian, all rights-of-way, onto maps and look for clusters of accidents and rates above normal, and you look at how to make things safer. If you are concerned about pedestrian safety, where are the real problems? What are you doing about them? Do you think cutting off an existing path is helpful?

Fear of Accidents.

The problem is that if you have paths, people will walk on them, and if they walk on them, they will walk across streets. If actual evidence shows some paths have unusual safety problems, you can increase safety measures, or maybe even close them. The General Plan does not call for closure; it does not say, "Close paths with a long, good safety record if they might become unsafe." It does not say "if some path over there has a safety problem, then you should close this path here." The General Plan says, paths are good; let's make them safe. The idea is to promote walking, to make paths attractive and safe, not kill them.

Hayward has accidents all over the place. Do you shut down streets that that have accidents? No, even though car travel has high risks and kills many children and youth. If safety and paths are

both values, then you don't get rid of paths; you make them safer. That's what the general plan calls for, safe paths, not closing paths based on hypothetical safety concerns.

Remember that Council approved crossings for a large number of people crossing a great distance against high traffic volumes. The Loop has far more safety problems than our little path. Instead of cutting off crossings, you made them safer.

Look at the safety record of this path. More accurately, try to find one. There is no safety record because there have been no accidents. The staff report appeals to unreasoning fear with speculation devoid of analysis and contrary to decades of evidence.

This whole safety thing could be taken more seriously if the City had safety data and were planning to close other paths. Staff should read the General Plan, which calls for making paths safe not eliminating them, some objective policy, not speculation. Am I hammering this home too much? Do I need to make it clearer?

Fear of Maintenance.

Concerns with Maintenance and Activities... isolated and localized pedestrian pathway between homes, which can be a problematic area harboring undesirable activities...

If we had a study, instead of a hit piece, you would look into the history. We, the people who have used it for decades, will tell you: the path has not needed, does not need, and will not need city maintenance.

Isolated from what? Localized? Problematic? Harboring? How do I deal with this? I thought local paths were good. Where does this stuff come from? All we are trying to do is save a nice path used for decades with no problems.

...removing litter and graffiti along such isolated and localized pedestrian pathways than those designated substantial public trails located throughout the City." The current Department Director agrees, citing various specific examples of problematic trails/paths within the City that have limited visibility: Pontiac/Langley Walkway; Dale/Sycamore Walkway; Eldridge/Peterman Overcrossing approaches; Tennyson HS Pathway; and Westchester/Greenbrier path. The Northern District Commander of the Hayward Police Department has also expressed concerns with isolated, low visibility paths.

I am trying to understand this. The city has problems on some paths so the Golden Oak path will have those problems? But the historic path has not had these problems. It certainly is visible. But there are also two more issues here. One, the City seems to have six problem paths. Two, as far as I know, the City is not doing anything about these paths except use them as a pretext to oppose a path that does not have these problems. If they are problems, why don't you do something? If you are not going to close those paths, why do you want to close a path that has not had those problems? Does the General Plan distinguish between "designated substantial public" and others? If the City tolerates problems to honor the General Plan, doesn't the same reasoning apply to this path?

I am going to guess this negativity is a sham; it's just being made up for this staff report. If you want to get serious, you need to make a list of the paths in the City and the issues associated with each. You need to have a grown-up debate about what paths to close and how to manage problems on the others.

Fear of erosion.

...maintaining such a steeply sloped trail, particularly during heavy rains.

I know from experience that erosion has never been a problem on the path. The clay soil grows grass quickly and the path drains east off the path, not on the path to the south. If a problem starts, you can kick off a high side. Fear of erosion is not a reason to not have paths. You really need to

talk to people who actually know something about paths. The path might start to erode if more people used it. Isn't that what you want, more people using paths? You need to decide your priorities, people using paths or erosion. It would take about an hour to chop out high sides. I've worked on wilderness trails on service trips for many years, and chopping out high side berms and putting in water bars stop erosion quickly and cheaply.

Thought experiment.

The staff report seems divorced from the simple path we would like to keep. Try doing a simple thought experiment. Supposed the developer wanted a path? Would you oppose it using the arguments of this staff report? Or would you look at the General Plan, decades of safe use and no problems, and see how the path and the five units complement each other? Would you look at the two alternatives and figure out which one was better?

Failure to study a path.

The delay of a study has been the major problem, and we still do not have a study. Read the comments I sent previously. It is a reasonably good discussion of what the City could have done, and done better, many months ago, giving Council a choice instead of ultimatum by staff report.

