EAST CONTRA COSTA COUNTY
HABITAT CONSERVANCY

DATE: May 10, 2012

TO: Governing Board

FROM: Conservancy Staff

SUBJECT: **Review and Adjustment of the HCP/NCCP Mitigation Fees**

RECOMMENDATION

ACCEPT update from staff on adjustment of HCP/NCCP mitigation fees, comment letters received by participating cities during their consideration of the Conservancy Board's July 22, 2011 recommendation regarding adjustment of fees, and response from Conservancy staff, Economic and Planning Systems and Conservancy's Counsel (Resources Law Group) to these comment letters.

DISCUSSION

On July 22, 2011, the Board approved the East Contra Costa County Mitigation Fee Update Report ("Report"), which was prepared by Economic and Planning Systems, Inc. and dated May 17, 2011. The Board action also included providing the report to participating cities and the County, recommending that they consider revising the wetland mitigation fees as recommended in the Report and directed staff to apply the revised wetland mitigation fees in future agreements between the Conservancy and Participating Special Entities. The Conservancy Board initially considered the report on March 21, 2011, voting to continue the item to provide more time for review. No oral or written public comments we received on this item at either meeting.

As more fully described in the Report, the East Contra Costa County HCP/NCCP requires automatic annual adjustments to HCP/NCCP Mitigation Fees based on economic indices as well periodic audits in years 3, 6, 10, 15, 20, and 25 of Plan implementation to assess whether changes in HCP/NCCP implementation cost over time require additional adjustment of fees. The Report concluded that the development fee, the primary HCP/NCCP mitigation fee applicable to all covered projects, did not require further adjustment. The automatic annual adjustments

CONTINUED ON ATTACHMENT: _Yes
ACTION OF BOARD ON: May 10, 2012 APPROVED AS RECOMMENDED__________________
OTHER____

VOTE OF BOARD MEMBERS
___UNANIMOUS
AYES:________________________________
NOES:________________________________
ABSENT:_____________________________
ABSTAIN:____________________________

I HEARBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF AN ACTION TAKEN AND ENTERED ON THE MEETING RECORD OF THE CONSERVANCY GOVERNING BOARD ON THE DATE SHOWN.

ATTESTED ____
Catherine Kutsuris, SECRETARY OF THE EAST CONTRA COSTA COUNTY HABITAT CONSERVANCY

BY:____, DEPUTY had reduced this fee by 10.5% relative to 2006 levels (the reduction was 14.4% relative to 2007 levels), an amount that was nearly equal to the level calculated after fee calculations were updated with new cost data. The report did conclude that significant increases were necessary to certain wetland mitigation fees (by as much as 32.4% for the seasonal wetland fee), while the stream fee should be reduced by 22.7%. These recommendations were based on calculation of the Conservancy's actual costs with wetland restoration to date as well as a variety of other cost data.

Between the two meetings, EPS prepared a second memorandum dated July 15, 2011, to provide more context on the recommendations. Though HCP/NCCP development fees apply to all covered projects, the stream and wetland fees only apply to some projects and the amount of the fee depends upon the extent of impact. In the July 15 memo, EPS compares the cumulative fee burden of all 21 projects that had been covered by the HCP/NCCP under three different fee schedules: 2006, 2011 unadjusted and 2011 adjusted. The analysis shows that the development fee comprises more than 90% of the fee burden thus far. It also shows that the decrease in the stream fee would have had a greater cumulative impact on the projects covered so far than the combined increases in other wetland fees. Because the development fees are the primary fees actually paid and have come down 10.5%, and because the recommended decrease in the stream fee essentially cancels out the recommended increase in the other wetland fees, the analysis shows the net effect of the recommended fee adjustment on prior projects would have resulted in a slight reduction of the overall fee burden. Compared to the cumulative fee burden of the fee schedule approved in 2006, the 2011 recommended fees would have reduced overall fees paid by the initial 21 projects by more than 9%.

Following the Conservancy Board action on July 22, 2012, the Conservancy recommendations were conveyed to the participating cities and the County for their consideration. The Pittsburg City Council held a noticed public hearing on the matter on January 17, 2012. In response to a letter received that day from Discovery Builders expressing a series of concerns with the proposed fee adjustments, the Pittsburg City Council continued the public hearing. The hearing was continued again on February 21 and March 19 in anticipation of a peer review of the fee adjustments. On April 2, 2012, the City of Pittsburg received a memo from Joanne Brion of Brion & Associates ("Brion memo") and a letter from Paul P. Spaulding, III of Farella, Braun & Martel, LLP ("Spaulding letter"), both representing Discovery Builders, providing comment on the proposed adjustment of HCP/NCCP fees. On April 17, 2012, the City of Pittsburg continued the public hearing again to provide time to consider the new information.

The Brion memo and Spaulding letter raise a number of concerns with fee adjustments and the Report approved by the Conservancy. Among the primary concerns raised are assertions that current economic conditions should have been considered, financial feasibility should have been analyzed, wetland fee calculations are incorrect, land value cost data are incorrect and the Report did not comply the HCP/NNCP requirements for an independent fee audit. The Brion memo and Spaulding letter are attached.

To address these concerns, Conservancy staff requested a response to the Brion memo and the Spaulding letter from Teifion Rice-Evans at EPS and from Chris Beale at Resources Law Group, the Conservancy's legal counsel. The response from EPS dated May 3, 2012 is in the form of a memo containing their primary response, tables providing additional data, an attachment with detailed response to comments and a second attachment containing the Brion memo and Spaulding letter and identifying individual comments with numbers in the margins. The response from Chris Beale is in the form of a letter dated May 4, 2012. The two documents are attached and together provide a comprehensive response to issues raised. Conservancy staff has reviewed these responses and concurs with their conclusions. Staff also wishes to point out that with: (a) recent U.S. Army Corps of Engineers issuance of the Regional General Permit ("RGP") for activities covered by the HCP/NCCP, (b) work now underway to develop an In-Lieu Fee Instrument with Corps and other agencies that would sanction the HCP/NCCP mitigation fees for use in the RGP, and (c) promising ongoing efforts to work with the State Water Resources Control Board and Regional Water Quality Control Boards to coordinate their regulatory actions with the RGP and HCP/NCCP, it is increasingly important that the wetland mitigation fees provide the revenue needed to meet the associated mitigation requirements. Chris Beale and Teifion Rice-Evans will both attend the meeting to present an overview of their responses and to respond to questions from the Board.

Separate from the discussion about the current fee adjustments and the appropriate current levels of the fees, the Board may wish to explore what steps have already been taken to keep the cost of complying with the HCP/NCCP as low as possible such that fees can be kept as low as possible and expenditures can achieve the greatest public benefits. In addition, Conservancy staff would be pleased to develop and consider ideas for additional strategic cost reductions over the medium and long term.

Attachments:

(A) Conservancy Board action on July 22, 2012
(B) Memo dated July 15, 2011 from EPS with additional information
(C) Memo dated March 17, 2011 from EPS entitled "East Contra Costa County Mitigation Fee Update Report"
(D) Memo dated May 3, 2012 from EPS responding to Brion Memo and Spaulding letter. Attached to the May 3 EPS memo are
  - Tables with additional data
  - Detailed response to comments
  - Brion memo and Spaulding letter with individual comments numbered in the margins

(E) Letter from Chris Beale, Resources Law Group, dated May 4, 2012

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EAST CONTRA COSTA COUNTY
HABITAT CONSERVANCY

DATE: July 22, 2011

TO: Governing Board

FROM: Conservancy Staff

SUBJECT: **Review and Adjustment of the HCP/NCCP Mitigation Fees**

RECOMMENDATION

APPROVE the East Contra Costa County Mitigation Fee Update Report ("Report"), consistent with requirements in the HCP/NCCP for periodic review of HCP/NCCP development fees. PROVIDE the Report to participating cities and the County and recommend that they consider revising wetland mitigation fees as recommended in the Report. DIRECT staff to apply the revised wetland mitigation fees in future agreements between the Conservancy and Participating Special Entities.

[ITEM CONTINUED FROM MARCH 21, 2011]

DISCUSSION

On March 21, 2011, the Board heard a presentation on and considered the East Contra Costa County Mitigation Fee Update Report ("Report") prepared by Economic and Planning Systems, Inc. (EPS), consistent with requirements in the HCP/NCCP for periodic review of HCP/NCCP development fees. The Board voted to continue the Item to the next meeting in order to give the Board members more time to review the Report.

Since the March 21, 2011 meeting, Staff has requested that EPS evaluate the impact of the recommended fee adjustments on the fee burden to born by covered projects. EPS also compared the results of the analysis presented in the earlier Report to new information on the costs of wetland restoration from two projects, one of which is the Upper Hess Creek Watershed Habitat Restoration Project developed by the Conservancy. The new information is presented in the attached memo from EPS dated July 15, 2011. The original Report from EPS and staff report are also attached. Teifion Rice-Evans from EPS will attend the Board meeting, present the new information and respond to any questions on the prior Report.

CONTINUED ON ATTACHMENT: Yes
ACTION OF BOARD ON: July 22, 2011 APPROVED AS RECOMMENDED: Yes
OTHER

VOTE OF BOARD MEMBERS
___UNANIMOUS
AYES: Glover, Pope, Stratford, Longmire
NOES:
ABSENT: Bryant
ABSTAIN:

I HEARBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF AN ACTION TAKEN AND ENTERED ON THE MEETING RECORD OF THE CONSERVANCY GOVERNING BOARD ON THE DATE SHOWN.

ATTESTED
Catherine Kutsuris, SECRETARY OF THE EAST CONTRA COSTA COUNTY HABITAT CONSERVANCY

BY: ______________________, DEPUTY

The staff recommendation is to approve the Report, provide the Report to participating cities and the County and recommend that they consider revising wetland mitigation fees as recommended, and directing staff to apply the revised wetland mitigation fees in future agreements between the Conservancy and Participating Special Entities.

Attachments

- Memo dated July 15, 2011 from EPS with additional information
- Materials from the March 21, 2011 Board Meeting on this topic, including the EPS Report

MEMORANDUM

To: John Kopchik, Contra Costa County

From: Teifion Rice-Evans and Catherine Meresak

Subject: East Contra Costa County HCP/ NCCP 2011 Mitigation Fee Update: Additional Information; EPS# 20149

Date: July 15, 2011

The Economics of Land Use

The 2011 Mitigation Fee Update (March 17, 2011) memorandum prepared by Economic & Planning Systems, Inc. (EPS) evaluated the latest available cost information to determine recommended refinements in the East Contra Costa County HCP/ NCCP Development Mitigation and Wetland Mitigation Fees. This technical analysis recommended:

(1) No change in the current 2011 development mitigation fees;
(2) Increase of between 5.3 percent and 32.4 percent in the wetland mitigation fees (excluding streams); and,
(3) Decrease of 22.7 percent in the per linear foot streams fee.

As documented in the 2011 Mitigation Fee Update memorandum, the recommended increases in the wetland fees were based on the Conservancy cost experience to date, restoration cost data from other projects in the region, and interviews with restoration specialists active in the East Bay and other Bay Area locations.

This memorandum describes new information available on two restorations projects, one Conservancy and one EBMUD. It also considers the relative effects of our recommendations on mitigation costs.

Additional Resotoration Cost Information

The recommended fee increases were based on estimates of per acre wetland restoration costs of between $114,000 and $122,500 per acre for wetlands, ponds, open water, and sloughs. The cost of riparian restoration was estimated at $68,000 per acre. These costs are conservative compared with the new project information described below:

Economic & Planning Systems, Inc.
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Berkeley, CA 94710-2515
510 841 9190 tel
510 841 9208 fax

Berkeley
Sacramento
Denver

www.epsys.com

- **Upper Hess Creek**. The Upper Hess Creek project is a Conservancy project that involves the restoration of wetlands/ ponds and streams. Based on Conservancy cost information, the total restoration cost associated with wetlands/ ponds component of the project was about $900,000, including staff costs, with about 45 percent of the costs representing direct construction costs. The project restored a total of 2.59 acres of wetlands/ ponds at an average restoration cost of $345,000 per acre.
- **Pavon Creeks and Scow Canyon**. Pavon Creeks and Scow Canyon are two restoration projects undertaken by EBMUD. The two projects both involved the restoration of wetlands/ ponds and streams. Based on EBMUD cost information (provided collectively for both projects), the total restoration cost associated with wetlands/ ponds component of the projects was about $1.65 million, excluding staff costs, with about 55 percent associated with direct construction costs. The project restored a total of 2.19 acres of wetlands/ ponds at an average restoration cost of $755,000 per acre.

Changes in Average Developer Cost

The recommended adjustments in wetland impact fees will allow the Conservancy to appropriately cover the costs associated with its ongoing restoration efforts. While the proposed increases are significant on a percentage basis, the wetlands component of the overall plan costs are relatively modest, and the development fees rather than the wetland mitigation fees are by far the biggest fee component for most projects. To illustrate this reality, EPS calculated the overall HCP/NCCP mitigation fees (including development, wetland (non-stream), and stream) associated with all development to date under the HCP/ NCCP for three different fee scenarios: (1) 2006 fee schedule; (2) current 2011 fee schedule; and, (3) recommended 2011 fee schedule.

Table 1 shows these three fee schedules for the different habitat types/ zones. **Table 2** shows the total "fee-paying acres" between 2008 and the present. As shown, the equivalent of 120.3 acres of activities have paid HCP/ NCCP fees to date, including 119.4 acres paying development mitigation fees and 0.65 acres paying wetland mitigation fees. The acreages were adjusted to incorporate temporary impact fees (which pay a reduced per-acre fee) and multipliers associated with rural roads. In addition, about 177 linear feet of streams have paid the streams restoration fee. **Table 2** also shows the total fee payments associated with the three different fee scenarios. Particular points of note include:

- The large majority of developer payments to date (about 90 percent) have been associated with the development mitigation fee.
- The wetland mitigation fee increases have been balanced out by the reduced stream payments, meaning that overall developer cost burden to date would have been similar under the current 2011 and recommended 2011 fee structures.

The actual future levels of development will not precisely mimic the distributions between development, wetland, and stream fee payments. As a result, it remains important to tie each of these elements to their own particular cost characteristics. It is also possible, for example, that the additional costs in wetland mitigation fee payments will be more under the recommended 2011 fee schedule than savings from the reductions in the streams fee. Nevertheless, the relatively limited level of wetland impacts from all covered development activities will continue to mean that the aggregate effect of the wetlands fee increase will be proportionally modest.

Table 1
Comparison of Mitigation Fee Amounts at the Time of HCP/NCCP Approval with Current and Recommended Fees

Fee Type/ Category	2006 Original Fee per Acre (2006 dollars)	2011 Current [1] Fee per Acre (2011 dollars)	2011 Recommended Fee per Acre (2011 dollars)
Development Fees			
Zone I	$11,919	$10,662	$10,662
Zone II	$23,838	$21,324	$21,324
Zone III	$5,960	$5,332	$5,332
"Zone IV" [2]	$17,879	$15,993	$15,993
Wetland Mitigation Fee			
Riparian Woodland/ Scrub	$58,140	$64,570	$68,000
Perennial Wetland	$79,560	$88,359	$117,000
Seasonal Wetland	$172,380	$191,445	$245,000
Alkali Wetland	$163,200	$181,250	$228,000
Ponds	$86,700	$96,289	$117,000
Aquatic (Open Water)	$43,860	$48,711	$58,000
Slough/ Channel	$98,940	$109,883	$124,000
Streams 25 feet wide or less	$474 [3]	$526 [3]	$407 [3]
Streams Greater than 25 feet wide	$714 [3]	$793 [3]	$613 [3]

[1] Current fee levels reflect application of the annual, automatic adjustment process to the original fees.
[2] Zone IV applies to certain covered projects within Antioch, such as EBART. HCP/NCCP provides that fees in this area will be an average of the Zone I and Zone II fees.
[3] Per linear foot

Sources: East Contra Costa County Habitat Conservancy; Economic & Planning Systems, Inc.

Table 2
Comparison of Cumulative Mitigation Costs from all Projects Covered by the HCP/NCCP to Date*

Fee Type/ Category	Total Acres of Impact Under HCP/NCCP to Date[1]	2006 Original Fee (2006 dollars)	2011 Current Fee [2] (2011 dollars)	2011 Recommended Fee (2011 dollars)
Development Fees				
Zone I	58.70	$699,660	$625,882	$625,882
Zone II	53.00	$1,263,372	$1,130,150	$1,130,150
Zone III	0.13	$779	$697	$697
"Zone IV" [3]	7.55	$134,911	$120,685	$120,685
Subtotal	**119.38**	**$2,098,722**	**$1,877,413**	**$1,877,413**
Wetland Mitigation Fee				
Riparian Woodland/ Scrub	0.26	$15,144	$16,818	$17,712
Perennial Wetland	0.02	$1,448	$1,608	$2,129
Seasonal Wetland	0.29	$50,283	$55,844	$71,466
Alkali Wetland	0.00	$8	$9	$11
Ponds	0.00	$0	$0	$0
Aquatic (Open Water)	0.00	$0	$0	$0
Slough/ Channel	0.08	$7,849	$8,717	$9,837
Subtotal	**0.65**	**$74,732**	**$82,997**	**$101,156**
Streams 25 feet wide or less	133.05 [4]	$63,066 [4]	$70,041 [4]	$54,127 [4]
Streams Greater than 25 feet wide	43.98 [4]	$31,401 [4]	$34,874 [4]	$26,950 [4]
Subtotal	**177.03 [4]**	**$94,467 [4]**	**$104,915 [4]**	**$81,077 [4]**
Total [5]	**120.03**	**$2,267,921**	**$2,065,325**	**$2,059,646**

[1] Acreage totals reflect all acres paying permanent impact fees. Acres of temporary impacts, cell tower buffers, or rural roads which pay a modified per acre fee were included in the totals but prorated at the appropriate rate.
[2] Current fee levels reflect application of the annual, automatic adjustment process to the original fees.
[3] Zone IV applies to certain covered projects within Antioch, such as EBART. HCP/NCCP provides that fees in this area will be an average of the Zone I and Zone II fees.
[4] Measured in linear feet
[5] Total acreage does not include linear feet of stream.

