

# GUIDELINES FOR INTERPRETING AND IMPLEMENTING THE MORAGA OPEN SPACE INITIATIVE

Appendix "A" To Town Council Resolution No. 14-92  
as amended by Town Council Resolution No. 6-99

## Table of Contents

	<u>PAGE</u>
I. INTRODUCTION .....	1
A. Findings .....	1
B. Purpose .....	2
II. INTERPRETATION .....	2
A. Definitions	2
B. Reference to Exhibits .....	4
C. Slope Calculations .....	5
D. Standards for Determining Whether Open Space Land is Within a High Risk Area.....	5
1. Preliminary Determination of High Risk Areas.....	5
2. Final Determination of High Risk Areas.....	6
III. RESTRICTIONS ON DEVELOPMENT IN OPEN SPACE LAND .....	6
A. Prohibition of Development .....	6
B. Density in Open Space Land.....	7
C. Increase in Density in Open Space Land.....	7
D. Design Review .....	8
IV. DETERMINING APPLICABILITY OF THE OPEN SPACE LAND.....	8
A. Application for Vested Rights Exemption .....	9
1. Restrictions on development unless vested rights exemption applies.....	9
2. Certificate of vested rights exemption.....	9
3. Application for vested rights exemption .....	9
4. Scope of Vested Rights Exemption .....	9

- B. Determining Applicability of Open Space Ordinance to Open Space Land .....10
  - 1. Status Determination .....10
  - 2. Application for Status Determination .....10
  
- C. Hearing, Determination and Appeal .....11
  - 1. Fixing hearing and giving notice .....11
  - 2. Reference of application .....12
  - 3. Hearing.....12
  - 4. Burden of Proof .....12
  - 5. Form of and time for decision .....12
  - 6. Findings and Decision .....12
  - 7. Appeal of status determination .....13
  - 8. Supplemental rules and procedures .....13
  
- D. Miscellaneous Provisions .....13
  - Fees .....13

## INTRODUCTION.

### A. Findings.

The Town Council of the Town of Moraga finds that:

1. The Moraga Open Space Initiative Measure A (the Open Space Ordinance) was adopted by the voters of the Town of Moraga at the General Municipal Election held on April 8, 1986. The Ordinance took effect on April 26, 1986.

2. By adopting the Ordinance, the people of Moraga have declared their intent "to protect the remaining open space resources within the Town in the interest of: (1) preserving the feel and character of the community; (2) ensuring the adequacy of recreational opportunities which are contingent on such open spaces; (3) ensuring the protection of local and regional wildlife resources which are dependent on the habitat provided by such open space; (4) ensuring that development does not occur in sensitive viewshed area; (5) protecting the health and safety of the residents of the Town by restricting development on steep or unstable slopes; and (6) ensuring that development within the Town is consistent with the capacity of local and regional streets and other public facilities and does not contribute to the degradation of local or regional air quality." (Ordinance Section 2a<sup>1</sup>)

3. The Open Space Ordinance directs the Town Council to implement the Ordinance promptly after its enactment. (Ordinance Section 5a)

4. These Guidelines are in partial fulfillment of this mandate and represent implementation. Additional measures to implement the Open Space Ordinance will be presented for adoption as mandated by Section 5 of the Ordinance. As these Guidelines are applied, it may become necessary to amend and supplement them.

5. These Guidelines are not intended to amend or modify a requirement of the Ordinance (Ordinance section 5a)

6. These Guidelines are intended to balance fairly the restrictions on development in open space lands under the Open Space Ordinance consistent with the Town's police power with the rights of owners of open space lands.

### B. Purpose.

---

<sup>1</sup> Unless stated otherwise all parenthetical references are to sections of the Open Space Ordinance, attached to these Guidelines as Exhibit "D".

These Guidelines are adopted in order to provide for the interpretation, implementation and application of the Open Space Ordinance.

