

December 18, 2023

(To Be Placed in Public Comment 12-19-23)

Dear Mayor, Council Members, City Manager, City Attorney, and the Clayton Community:

We are writing to provide a professional courtesy update regarding our September 5, 2023 letter, in which we requested documents about the Olivia on Marsh Creek project. We aim to inform you and the community about our ongoing research into the project and the potential for litigation.

Please know that we do not dispute the project's approvals or its success in defending legal challenges. Our concerns stem solely from interpretations of Resolution No. 07-2020 and others related to Olivia on Marsh Creek, as well as enforcement of the project's Conditions of Approval (COA).

We had hoped the Council would announce its position on the Olivia on Marsh Creek project after its closed-door meeting on September 7, 2023, as mentioned in our previous letter. Specifically, we were interested in hearing about any violations, enforcement issues, and the City Attorney's opinion regarding the project's compliance with Resolution No. 07-2020, and other resolutions relating to the Olivia on Marsh Creek project.

The Council's silence on these matters raises many unanswered questions. If the project fully complied with Resolution No. 07-2020, the City presumably would have reported that back to the community. The lack of an announcement suggests issues with how the project was approved and why it has not progressed diligently, as required in Resolution No. 07-2020.

After a lengthy review of over 325 pages of documents obtained through our September 5, 2023, Freedom of Information Act (FOIA) / California Public Records Act (PRA) request, which covered January 1, 2023, through September 14, 2023, we have organized the materials chronologically and analyzed them with our legal counsel to prepare an initial report of our findings and conclusions for the Council and community to see.

Side note: Councilmember Holly Tillman's accusations of misuse of our FOIA/PRA requests are baseless and inappropriate. First, exercising one's legal rights should never be considered wrongdoing. Second, these requests would have been unnecessary if the City had properly enforced Resolution No. 07-2020 and the law. (Asking questions should never be considered inappropriate!)

Because the documents were not sent to us chronologically, we had to spend many hours organizing them to understand the timeline. After arranging the documents and reviewing most with our legal counsel, we have identified observations and conclusions about what happened.

The City's oversight and enforcement should be called into question by several COA violations, including, but not limited to:

- improper construction fencing,
- inadequate dust mitigation,
- failed hydroseeding,
- lack of rodent control,
- falsely applying for permits as an owner-builder. (See below)

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City of Clayton

According to the California Department of Consumer Affairs (DCA) and the Contractors State License Board (CSLB).

1. An owner-builder is a property owner who acts as their general contractor on a construction project instead of hiring a licensed contractor to manage the work.
2. The owner-builder may perform the labor themselves or hire employees and subcontractors.
3. However, owner-builder projects must be on the owner's primary residence that they have lived in for at least 12 months before completing the work.
4. Furthermore, the owner cannot build and sell more than two structures in any 3-year period, which aims to prevent abuse of the owner-builder exemption.

Interestingly, the defensive, arrogant, and rude response from the City Manager, City Engineer, and Kennedy and Associates when questioned about oversight of William Jordan's owner-builder Olivia project at our November 5, 2023 meeting can likely be explained in #3 and #4 above. The point is, that the property was not his primary residence, and he plans to build more than two structures. The application misrepresented the developer's owner-builder status and number of buildings constructed, violating eligibility requirements. In addition, there was no oversight and they (the City Manager, City Engineer, and Kennedy and Associates) all knew it but did nothing.

However, there was another important takeaway from this meeting: Olivia's oversight seems to be reactive (complaint-driven) rather than proactive (through site visits). Ironically, this reactive approach has led to the City Manager feeling overwhelmed and frustrated by the high volume of complaints, even as he ignores more proactive oversight.

Based on several of the documents we have reviewed, it appears that William Jordan the developer, is buying time and the City of Clayton is being played as a fool.

1. William Jordan the developer requested an extension until March 3, 2023, from the prior date of March 3, 2022, from the City Council, which was approved on a 3/2 vote. The same evening, he requested the extension, he lied to the council and said he would be building the project when all along he had the project listed for sale on LoopNet.
2. William Jordan the developer violated many Conditions of Approval by the March 3, 2023 deadline. A building permit was not obtained by this deadline, as required in Resolution No. 07-2020. Number 16, General Conditions of Resolution No. 07-2020 clearly states that unless a building permit has been issued and construction has diligently commenced the approval will expire.
3. In a letter dated March 10, 2023, the Community Development Director Dana Ayers reported to an unknown individual (the name was redacted) about the COA received to date. The Community Development Director clearly states in this letter that groundbreaking activities have not started yet.
4. In a letter dated July 17, 2023, William Jordan mentions to Brian Brown from Contra Costa County – Department of Conservation and Development that he is having problems finding financing.
5. In one of the letters dated August 1, 2023, from William Jordan to Community Development Director Dana Ayers, he notifies her that an addiction recovery group contacted him about a "Sober Living Environment" being built or occupying the Olivia property. William Jordan wanted to know if he needed to go to the Planning Commission for approval. We found no response from Community Development Director Dana Ayers in the files we received.