The Planning Commission asked for a study; that study—a real study—has never been done by the City. Just compare my detailed report with the staff report. Which one is more of a real study? I did a great study that the City has ignored. I kept asking for a timely study, not a last minute hatchet job. I'd like to at least get fair consideration.

An honest report on the path would have supported City policies for paths, explained how the subdivision map act allows the City to require a path, shown how the developer could accommodate a good path, discusses how access could be controlled, explained path immunity as actually being what it says it is, explained why the tentative map could be revised quickly and at low cost, discussed the vesting of a final map with a good path while a real study was done and had input from the neighborhood, and compared the two paths, documented how paths improve property values, given examples of paths in nearby cities, discussed various path issue in Hayward and how they apply to this path, reviewed the historic use of the path to demonstrate usefulness, lack of erosion and trash, and lack of social problems or accidents. Let's be honest; there is no study of a path.

It will be a miracle if Council can see through the smokescreen of a simple issue being obfuscated by a really bad staff report and strong developer claims that don't check out factually.

Delay.

The single biggest problem in this controversy has been the failure of the City to a timely study of the path. It has not been fair to path proponents or to the developer or to Council. The developer and I have a difficult relationship. I respect his passion and most of his vision for his project, and I do not want it delayed. But it has been delayed by the failure to do a timely study and, now, the failure of the staff report to be a study. It is beyond belief how such a small problem got so screwed up.

However, if Council is counting on staff for an excuse to wash their hands on the issue, this report will do. I do not trust the City on this issue because of its blatant disregard of the General Plan, ignoring years of requests for a path, failing to respond to the Planning Commission request, ignoring my report, a late staff report allowing no time to respond, a staff report full of bogus arguments, misdirection, illogic, and omissions, and the inability of Council to challenge staff.

I believe what I know from decades of experience and from my lawyer and my civil engineer. I know what I am talking about and I don't think you do. If you want to abuse your power under the cover of a clearly biased staff report, I can't stop you.

The End?

I believe in paths; I like paths. I support City policies for paths. I am not scared by problems paths might have. I was naïve to think the City supported real paths. When I discovered the City was ignoring my messages and the developer was hostile to a path, I sued and spent \$92,000 and a lot of my time to force a settlement that resulted in a mediocre path, but one that is better than nothing. If I had relied on the City to support its General Plan, there would be no path at all. I appreciate the developer's willingness to let well-behaved neighbors use the path, but it's not as good as the one I advocate. I've consulted with my attorney and civil engineer and they have been totally persuasive that a path is buildable, speedily, financially, and legally. I've reported to you in great detail, including an alternative tract map. It is the City that is the problem, thinking up excuses to ignore its powers and complain about this path as it has about no others. Staff should work for the City, not do hit pieces for the developer, designed to fool an uninformed City Council.

Do I support paths? Yep. Does the City of Hayward? Not so much.

Miriam Lens

From: Sherman Lewis
Sent: Tuesday, June 30, 2015 11:22 AM
To: Francisco Zermeno; Al Mendall; Greg Jones; Marvin Peixoto; Elisa Marquez; Sara Lamnin; Barbara Halliday; Fran David; Miriam Lens
Cc: Ronesau; Lora Lowman; Mark Lowman; Kathy Lord; Joy Rowan
Subject: little path, big problems

There has, I think and hope, been a narrowing of differences.

The developer is willing to let neighbors use the path under certain conditions, which I will call a semi-public path.

I am willing to have a locked path for neighbors if there can be some ease of use and a system to prevent abuse of a locking system, which could be a tap-in number control lock that can be easily entered and easily recoded if there is abuse--in short, a semi-public path.

More details can be worked out.

There is going to be, then, a semi-public path, with two more questions.

Width: 3 feet is really narrow. The path should be 6 feet wide, which the developer believes won't work given the lot width he wants. (The set backs can work. Each top lot would get 1.5 feet narrower and still be over 100' wide.) This could be discussed with the developer's civil engineer.

Alignment: The path could come down either side. The east side is better for access from Hillcrest and for lining up with the campus sidewalk opposite, but crosses a private street east of 3 houses. The semi-public restricted nature of use would prevent the general public from coming through, but may still be too much for the developer.

The City Council has the authority to decide these questions, but there has been too much delay by staff, creating problems for path proponents, the developer, and Council. A truly inadequate staff report means Council will have to work a little harder, but your decision will last a long time.

I hope this is a fair presentation of the most critical issues.

--

Sherman Lewis
Professor Emeritus, Cal State Hayward
President, Hayward Area Planning Association

www.bayviewvillage.us