***Note: This table illustrates the collective fee burden from all 21 projects covered under the HCP/NCCP between 2008 and 2011 assuming all projects paid fees at the Original, Current, and Recommended levels.**

Sources: East Contra Costa County Habitat Conservancy; Economic & Planning Systems, Inc.

MEMORANDUM

To: John Kopchik, Contra Costa County

From: Teifion Rice-Evans and Catherine Meresak

Subject: East Contra Costa County HCP/NCCP:
2011 Mitigation Fee Update; EPS #20149

Date: March 17, 2011

The Economics of Land Use

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This memorandum provides the required 2011 review of the mitigation fees charged under the East Contra Costa County HCP/NCCP as well as the technical basis for their refinement, where appropriate. Chapter 9 of the East Contra Costa County HCP/NCCP (conservation plan)—the Funding Chapter—specifically requires the review and adjustment of mitigation fees. These adjustments include annual automatic adjustments of mitigation fees based on prescribed formulas as well as a periodic, more detailed review and adjustment, where necessary, of the mitigation fees. This review is necessary to ensure that, as circumstances change through time, conservation plan financing mechanisms are calibrated to provide the proper amount of funding to achieve the conservation goals. The conservation plan sets a specific required schedule for the detailed review, namely by March 15 of years 3, 6, 10, 15, 20, and 25. The first review is now due.

Analytical Framework

This analysis focuses on changes in conservation plan costs since 2006 to determine whether any refinements to mitigation fees are appropriate. The conservation framework, goals, and mitigation requirements established by the conservation plan in 2006 are understood to have remained unchanged. As a result, this analysis evaluates changes in conservation costs, integrates the revised costs into the existing cost and fee estimating models, and determines the appropriate fee levels for 2011 based on the best information available. Beyond 2011, as stated above, further annual adjustments and additional detailed periodic review will be needed as costs continue to fluctuate through time and more information becomes available as conservation plan implementation proceeds.

The primary focus of this cost analysis and the associated fee adjustments are in areas where major cost fluctuations have occurred over the last five years (e.g., the real estate and land market) and where the East Contra Costa County Habitat Conservancy (the Conservancy) has had specific implementation experience (e.g., acquisition of large land parcels and wetland creation/restoration). These costs are major components of the development mitigation fees and the wetland restoration/creation fees.

Specifically, the cost review focuses on three areas:

- **Land Acquisition Costs**. The real estate market has changed significantly since 2006. Information on land transactions by the Conservancy as well as other relevant rural land sales in East County in recent years were used to develop new estimates of per-acre land costs to update land acquisition costs.
- **Wetland Restoration/Creation Costs**. The Conservancy has implemented several restoration projects. This information combined with a review of information on other individual restoration projects, interviews with firms active in overseeing wetland restoration projects in East County and elsewhere in the region, and cost assumptions from other HCP/NCCPs inform the refinement of restoration and related costs.
- **Other Costs (management, monitoring, and other implementation costs)**. The early stage of conservation plan implementation means that there is limited information on many other plan costs, such as the costs of preserve management and maintenance, the costs of monitoring, research, and adaptive management, or the overall administrative costs. For these other costs, an inflation-related index was used to estimate 2011 costs.

The updated cost estimates were then integrated into the existing fee calculators that reflect the established mitigation requirements and fair share cost allocations to estimate 2011 mitigation fee levels. These fee estimates were then compared to current fee levels. Since plan adoption in 2006, the Conservancy has automatically updated its development and wetland mitigation fees using the combination of consumer price and housing price indices described in Chapter 9 of the Conservation Plan. The annual automatic adjustments between 2006 and 2011 increased wetland mitigation fees by 11.1 percent in line with inflation and decreased development mitigation fees by 10.5 percent (see **Table 1**).

Findings and Recommendations

Table 2 summarizes the 2011 development and wetland mitigation fee estimates. **Appendix A** provides the detailed development fee calculation. Key findings and recommendations are as follows:

1. The 2011 levels of the development fees determined by the automatic adjustment process are appropriate for 2011 with no adjustment necessary.

Reflecting a combination of both the significant declines in real estate and rural land values as well as inflationary increases in other costs, the annual automatic inflator established a 10.5 percent decline in development mitigation fee levels in all three zones. As shown in **Table 3**, the 2011 fair share cost estimate to be funded by development mitigation fees is estimated at $150 million, relative to the $170 million 2006 estimate. The 2011 fee levels required to cover this cost allocation are very similar (0.7 percent above) to the 2011 automatic inflator fee levels (see **Table 2**). This level of difference is minor given the planning-level nature of the cost estimates. As a result, the automatic inflator 2011 fee level is appropriate for 2011.

2. With the exception of riparian habitat and stream impact mitigation, the wetland mitigation fee levels require a significant upward adjustment.

Wetland mitigation costs—including construction costs, the associated planning, engineering, and post-construction maintenance costs, and staff costs—are particularly difficult to estimate. Every project is characterized by different issues and challenges and the actual outcomes in terms of the acres of new functioning wetland created/restored is often uncertain until several years after project completion. Based on a combination of the Conservancy's experience to date, a review of costs of other restoration projects, cost assumptions in other San Francisco Bay Area HCP/NCCPs, interviews with restoration specialists active in Contra Costa County, and the evolving understanding of the restoration opportunities available in the East County, a wetland mitigation fee increase in the 12.5 to 32.5 percent range is recommended for wetlands (perennial, alkali, and seasonal) and ponds, open water, and sloughs. As discussed in subsequent sections, this increase results in fees that are higher than current fees but lower than what would be needed based on the Conservancy's actual restoration costs to date. Future larger wetland restoration projects could result in an average cost below this range, while the continuation of the Conservancy's existing experience could result in an average cost above this range. Continued scrutiny of the actual costs of restoration/creation in subsequent reviews will help ensure the fees are set as close as possible to actual costs.

3. The stream mitigation fee can be adjusted downward, while the riparian habitat mitigation fee requires only a modest increase.

The stream fee represents a unique case among wetland types. To date the Conservancy has had limited experience with streams restoration, though these experiences do suggest the opportunity to reduce the fee and still have sufficient revenue to cover stream restoration costs. As a result, the level of contingency was reduced for this habitat type from 20 percent to 5 percent, reducing the required fee by close to 15 percent relative to the 2006 fee level and over 20 percent relative to the current 2011 fee level. The riparian restoration mitigation fee was refined modestly upward to include higher staff costs and construction-related costs, consistent with the refinements for other habitat categories (however, the construction costs were solely adjusted by inflation for the period 2006 to 2011). This results in a recommended increase of about 5 percent relative to the current 2011 fee.

4. The annual automatic inflator has been functioning appropriately and no change to the indices or approach is recommended.

There are a number of factors that change conservation costs over time and no one index or set of indices can track these changes perfectly. The experience to date does, however, suggest that the automatic update approach being used for the development mitigation fee has performed relatively well. The refinements in the wetland mitigation fees are more significant relative to the automatic refinements, though this is more related to the challenges and uncertainties in estimating these costs than the use of an inflation-based index to adjust the mitigation fees. As a result, it is recommended that the same annual automatic inflator approach is applied in the years after this update, but before the next more detailed update.

Land Value Analysis

Land acquisition costs represented over 55 percent of the total conservation costs estimated in 2006, under both the initial and maximum UDA scenarios. Per-acre land value estimates were developed for parcels of different sizes and topography in 2006 based on available information on arms-length transactions of rural land in East County and for land inside the Urban Limit Line based on a simplified residual land value analysis. These per-acre values were applied to the expected blend of parcel sizes and relative locations to develop the 2006 acquisition cost. This update applied the same methodology using more recent land transactions data as well as Conservancy-specific information to update the per-acre land value estimates and the overall land acquisition cost estimate. **Table 4** shows both the 2006 and 2011 per-acre land value estimates. Detailed information on the new land value information and analysis used to develop the 2011 per-acre land values is provided in **Appendix B**. An overview of the approach and data considered is described below:

- **120 acres and over**. This size category is expected to account for the majority of the land conserved by the plan. Working with the East Bay Regional Park District, the Conservancy has had considerable success in acquiring parcels of over 120 acres. Based on this data and necessary adjustments for sale-specific circumstances—such as the purchase of lease rights as well as land—the average land value per acre was about $4,700 per acre, over 15 percent below the 2006 estimate in nominal dollar terms.

- **5 to 120 acres**. The Conservancy has not purchased parcels in this size range to date, though a number of purchases in this range are expected to be necessary. A County Assessor database of transactions was searched for arms-length transactions of rural parcels in the East County in the ranges of 5 to 10, 10 to 40, and 40 to 120 acres. This data was considered in conjunction with recent transactions by Save Mount Diablo to identify planning-level estimates of average land values. As shown, land value reductions of 32 percent, 28 percent, and 10 percent were identified for the three size categories.

- **Inside Urban Limit**. Land inside the urban limit line carries greater levels of speculative value associated with its future urban development potential. In 2006, land values were estimated based on home prices and estimates of the general time period before the development. This same approach was taken with a downward adjustment of the average home price for sales in the East County. As a result, land values were estimated to decrease by about 43 percent for the range of land types considered within the Urban Limit Line. As a result, 2011 per-acre land values were estimated at up to $37,500 per acre.

Table 4 also shows the overall effects of these changes in per-acre land value estimates. In particular, the direct land acquisition costs reduced from $220 million in 2006 to about $177 million in 2011 (nominal dollar terms). When other acquisition-related costs—such as site improvements, due diligence, and planning surveys—are included, the 2006 nominal dollar cost of $236 million reduces to $192 million, a reduction of close to 20 percent.

Wetland Restoration Cost Analysis

Wetland restoration costs were updated based on Conservancy experience, a review of cost data from other restoration projects in the region, cost assumptions used in other San Francisco Bay Area HCP/NCCPs, and conversations with restoration specialists involved with restoration projects in East County and other Bay Area locations. The key information sources and wetland mitigation fee calculator adjustments and results are described below. **Appendix C** provides the detailed background data considered.

Information Sources

Conservancy Experience

Conservancy experience has included three restoration projects to date—two seasonal wetlands/ponds projects (Souza I/Vasco Caves and Souza II) and one riparian project (Irish Canyon). Irish Canyon involved volunteer labor that will not be typically available so this labor was monetized so that project projects could be utilized in this analysis. A portion of Souza II and Irish Canyon restoration costs were associated with stream restoration, so these were removed. The resulting data indicated the following average per-acre restoration costs:

1. Seasonal wetland/pond restoration costs of about $180,000 per acre, including about $75,000 per acre in construction costs, $75,000 per acre in construction-related costs, and $30,000 per acre in Conservancy staff costs; and

2. Riparian restoration costs of about $85,000 per acre, including about $50,000 per acre in construction costs, about $25,000 per acre in construction-related costs, and about $10,000 per acre in Conservancy staff costs.[1]

Other Information Sources

Three additional sets of information were also considered:

- **Other Restoration Projects**. Actual restoration costs per acre for projects in the Bay Area and Sacramento Valley have varied between $10,000 per acre to $550,000 per acre depending on the location, micro-climate, level of engineering, and scale of project. Restoration projects were selected based on size (less than 25 acres) and type (riparian/wetland projects only) from a database of restoration projects compiled by ICF International. For this sample, the weighted average per-acre restoration cost was about $200,000 per acre for projects of an average size of about 14 acres.

- **Interviews with Restoration Specialists**. Interviews with wetland specialists at HT Harvey & Associates suggested a typical range of $80,000 to $220,000 per-acre wetland restoration cost (excluding implementing entity staff costs) in the East County, recognizing the possibility for higher costs where significant engineering is required to create self-sustaining wetlands. For East County, the topography and climate create challenges that drive the costs upwards and suggest a potential average per-acre restoration cost for wetlands close to the mid-point of this range or in the $130,000 to $150,000 per-acre range. This cost range could be expected to apply to the three wetland types and the open water, channel, and pond categories.

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[1] The overall wetted acre outcomes from these three projects are still uncertain. Small variations in the outcomes could result in significant changes in the estimated costs per acre. A fourth project, the Lentzner Springs project, was performed by the Conservancy but not included in this analysis because the project was a small pilot project and the very high per-acre costs are not representative of likely future projects.

- **Santa Clara Valley HCP/NCCP**. The Santa Clara Valley HCP/NCCP public review document has recently developed a series of per-acre restoration cost estimates for some similar habitat types. While there are numerous differences in the two plans and locations, they are both San Francisco Bay Area plans expected to be required to conduct a number of smaller restoration projects relative to other plans in the Sacramento and San Joaquin Valleys. The following 2010 Santa Clara Valley restoration cost estimates (excluding staff costs) were considered as a point of comparison, $85,000 per acre for riparian restoration, $125,000 per acre for seasonal wetland restoration, $97,500 per acre for ponds restoration, and $506 per linear foot for stream restoration. Implementing staff and related costs are estimated at about $10,500 per acre.

Mitigation Fee Refinements and Results

Recognizing both the importance of the Conservancy experience, but also the limited sample size and uncertain outcomes, the following refinements were applied to the wetland mitigation cost/fee calculator model:

- Per-acre construction costs for the three wetland types and the three other categories noted (ponds, open water, sloughs) were all re-estimated at a level representing the average between the 2006 construction cost level and the Conservancy's seasonal wetland/ponds average of about $75,000 per acre. Because of the variations in starting 2006 estimates, the resulting per-acre construction cost estimates varied, but all fell within the $58,000 to $65,000 per-acre range.

- Construction-related costs as a proportion of construction costs were assumed to be a little over 40 percent, consistent with ICF International estimates for other conservation plans. Although this is below the average level experienced by the Conservancy (100 percent), the addition of the contingency to the fee captures some of this difference.

- Staff-related costs were increased to $12,500 per acre to be more consistent with the original 2006 overall cost model and similar to ICF International estimates for other conservation plans. These are significantly below the Conservancy's experience to date, though staff costs may decrease somewhat as more projects are conducted and if large projects with greater wetted acreage outcomes are identified.

Table 5 summarizes the outcomes of these refinements. As shown, for the six habitat categories addressed so far, the total per-acre restoration costs range from $113,000 to $125,000 per acre, including staff costs. As discussed above in the findings section, the contingency on the stream mitigation fee was reduced to 5 percent given the current expectation of a lower restoration cost per linear foot of stream of about $410 per linear foot (for streams less than 25 feet in width) and over $610 per linear foot for wider streams. Riparian construction costs were also treated distinctly with an assumption that construction costs increased at the level of inflation since 2006 (measured by the consumer price index). The resulting restoration cost per acre is about $68,500.

These per-acre restoration costs represent the mitigation fees with the exception of seasonal wetland and alkali wetland that both have a mitigation ratio of 2:1 under the plan and open water, with a 0.5:1 mitigation ratio. As a result, the seasonal wetland mitigation fee is $245,000 per acre, the alkali wetland mitigation fee is $228,000 per acre, and the open water mitigation fee is $58,500 per acre. Overall, this fee schedule would cover the estimated wetland mitigation costs, generating $28.2 million in wetland mitigation fees under the initial UDA and $29.9 million in wetland mitigation fees under the maximum UDA scenario (see **Table 5**).

Other Costs

Other costs include management, monitoring, and other implementation costs. The early stages in the conservation plan and the associated limited Conservancy experience addressing ongoing maintenance, monitoring, adaptive management, and other activities means there is little or no new information available to update the cost estimates in the conservation plan. As a result, these costs were increased by the same inflation index (consumer price index) used in the automatic updates under the conservation plan.

Table 1
Mitigation Fee History *
East Contra Costa County HCP/ NCCP Fee Update; EPS#20149

Fee Type/ Category	2006 Original (2006 dollars)	2007 Auto. Updates (2007 dollars)	2008 Auto. Updates (2008 dollars)	2009 Auto. Updates (2009 dollars)	2010 Auto. Updates (2010 dollars)	2011 Auto. Updates (2011 dollars)	2006 - 2011 Change
Development Fees							
(per acre)							
Zone I	$11,919	$12,457	$12,078	$10,731	$10,558	$10,662	-10.5%
Zone II	$23,838	$24,914	$24,155	$21,462	$21,116	$21,324	-10.5%
Zone III	$5,960	$6,229	$6,039	$5,366	$5,279	$5,332	-10.5%
Wetland Mitigation Fee							
(per acre, except as noted)							
Riparian Woodland/ Scrub	$58,140	$60,004	$61,969	$61,981	$63,601	$64,570	11.1%
Perennial Wetland	$79,560	$82,111	$84,799	$84,816	$87,032	$88,359	11.1%
Seasonal Wetland	$172,380	$177,908	$183,731	$183,768	$188,570	$191,445	11.1%
Alkali Wetland	$163,200	$168,433	$173,947	$173,981	$178,528	$181,250	11.1%
Ponds	$86,700	$89,480	$92,409	$92,427	$94,843	$96,289	11.1%
Aquatic (Open Water) (1)	$43,860	$45,266	$46,748	$46,757	$47,979	$48,711	11.1%
Slough/ Channel	$98,940	$102,113	$105,455	$105,476	$108,233	$109,883	11.1%
Streams (per linear foot)							
- 25 feet wide or less	$474	$489	$505	$505	$519	$526	11.1%
- Greater than 25 feet wide	$714	$737	$761	$761	$781	$793	11.1%

*Fee amounts indicated for each calendar year are valid from March 15 of that year until March 14 of the subsequent calendar year.