## II. INTERPRETATION.

### A. Definitions.

In these Guidelines unless the context otherwise requires:

1. building permit means an entitlement issued under the Uniform Building Code to erect, construct, alter, repair or demolish a building or structure regulated by the Uniform Building Code;

2. building permit for a development project refers to the permission given to a development project which on or before April 6, 1986:

a. had a final subdivision map approved by the Town; and

b. had a fully executed subdivision agreement for completion of tract improvements; (Ordinance Section 4)

3. cell refers to a polygonal shaped area comprised of a minimum of 10,000 square feet. Its function is to describe a specific area for the purpose of ascertaining the average slope grade of the cell. The resulting slope grade calculation determines whether development within the cell may be permitted or is prohibited (Ordinance sections 3b, 3d). In the absence of a submittal by an applicant showing one or more cells as defined, cell refers to an area 200' by 200' as designated on Exhibit "C";

4. centerline of a ridge or crest of a ridge is the line running along the highest portion of a ridge; (Ordinance section 3e)

5. design review control is the function of design review prescribed in sections 8-1301 through 8-1341 of the Municipal Code; (Ordinance section 3e)

6. development means the placement, discharge or disposal of any material, the grading or removal of any material, the change in the density or intensity of use of the land, the subdivision of land, or the construction or erection of a structure. Development does not include (1) work necessary to eliminate or prevent a condition which is determined by the Town to be a menace to life, limb or property or adversely affects the safety, use or stability of a public way or drainage way or channel, or (2) establishment of a fire trail approved by the Moraga-Orinda Fire Protection District, or (3) a road together with attendant underground utilities, may cross a ridge, if the Planning Commission finds that the crossing is necessary for the orderly development of

the Town and does not otherwise conflict with the Municipal Code; (Ordinance Sections 3a-e, as amended by the Town Council on February 24, 1999 by Resolution 6-99).

7. hearing body means the Town Council in the case of an application for vested rights exemption and the Planning Commission in the case of an application for status determination;

8. high risk area is an area located in Open Space Land determined to be high risk in accordance with Part II D. of these Guidelines; (Ordinance sections 3a, 3c, 3d)

9. major ridgeline means the centerline or crest of the ridges known as Indian Ridge, Sanders Ridge, Mulholland Hill, and Campolindo Ridge, where the centerline is located in the lands designated as "public open space study" as shown on the General Plan as it existed on October 16, 1985; (See Exhibit "B")

10. minor ridgeline means the centerline or crest of a ridge other than a major ridgeline, which rises above 800 feet from mean sea level; (see Exhibit "B"); (Ordinance sections 3b, 3d)

11. open space land is an area designated as open space in the General Plan, adopted on August 15, 1990. Open Space Land includes an area designated as "Open Space" by the Open Space Ordinance;

The lands described in GPA 6--Resolution No. 28-83 adopted June 10, 1983, GPA 8--Resolution No. 39-83 adopted September 7, 1983, are included within the term Open Space Land (see Exhibit A); (Ordinance sections 3a, 3c, 3d, 3e, 3f, 5b)

12. Open Space Ordinance means Measure A adopted at the Consolidated General Municipal Election held April 8, 1986, a copy of which is attached as Exhibit "E";

13. parcel means all land which is contiguous and under one ownership.

14. project means a Town approved plan prepared in sufficient detail to permit the completion of physical efforts necessary to accomplish the plan's ultimate objective;

15. ridge is the upper portion of a hill which rises to a crest or ridgeline;

16. ridgeline is the centerline or crest of a ridge;

17. slope with grade of 20% or greater refers to land located within open space land which contains an average slope of 20% or greater using the slope

calculation method set forth in section II.C. of these Guidelines; (Ordinance sections 3b, 3d, 5b)

18. substantial construction expense means performing work in good faith reliance on a building permit for the development project. The term refers to expense incurred in actual construction as opposed to expense incurred in planning, engineering or architectural drawings. The existence of substantial construction expense requires a factual determination in each case, taking into account the nature of the project, Town approvals, and time factors. Among the elements to consider are the physical size and substantiality of work performed, the dollar cost of the work performed and liabilities incurred and the percentage of the total project represented by the work and expenditures already undertaken. (Ordinance section 4)

B. Reference To Exhibits.

The maps described as

- Exhibit "A" — Moraga Open Space Ordinance, Preliminary Interpretation (May 12, 1986) Open Space Land Use Designations
- Exhibit "B" — Moraga Open Space Ordinance, Preliminary Interpretation (May 12, 1986 Ridges Above 800-foot Elevation
- Exhibit "C" — Slope Map, General Plan Program, Town of Moraga (December 1975) (COMARC Design Systems)
- Exhibit "D" — Development Capability Map, General Plan Program, Town of Moraga (December 1975) (COMARC Design Systems)
- Exhibit "E" — Sample Ballot and Voter Information Pamphlet, Consolidated General Municipal Election, Tuesday, April 8, 1986

the originals of which are on file in the office of the Planning Director are made a part of these Guidelines. A copy of each is attached for reference purposes.