6. In a letter dated August 10, 2023, William Jordan asked the Community Development Director Dana Ayers how many times he could renew his permits.
7. On August 17, 2023, William Jordan received a response from Housing and Community Development (HCD) Troy Andres indicating they are unable to assist in the project scoping or due diligence activities. HCD advised William Jordan to complete an independent analysis to establish eligibility under the law for supportive housing.
8. On August 21, 2023, William Jordan notified Community Development Director Dana Ayers about his communication with HCD in Sacramento on August 9, 2023. His conversation with Troy Andres from HCD was to get a clear understanding of whether a proposal for supportive housing is allowed without any further discretionary approvals from the City of Clayton. More specifically, what he would need to do other than obtain a business license from the City of Clayton?
9. On Sunday, September 17, 2023, the Clayton Police were contacted about work being conducted over the weekend. The document we received indicates that Sergeant Rich Enea contacted William Jordan at the property location. William Jordan said he had a permit to work on weekends, when in fact he did not. This is in complete violation of the Conditions of Approval #25.
10. The oversight agreement with Kennedy and Associates was not signed until September 19, 2023, yet work began earlier over Labor Day weekend.

Therefore, based on William Jordan's history with the City of Clayton, any reasonable person should be asking themselves why the City of Clayton is playing along with his shenanigans and allowing him to destroy our town. He has no intention of building the project at this time and is not a contractor. According to the records we have seen, the County has requested on several occasions that William Jordan identify his contractor, which he has failed to do. The City of Clayton should do the right thing and cancel the ill-advised project that the community never wanted in the first place.

Lastly and most importantly, as recognized by the construction industry, and in the legal profession, the diligent start of construction means the first placement of permanent construction of a structure depicted on an approved site plan, such as pouring of slabs or footings, installation of piles, construction of columns, or any work beyond the stage of excavation of a foundation. Permanent construction does not include land preparation, such as clearing, grading, tree removal, and filling; nor does it include the installation of streets and/or walkways; nor does it include excavation of footings, piers, or foundations or the erection of temporary forms. Therefore, based on industry standards, the city and developer would struggle to prove the diligent start of construction occurred by March 3, 2023.

In our opinion, the City of Clayton is unwilling to enforce Resolution No. 07-2020, Planning Conditions #12 itself based on a possible misreading of the hold harmless/indemnify clause within it.

Upon a second read of Resolution No. 07-2020, Planning Conditions #12, **it clearly states that the applicant agrees to indemnify**, protect, defend, and hold harmless the City and its elected and appointed officials, officers, employees, and agents from and against any and all liabilities, claims, actions, causes, proceedings, suits, damages, judgments, liens, levies, costs, and expenses of whatever nature, including attorney's fees and disbursements arising out of or in any way relating to the issuance of this entitlement, **any actions taken by the City relating to this entitlement**, or the environmental review conducted under the California Environmental Quality Act for this entitlement and related actions. In addition, if there is any referendum or other election action to contest or overturn these approvals, the applicant shall either withdraw the application or pay all City costs for such an election.

The noise and misinformation from several members of the community, including two council members, and our City Attorney regarding the City being sued for millions of dollars for enforcing Resolution No. 07-2020 is complete and total nonsense.

The City of Clayton forcing an outside group to sue the City for the lack of enforcement of Resolution No. 07-2020, makes us feel that you are placing developers in front of the wishes of the community and leaving citizens unrepresented and unprotected. The core issue remains unresolved - the City must take responsibility for enforcing the laws it passed, not pass that duty to citizens through legal technicalities.

At this time, we are still reviewing additional documents and assessing our options. Our legal counsel recommended pausing over the holidays to regroup in January 2024, which we agreed was prudent.

The new year brings an opportunity for a fresh start. We are optimistic we can work together to thoroughly yet efficiently review this project's details and hold William Jordan the developer accountable with your help.

Let's begin 2024 with a renewed commitment to open communication and good faith. The Clayton community deserves no less.

Sincerely,

Gary Hood
Clayton Watch

Bill Walcutt
Clayton Watch