Sources: East Contra Costa County Habitat Conservancy; Economic & Planning Systems, Inc.

Table 2
Estimated 2011 Mitigation Fees
East Contra Costa County HCP/ NCCP Fee Update; EPS#20149

Fee Type/ Category	**2006 Original** (2006 dollars)	**2011 Auto. Updates** (2011 dollars)	**2011 New Estimate** (2011 dollars)	**2011: Est. vs. Auto % Pot'l Change** (nominal dollar)
Development Fees				
(per acre)				
Zone I	$11,919	$10,662	$10,732	0.7%
Zone II	$23,838	$21,324	$21,465	0.7%
Zone III	$5,960	$5,332	$5,366	0.7%
Wetland Mitigation Fee				
(per acre, except as noted)				
Riparian Woodland/ Scrub	$58,140	$64,570	$68,000	5.3%
Perennial Wetland	$79,560	$88,359	$117,000	32.4%
Seasonal Wetland	$172,380	$191,445	$245,000	28.0%
Alkali Wetland	$163,200	$181,250	$228,000	25.8%
Ponds	$86,700	$96,289	$117,000	21.5%
Aquatic (Open Water) (1)	$43,860	$48,711	$58,000	19.1%
Slough/ Channel	$98,940	$109,883	$124,000	12.8%
Streams (per linear foot)				
- 25 feet wide or less	$474	$526	$407	-22.7%
- Greater than 25 feet wide	$714	$793	$613	-22.7%

Sources: East Contra Costa County Habitat Conservancy; ICF International; Economic & Planning Systems, Inc.

Table 3
2011 Conservation Cost Summary (2011 dollars): Maximum Permit Area Scenario
East Contra Costa County HCP/ NCCP Fee Update; EPS#20149

Cost Category	2006 Original (2006 dollars)	2011 New Estimate (2011 dollars)	2010 - 2011 % Change
Conservation Costs/ Uses of Funds			
Land Acquisition	$235,680,000	$192,200,000	-18%
Wetland Restoration/ Creation	$23,650,000	$29,858,179	26%
Other/ Contingency	$90,710,000	$96,470,351	6%
Total Costs	**$350,040,000**	**$318,528,531**	**-9%**
Sources of Funds			
Development Mitigations Fees	$169,722,800	$150,108,583	-12%
Wetland Mitigation Fees	$23,650,000	$29,858,179	26%
Rural Infrastructure Projects	$8,931,600	$8,931,600	0%
Other Funding	$147,735,600	$129,630,169	-12%
Total Funding	**$350,040,000**	**$318,528,531**	**-9%**

Sources: East Contra Costa County Habitat Conservancy; ICF International; Economic & Planning Systems, Inc.

Table 4
Average Land Values and Total Land Acquisition Cost
East Contra Costa County HCP/ NCCP Fee Update; EPS#2014

Fee Type/ Category	**2006** (2006 dollars)	**2011** (2011 dollars)	**2006 - 2011 % Change** (Nominal Dollar)	**Source**
Per Acre Land Values				
120 acres and over	$5,600	$4,700	-16%	Conservancy Acquisitions
40 to 120 acres	$9,600	$8,600	-10%	East County General Sales/ Save Mount Diablo
10 to 40 acres	$31,900	$23,000	-28%	East County General Sales/ Save Mount Diablo
5 to 10 acres	$56,000	$38,000	-32%	East County General Sales/ Save Mount Diablo
Inside Urban Limit Line	Up to $66,000	Up to $37,500	-43%	Residual Land Value/ Home Price
Land Acquisition Costs				
Land Acquisition Costs	$220,004,713	$176,832,595	-20%	
Total Land-Related Costs (inc. site improvements, due diligence, planning surveys)	**$235,680,000**	**$192,196,463**	-18%	

Sources: East Contra Costa Conservancy; Save Mount Diablo; County Assessor data; Dataquick; Economic & Planning Systems, Inc.

Table 5
2011 East Contra Costa HCP/ NCCP Wetland Mitigation Fee Estimates
East Contra Costa County HCP/ NCCP Fee Update; EPS#20149

Cost Category	Estimated cost per acre or linear feet of restoration/creation by land cover type								
	Riparian Restoration Acres	**Stream Impact** Linear Ft	**Perennial wetland** Acres	**Seasonal wetland** Acres	**Alkali wetland** Acres	**Slough/ channel** Acres	**Open Water Impact** Acres	**Pond Impact &** Acres	**Total**
COSTS									
Staff and Related Costs	$12,300	$20	$12,300	$12,300	$12,300	$12,300	$12,300	$12,300	na
Construction Costs	$31,625	$299	$60,822	$63,697	$58,672	$64,822	$60,322	$60,322	na
Construction-Related Costs	$13,050	$69	$24,729	$25,879	$23,869	$26,329	$24,529	$24,529	na
Contingency (20%)	$11,395	$19	$19,570	$20,375	$18,968	$20,690	$19,430	$19,430	na
TOTAL per acre	**$68,370**		**$117,421**	**$122,251**	**$113,809**	**$124,141**	**$116,581**	**$116,581**	na
TOTAL per linear ft		**$407**							
FEE CALCULATION									
Mitigation requirement	1:1	1:1	1:1	2:1	2:1	1:1	0.5:1	1:1	na
Fee per acre of impact	$68,370	$407	$117,421	$244,502	$227,618	$124,141	$116,581	$116,581	na
Fee for Final HCP/NCCP (rounded)	**$68,000**	**$407**	**$117,000**	**$245,000**	**$228,000**	**$124,000**	**$58,500**	**$117,000**	na
ESTIMATED FEE REVENUE									
Est. Impacts (Max UDA)	35	4,224	75	16	10	73	17	8	233
Estimated Revenue (Max UDA)	**$ 2,380,000**	**$ 1,718,379**	**$ 8,775,000**	**$ 3,822,000**	**$ 2,188,800**	**$ 9,052,000**	**$ 994,500**	**$ 936,000**	**$ 29,866,679**

Sources: ECCC HCP/ NCCP; East Contra Costa County Conservancy; ICF/ Jones & Stokes; HT Harvey; Economic & Planning Systems, Inc.

APPENDIX A:

Development Fee Calculator

Table A-1: ECCC HCP/NCCP Development Fee Calculator, 2011

1. Determining Future Development's FAIR SHARE of Implementation Costs (assumes Maximum Urban Development Area)

	Urban Acres	Irrigated Ag. Acres	Total Impacted Acres (urban + 0.5*irrigated ag)	Conservation Acres	Conservation Ratio	Fair Share Ratio	Fair Share of New Conservation Acres	Fair Share	
Existing (2003)	23,828	33,028	40,342	43,000	1.07	1.43	14,596	48%	(public share)
Affected during HCP	15,000	(8,000)	11,000	30,300	2.75	1.43	15,704	52%	(future development share)
Status after HCP	38,828	25,028	51,342	73,300	1.43	1.43	30,300	100%	

2. Gross Cost Allocations

	Item	Amount: Initial Permit Area	Amount: Max. Permit Area
a	Total Plan Cost *	$273,187,417	$318,528,531
b	**Wetland Mitigation Cost** (Creation & Restoration) (to be paid by wetland fee)	$28,208,385	$29,858,179
c	Adjusted Plan Cost	$244,979,032	$288,670,351
d	Future Urban Development's "Fair Share" %	43%	52%
e=c*d	**Future Impacts "Fair Share" $**	**$106,417,263**	**$150,108,583**
f	**Contribution by Rural Infrastructure Projects**	**$8,931,600**	**$8,931,600**
g=c-e-f	**Remaining Cost** (to be funded by a variety of public sources)	**$129,630,169**	**$129,630,169**
i=b+e+f+g	Total revenues	$273,187,417	$318,528,531

Key Assumptions:	
Ag. habitat & open space value relative to natural land	50%
New development's share of rural road mitigation costs	0%
Rural road mitigation costs	$7,431,600
Other rural infra. mitigation costs	$1,500,000
Total rural infra. mitigation costs	$8,931,600
Fee zone ratio:	
Zone 1: Eastern and Ag:	2
Zone 2: S/W and Natural:	4
Zone 3: Infill:	1
Paying acres contingency (see note 4)	10%
Units / acre	4

3. Estimated Development Mitigation Fee by Fee Zone

ITEM	FEE ZONES: Eastern and Agricultural Zone I	South + West Natural Areas Zone II	Infill (less 10 acres) Zone III	Total/ Weighted Avg
Total Acres of Impacts (n/incl Rural Infrastructure)				
Initial Plan Area	6,212	2,306	166	8,684
Maximum Plan Area	7,533	4,180	166	11,879
Relative Fee Weighting by Zone (1)	2	4	1	
Relative Funding Burden by Zone -- Percent (2)				
Initial Plan Area	57%	42%	0.8%	100%
Maximum Plan Area	47%	52%	0.5%	100%
Relative Funding Burden by Zone -- Amount (3)				
Initial Plan Area	$60,609,154	$44,998,296	$809,813	$106,417,263
Maximum Plan Area	$70,779,166	$78,549,559	$779,858	$150,108,583
Fee Per Developed Acre (4)				
Initial Plan Area	**$10,732**	**$21,465**	**$5,366**	$12,521
Maximum Plan Area	$10,335	$20,671	$5,168	$12,058
Est. Fee Per Housing Unit for Residential Dvlpmt (5)				
Initial Plan Area	$2,683	$5,366	$1,342	$3,130
Maximum Plan Area	$2,584	$5,168	$1,292	$3,015

Notes:
(1) Relative fee contribution of an acre in each zone.
(2) Relative funding contribution of each zone, taking into account total zone acreage and fee weighting factor.
(3) Relative funding burden times total fee-funded HCP costs.
(4) Funding burden divided by zone acreage. Also includes a 10% contingency factor to account for incomplete buildout.
(5) Assumes average housing density of 4.0 units per acre.

APPENDIX B:

Land Value Information and Analysis

Table B-1

Average Per Acre Land Values
East Contra Costa County HCP/NCCP 2011 Fee Update; EPS # 20149

Category #	Size	Slope	Other	Per Acre Land Value (2006 Valuation)	Per Acre Land Value (2011 Valuation)	Percent Change (2006 to 2011)
OUTSIDE URBAN LIMIT LINE		Whole Parcel				
1.	120 acres+	< 26%	na	$5,600	$4,700	-16%
2.	40 -120 acres	< 26%	na	$9,600	$8,600	-10%
3.	10 - 40 acres	< 26%	na	$31,900	$23,000	-28%
4.	5 - 10 acres	< 26%	na	$56,000	$38,000	-32%
5.	0 - 5 acres	< 26%	na	$80,000	$132,000	65%
6	ALL	> 26%	na	$3,800	$3,500	-8%
INSIDE URBAN LIMIT LINE		Percentages of Parcel				
7.	na	<15%	Not Now Designated for Development	$21,300	$12,050	-43%
8.	na	15-26%	Not Now Designated for Development	$14,800	$8,400	-43%
9.	na	>30%	Not Now Designated for Development	$5,200	$3,000	-42%
10.	na	<15%	Designated for Development	$66,200	$37,400	-44%
11.	na	15-26%	Designated for Development	$46,400	$26,200	-44%
12.	na	>26%	Designated for Development	$16,600	$9,400	-43%
INSIDE URBAN LIMIT LINE - BYRON AIRPORT						
13.	na	na	na	$10,300	$5,800	-44%

Source: Variety of Appraisals; County Assessor data; Home Sales Prices and Residual Land Value Analysis; East Contra Costa Habitat Conservancy; Save Mount Diablo; Economic & Planning Systems, Inc.

Table B-2
Overview of EBRPD/ECCC Habitat Conservancy Land Acquisitions
East Contra Costa County HCP/NCCP 2011 Fee Update; EPS # 20149

	Owner/Project Name	Year of Sale	Approx Size (acres)	Adjusted Price (1)	Adjusted Price per Acre (1)
1	Souza I	2004	617	$2,780,000	$4,506
2	Lenztner	2005	320	$1,340,000	$4,188
3	Chaparral Spring	2008	333	$1,400,000	$4,204
4	Schwartz	2009	153	$803,880	$5,254
5	Souza II	2009	190	$1,692,000	$8,905
6	Fox Ridge	2009	221	$1,900,000	$8,597
7	Vaquero Farms South	2009	681	$2,383,500	$3,500
8	Vaquero Farms North	2010	577	$2,770,000	$4,801
9	Grandma's Quarter	2010	157	$1,036,200	$6,600
10	Martin	2010	230	$1,445,395	$6,284
11	Ang	2010	460	$2,763,840	$6,008
12	Souza III	Pending	911	$2,222,765	$2,440
13	Irish Canyon--Save Mount Diablo	2010	320	$1,700,000	$5,313
14	Land Waste Management	Pending	469	$3,050,000	$6,503
15	Barron	Pending	798	$2,952,600	$3,700
	Total		**6,437**	**$30,240,180**	**$4,698**

*All prices in nominal dollars.
(1) Adjusted price and adjusted price per acre exclude portions of sales price and acreage pertaining to lease revenues, existing conservation easements, and significant improvements.

Source: Contra Costa County January 2011; Economic & Planning Systems, Inc.

Table B-3
Transaction Data for Sales between 40 and 120 Acres
East Contra Costa County HCP/NCCP 2011 Fee Update; EPS # 20149

#	Closest City	Zoning	Land Use/ Project Name	Sales Date	Acres	Sales Price (Nominal Dollars)	Price per Acre	Source
East County Assessor Information [1]								
1	Bay Point	P-1	VACANT LAND (NEC)	September-07	89	$906,000	$10,158	
2	Pittsburg		VACANT LAND (NEC)	April-10	61	$330,000	$5,377	
3	Pittsburg	A-4	VACANT LAND (NEC)	April-10	61	$1,032,000	$16,918	
4	Pittsburg	A-4	VACANT LAND (NEC)	June-09	54	$300,000	$5,580	
5	Pittsburg	A-4	VACANT LAND (NEC)	June-09	50	$300,000	$5,948	
	Weighted Average						**$9,083**	
Save Mount Diablo Acquisitions								
1		A-4	Wright Canyon	December-01	76	$640,000	$8,421	
2		A-4	Joseph Galvin Ranch	January-03	61	$385,000	$6,311	
	Weighted Average						**$7,482**	
Total								
	Weighted Average						**$8,598**	

(1) Recent transaction data from County Assessor land transaction database for land with zero or minimal improvement value.

Source: First American Real Estate Solutions (FARES) - County Assessor Data; Save Mount Diablo; Economic & Planning Systems, Inc.

Table B-4
Transaction Data for Sales between 10 and 40 Acres
East Contra Costa County HCP/NCCP 2011 Fee Update; EPS # 20149

#	Closest City	Zoning	Land Use/ Project Name	Sales Date	Acres	Sales Price (Nominal Dollars)	Price per Acre	Source
East County Assessor Information [1]								
1	Oakley		VACANT LAND (NEC)	November-08	40	$1,447,500	$36,636	
2	Byron	A-4	AGRICULTURAL (NEC)	March-10	31	$405,000	$13,111	
3	Byron	A-4	AGRICULTURAL (NEC)	July-09	26	$275,000	$10,385	
4	Knightsen	A-3	VACANT LAND (NEC)	September-09	21	$337,000	$16,431	
5	Byron	A-4	AGRICULTURAL (NEC)	March-09	20	$300,000	$14,815	
6	Antioch		VACANT LAND (NEC)	September-09	20	$1,071,500	$52,966	
	Weighted Average						**$24,298**	
Save Mount Diablo Acquisitions								
1		A-20	7030 Morgan Territory Rd	December-10	20	$425,000	$21,250	
2		A-2	Young Canyon	May-06	18	$300,000	$17,026	
3		A-2	Marsh Creek II	May-08	17	$320,000	$18,824	
	Weighted Average						**$19,132**	
Total								
	Weighted Average						**$22,970**	

(1) Recent transaction data from County Assessor land transaction database for land with zero or minimal improvement value.

Source: First American Real Estate Solutions (FARES) - County Assessor Data; Save Mount Diablo; Economic & Planning Systems, Inc.

Table B-5
Transaction Data for Sales between 5 and 10 Acres
East Contra Costa County HCP/NCCP 2011 Fee Update; EPS # 20149

#	Closest City	Zoning	Land Use	Sales Date	Acres	Sales Price (Nominal Dollars)	Price per Acre	Source
East County Assessor Information [1]								
1	Bethel Island	A-2	VACANT LAND (NEC)	December-06	10	$700,000	$70,000	
2	Pittsburg	A-4	VACANT LAND (NEC)	June-09	5	$300,000	$57,692	
	Weighted Average						**$65,789**	
Save Mount Diablo Acquisitions								
1		A-2	Oak Hill	December-10	10	$87,500	$8,750	
2		A-2	Marsh Creek I	November-07	9	$315,000	$35,314	
3		A-2	Dry Creek	August-10	5	$84,000	$16,216	
	Weighted Average						**$20,187**	
Total								
	Weighted Average						**$37,824**	

(1) Recent transaction data from County Assessor land transaction database for land with zero or minimal improvement value.

Source: First American Real Estate Solutions (FARES) - County Assessor Data; Save Mount Diablo; Economic & Planning Systems, Inc.