Exhibits "C" and "D" depict only preliminary determination as to slopes and development capability, respectively. An applicant may submit current information which is more refined and more accurately characterizes the site, in which case that information if accepted by the Town supersedes Exhibit "C" and "D".

C. Slope Calculations.

A preliminary determination of slopes with grades of 20% or greater is shown on the Slope Map, attached as Exhibit "C". On that map the cells (200' x 200') designated 5, 6 and 7 represent areas with slopes of greater than 20%. A submittal under these Guidelines shall include a slope analysis map of at least a scale of 1 inch equals 100 feet showing (1) the boundaries of each parcel, (2) elevations every five feet and (3) the average slope for each cell throughout the parcel.

D. Standards for Determining Whether Open Space Land is Within a High Risk Area.

1. Preliminary Identification of High Risk Areas.

The areas located within a cell designated 1, 2, 3 or 4 on the Development Capability Map (Exhibit "D") are determined, on a preliminary basis, to be high risk areas.

This is a preliminary determination and governs until more accurate data are submitted to and approved by the Town.

2. Final Determination of High Risk Areas.

The final determination of a high risk area shall be made under the procedure provided for a status determination and in accordance with the following criteria and standards:

An area shall be classified as a high risk area depending upon both (1) its own site characteristics and (2) its location in relation to other geological and topographical conditions.

The standards for classification of a high risk area as they relate to a site's characteristics include evidence or history or both of soil instability, steepness of slopes, difficulty of access, and adverse drainage conditions. Other standards to be included are whether the site is adversely affected by an off site landslide and whether or not these characteristics can be adequately mitigated consistent with the California Environmental Quality Act (CEQA), the Towns' Environmental Guidelines, and the Goals and Policies of the General Plan.

The Conditions that determine classification as a high risk area include but are not limited to:

- a) whether the area has the potential to be adversely impacted by a landslide, unstable soil, soil with a history of slippage or a slope subject to severe surface erosion or deterioration;
- b) whether it serves as a natural drainage way or swale, with a drainage basin of 50 acres or more or crossed by a perennial or ephemeral (intermittent) drainage channel;

- c) within 50 feet of a known active or dormant fault trace;
- d) containing a regular or intermittent spring or adverse ground water conditions;
- e) within 100 yards upstream or 500 yards downstream of a reservoir, detention basin or pond of one acre or more in surface area;
- f) within an area subject to enhanced seismically induced ground shaking or a seismically induced ground failure such as a landslide, lateral spread, rockfall, ground lurching, liquefaction, soil settlement, differential compaction and compression;
- g) within an area subject to the effect of seismically induced flooding and/or dam or stock pond failure.

An area which is classified as a high risk area through the application of the foregoing criteria may be changed from that classification, upon submittal by the applicant, it is found and determined to the Towns' satisfaction that the characteristics making it high risk may be abated by appropriate remedial efforts which are consistent with CEQA, the Town's environmental guidelines, and the Goals and Policies of the General Plan.

Within a single parcel one area could be determined to be "high risk area" and another may not. If a high risk area exists on a parcel, each cell within the parcel which is not designated high risk must be at least 10,000 square feet in area to be excluded from the high risk area classification.

### III. RESTRICTIONS ON DEVELOPMENT IN OPEN SPACE LAND.

#### A. Prohibition of Development.

Development is prohibited in the following areas:

1. Property situated within open space land (Exhibit "A") as follows:
  - a) on a slope within open space land where the slope has a grade of 20% or greater (See definition of cell and Exhibit "C");
  - b) within 500 feet of a major ridge (Exhibit "B");
  - c) on a minor ridgeline (Exhibit "B") and
2. Property situated on a minor ridgeline immediately adjacent to open space land which meets the slope and elevation criteria of section 3.d.(b) of the Open Space Ordinance.