Table B-6
Transaction Data for Sales between 2 and 5 Acres
East Contra Costa County HCP/NCCP 2011 Fee Update; EPS # 20149

#	Closest City	Zoning	Land Use	Sales Date	Acres	Sales Price (Nominal Dollars)	Price per Acre	Source
East County Assessor Information [1]								
1	Pittsburg		INDUSTRIAL ACREAGE	April-09	4	$100,000	$22,624	
2	Bay Point	P-1	RESIDENTIAL ACREAGE	December-09	3	$500,000	$174,825	
3	Discovery Bay	P-1	RESIDENTIAL ACREAGE	November-10	2	$800,000	$329,218	
4	Bay Point	P-1	RESIDENTIAL ACREAGE	December-09	2	$500,000	$215,517	
5	Bay Point	P-1	RESIDENTIAL ACREAGE	December-09	2	$500,000	$215,517	
6	Brentwood		RESIDENTIAL ACREAGE	December-10	2	$200,000	$90,909	
7	Oakley		RESIDENTIAL ACREAGE	April-09	2	$50,000	$24,390	
8	Bethel Island	A-2	RESIDENTIAL ACREAGE	December-10	2	$100,000	$50,000	
	Weighted Average						**$133,495**	
Save Mount Diablo Acquisitions								
1		F-R	Marsh Creek IV	December-08	3	$325,000	$122,642	
	Weighted Average						**$122,642**	
Total								
	Weighted Average						**$132,258**	

(1) Recent transaction data from County Assessor land transaction database for land with zero or minimal improvement value.

Source: First American Real Estate Solutions (FARES) - County Assessor Data; Save Mount Diablo; Economic & Planning Systems, Inc.

Table B-7
Inside the ULL Per Acre Land Value Calculation
East Contra Costa County HCP/NCCP 2011 Fee Update; EPS # 20149

Item	Value		Source
Average Sales Price Per Single Family Unit	$381,000	a	New Residential Project Sales Prices, including Shea, Seeno, and KB Homes
Units per Gross Acre	4.5	b	Average Lot Size of 7,000 sqft and net to gross ratio of 75 percent
Total Development Value	$1,714,500	c=a*b	Calculated
Raw Entitled Land Value as % of Development Value	9.0%	d	Based on standard 10 percent ratio, adjusted down slightly based on real estate broker conversations
Raw Entitled Land Value	$154,305	e=c*d	Calculated
Discount Rate	12%	f	Average land speculator discount rate
Category IV - 12.5 years to entitlement/ development	$37,424	g=e/(1+f)^12.5	Calculated
Category IV - 22.5 years to entitlement/ development	$12,050	h=e/(1+f)^22.5	Calculated

Sources: The Gregory Group; Economic & Planning Systems, Inc.

APPENDIX C:

Wetland Mitigation Background Data

Table C-1
Conservancy Projects: Expected Restoration/ Creation Outcomes (1)
East Contra Costa County HCP/ NCCP Fee Update; EPS#20149

Project	Riparian (acres)	Seasonal Wetlands (acres)	Ponds (acres)	Total Acres
VASCO CAVES - SOUZA I POND	0.00	0.99	0.10	1.09
SOUZA II RESTORATION	0.00	4.00	0.20	4.20
IRISH CANYON	0.91	0.00	0.00	0.91
TOTAL	0.91	4.99	0.30	6.20

(1) Actual outcomes in terms of successfully created and sustainable wetlands are sometimes uncertain until a period after the actual work is completed. These numbers represent the Conservancy's best estimates of expected outcomes based on current information.

Source: Contra Costa County; Economic & Planning Systems, Inc.

Table C-2
Conservancy Wetlands Projects: Restoration/ Creation Costs (1)
East Contra Costa County HCP/ NCCP Fee Update; EPS#20149

Project/ Cost Category	Cost	Per Acre
WETLANDS/ PONDS		
Vasco Caves - Souza I Pond		
Staff	$65,020	$59,651
Construction	$167,655	$153,812
Design	$75,000	$68,807
Maintenance	$51,394	$47,151
Other (2)	$0	$0
Total	**$359,069**	**$329,421**
Souza II Restoration (3)		
Staff	$87,739	$20,890
Construction	$232,500	$55,357
Design	$170,457	$40,585
Maintenance	$42,279	$10,067
Other (2)	$55,923	$13,315
Total	**$588,899**	**$140,214**
Total/ Average		
Staff	$152,759	$28,877
Construction	$400,155	$75,644
Design	$245,457	$46,400
Maintenance	$93,674	$17,708
Other (2)	$55,923	$10,572
Total	**$947,968**	**$179,200**
RIPARIAN		
Irish Canyon (3)		
Staff	$9,546	$10,490
Construction (4)	$46,013	$50,564
Design	$3,205	$3,522
Maintenance	$14,000	$15,385
Other (2)	$5,600	$6,154
Total	**$78,365**	**$86,115**

Table C-2
Conservancy Wetlands Projects: Restoration/ Creation Costs (1)
East Contra Costa County HCP/ NCCP Fee Update; EPS#20149

Project/ Cost Category	Cost	Per Acre

(1) Cost from Conservancy accounting system. Includes actual costs from 2008 to 2010 as well as associated maintenances costs expected for 2011 to 2012.
(2) Includes other costs not easily allocated to one of the other categories.
(3) Excludes 30 percent of total restoration costs not associated with seasonal wetlands, ponds, or riparian creation.
(4) Irish Canyon construction was coordinated by Save Mount Diablo and primarily included volunteer labor. Because this is approach is unlikely to be suitable in most cases, the volunteer (3,400 hours) were monetized using two-thirds of the lowest hourly rate provided to the Conservancy by its contractors (assuming more efficient work from professional contractors).

Source: Contra Costa County; Economic & Planning Systems, Inc.

Table C-3
Selected Riparian/ Wetlands Restoration/ Creation Projects and Costs (1)
East Contra Costa County HCP/ NCCP Fee Update; EPS#20149

Year	Project	County	Size (acres)	Landcover Type	Total Cost (2007 $$) (2), (3)	Cost/Acre (2007 $$) (3)
1994	Coyote Creek 1	Santa Clara	8.0	Riparian	$279,320	$34,915
1995	El Dorado Hills	El Dorado	3.0	Riparian/Ponds	$899,066	$299,689
1995	Coyote Creek 2	Santa Clara	22.0	Riparian/SRA	$1,866,691	$84,850
2001	Guadalupe Creek	Santa Clara	20.4	Riparian/upland	$7,618,326	$373,447
2004	Del Paso Park	Sacramento	13.6	Riparian/wetland/upland	$500,204	$36,780
2005	Miners Ravine	Sacramento	20.5	Riparian/wetland/upland	$344,342	$16,797
2006	Del Paso Park	Sacramento	13.6	Riparian/wetland/upland	$559,382	$41,131
2006/ 2007	Coyote Parkway Freshwater Wetland Project	Santa Clara	8.6	water channels	$4,693,325	$545,735
2006/ 2007	Pajaro Basin Freshwater Wetland Project	Santa Clara	9.0	Freshwater wetland	$4,661,349	$517,928
2004	Riparian & Wetland Habitats Mitigation	Santa Clara	20.0	Riparian/wetland	$6,634,522	$331,726
Total/ Weighted Average			**138.7**		**$28,056,526**	**$202,282**

(1) Taken from ICF International 2007 restoration project cost database; only includes riparian/ wetland projects of less than 25 acres.
(2) In most cases the total cost to construct is generated from construction cost estimates from 100% plan set construction documents, engineer's estimate and bid form, or actual cost to construct the project.
(3) Calculated using Bureau of Labor Statistics inflation calculator on http://www.bls.gov/cpi/home.htm. Accessed 7/1/07.

Sources: ICF International; Economic & Planning Systems, Inc.

Table C-4
Santa Clara Valley Habitat Plan Public Review Draft: Restoration/ Creation Cost Assumptions *
East Contra Costa County HCP/ NCCP Fee Update; EPS#20149

Land Cover Type	Cost per Acre: Construction (1)	Construction Related (2)	Staff Costs (4)	Contingency (3)	Total	Mitigation Ratio	Potential Per Acre Mitigation Fee (5) (rounded)
Riparian Woodland/ Scrub	$47,840	$26,598	$10,432	$11,166	$96,036	1:1	$96,000
Seasonal Wetland	$80,730	$29,536	$10,432	$16,540	$137,238	2:1	$274,000
Ponds	$59,800	$24,856	$10,432	$12,698	$107,786	1:1	$108,000
Streams (linear ft)	$311	$129	na	$66	$506	1:1	$506

* Per acre staff cost and total fee per acre estimated by EPS based on information in draft HCP/ NCCP.
[1] Includes Construction and Restoration Repair costs.
[2] Includes Design, Plans and specifications, Bid assistance, Pre-construction surveys, Construction oversight and monitoring and Post-construction maintenance
[3] 15 percent of construction and construction-related costs.
[4] Based on total estimated implementing staff costs spread across 573 acres of restoration conservation goal. Staff costs associated with stream restoration was not estimated.
(5) Estimated by EPS. Includes EPS estimate of staff costs where shown.

Source: Santa Clara Valley Draft HCP/ NCCP/ ICF International (September 2010);
Economic & Planning Systems, Inc.

MEMORANDUM

To: John Kopchik, Contra Costa County

From: Teifion Rice-Evans and Walter Kieser

Subject: Response to Comments on the Update to the Habitat Conservation Plan/Natural Community Conservation Plan Mitigation Fees; EPS #121059

Date: May 3, 2012

The Economics of Land Use

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We have had the opportunity to review the two memoranda, dated April 2, 2012 and addressed to Mayor Ben Johnson and Members of the City of Pittsburg City Council, commenting on the Habitat Conservation/Natural Communities Conservation Plan Mitigation Fee Update. These memoranda are the "Brion Memorandum" with the subject of "Peer Review Analysis…" prepared by Brion & Associates and the "Farella Memorandum" with the subject of "Continued City Council Agenda …" prepared by Farella Braun + Martel.

Both memoranda provide comments on the technical work prepared by Economic & Planning Systems, Inc. (EPS) for the East Contra Costa County Habitat Conservancy supporting the Update to the Habitat Conservation Plan/Natural Community Conservation Plan Mitigation Fees. The memoranda primarily refer to two EPS memoranda referred to here as: (1) March 17, 2011 EPS Memorandum (March 17 EPS Memorandum) and (2) July 15, 2011 EPS Memorandum (July 15 EPS Memorandum). The Brion and Farella Memoranda both include comments on certain legal, procedural, and definitional issues which are primarily addressed in the Resources Law Group memorandum.

Beyond the definitional and legal issues addressed by the Resources Law Group memorandum, the Brion and Farella Memoranda present a range of criticisms that focus primarily on the current economic context of development (housing market conditions, etc.) in Eastern Contra Costa County, a topic unrelated in our view to the calculation of the updated HCP/NCCP (Habitat) Mitigation Fees. There is also reference to several of the technical assumptions EPS made in arriving at the updated mitigation fee. Under each topic, the Brion Memorandum concludes with a specific recommendation to the City of Pittsburg. We have reviewed these comments in some detail but do not think the Brion Memorandum's conclusions or recommendations are relevant to the Habitat Mitigation Fee Update or otherwise raise substantive concerns.

The Farella Memorandum relies on the Brion Memorandum for several of its comments and recommendations and adds some additional recommendations. Similar to the Brion Memorandum, we do not concur with the suggested recommendations.

This memorandum provides the three primary reasons for this conclusion. The technical responses in the third point are supported by some additional data and analysis. The attached **Appendix A** provides detailed responses to the detailed comments in the Brion and Farella Memoranda. **Appendix B** provides copies of the Brion and Farella Memoranda with comment/response numbers marked to allow for cross-referencing as appropriate.

1. ***Mitigation fees under the HCP/NCCP are fundamentally different from infrastructure/ capital facilities fees charged by cities or counties.***

   It is important to distinguish locally-controlled infrastructure/capital facilities development fees from mitigation fees under an HCP/NCCP, a distinction that has not been made in the Brion or Farella Memorandum. Infrastructure/capital facilities fees are charges to new development related to the need for the additional infrastructure necessary to serve new development in a given community. Such fees have become a very common means throughout California for assuring that new development "pays its own way" regarding the infrastructure needed to maintain desired community levels of municipal service.

   Mitigation fees are different in that they are based upon mitigation of environmental impacts determined through environmental review or, in the case of the HCP/NCCP, meeting the requirements of federal and state law regarding threatened and endangered species protection. Such mitigation costs are fundamentally different than paying for the infrastructure needed to meet demands caused by new development as may be determined by the local jurisdiction. Rather, mitigation fees address site-specific constraints (in this instance, the potential occurrence of threatened or endangered species) that are features of the land being developed, similar to other physical attributes such as soil instability, flooding, or the existence of hazardous substances.

   In this regard, any recommendation to reduce the Habitat Mitigation Fees arbitrarily, independent of altering the established mitigation requirements, as local jurisdictions can do in the case of their infrastructure/capital facilities fees, is not tenable. Moreover, the motivation to create the HCP/NCCP and the related use of mitigation fees is to reduce the delays and uncertainties associated with complying with the pertinent federal and state laws. This is why HCPs and HCP/NCCPs have become a common alternative to individual compliance with species regulations in California and elsewhere.

2. ***Habitat mitigation fees updates are based on technical calculations of mitigation costs and cannot be tied directly to other market variables.***

   Real estate market conditions in eastern Contra Costa County were hit particularly hard by the Great Recession. After a rapid increase in housing prices between 2000 and 2006, home prices declined even more quickly. Foreclosure rates climbed to unseen levels and remain well above the historical average, and annual building permit issuances reached their lowest levels in over 20 years. Current conditions remain weak, characterized by an oversupply of existing houses, a preponderance of homes with "upside down" mortgage obligations, and weak prices. Under these circumstances there will be little new development in the area as demand and prices are barely adequate to pay the cost of construction, let alone aggregate fee obligations due to the City or other local jurisdictions.

While it is the case that aggregate development impact fee burdens ideally should be consistent with development values under normalized market conditions, it does not follow that development impact or mitigation fee calculations should or can respond to turns in the market, rising with higher pricing and falling with lower pricing.[1] Rather, fee calculations, by definition and under the requirements of the governing statutes and case law, are based on technical considerations including desired municipal service levels, cost of related infrastructure improvements, and allocation of these costs to new development based upon "rational nexus" formulae. As a matter of policy, local jurisdictions can (and often do) choose to adopt local infrastructure/ capital facilities fees that are not consistent with (i.e., lower than) the supporting technical calculations in order to achieve some other policy goal. The implication of such a choice is that certain objectives of the fee (e.g., assuring that new development pays its proportional share of infrastructure costs and avoiding a worsening level of service to existing residents) may not be achieved. As discussed above, the HCP/NCCP mitigation fees and the habitat mitigation actions they fund are requirements of the state and federal permits issued pursuant to the HCP/NCCP and may not be unilaterally altered.

As a part of EPS's technical work on the Habitat Mitigation Fee Update we did not consider current aggregate burden limitations or economic circumstances, save how current cost estimates of land values and wetland restoration influence the cost of achieving mandated levels of mitigation. It is recognized that, under current pricing, existing development impact fee levels charged by local jurisdictions may exceed industry standards and further impede development. However, it is expected that as the economy improves and a more normal housing market resumes, demand will increase and housing prices will rise. When this change occurs, existing development impact fee burdens will become more affordable.

3. ***Technical assumptions used by EPS are appropriate as the basis of the mitigation fee update.***

The methodology applied by EPS to update the Habitat Mitigation Fee is consistent with appropriate and common practices in establishing and updating Habitat Mitigation Fees as used in other HCPs and HCP/NCCPs throughout California. As noted in the March 17 EPS Memorandum, the cost estimates represent planning-level estimates based on available information with a particular emphasis on the actual experience of the Conservancy, where possible, in addition to the experience of other conservation organizations active in eastern Contra Costa County. The Brion and Farella Memoranda do not provide any alternative data on land values or wetland mitigation costs for consideration but, instead, raise questions about selected data, assumptions, and clarity in the EPS Memorandum. Responses to these questions are provided below.

Land Valuation Analysis

The Brion Memorandum raises two technical issues about land values: (1) the land value assumptions for the 0- to 5-acre category and (2) the inclusion, in selected cases, of sales in the period 2004 to 2008. As discussed below, even if the proposed/implied refinements were

[1] It should be noted that housing price indices or other economic indices can be used as part of the automatic, indexed, annual adjustment process, but not as part of the periodic fee audit that must be tied to estimates of actual mitigation costs.

made, there would basically be no impact on fee levels. In addition, the Brion Memorandum provides alternative estimates of land value reductions of between 48 and 83 percent based on Conservancy data. These alternative estimates appear to be a misunderstanding of the data provided.

- **Valuation of Parcels less than Five Acres**. For parcels of less than five acres, the Brion Memorandum correctly notes that the County Assessor data on land values suggests an unexpected increase in per acre values. However, no parcels in this size range are estimated to be purchased under the Initial Urban Development Area scenario, which is the scenario used to calculate the mitigation fee. As a result, adjustments in the valuation for this acreage category would have no effect on the fee level. **Table 1** shows the expected distribution of acreage by land value category. As shown, zero acres in the 0 to 5-acre parcel category are estimated to be acquired under the Initial Urban Development Area Scenario.

- **Date of Land Transactions**. The Brion Memorandum correctly notes that some sales transactions from before 2009 are included in the estimation of land values of parcels over 5 acres and outside the Urban Limit Line. Conservancy, EBRPD, and other conservation organization acquisitions from prior time periods were included to capture a greater number of land sale comparables, while County Assessor data on transactions from after the housing peak of (2007 onwards) were included. The Brion Memorandum is incorrect in its assertion that the inclusion of these sales transactions overstates land values. The effects of the removal of these sales transactions is, in fact, mixed, increasing the average land value for certain parcel size categories and reducing them for other parcel categories. The overall effect of excluding sales transactions from before 2009 is insignificant, altering total land cost estimates by well below 0.5 percent.