B. Density in Open Space Land.

1. In a high risk area, the density is one dwelling unit per 20 acres and may not be increased.

2. In open space land other than a high risk area density is one dwelling unit per 20 acres unless density is increased as provided in III.C and IV.B of these Guidelines.

3. Density may be transferred from open space land to another residential area located in a land use district other than an open space land use district. Density may not be transferred to a high risk area. (Ordinance section 3d(a))

C. Increase in Density in Open Space Land.

1. The Planning Commission may approve an increase in density from one unit per 20 acres to not more than one unit per 5 acres based upon findings that a proposed development is consistent with the following criteria:

a. the site is physically suitable for the type of development and requested density;

b. the development is not likely to cause environmental damage;

c. the development is not likely to cause public health problems;

d. the distance and relationship to high risk areas is sufficient so that development will not cause undue risk to the subject and surrounding properties and will not increase risk to the public health, safety and welfare;

e. the dwelling units in the proposed development can be substantially concealed from scenic corridors by vegetation or the terrain;

f. public benefit will result from the dedication of open space lands, trails or park and recreational facilities beyond those otherwise required for development;

g. the distance of development from ridgelines is such that the view of ridgelines from a scenic corridor is protected;

h. the project is in compliance with Goal 5 and related policies of the

Open Space and Conservation Element of the General Plan;

i. the proposed development is consistent with the information provided regarding development capability (See II.D.)

2. The procedure for determining density in open space land which is not classified as high risk is prescribed in IV.B.

D. Design Review.

Development on land located on a major or minor ridge is subject to design review control. A road may cross a ridge only if the Planning Commission finds that the crossing is necessary for orderly development and does not otherwise conflict with the Municipal Code. (Ordinance section 3e)

IV. DETERMINING APPLICABILITY OF THE OPEN SPACE ORDINANCE.

A. Application for Vested Rights Exemption (Section 4).

1. Restrictions on development unless vested rights exemption applies.

The restrictions on development set forth in III apply to "...A person who, as of [April 8, 1986] has not (a) obtained a building permit for the development project and (b) incurred substantial construction expenses in good faith reliance on such building permit...". (Ordinance section 4)

2. Certificate of vested rights exemption.

A person seeking an exemption under section 4 of the Open Space Ordinance may apply to the Town for a vested rights exemption.

3. Application for vested rights exemption.

A person seeking a vested rights exemption shall apply to the Planning Director setting forth:

(1) the status of the project and amount of construction work completed as of April 8, 1986;

(2) a statement of the construction expenses incurred for grading, subdivision improvements and structures as of April 8, 1986;

(3) the percentage of the total project represented by the work and expenditures in (1) and (2) above;

(4) other information required by the Director which in his opinion is necessary to determine entitlement to a vested rights exemption.

4. Scope of Vested Rights Exemptions.

A vested rights exemption does not exempt the person receiving the exemption from a permit approval, or requirement other than that imposed by the Open Space Ordinance. Further development on land within a development project for which a person has obtained a vested rights exemption is not subject to the requirements of the Open Space Ordinance.

B. Determining Applicability of Open Space Ordinance to Open Space Land.

1. Status Determination.

A person whose property is or may be affected by the Open Space Ordinance may apply to the Town for a status determination.

The property owner may apply for a status determination at any time and need not await determination until a development plan is submitted. The application may request a determination as to whether the property is subject to the Open Space Ordinance and if so may request a finding of:

- a) the slope calculation of the property;
- b) whether or not located in a high risk area;
- c) the maximum permitted density, applying the criteria set forth in III.C.1 of these Guidelines

2. Application for status determination.

The application for status determination shall be on a form provided by the Town. The application shall be accompanied by:

- a. a map showing:
  - (1) the size and location of the property
  - (2) the present general plan and zoning designations
  - (3) the location of major and minor ridgelines
  - (4) the area within 500 feet of each major ridgeline;

b. a slope analysis map with a scale of no smaller than 1 inch equals 100 feet showing:

- (1) the boundaries of each parcel
- (2) elevations at intervals of no more than five feet
- (3) the average slope for each cell throughout the parcel, SEE II C (Slope calculation)
- (4) the actual slope for each portion of the parcel when the slope is 20% or greater

This slope analysis map must be accompanied by supplemental information explaining differences, if any, between the map submitted and the Town's Development Capability Map. (Exhibit "D");

c. a map identifying all applicable geologic and topographic conditions set forth in section II.D. (characteristics of a high risk area) of these Guidelines;

d. sketches showing generally the areas which because of terrain or existing vegetation are concealed from view from scenic corridors;

e. soils, geologic or other study which the developer believes would aid the Planning Commission in its determination.