  Table 2 shows the effects of removing the pre-2009 land transactions on the per acre values by category. **Table 3** estimates total land costs for both the Initial and Maximum Urban Development Area Scenarios based on per acre land values with and without the pre-2009 land transactions. As shown, under the Initial Urban Development Area Scenario, the total land cost increases marginally under the Initial Urban Development Area Scenario when the pre-2009 transactions are excluded and reduces marginally under the Maximum Permit Scenario. These changes are less than 0.5 percent and have no material effect on the mitigation fees. **Table 4** shows the 2006 to 2011 reduction in total land values.

It is important to note that under the East Contra Costa County HCP/NCCP, project proponents have the option of not paying the mitigation fees. Under this option, project proponents can meet the mitigation requirements under the HCP/NCCP by preserving habitat land, as necessary, themselves. To the extent that project proponents believe they can conduct these activities more cost-effectively than the Conservancy and at a lower cost than the mitigation fees, they can do so. To date, no project proponent has taken this option.

Wetland Restoration Cost Analysis

The Brion Memorandum raises three technical issues about wetland restoration costs: (1) the level of staff costs assumed; (2) the level of non-construction costs, including contingency, used; and (3) the role of the additional wetland restoration costs provided in the July 15 Memorandum.

The comments and the estimated fee reductions in the Brion Memorandum do not appear to be based on any additional wetland restoration cost research and appear to ignore the research presented in the March 17 EPS Memorandum including: (a) the Conservancy experience and cost data on its restoration projects to date, (b) the insights into costs provided by restoration specialists, and (c) the cost data from other relatively comparable wetland restoration projects and HCPs. The Brion Memorandum also appears to misstate the 15 percent contingency assumption shown for the Santa Clara Valley HCP/NCCP contingency in the EPS Memorandum.

- **Staff Costs**. In terms of staff costs, the average per acre cost for restoration projects undertaken by the Conservancy has varied significantly, though it has, on average, been well above the $12,500 per acre included in the fee calculation. This is, in part, reflective of the complexity of conducting wetland restoration projects in hilly, arid eastern Contra Costa County where substantial staff time is required to manage engineering and design work and the ultimate scale of the wetlands restored/created is often modest. The use of this number presents a low cost relative to Conservancy experience reflecting the expectation that additional experience and, potentially, larger projects in the future will reduce the average staff cost per acre. It is also partially offset by the inclusion of the 20 percent contingency factor as discussed further below. In addition, costs vary substantially based on the specifics of the project and it is not feasible at this point to determine accurate distinctions between average staff costs by wetland restoration type. This is consistent with practice among other HCP/NCCPs.

- **Non-Construction Costs and Contingency**. In terms of construction-related costs, the EPS Memorandum uses a rate of approximately 40 percent of construction costs. Construction-related costs include plans and specification engineering, bid assistance, pre-construction surveys, construction oversight and monitoring, and post-construction maintenance. As mentioned in the EPS Memorandum, this ratio is well below the ratio experienced by the Conservancy to date. In the context of the use of staff costs, wetland construction costs, and construction-related costs lower than the Conservancy experience to date, EPS considers a 20 percent contingency to be reasonable. It is also consistent with the contingency used in the original East Contra Costa County HCP/NCCP.

- **Additional Data Summarized by EPS**. The July 15 EPS Memorandum includes information on two additional wetland restoration projects conducted in Contra Costa County. The information became available to EPS after the completion of the March 17 EPS Memorandum. The recommended wetland mitigation fees were not further adjusted/increased based on this data. Rather, these examples were provided as further evidence of the variability and potential scale of wetland restoration costs.

Again, it is important to note that under the East Contra Costa County HCP/NCCP, project proponents have the option of not paying the mitigation fees. Under this option, project proponents can meet the mitigation requirements under the HCP/NCCP by restoring wetlands, as necessary, themselves. To the extent that project proponents believe they can conduct these activities more cost-effectively than the Conservancy and at a lower cost than the wetland mitigation fees, they can do so. To date, no project proponent has taken this option.

In summary, we conclude that the Brion Memorandum (and the companion Farella Memorandum), in the first instance focuses on current economic conditions and market pricing, a topic that in our view is not relevant to the purpose or calculation of the Habitat Mitigation Fee. There is also a related misunderstanding regarding a local jurisdiction's discretion regarding the Habitat Mitigation Fee—unlike locally controlled infrastructure/capital facilities fees, the Habitat Mitigation Fee is intended to implement state and federal threatened and endangered species regulations, which is not a matter of local discretion. The East Contra Costa County HCP/NCCP was developed and has been implemented in a manner that reduces the uncertainty and delays faced by private and public development associated with meeting these state and federal threatened and endangered species protection requirements by comparison to project proponents pursuing their own individual permits. Under the provisions of the HCP/NCCP, project proponents who can achieve mitigation requirements in a manner less costly than their Habitat Mitigation Fee are free to do so. Finally, the technical comments in the Brion and Farella Memoranda, as we have documented above, do not in our opinion justify any changes to the technical work documented in our Memoranda.

Table 1
Estimated Land Conservation Requirements by Parcel Category
East Contra Costa County HCP/NCCP; EPS # 121059

Size	Slope	Initial UDA Scenario [1]		Max UDA Scenario [1]	
		Acres	% of Total	Acres	% of Total
OUTSIDE URBAN LIMIT LINE					
120 acres+	< 26%	19,054	79%	22,135	76%
40 -120 acres	< 26%	2,530	10%	3,858	13%
10 - 40 acres	< 26%	622	3%	913	3%
5 - 10 acres	< 26%	15	0%	27	0%
0 - 5 acres	< 26%	0	0%	4	0%
ALL	> 26%	608	3%	622	2%
INSIDE URBAN LIMIT LINE		*1,274*	*5%*	*1,464*	*5%*
Total		**24,104 ***	100%	**29,024 ***	100%

[1] UDA = Urban Development Area
* Numbers may not add due to rounding.

Source: East Contra Costa Habitat Conservancy; Economic & Planning Systems, Inc.

Table 2

Average Per Acre Land Values Using Different Sale Comparables
East Contra Costa County HCP/NCCP; EPS # 121059

Size	Slope	2011 Per Acre Land Value (All Comps) [1]	2011 Per Acre Land Value (2009-2011 Comps) [1]	Percent Difference
OUTSIDE URBAN LIMIT LINE				
120 acres+	< 26%	$4,700	$4,800	2%
40 -120 acres	< 26%	$8,600	$8,700	1%
10 - 40 acres	< 26%	$23,000	$20,300	-12%
5 - 10 acres	< 26%	$38,000	$23,100	-39%
0 - 5 acres	< 26%	$132,000	$133,500	1%
ALL	> 26%	$3,500	$3,500	No Change
INSIDE URBAN LIMIT LINE [2]		$10,115	$10,115	No Change

[1] Comps = land sale comparables
[2] Small differences in weighted average per acre land value inside the Urban Limit Line between Initial and Max Scenarios due to the different set of parcels.

Source: Variety of Appraisals; County Assessor data; Home Sales Prices and Residual Land Value Analysis; East Contra Costa Habitat Conservancy; Save Mount Diablo; Economic & Planning Systems, Inc.

Table 3
Average Per Acre Land Values, Sales Comps Comparison
East Contra Costa County HCP/NCCP; EPS # 121059

Size	Slope	Initial UDA Scenario [1] 2011 Total Land Value (All Comps)	Initial UDA Scenario [1] 2011 Total Land Value (2009-2011 Comps)	Max UDA Scenario [1] 2011 Total Land Value (All Comps)	Max UDA Scenario [1] 2011 Total Land Value (2009-2011 Comps)
OUTSIDE URBAN LIMIT LINE					
120 acres+	< 26%	$89,553,911	$91,459,313	$104,033,386	$106,246,863
40 -120 acres	< 26%	$21,760,933	$22,013,967	$33,177,812	$33,563,601
10 - 40 acres	< 26%	$14,314,673	$12,634,254	$21,010,429	$18,543,988
5 - 10 acres	< 26%	$587,514	$357,147	$1,033,990	$628,557
0 - 5 acres	< 26%	$0	$0	$587,329	$594,003
ALL	> 26%	$2,129,521	$2,129,521	$2,177,736	$2,177,736
Subtotal		*$128,346,551*	*$128,594,202*	*$162,020,683*	*$161,754,747*
INSIDE URBAN LIMIT LINE		$12,883,423	$12,883,423	$14,811,912	$14,811,912
Total		**$141,229,975**	**$141,477,626**	**$176,832,595**	**$176,566,659**
Difference			0.2% higher		0.2% lower

[1] UDA = Urban Development Area

Source: East Contra Costa Habitat Conservancy; Economic & Planning Systems, Inc.

Table 4
Comparison of Total Land Value Estimates
East Contra Costa County HCP/NCCP; EPS # 121059

	2006 Total Land Value	2011 Total Land Value (All Comps) [1]	2011 Total Land Value (2009-2011 Comps) [1]
Initial UDA Scenario [2]	$176,957,902	$141,229,975	$141,477,626
% Reduction from 2006		-20.2%	-20.1%
Max UDA Scenario [2]	$220,004,713	$176,832,595	$176,566,659
% Reduction from 2006		-19.6%	-19.7%

[1] Comps = land sale comparables
[2] UDA = Urban Development Area

Source: East Contra Costa Habitat Conservancy; Economic & Planning Systems, Inc.

APPENDIX A:

Detailed Response to Comments

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APPENDIX A: DETAILED RESPONSE TO COMMENTS

This appendix provides detailed responses to the comments included in the April 2nd 2012 memoranda to Mayor Ben Johnson and Members of the City of Pittsburg City Council from Brion & Associates (Brion Memorandum) and Farella Braun and Martel (Farella Memorandum). The comments and corresponding responses are numbered and an annotated copy of the Brion and Farella Memoranda are included in **Appendix B** with the comment numbers placed next to the relevant sections. Responses to comments addressing definitional, procedural, and legal issues are included in the Resources Law Group memorandum dated May 4, 2012.

Responses to the Brion Memorandum

Comment 1: "According to the requirements of the original ECCC HCP, which was adopted in 2006-2007, the Eastern Contra Costa Habitat Conservancy (Conservancy) must prepare a "thorough fee audit" for the fee program every three, six, ten years, etc. As we understand it, the fee update prepared by EPS is intended to be the first "fee audit" under the plan. However, the documents submitted do not represent a fee audit of the entire HCP Plan. The documents submitted by EPS represent a fee update only. Prior years' changes in fee rates have been based on the adopted formula for inflation."

Response 1: The Resources Law Group Memorandum responds to this comment concerning the definition of a fee audit.

Comment 2: "The Fee Memoranda has been prepared in a vacuum without regard for the economic realities facing new development. It fails to acknowledge the current economic situation, the weak housing market, and the crisis that has hit housing in ECCC particularly hard."

Response 2: The recommended HCP mitigation fees were appropriately based on estimates of mitigation costs. Market conditions are relevant to the extent they affect one or more of the mitigation costs (e.g. land values, wetland restoration costs, and/or other costs). HCP mitigation fees under the HCP/NCCP cannot be changed based on fluctuations in general economic and real estate market conditions as suggested by this comment.

Comment 3: "The Fee Memoranda recommends using the indexed adjustment for the development fee, which results in a fee reduction of 10.5% from 2006 to 2011. There is no fee reduction proposed for 2011 to 2012. This is not consistent with recent changes in the economy."

Response 3: The habitat mitigation fee reduction is based on changes in the costs of meeting the HCP/NCCP mitigation requirements. Appropriately, it is not based on changes economic metrics not directly associated with mitigation costs. The comment also implies that an indexed adjustment was applied to obtain the new, recommended fee levels. Rather, after detailed analysis, it was concluded that the appropriate 2011 development mitigation fees were close enough to the reduced 2011 levels indicated by the indexed reductions that no additional changes in development fees were required.

Comment 4: "Furthermore this minimal adjustment does not bear any relationship to actual changes in housing prices, land prices, or market conditions faced by developers. As identified in the EPS report, land prices have dropped 8% to 48% between 2006 and 2011, depending on the parcel size."

Response 4: This comment is incorrect. The recommended habitat mitigation fee levels are closely tied to estimates of land values. As shown in **Table 4** of this memorandum and Table 3 of the March 17th EPS Memorandum, the land value component of the mitigation costs was decreased by 20 percent overall (18 percent when land transaction costs are also taken into account). This is based on and consistent with the land value reductions of between 8 percent and 43 percent identified by EPS. The updated habitat mitigation fees are based on updated mitigation costs and are appropriately not directly tied to housing prices or other metrics of economic conditions. It is important to note that while housing price indices can be used as part of the automatic annual indexed adjustment, they cannot be used as the basis for the periodic fee audit that must be tied to estimates of actual mitigation costs.

Comment 5: "As identified in the EPS report, land prices have dropped 8% to 48% between 2006 and 2011, depending on the parcel size. The only exception to this trend is small parcels of 0 to 5 acres, which increased 65% on average. We raise further questions about this increase below. Any increase of this magnitude is completely contrary to the reduced land values throughout East Contra Costa County."

Response 5: For parcels of less than 5 acres, this comment correctly notes that County Assessor data on land value estimates suggests an unexpected increase in per acre values. The actual adjustment of the land value for this parcel size category does not, however, have a significant impact on the total land value. The acreage distribution used as the basis of the total land cost estimate included zero acres under the Initial Urban Development Area Scenario and less than five acres under Maximum Urban Development Area Scenario (see **Table 1** of this memorandum). The Initial Urban Development Area Scenario is the basis of the habitat development fee calculations. As a result, the per acre land value assumption for this parcel size category has no effect on the habitat mitigation fee estimates.

Comment 6: "Current economic conditions in the housing market are strikingly different than the conditions that prevailed in 2006, considered by some to be the peak of the housing boom in California. Housing prices in the ECCC[1] have plummeted since 2006 and the market has been flooded with foreclosed, recently constructed homes. Attachment A contains a market assessment of housing prices in the ECCC used in this analysis, which has been prepared by S.L. State & Associates for this effort.

Between 1999 and 2006, the ECCC market area added about 20,000 new homes. Many of these new homes are now selling at greatly reduced prices….. Prices have dropped by 56% in Contra Costa County and by 65% in Pittsburg. Nonetheless, the actual number of homes sold hasn't changed significantly from 2006 to 2011. However, the type of home that is selling has changed. Now the market is dominated by resales and foreclosures and includes very few new homes. Currently, new home sales are 4% to 5% of total sales; in the past this figure was closer to 20% in the ECCC market area. While the number of units sold in 2011 was only 6% less than in 2006 the average price has been reduced by 56%. This represents a fundamental change in the pricing structure of residential sales in the ECCC market."

Response 6: This comment includes information on housing market conditions that appear generally accurate and confirm the general understanding of housing market conditions, but are not directly relevant to providing update habitat mitigation fees.

Comment 7: "Today, new home construction in ECCC is competing with existing resale, short sales and foreclosed units. In the past there was a 15% to 20% price premium that any newly constructed home could command. In the ECCC market, this price premium has eroded. In order to compete with the resale market, home builders are selling new homes at prices equal or similar to those of recent resale closings. In addition, builders are forced to offer homes that are significantly larger than homes on the resale market to achieve the same average prices.

Newly constructed homes are also not moving, and developers have to offer increased amenities and significantly more square footage in order to compete with resales and foreclosures in the market. S.L. State & Associates (see Attachment A) finds that housing prices overall have dropped at least 50% since the housing boom, when the prices which formed the basis of the original HCP fees prevailed. Indeed, as shown above, this figure is even higher in every city in the ECCC market area. While housing prices are significantly lower than when the HCP was adopted in 2006, some city impact fees have not decreased. This means that the overall impact of the fees on project feasibility is much greater than in the past, as discussed below under Comment #2."

Response 7: The second part of the statement (italicized) that "... housing prices overall have dropped at least 50% since the housing boom, *when the prices which formed the basis of the original HCP fees prevailed*" is incorrect. The original HCP/NCCP analysis, similar to the March 17th 2011 habitat mitigation fee update, did not set mitigation fees based on housing prices. Mitigation fees were set based on estimates of land values, wetland mitigation costs, and other mitigation costs. Habitat mitigations fee updates must reflect mitigations costs and cannot be set based on fluctuations in housing prices or financial feasibility analysis (housing price indices can be used as part of the automatic annual indexed adjustment, but not as part of the periodic fee audit that must be tied to estimates of actual mitigation costs).

Comment 8: "Since new homes and resale homes are essentially competing for the same buyers, any significant costs imposed by public agencies on new development that are not imposed on resale homes will make new homes that much more expensive, thereby undercutting their competitiveness. Resale homes are not required to pay these mitigation fees or other impact fees (although they are assumed to have historically caused many of the environmental impacts covered by the HCP fees). Consequently, the HCP fees imposed on new development projects are causing an economic impediment to new construction in the current and foreseeable future market and will significantly impair the ability of new homes to compete with resale homes."

Response 8: Habitat mitigation fees are tied directly to the impact of new development on habitat and, as such, are appropriately charged to new development and not to existing homes. For most new developments covered by the State and federal ESA regulations, the regional HCP/NCCP improves development feasibility by streamlining the permitting process and reducing uncertainty over delays and costs. Without the appropriate habitat mitigation fees, the regional HCP/NCCP would be under-funded and the terms of the permit would not be met. Without the regional HCP/NCCP, developers would return to the more complex process of case-by-case consultation with State and federal regulatory agencies to obtain take permits. Developers would lose the streamlined opportunity to obtain these permits by paying habitat mitigation fees and/or conducting the specified mitigation themselves.

Comment 9: "Unemployment rates also remain extremely high in the ECCC area compared to other locations in the Bay Area, as discussed in Attachment A. This means that homeownership is out of reach for many residents in the plan area. The unemployment rates in Bay Point and Pittsburg are about 18% and 15%, respectively, and significantly higher than the County average of 9.3%. In Brentwood and Oakley, rates are slightly lower than the County average. Antioch's rate is 10.6%, higher than the County average. The extremely high rates of unemployment mean that the demand for new residential homes is weaker than usual, contributing to the current oversupply of units on the market and significantly lowering home prices."

Response 9: This description of economic conditions is consistent with our knowledge and research. Habitat mitigation fees, however, must be tied to mitigation costs, not just general economic conditions.

Comment 10: "S.L. State & Associates predicts that it will be five years or more before the ECCC market stabilizes. Some public agencies are reducing impact fees to stimulate local development. For example, the East Contra Costa County Regional Fee & Finance Authority (ECCRFFA) recently lowered the Regional Transportation Impact Fee by 50% for the next two years. Fee waivers, fee payment plans, fee reductions/adjustments and fee deferrals are also being considered or have been adopted by some cities in California (Vacaville, Oakley, Fairfield, and Brentwood)."

Response 10: Habitat mitigation fees are determined based on technical cost calculations estimating the costs of complying with the biological requirements of the HCP/NCCP and the associated State and federal permits. Unlike in the case of local and regional infrastructure/capital facilities fees where jurisdictions can reduce fees by altering services standards, habitat mitigations fees under an HCP/NCCP cannot be reduced by local jurisdictions below the level required to cover their costs without securing an alternative source of funding acceptable to the wildlife agencies (some local jurisdictions pledge General Fund revenues), securing a reduction in permit requirements from the wildlife agencies, or running the risk of suspension or revocation of the permits.

Comment 11: "One of the largest impediments to current projects is the fact that the HCP fee is due in total at the very beginning of project development, prior to issuance of a grading permit. Most development fees are paid when building permits for vertical house construction are pulled and can be reasonably expected to be funded by housing sales. In many jurisdictions, including Pittsburg, a fee deferral plan has been adopted that allows developers to defer paying permit fees."

Response 11: The imposition of fees is typically tied closely to the timing of the "impact". Habitat mitigation fees are then typically due prior to infrastructure fees as the impact occurs at time of grading, rather than time of building. The HCP/NCCP requires fee payment in advance of grading impacts, but provides the option for one-third of the fee obligation to be paid over time by imposing an assessment on the new development. Deferring mitigation fee payment beyond the time of impact may also cause nexus challenges in cases where land ownership changes after the impact occurs.

Comment 12: "Recommendations: The City of Pittsburg should deny the Conservancy's current request for modification of the mitigation fees and direct the Conservancy to evaluate the financial feasibility of the updated fees in the context of a dramatically lower median house prices and the effects of resale housing competition on new home prices in each of the participant jurisdictions. The City of Pittsburg should consider a 25% or more reduction in fees as well. In addition, the City of Pittsburg should request the Conservancy to look at fee payment plans, and/or fee deferrals. The agency needs to incorporate current housing market conditions into the analysis so decision makers can make informed decisions regarding the implications of new fee rates."

Response 12: This recommendation is problematic for a number of reasons. Habitat mitigation fees under the HCP/NCCP are fundamentally different from locally imposed infrastructure/capital facilities fees. Habitat mitigation fee calculations are based on estimated costs of complying with permit conditions under the HCP/NCCP. The Brion Memorandum recommends a 25 percent reduction in mitigation fees without providing any supporting evidence such as land value data, wetland mitigation cost data, or other cost data.

Comment 13: "The proposed fee update does not take into account the impact of the fees on the financial feasibility of new development. The adjustment to the development fee is minimal and insignificant (it is down by 10.5% since 2006), but wetland fees have increased significantly. Current economic conditions, discussed above, are radically different than in 2006 when the plan and fees were adopted.

The failure of the Fee Memoranda to analyze the cost burden of the proposed fee structure on new development is a gross oversight that undermines the resulting fee program. The original HCP incorrectly asserted that financial feasibility was a distinct methodology for determining or establishing fee programs and implied that it was not relevant to the establishment of the HCP fees. However, financial feasibility analysis, sometimes called "cost burden," is not a separate methodology for establishing fees. Rather, it is a method for evaluating results of a proposed fee methodology in the context of local conditions, no matter what type of fee is being considered."

Response 13: Habitat mitigations fees under the HCP/NCCP are fundamentally different from locally imposed infrastructure/capital facilities fees. Once biological requirements are set in place, mitigation fees must be established to cover the associated mitigation costs and cannot be adjusted as part of the periodic fee audit based on fluctuations in housing prices or associated financial feasibility analysis. A reduction of the mitigation fees based on financial feasibility analysis under current market conditions would lead to under-funding of the regional HCP/NCCP and not meeting the HCP/NCCP permit requirements. Without the regional HCP/NCCP, development feasibility would likely worsen as developers were required to return to the more complex process of case-by-case consultation with State and federal regulatory agencies to obtain take permits. Developers would lose the streamlined opportunity to obtain these permits by paying habitat mitigation fees and/or purchasing habitat mitigation lands themselves.

Comment 14: "It is well accepted that the financial feasibility, or cost burden, of proposed mitigation fees should always be examined before approving new fees. EPS and others, including Brion & Associates, always consider financial feasibility when conducting a fee mitigation study. Not to do so would be irresponsible and contrary to established norms in the urban economics field."

Response 14: Habitat mitigation fees under HCP/NCCP must be based on the costs of meeting the HCP/NCCP permit requirements. Unlike with locally-set infrastructure/capital facilities fees, habitat mitigation fees cannot be updated based on financial feasibility analysis. Comparisons of the relative impacts on development feasibility of State and federal ESA regulations under individual permitting and regional permitting, as well as other types of feasibility analysis, have been conducted by EPS at the time of establishment of some HCP/NCCPs. Most HCP/NCCP fee updates do not conduct development feasibility analysis as the update is based on the conservation requirements established as part of the original HCP/NCCP and the updated estimates of implementation costs. Habitat mitigation fees cannot be changed based on the results of development feasibility analysis.

Comment 15: "Attachment B lists several citations of EPS studies that consider financial feasibility and cost burden in the preparation of fee studies, public financing plans, financial feasibility studies, etc. In several recent studies, articles and a power point presentation, EPS has stressed that in these difficult economic times, evaluating the financial burden placed on new development is key to ensuring that development can proceed. Here are two quotes from citations and references in EPS documents listed in Attachment B.

- Typical Components of New Single-Family Home Construction, identifying "infrastructure cost burden" as 15 to 20% of market value.
- The infrastructure cost burden has to be realistic (no more than 20 percent of the building sales price) when balanced with land, entitlement and construction costs for projects to make sense, Gomes says. "We need to bring cost structures back into alignment with the new reality of pricing, in order to get the economy back on track," he says.

All fees must be considered in the context of current market and economic conditions in the affected jurisdiction(s). Fees may meet some form of cost allocation on a fair share basis, but may still be too high to allow new development to move forward. EPS has prepared hundreds of fee studies and fee-based public financing plans that consider cost burden and the financial feasibility of the proposed fee program. The omission of financial feasibility analysis from the original HCP and subsequent Fee Memoranda is a gross oversight."

Response 15: There is a fundamental difference between habitat mitigation fees under HCP/NCCP and local infrastructure/capital facilities fees. The EPS work referenced and quoted here and in the Brion Memorandum's Attachment B relates to locally or regionally established infrastructure/capital facilities fees, not habitat mitigation fee studies. The update of a mitigation fee under the HCP/NCCP is fundamentally different and the work conducted for this HCP/NCCP fee update is consistent with other EPS HCP mitigation fee updates.

Comment 16: "A development impact fee may be adopted at 100% of its calculated fair share rate or burden, but it cannot be adopted at a higher rate. However, a jurisdiction may choose to adopt a lower fee either permanently or temporarily to address economic conditions and concerns of financial feasibility. The role of the economist in such fee studies is to evaluate all the implications (including financial feasibility) of a proposed fee program while establishing nexus. If a fee is so high as to render new development infeasible, then the goals of the fee program are not met, and new infrastructure and facilities are not purchased or built, and the community does not benefit.

In sum, fees must be reasonable and proportional but also take economics and market conditions into consideration. In this fee update, EPS has not considered the significant changes to the housing market conditions in the ECCC since the fees were originally established, as discussed above and documented in Attachment A."

Response 16: Important components of this comment are incorrect. Under locally-set infrastructure/capital facilities fee nexus studies, a maximum supportable fee is calculated and policymakers balance service standards, development feasibility, and other concerns to determine the appropriate level of the jurisdiction. Habitat mitigation fees must be set to cover mitigation costs and cannot be reduced to a lower level based on financial feasibility analysis. If habitat mitigation fees are reduced below the level necessary to cover costs, the HCP/NCCP would be under-funded and the terms of the HCP/NCCP permit would not be met.

Comment 17: "The original HCP defines financial feasibility as a separate fee methodology for establishing fees and then dismisses it outright. Financial feasibility is not a valid method for establishing or calculating a fee. It is a method for evaluating the impacts of a proposed fee based on some form of cost allocation. The original HCP dismisses this important step in establishing a development fee by labeling it a "method" rather than an "evaluation tool." To use financial feasibility as a "method" would imply that a fee could be set to the maximum level that the market can bear without consideration of nexus, reasonableness, and proportionality of the impact created by new development. State law does not allow this. Financial feasibility analyses, including cost burden assessments, provide information that allows decision makers to understand the implications of the proposed fee program in the context of existing adopted fees and market conditions. In this case, the important economic conditions are housing prices, an abundance of supply on the market, the effects of the housing foreclosure crisis on home prices, and the difficulty of obtaining financing."

Response 17: The original HCP/NCCP conducted some illustrative development feasibility analysis to place potential habitat mitigation fees on land with specific characteristics in context. Appropriately, it did not use development feasibility analysis to reduce mitigation fees below the levels required to cover mitigation costs.

The biological analysis, the allocation of costs between mitigation and conservation, and the mitigation fee levels were discussed at numerous stakeholder group meetings during the development of the original HCP/NCCP. Once the mitigation requirements are established, the mitigation fee updates depend on changes in mitigation costs. Fluctuations in market conditions are relevant to mitigation fee calculations only to the extent they affect mitigation costs, not in and of themselves as suggested by the comment.

Comment 18: "For this peer review we have prepared a summary of the 2012 estimated fees that would be charged to a new single family home in Pittsburg, at two densities. Table 2 summarizes the current impact fees that would apply to two single family units: one 2,350 sq ft unit at 3.5 units per acre and one 1,700 sq ft unit at 6.5 units per acre. The 2012 City and County fees for these units total about $51,960 and $46,130, respectively. With the proposed HCP fees in Zone II, the total fees for each unit type would be about $58,000 and $49,400, as shown. The average market price for units of this size is $228,000 and $179,000, respectively, including resales, new construction, and foreclosures. As discussed above, the overall average market price is important here. In addition, each percent increase in the cost burden, represents a significant increase in costs to builders. For context, the proposed HCP fees represent from 6% to 10% of total fees due for projects in Pittsburg, depending on the HCP Zone.

The proposed updated HCP fees, combined with current City and other fees are extremely high in comparison to current market prices. The proposed HCP fees, in combination with all other impact fees in Pittsburg, equal about 24% to 25% of market value of a 2,350 sq ft unit and 27% to 28% of the market value of a 1,700 sq ft house (depending on the HCP Zone). Total fees should not exceed 15% to 20% of market value, a measure that EPS established in the 1990s and still uses extensively (see Attachment B). As the analysis in Table 2 shows, the current fee burden in Pittsburg significantly exceeds this measure of burden irrespective of density or HCP Zone. In addition, for lower density projects, the HCP fees are even higher on a cost per unit basis. Today, compared with 2006, the total cost burden of the proposed fees is significantly higher. The cost burden is approximately double what it would have been in 2006."

Response 18: This comment summarizes a financial feasibility analysis conducted for two prototypes in the City of Pittsburg. As stated above, it is mitigation costs, not financial feasibility analysis that determine updated mitigation fees. Rather than comparing development feasibility under the regional HCP/NCCP versus individual permitting/consultation, mitigation fees are treated as additional fees, rather than a replacement for individual permitting costs.

Comment 19: "In order to stimulate new development in a difficult market, many jurisdictions are lowering impact and other fees or at least not increasing them. The City of Oakley has just cut their fees by 50%. While the HCP development fee has only decreased by 10.5% since 2006, this reduction is not proportionate to the significant reduction in housing and land prices. When wetland fees are taken into account, the cost burden is even higher. We have not included wetland fees in this analysis because they are too difficult to estimate for a single unit."

Response 19: The proposed habitat mitigation fees have been adjusted based on reduction in land values since 2006 and on estimated changes in other costs. As mentioned in prior responses, unlike locally or regionally controlled infrastructure/capital facilities fees, habitat mitigation fees under the HCP/NCCP can be updated/reduced purely based on financial feasibility analysis. To do so would be to underfund HCP/NCCP implementation and thereby not meet the permit requirements.

Comment 20: "Recommendations: The City of Pittsburg should deny the Conservancy's request for approval of these fees and require that the Conservancy conduct a rigorous financial analysis of the fee update in the context of the dramatically changed market conditions facing the development industry and the cost burden of this fee. This economic analysis needs to evaluate the potential negative impacts of imposing higher fees at this time in light of all other fees on new development. The Conservancy itself would not be negatively impacted if development does not occur, but the local jurisdictions that implement the fee would be harmed."

Response 20: The mitigation fee update appropriately considers changes in mitigation costs in confirming the 10.5 percent reduction in development fees since 2006. Market conditions have been accounted for appropriately through their effect on land values/mitigation costs. Under the periodic fee audit, habitat mitigation fees cannot be simply based on housing prices as this and other comments appear to suggest (housing price indices can be used as part of the automatic annual indexed adjustment, but not as part of the periodic fee audit that must be tied to estimates of actual mitigation costs). This approach would result in the underfunding of the HCP/NCCP and would not meet the terms of the permit. In addition, all comments concerning effects on development feasibility analysis must compare the mitigation costs under the HCP/NCCP (through fees or through the developer option to conduct own mitigation) with mitigation costs under case-by-case permitting with the State and federal regulatory agencies.

Comment 21: "There are a variety of problems with the land values used to establish the Development Fees. First, the use of old comps from the 2004 to 2008 period improperly skews the land values upward, as this data omits most effects of the economic recession."

Response 21: This comment correctly notes that some sales transactions from prior to 2009 are included in the estimation of land values of parcels over 5 acres and outside the Urban Limit Line. The EPS analysis considered County Assessor information on land transactions after 2006 (after the market peak) as well as Conservancy and other organization transactions over a longer period. This approach avoided the peak years of the real estate cycle and ensured the broad set of experience of the Conservancy was included. The suggestion to limit the use of sales transactions to only those from 2009 onwards is a reasonable alternative methodology that would reduce the sample size. However, as quantified in this memorandum (see **Table 3**), this alternative approach has no significant effect on the 2011 total land value/cost estimate (it results in a marginal increase in overall land values). This is because the removal of sales from prior to 2009 increases the average per acre land value estimate for some parcel categories and reduces others.

Comment 22: "In addition, the "blending" of purchase costs across categories has the effect of hiding true land cost savings, resulting in estimates of land cost that significantly overstate actual value."

Response 22: The main memorandum includes additional information on the Conservancy's estimates of the mix of acres by parcel size (see **Table 1**), which together with the per acre land value assumptions, determines the land value estimates. This should clarify the distribution of parcel types expected to be conserved, their relative significance in driving the land value estimates, and the resulting conclusion that the planning-level estimates of land acquisition costs decreased 20 percent between 2006 and 2011.

Comment 23: "Even using the Conservancy's methods, land costs have decreased between 80% and 48% for parcels of 5 acres or more."

Response 23: This comment appears to misquote the March 17th EPS Memorandum. As shown in Table B-1 of the March 17th EPS Memorandum, land values were estimated to decrease between 8 and 32 percent for parcels over 5 acres outside the urban limit line and by about 43 percent for parcels inside the urban limit line. As shown in Table 4 of the March 17th EPS Memorandum and again in **Table 4** of this memorandum, estimated total acquisition costs decreased by 20 percent between 2006 and 2011.

Comment 24: "There also appears to be erroneous data used in the land values for the 0 to 5 acre parcel category (See Table B-1 of EPS March 17, 2011 Memo). All current land comps for land values have dropped significantly since 2006, but the land value for parcels in this category has supposedly increased by 65%. This increase conflicts with all of the other data presented. It could be that the comps used for this parcel size category are inappropriate. Most are listed as

Residential Land. It appears that perhaps these parcels were improved residential land with infrastructure, which would account for average per acre costs that are significantly higher than those for all other land comps in the analysis. While the footnote indicates that these transactions had zero or little improvement value, the prices paid seem incompatible with this statement, unless they are high end residential parcels in a planned residential neighborhood. But if this is the case, these comps would not be appropriate for this land category. We would expect that the conservancy is not going to purchase high end, improved, master planned lots."

Response 24: For parcels of less than five acres, this comment correctly notes that the County Assessor data on land value estimates suggests an unexpected increase in per acre values. The habitat mitigation fee calculation was based on minimal acquisition. As shown in **Table 1** of this memorandum, no parcels in this size range are assumed to be purchased under the Initial Urban Development Area Permit Area scenario, which is the scenario used to calculate the habitat mitigation fee. As a result, adjustments in the valuation for this acreage category would have no effect on the fee level.

Comment 25: "Recommendation: The City of Pittsburg should deny the Conservancy's request for approval of these fees and require that the Conservancy conduct a more thorough review of actual land costs and related staff costs. Comparable sales data of land transactions from 2009 to 2011 should be used exclusively."