C. Hearing, Determination and Appeal.

1. Fixing hearing and giving notice.

a. Procedure in the case of vested rights exemption.

(1) Preliminary exemption determination.

Upon the filing of an application for a vested rights exemption, the Planning Director shall determine from the application and the Town's records whether the applicant, in the Director's opinion, is entitled to an exemption.

(2) Director's recommendation.

If the Director concludes that the applicant is entitled to an exemption, he shall so advise the applicant and have the recommendation placed on the agenda of the first available meeting of the Town Council. No other notice need be given.

(3) Town Council action on recommendation.

The Town Council shall act on the Director's recommendation at the earliest practicable time and in no case later than 30 days following the date of the meeting at which the Town Council receives the Director's recommendation unless the time period is waived by the applicant.

(4) Failure of Director to recommend.

If the Director concludes that there is reasonable doubt as to whether the applicant is entitled to an exemption the Director shall set the application for hearing before the Town Council.

Notice and conduct of the hearing and decision on the application shall be as provided for in the case of an application for status determination.

b. Procedure in the case of status determination.

Upon the filing of an application for status determination, the Planning Director shall set the application for public hearing before the Planning Commission to be held within 30 days after the submittal is complete. Notice of the hearing shall be sent to all owners of property within 300 feet of the property which is the subject of the application and to any other person who has requested in writing to be notified for that specific application.

2. Reference of application.

In the case of an application for status determination, the Planning Director may refer the application to the Town Engineer, subcommittee of any Town reviewing body or other technical or professional person.

The cost incurred in referring the application shall be borne by the applicant.

3. Hearing.

At the hearing, the hearing body shall consider the application, the testimony, evidence and all pertinent information presented.

4. Burden of proof.

The applicant has the burden to present evidence which supports the findings necessary to the decision which it seeks.

5. Form of and time for decision.

The hearing body shall make its decision in writing together with appropriate findings.

a) in the case of an application for vested rights determination, not later

than 15 days from the close of the public hearing; and

b) in the case of an application for status determination, not later than 60 days from the close of the public hearing unless the applicant consents to an extension.

The Planning Director shall mail a copy of the decision to the applicant and to each person who has requested in writing to be notified of that decision.

6. Findings and decision.

a) Vested rights determination

The Town Council may not grant an exemption unless it finds that the applicant has:

- (1) obtained a building permit for the development project; and
- (2) incurred substantial construction expenses in good faith reliance on the permit.

b) Status determination

In its decision on a status determination, the Planning Commission shall make findings to support its decision with specific reference to the criteria applicable to the request:

- (1) as to slope calculation, see II C (Slope Calculation)
- (2) as to high risk areas, see II D (Standards for Determining Whether Open Space Land is within a high risk area)
- (3) as to density see III C (Increase in Density in Open Space Land)

The Planning Commission decision shall, to the extent practicable, advise the applicant (1) which areas of the property may and may not be developed and (2) the maximum density permitted on the site.

The density determination may be modified based upon new information developed for a specific project and environmental studies conducted for that project.

7. Appeal of Status Determination.

A person desiring to appeal the status determination decision of the Planning Commission to the Town Council shall file a written notice of appeal with the Planning Director within 15 days of the date of the Planning Commission decision. The Town Council shall make its decision on the appeal within 60 days of the date of the notice of appeal.

8. Supplemental rules and procedures.

The Planning Commission may adopt additional rules and procedures governing proceedings under these Guidelines which are not inconsistent with these Guidelines.

D. Miscellaneous Provisions.

Fees.

The fee for filing an application for a vested rights exemption or a status determination is the same as the fee fixed for filing an application for a conditional use permit prescribed by Council Resolution No. 39-91.

The fee for appealing a status determination of the Planning Commission is the fee fixed for an appeal of a Planning Commission decision prescribed by Council Resolution No. 39-91.