Response 25: The March 17th EPS Memorandum provides detailed research and analysis of land values in East County. This includes careful review and reliance on actual Conservancy land acquisition costs as well as information on other pertinent East County transactions. As described in Response 21, the use of the refined land valuation methodology would not change the habitat mitigation fee estimates.

Comment 26: "The Wetland Mitigation Fee is proposed to increase by as much as 32% (when compared to the 2006 rates) as shown in Table 1 depending on the type of wetland or habitat. There are nine wetland related fee categories, including riparian stream restoration. Staff costs per acre of wetland are estimated at $12,300 per acre. No data is presented to support these costs, and they do not vary per type of wetland created (see Table 5 of the March 17 memorandum)."

Response 26: This comment incorrectly asserts that no data has been provided to support the per acre staff costs associated with wetland restoration. The March 17th Memorandum includes data on Conservancy staff costs associated with its wetland restoration projects, which in all cases is above $12,500 acre. Rather than set the per acre staff cost at the higher level suggested by Conservancy experience to date, the per acre staff cost was limited, recognizing that the 20 percent contingency could capture some of the uncertainty. The Conservancy also hopes that per acre staff costs will decrease from its experience to date as additional experience is gained.

Comment 27: "Contingency costs are an additional 20%. Total non-construction related costs of the proposed wetland fee rates are about 48% of the total fee rate, for most of the fee categories; with the exception of Riparian Restoration at 54%, and Stream Impact at 27%. The non-construction related costs component of each fee is excessive. Table 3 below shows that if the contingency factor is lowered to a more reasonable 10%, the total wetland fee costs would be reduced by almost $4.7 million, or about 17%. The wetland cost data in the Fee Memoranda from the Santa Clara HCP uses a 12% contingency rate, for example."

Response 27: The March 17th EPS Memorandum includes wetland restoration cost data from Conservancy experience to date, cost estimates provided by biologists active on restoration projects in East County, and cost information from pertinent wetland restoration projects and other HCP/NCCP's. In terms of construction-related (i.e. non-construction costs), the March 17th EPS Memorandum uses a rate of approximately 40 percent of construction costs. Construction-related costs include plans and specification engineering, bid assistance, pre-construction surveys, construction oversight and monitoring, and post-construction maintenance. This ratio is well below the ratio experienced by the Conservancy to date. A 20 percent contingency is applied, consistent with the original wetland mitigation fee estimates, and reflective of the use of staff costs and some construction-related costs at levels below Conservancy experience to date. As reported in the March 17th Memorandum, the proposed Santa Clara Valley HCP/NCCP uses a contingency rate of 15 percent.

Comment 28: "Recommendations: The City of Pittsburg should direct that the Conservancy revisit the data used in the wetland fee component of the fee program. Excessive staff and other non-construction costs need to be reduced in the analysis, and a more reasonable contingency factor needs to be included. This would help make the fee more reasonable while not impacting the program."

Response 28: The recommendation does not appear to be based on any additional wetland restoration cost research and ignores the research presented in the March 17 Memorandum including: (a) the Conservancy experience and cost data on its restoration projects to date, (b) the insights into costs provided by restoration specialists, and (c) the cost data from other relatively comparable wetland restoration projects and HCPs. The staff costs, non-construction costs, and contingency factor are all reasonable and appropriate. As stated in the March 17th Memorandum, the proposed increase in certain wetland mitigation fees falls in between the current wetland mitigation fees and the fee levels required if based solely on Conservancy experience.

Comment 29: "When the City of Pittsburg approved the original HCP Plan, it approved the requirement that the Conservancy conduct a 'thorough fee audit' that will be completed by March 15 of year 3, 6, 10, etc. of the HCP Plan implementation period. The Conservancy is required to hire 'an outside, independent financial auditor' to prepare the Fee Audit. The two memoranda prepared by EPS do not constitute a Fee Audit. First, EPS does not qualify as an outside independent auditor for this particular Fee Audit.' Second, these memoranda, with a handful of charts, do not have the content, rigor, backup information or any other characteristics of a true fee audit."

Response 29: The Resources Law Group Memorandum responds to the statements concerning the definition of a fee audit, the definition of the financial auditor, and the appropriate content of a fee audit.

Comment 30: "The Fee Memoranda do not attempt to audit the administrative costs of the Conservancy or analyze in any respect the actual costs of operating, maintaining and managing the preserve system."

Response 30: Implementation of the East Contra Costa HCP/NCCP is still at an early stage. As envisioned in the HCP/NCCP, the Conservancy's initial focus has been on land acquisition and wetland restoration in order to meet the jump start and stay ahead provisions of the Plan. The Conservancy has been acquiring land at a strong rate. Now that lands have been acquired in manageable blocks, the Conservancy is conducting more detailed resource inventories of these lands, preparing preserve management plans and developing monitoring protocols, a schedule consistent with that envisioned in the HCP/NCCP. Once management plans are finished and approved, the work of operating, maintaining and monitoring the Preserve System will start. Since these major activities have not yet begun, there is not data on actual costs to update the original estimates contained in the HCP/NCCP. As a result, the updated fee estimates use the same operating, maintenance, and management cost assumptions adjusted for inflation.

Comment 31: "By no means do these memoranda meet the professional requirements for a thorough fee audit. The Fee Memoranda represents a fee update only but the Conservancy is required to conduct a thorough fee audit."

Response 31: The Resources Law Group Memorandum responds to the statements concerning the definition of a fee audit.

Comment 32: " Overall, the data is presented in a convoluted manner throughout the two EPS memoranda on the fee update (March 17 and July 15, 2011) and the memoranda omit significant information needed to understand how the fees are derived. Based on the data presented, the fee update figures cannot be replicated. Much of the original data on acreage by zone and type is left out. Numerous data on land comps and wetland mitigation project costs are presented without explanation on how this data is used. Even with the original HCP documents, it is not possible to replicate the calculations and figures."

Response 32: It is correct that the original HCP/NCCP and the 2011 habitat mitigation fee update do not show the distribution of acres by land value category. **Table 1** of this memorandum provides this information.

Comment 33: "There are two specific projects that have extraordinary costs on a per acre basis, i.e. $345,000 and $755,000 (see page 2 of July 15, 2011 memorandum). Firstly, these costs are excessive and not in line with any other costs presented in the original plan and the March 17, 2011 memorandum. Secondly, it is not clearly documented how these costs are integrated into the analysis and the subsequent new fees."

Response 33: The July 15th 2011 EPS Memorandum provided additional information on recently completed wetland restoration projects in Contra Costa County. This data was not available at the time of the March 17th 2011 EPS Memorandum but was documented as further evidence of the high cost of conducting wetland restoration projects in East County. The specific cost estimates for the two referenced projects were not used to adjust the wetland restoration cost estimates.

Comment 34: "Some numbers are different from one table to another. It is not clear which final numbers are used in the calculations."

Response 34: It is unclear which numbers are being referred. We would be pleased to respond to specific questions concerning the data and calculations.

Comment 35: "For instance, the number of acres by parcel size needs to be shown in each table used to calculate the new development fee so the reader can understand how each new land value affects the overall development fee. These tables do not show how much land is assumed to be purchased in each size category."

Response 35: It is correct that the original HCP/NCCP and the fee update do not show the distribution of acres by land value category. **Table 1** of this memorandum provides this information.

Comment 36: "The Fee Memoranda does not indicate the amount of actual land purchased to date by the Agency, or the amount remaining to be acquired. It does not assess how much progress has been made towards HCP goals. This is typically included in a true fee audit."

Response 36: The habitat mitigation fee update estimated the new estimated total mitigation costs for the whole HCP/NCCP program. Consistently, habitat mitigation fees were calculated based on the total acres permitted under the Initial Urban Development Area Scenario and the Maximum Urban Development Area Scenario. Information on actual Conservancy acquisitions was provided in Table B-2 of the March 17th EPS Memorandum.

Comment 37: "Recommendation: The City of Pittsburg should request a thorough and independent audit of the HCP Plan fees and plan as required in Chapter 9 of the HCP Plan. The information presented is a fee update, but it is not a fee audit as required. An audit needs to be provided by an independent third party. EPS was the original consultant on the financial analysis for the HCP Plan. While they are knowledgeable they are not independent."

Response 37: The Resources Law Group Memorandum responds to the statements concerning the definition of a fee audit and the issue of independence.

Responses to the Farella Memorandum

The Farella Memorandum relies in part on the Brion Memorandum, independently makes some similar arguments as contained in the Brion Memorandum, and also raises some additional issues. A large number of the comments in the Farella Memorandum address the issue of definition of a fee audit and financial auditor, the timing of the fee audit, and legal application. The Resources Law Group memorandum addresses these issues, so most of these comments are not directly responded to here. This section addresses both Farella comments that refer to or repeat comments provided to the Brion Memorandum as well as other comments unique to the Farella Memorandum not addressed in the Resources Law Group memorandum.

Comment 38: "In the meantime, the City should exercise its discretion to immediately adopt an interim two-year fee structure that reduces each of the individual HCP development and wetland mitigation fees by at least 25% and defers payment of portions of the imposed HCP fees."

Response 38: The Farella Memorandum recommendation of a 25 percent reduction in habitat mitigation fees is not based on any supporting evidence such as land value data, wetland mitigation cost data, or other cost data. This recommendation would result in mitigation funding below mitigation costs and an inability to meet the terms of the permit. Without the regional HCP/NCCP, development feasibility would likely worsen as developers return to the more complex process of case-by-case consultation with State and federal regulatory agencies to obtain take permits. Developers would lose the streamlined opportunity to obtain these permits by paying habitat mitigation fees and/or purchasing habitat mitigation lands themselves.

Comment 39: "Instead of preparing a comprehensive audit report regarding the mitigation fees, EPS originally prepared only a seven-page memorandum dated March 17, 2011 with a few tables to support its conclusions that development fees (which are ultimately expected to generate over $150 million in revenue for the HCP Plan) should essentially stay at their current level and that most wetland fees ($30 million in expected revenue) should be increased substantially."

Response 39: The Resources Law Group memorandum responds to this issue.

Comment 40: "After the Conservancy's staff requested that EPS 'evaluate the impact of the recommended fee adjustments on the fee burden to be born [sic] by the covered projects,' EPS prepared a July 15, 2011 memorandum containing only two pages of text and two tables. Based on this supposedly 'thorough fee audit,' the Conservancy Board approved the 'audit report' and recommended that the participating cities revise their fees accordingly."

Response 40: Conservancy staff requested that EPS estimate whether the recommended 2011 mitigation fees and wetland mitigation fees would have resulted in a higher cost burden to developers who have paid the mitigation fees since HCP/NCCP adoption. As described in the July 15th EPS Memorandum, the majority of mitigation fees accruing to the Conservancy are associated with the development mitigation fees that are proposed to remain 10.5 percent below their 2006 level. For developments that affect "wet acres", the proposed reduction in stream fee would have generally balanced out the increase in riparian/wetlands fees. As stated in the EPS Memorandum, there is no guarantee that this same distribution and balance between stream impacts and riparian/wetlands impacts would occur in the future.

Comment 41: "As the peer review analysis by Brion & Associates ("Brion Report") demonstrates, these two memoranda fall far short of the "thorough fee audit" contemplated by the HCP Plan and cannot form an appropriate factual basis for assessment of these mitigation fees or validation of associated fee methodology."

Response 41: Please see Reponses 1 through 37 for detailed responses to the Brion Memorandum comments and the Resources Law Group memorandum concerning definitional issues.

Comment 42: "As the City knows, there is a well-developed set of legal standards — constitutional, statutory and case law — governing the imposition of development fees. I am not going to summarize the applicable standards in this letter. However, these standards are addressed in a series of U.S. Supreme Court, California Supreme Court and California Court of Appeal decisions which discuss the key nexus, relationship and proportionality standards required by law. It is absolutely essential for a city like Pittsburg that is considering the imposition of development fees, including any HCP Plan fees, to scrupulously observe these standards.

Many of these applicable standards are set forth in the Mitigation Fee Act, California Government Code §§ 66000-25. Under this Act, the City has important responsibilities when establishing, increasing or imposing mitigation fees for development projects. For example, the agency must identify the purpose of the fee and the use to which the fee is put. Id, § 66001(a). It must establish "a reasonable relationship" between "the fee's use and the type of development project on which the fee is imposed" and also between "the need for the public facility and the type of development project on which the fee is imposed." Id.

There are also important requirements in the Mitigation Fee Act relating to the amount and timing of the fees, including the following:

- The City must determine that there is "a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed." Id., § 66001(b).
- The City must also ensure that any fees or exactions on proposed development "shall not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed." Id., § 66005(a).
- The City must also closely heed the Legislature's finding that "untimely or improper allocation of development fees hinders economic growth and is, therefore, a matter of statewide interest and concern." Id., § 66006(d)."

Response 42: The Resources Law Group memorandum also responds to this comment. The March 17th EPS Memorandum provides a clear set of updated costs that are then attributed to new development using the same reasonable relationship established in the original HCP/NCCP and approved by the regulatory agencies as consistent with pertinent State and federal regulations. In providing updated cost estimates and setting habitat mitigation fees on this basis, the March 17th EPS Memorandum ensures the habitat mitigation fees (and associated revenues) do not exceed estimated mitigation costs and are consistent with the requirements of the original HCP/NCCP and associated permit.

Comment 43: "In this case, for the reasons below, the fees being proposed, based on the Conservancy's inadequate "audit report," are not justified and should not be adopted. This insufficient record fails to establish the requisite nexus, proportionality and reasonable relationship requirements that are embodied in the federal and state constitutions and the Mitigation Fee Act."

Response 43: The Resources Law Group memorandum also responds to this comment. The March 17th EPS Memorandum provides a clear set of updated costs that are then attributed to new development using the same reasonable relationship established in the original HCP/NCCP and approved by State and federal regulatory agencies. The approach meets nexus requirements and is consistent with other habitat mitigation fee updates.

Comment 44: "Moreover, there is absolutely no evidence in the record to analyze the financial feasibility and cost burden on development projects and therefore determine whether the State policy against such fees hindering economic development has been satisfied."

Response 44: There is a fundamental distinction between habitat mitigation fees under the HCP/NCCP and locally set infrastructure/capital facilities fees. Habitat mitigation fees must be set to cover mitigation costs and cannot be reduced to a lower level based on financial feasibility analysis. If habitat mitigation fees are reduced below the level necessary to cover costs, the HCP/NCCP would be under-funded and the terms of the HCP/NCCP permit would not be met. Without the regional HCP/NCCP, development feasibility would likely worsen as developers were required to return to the more complex process of case-by-case consultation with State and federal regulatory agencies to obtain take permits. Developers would lose the streamlined opportunity to obtain these permits by paying habitat mitigation fees and/or purchasing habitat mitigation lands themselves.

Comment 45: "It is beyond dispute that the two memoranda prepared by EPS do not constitute a Fee Audit. First, as explained above, EPS does not qualify as an outside, independent auditor for this particular Fee Audit. Second, these memoranda, with a handful of charts, do not have the content, rigor, backup information or any other characteristics of a true fee audit. Contrary to the HCP Plan, they do not attempt to audit the administrative costs of the Conservancy or analyze in any respect the actual costs of operating, maintaining and managing the preserve system. See HCP Plan, at 9-31."

Response 45: The Resources Law Group Memorandum also responds to this comment. Implementation of the East Contra Costa HCP/NCCP is still at an early stage. As envisioned in the HCP/NCCP (and explained in Response 30), the Conservancy's initial focus has been on land acquisition and wetland restoration in order to meet the jump start and stay ahead provisions of the Plan. The Conservancy has been acquiring land at a strong rate. Now that lands have been acquired in manageable blocks, the Conservancy is conducting more detailed resource inventories of these lands, preparing preserve management plans and developing monitoring protocols, a schedule consistent with that envisioned in the HCP/NCCP. Once management plans are finished and approved, the work of operating, maintaining and monitoring the Preserve System will start. Since these major activities have not yet begun, there is not data on actual costs to update the original estimates contained in the HCP/NCCP. As a result, the updated fee estimates use the same operating, maintenance, and management cost assumptions adjusted for inflation.

Comment 46: "The Conservancy's failure to timely or competently perform its Fee Audit responsibilities is a breach of its legal responsibilities under the Implementing Agreement to which the City is a party. This is a particularly serious problem because the Conservancy hopes to have Pittsburg and the other participating cities continue collecting approximately $180 million in development and wetland mitigation fees on the basis of this deficient analysis. However, these informal documents fail to provide any credible factual basis for the City to make the necessary findings to impose the proposed fee schedule. The Conservancy must be held to its legal obligations, particularly given the size and scope of the fees being requested."

Response 46: The Resources Law Group Memorandum also responds to this comment. The March 17th EPS Memorandum provides substantive research and analysis to support its recommendations.

Comment 47: "In short, the City should reject the Conservancy's new proposed slate of fees and instruct the Conservancy to immediately obtain a Fee Audit, from an outside independent auditor, that is required by the HCP Plan. In the meantime, for all the reasons contained in this letter, the City should immediately impose at least a 25% reduction from 2011 levels for each of the individual development and wetland fees until the required analysis is provided and the appropriate level of fees can be set."

Response 47: The Farella Memorandum recommends a 25 reduction in mitigation fees without providing any supporting evidence on land value data, wetland restoration, or other mitigation cost data. This reduction would result in mitigation funding below mitigation costs and the terms of the HCP/NCCP permit would not be met. Without the regional HCP/NCCP, developers would lose the streamlined opportunity to obtain these permits by paying habitat mitigation fees and/or purchasing habitat mitigation lands themselves. The permitting process for development would become more arduous.

Comment 48: "When the initial HCP Plan was prepared and adopted, the land and housing markets in eastern Contra Costa County were reaching the end of an unprecedented boom period. As set forth in the Brion Report, housing prices had reached record high levels. In 2006, the median sales price of a home in Contra Costa County was $575,000 and in Pittsburg was $460,000. The cost of undeveloped land was similarly at its highest level. The HCP Plan mitigation fees adopted by Pittsburg and other participating cities in 2007 reflected these upward trends and the resulting record prices.

Unfortunately, as we all know, the real estate market took a nosedive beginning around 2008. By 2011, the median price of a home in the County had decreased by 56% to only $255,000 and the corresponding decrease in Pittsburg has been an astounding 65% to a 2011 median price of $160,000. Today, as the Brion Report explains, new home construction in eastern Contra Costa County is competing with existing resales and foreclosures, which has eliminated the price premium that new homes traditionally have enjoyed. As a result, a new home developer like Discovery Builders not only has to try to sell homes at extremely low prices, but must also offer more space and many costly amenities to make its homes attractive when competing with other types of housing on the market. The HCP fees, which are not assessed on resales or foreclosure properties, put new home developers at an even greater economic disadvantage and create an infeasible, unrealistic cost burden."

Response 48: There is a fundamental distinction between habitat mitigation fees under the HCP/NCCP and locally set infrastructure/capital facilities fees. Habitat mitigation fees must be set to cover mitigation costs and cannot be reduced to a lower level based on financial feasibility analysis. Once biological requirements are set in place, mitigation fees must be established to cover the associated mitigation costs. The periodic fee audit cannot reduce mitigation fees below levels required to cover mitigation costs based on fluctuations in housing prices or the findings of associated financial feasibility analysis (housing price indices can be used as part of the automatic annual indexed adjustment, but not as part of the periodic fee audit that must be tied to estimates of actual mitigation costs).

Comment 49: "These dramatic changes in home prices are very relevant to the amount of the HCP fees that are imposed to purchase undeveloped land because, as the HCP Plan states, "housing prices generally provide a more accurate index for land cost inflation than measures of general inflation." HCP Plan, at 9-30. If home prices are decreasing substantially, the market value of undeveloped land can be expected to do so as well."

Response 49: This comment accurately notes that the index for the land value portion of the development mitigation fee is tied to a housing price index that tracks changes in value in the same homes over time. While the use of such a housing index is reasonable as an indexing device, a periodic fee audit must be tied to estimates of actual mitigation costs (land values for the land component of the fee) and cannot be determined by housing price fluctuations.

Comment 50: "In fact, these same market price reductions have occurred for the type of land that the Conservancy plans to purchase in eastern Contra Costa County to implement the HCP. As demonstrated by the Brion Report, the price of undeveloped land over five acres in size has decreased from 8% to 48% (depending on parcel size) from 2006 to 2011 as reflected in the EPS report information. Even utilizing the Conservancy's figures (which are suspect for the reasons set forth in the Brion Report), the average cost of land for parcels greater than five acres in size has decreased overall by 48%. In addition, by excluding land sale comparables before 2009 from this analysis, the average land value for the 5-10 acre and 10-40 acre parcel category are reduced 17% and 38%, respectively, from the EPS figures."

Response 50: There appear to be a number of inaccuracies in this comment. The March 17th EPS report shows land value reductions between 8 percent and 32 percent for parcels over 5 acres outside the urban limit line and 43 percent for parcels inside the urban limit line. It also shows an overall reduction in total land acquisition cost estimates of 20 percent. As shown in Table 3 of this memorandum, the removal of sales comparables from before 2009 does not have a significant impact on mitigation costs or the associated mitigation fees (the resulting land value reductions for certain parcel sizes are balanced out by increases in land values for other parcel sizes when pre-2009 land sales transactions are not included).

Comment 51: "The HCP Plan provides that, when the "thorough fee audit" is performed, both the land acquisition and the operations/maintenance portions of the development fee should be examined. The land acquisition cost is by far the largest component of these costs in the HCP at approximately 67% of the total expected costs. The land cost is reviewed in several respects, including the actual land sale results of the Conservancy, which show the significant price decline described above."

Response 51: As described in Response 52 above and in this memorandum, total land values were estimated to decrease by 20 percent between 2006 and 2011.

Comment 52: "The other component (operations/maintenance) to be reviewed includes the "actual costs of operating, maintaining, and managing the Preserve System." Id., at 9-31. However, the audit report states that "there is limited information on many other plan costs, such as the costs of preserve management and maintenance, the costs of monitoring research, and adaptive management, or the overall administrative costs." It is difficult to believe (indeed it is not credible) that, after five years of operation, the Conservancy is unable to provide any information on its administrative or management costs. However, rather than undertake the "actual cost" analysis mandated by the HCP Plan, the consultant instead reverted to an "inflation-related index" (consumer price index) to increase these non-land costs by approximately 13%. As the Conservancy concedes, it has absolutely no actual preserve mitigation, monitoring or administrative cost data to support this proposed increase."

Response 52: As described in Responses 30 and 45, as envisioned in the HCP/NCCP, the Conservancy's initial focus has been on land acquisition and wetland restoration in order to meet the jump start and stay ahead provisions of the Plan. The Conservancy has been acquiring land at a strong rate. Now that lands have been acquired in manageable blocks, the Conservancy is conducting more detailed resource inventories of these lands, preparing preserve management plans and developing monitoring protocols, a schedule consistent with that envisioned in the HCP/NCCP. Once management plans are finished and approved, the work of operating, maintaining and monitoring the Preserve System will start. Since these major activities have not yet begun, there is not data on actual costs to update the original estimates contained in the HCP/NCCP. As a result, the updated fee estimates use the same operating, maintenance, and management cost assumptions adjusted for inflation.

Comment 53: "In sum, the current proposal to modify the HCP development fee is unsupported and erroneous and should be rejected. The changes in home prices in Pittsburg (which the HCP Plan identifies as "a more accurate index for land cost inflation") has decreased by 65% during this period and the actual land sale cost to the Conservancy for parcels over five acres in size based on recent comparables has decreased by 8% to 48%. Thus, the land acquisition component of this fee (which comprises the vast majority of the fee amount) should be substantially reduced. The Conservancy has failed to provide any information whatsoever on the other, lesser component of the fee based on its actual management costs. Thus, the Conservancy is improperly proposing fee imposition based on inadequate analysis and supporting data in contravention of the HCP Plan."

Response 53: The fee update research, analysis, and conclusions provide appropriate support for the habitat mitigation fee recommendations. While the use of a housing price index is a reasonable automatic indexing approach for the land value component of mitigation fees, it is inadequate for s (i.e. the use of a housing price index tracks changes in value in the same homes over time) with the appropriate approach for a fee update. A mitigation fee update must be based on estimates of actual mitigation costs (i.e. land values, wetland restoration costs, etc.) to ensure the mitigation fees will provide their share of the required funding. Consistent with the appropriate approach to updating habitat mitigation fees, the land value component of the fee has been appropriately reduced by 20 percent. Monitoring and management costs have been maintained at the levels estimated under the original HCP/NCCP, with adjustments for inflation, an appropriate approach given the lack of new information available.

Comment 54: "In sum, the City is unable to ensure that there is a reasonable relationship between the amount of the development mitigation fee and the cost of the facility attributable to the fee. Moreover, the City cannot ensure that the fee does not exceed the reasonable cost of providing the HCP benefits for which the fee is imposed. Particularly in this difficult economy and real estate market, it is essential that the City require from the Conservancy the rigorous nexus and reasonable relationship information to justify the fees, given that the City will have to defend the imposition of these new fees on development."

Response 54: The March 17^{th} EPS Memorandum provides sufficient data and analysis of mitigation costs to confirm the appropriate relationship between the proposed mitigation fees and expected mitigation costs consistent with the requirements of the HCP/NCCP and the associated take permits authorized by the State and federal regulatory agencies.

Comment 55: "The Legislature embedded in the Mitigation Fee Act a strong public policy of ensuring that development fees do not hinder economic development. In this case, it is evident that neither the Conservancy nor the City has made any analysis of the financial feasibility or cost burden of the proposed mitigation fees, together with other existing fees and exactions, on developers of new residential projects in the current economy. The City, as the entity imposing the fees, must ensure that the impact of the fee in combination with all other fees does not create a situation where new development is infeasible."

Response 55: As stated in previous comments, financial feasibility analysis cannot reduce habitat mitigation fees under the HCP/NCCP below the level required to cover mitigation costs. Regional HCP/NCCP's often garner the support of development and building communities throughout California as they provide a streamlined approach to obtaining permits from State and federal regulatory agencies for development on certain types of land. Compared to the case-by-case approach, regional HCP/NCCPs are often viewed as supporting economic development and regional conservation efforts.

Comment 56: "Indeed, although it did not address "financial feasibility" in its current HCP Plan fee memoranda, EPS is very familiar with the importance and need for a developer cost burden analysis. It has developed a "measure of development feasibility" which it calls the "Infrastructure Cost Burden as a Percentage of Finished Home Sales Price." EPS, "El Dorado County Development Feasibility Study," PowerPoint slides dated November 9, 2010 . In another document, it explains this feasibility benchmark as follows:

> The infrastructure cost burden of development to a property owner can be used to assess the financial feasibility of a development project. The total infrastructure cost burden consists of all costs (e.g., developer funding and the bond debt associated with special taxes and assessments) plus applicable fees (e.g., county development impact fees, school mitigation fees). A project is financially feasible if the total cost burden is less than 15 to 20 percent of the finished home price. Typically, residential units with a cost burden percentage below 15 percent are clearly financially feasible, while units with a cost burden percentage above 20 percent are likely to be financially infeasible.
>
> *EPS Public Review Draft Report, Rio del Oro Specific Plan Public Facilities Financing Plan, December 8, 2006, at 68.*

Thus, according to EPS, a new residential home development project is considered feasible if the cost burden is less than 15% of the sales price, is considered within the range of feasibility if the cost burden is 15% to 20% and is generally considered infeasible if the cost burden is over 20%. EPS Final Report, "Sacramento Regional County Sanitation District Potential Fee Increase Feasibility Analysis, October 8, 2010 ("Sacramento Study"). The 15% to 20% feasibility range is also further qualified as follows: "Of note, development with a Cost Burden at the higher end of the range (i.e., 17 to 20 percent) are only typically feasible coupled with positive trends, such as strong housing markets, financial markets, or job growth." Id., at 6. Since none of these positive economic trends are present in this economy, EPS would presumably establish the maximum cost burden for residential development feasibility in the Pittsburg regional economy at approximately no more than 16% of the finished home price.

In the Sacramento Study, EPS concluded that its calculated developer cost burden (ranging from 20% to 32%) that included new sewer fees "would essentially render all new residential and nonresidential development infeasible, with the exception of very high-end residential units and warehouse distribution buildings." Id., at 3. Moreover, it would assertedly "have disastrous effects on the Sacramento regional economy," just as the region "is starting to emerge from the great recession of 2007 through 2010." Id. EPS points out that "[cities, counties, and developers have been working over the past few years to reset the infrastructure burdens to feasible levels." Id. As explained below, these same dynamics exist today in the Pittsburg area economy.

The Conservancy's "audit" is conspicuously silent on the projected cost burden of the aggregate fees, including the proposed HCP Plan fees, on new development. The original March 17, 2011 consultant report fails to analyze this important benchmark for mitigation fees."

Response 56: There is a fundamental difference between habitat mitigation fees under HCP/NCCP and local infrastructure/capital facilities fees. The EPS work referenced and quoted here and in the Brion Memorandum's Attachment B relates to locally or regionally established infrastructure/capital facilities fees, not habitat mitigation fee studies. The update of a mitigation fee under the HCP/NCCP is fundamentally different and the work conducted for this HCP/NCCP fee update is consistent with other EPS HCP mitigation fee updates.

Comment 57: "According to a July 22, 2011 memorandum from Conservancy Staff to the Conservancy Governing Board, Staff "requested that EPS evaluate the impact of the recommended fee adjustments on the fee burden to be born [sic] by covered projects." Remarkably, however, the July 15, 2011 consultant report that followed this request again fails to address this issue. So there is no information whatsoever in the "audit" materials submitted by the Conservancy to analyze the developer cost burden."

Response 57: Conservancy staff requested that EPS estimate whether the recommended 2011 mitigation fees and wetland mitigation fees would have resulted in a higher cost burden to developers who have paid the mitigation fees since HCP/NCCP adoption. As described in the July 15th EPS Memorandum, the majority of mitigation fees accruing to the Conservancy are associated with the development mitigation fees that are proposed to remain 10.5 percent below their 2006 level. For developments that affect "wet acres", the proposed reduction in stream fee would have generally balanced out the increase in riparian/wetlands fees. This analysis established that based on the historical pattern of development, the proposed mitigation fees would have represented a similar cost burden to the 2011 mitigation fees associated with the indexing process. As stated in the EPS Memorandum, there is no guarantee that this same distribution and balance between stream impacts and riparian/wetlands impacts would occur in the future.

Comment 58: "However, the Brion Report does address this issue and reaches some significant conclusions. The Report demonstrates that, under the proposed new fee schedule, the 2012 combined fee burden for a 1,700 square foot house in Pittsburg would be about 24% to 25% of its fair market value and the corresponding burden for a 2,350 square foot unit would be 26% to 27% of its market value (i.e., average home price), depending on whether Zone I or II HCP fees are applicable. The equivalent cost burdens in 2006, under the original set of HCP fees and then-existing home prices, reportedly were under the EPS 15% feasibility benchmark.

This huge fee burden is far in excess of any cost burden on new development that is considered feasible or appropriate. These fees on new residential home development, with the proposed new HCP Plan fees, fail the EPS cost burden feasibility benchmarks by a wide margin. Indeed, just as EPS points out in the Sacramento Study, these extremely high costs burdens may have a dramatic adverse effect on the Pittsburg regional economy at a delicate time when cities and developers are taking steps to encourage development to improve the economy.

Indeed, this kind of disproportionate cost burden has led several cities to lower fees to eliminate this significant economic barrier to new residential home development. For example, in June 2011, the Oakley City Council approved a development fee reduction incentive program that reduced City-controlled development fees by 50%. Similarly, in November 2011, the East Contra Costa Regional Fee and Financing Authority implemented a two-year fee program that provides a 50% rebate of regional transportation impact fees to all applicants for homes and other residential units. Many other cities in northern California (including Sacramento, Merced and Stockton) have adopted similar mitigation fee reduction or deferral programs.

The Conservancy's consultant (EPS) has been engaged by several cities in these mitigation fee reduction or deferral efforts. For example, EPS prepared February 2012 reports for the cities of Fairfield and Vacaville which evaluate their development impact fee programs. In one report, it confirms that "[t]he market for new housing throughout most of California is trapped in a downturn that is driven by a lack of overall demand for housing and made worse by the unprecedented availability of existing housing stock." EPS, "Development Impact Fee Program Review," City of Fairfield (February 17, 2012), at 11.

EPS also emphasizes the "importance of establishing aggregate fee levels that strike a city-by-city appropriate balance between providing an appropriate level of facilities/infrastructure to new City residents and businesses consistent with the City's goals/vision, while avoiding placing excessive costs on development and thereby slowing the impact of development." Id., at 14.

Most importantly, in the Fairfield/Vacaville Reports, EPS stresses the importance of carefully assessing the cost burden of fees on new development. It states, in no uncertain terms, that "no increases in development impact fees should be made without consideration of the potential impacts on development feasibility and the associated pace of new development." Id., at 14. It then goes on to recite the EPS feasibility benchmarks identified above (including the "traditional overall maximum infrastructure cost burden feasibility standard of 15 to 20 percent") and further states that "under current market conditions, even meeting this 15 to 20 percent standard does not ensure feasibility as the traditional margins between vertical development costs and home prices have been squeezed." Id., at 24.

We agree entirely with the general principle that any proposed development fees imposed by a city must undergo a stringent analysis "to ensure feasibility" before they are imposed. It is undisputed that neither the Conservancy nor its consultant EPS has done so for these proposed HCP Plan fees. Accordingly, the City must either conduct this analysis itself or require it to be accomplished by the Conservancy and then independently verified by the City."

Response 58: Again, mitigation fees under the HCP/NCCP are different from locally established infrastructure/capital facilities fees charged by cities or counties. As a result, the application of financial feasibility to reduce fees - as is often done for infrastructure/capital facilities fees - cannot be applied to habitat mitigation fees under an established HCP/NCCP. Discussion of financial feasibility associated with habitat mitigation fees should also be careful to compare the mitigation costs under the HCP/NCCP (through fees or through the developer option to conduct own mitigation) with mitigation costs under case-by-case permitting with the State and federal regulatory agencies.

Comment 59: "The Conservancy proposes that the wetland fee portion of the HCP mitigation fee package increase by up to 32.5% from 2011 levels, with the seasonal wetland mitigation fee topping out at $245,000 per acre, which is 42% higher than the 2006 corresponding fee of $172,380. These proposed increases are occurring at a time when home prices in Pittsburg have decreased by 65% and undeveloped land prices, according to EPS figures, for parcels over five acres in size have decreased by up to 48% over the same period.

As the Brion Report demonstrates, the Conservancy "audit" report fails to provide any solid economic basis for these fee increases. The staff costs per acre are simply set at an across-the-board number that has no rational economic basis, the contingency costs are unreasonably high, and the non-construction cost portion of these fees are also very high. Staff costs, contingency and non-construction related costs for wetlands projects are at about 48% of total costs, with the riparian restoration non-construction costs at 54%. In general, according to the Brion Report, staff and administrative, non-construction costs would be expected to be 10% to 20% of total construction costs and contingencies should be in the 10% range. Since no "fee audit" has been performed, there is no factual basis on which to verify or test these surprising figures."

Response 59: The recommended increase in certain riparian/wetland mitigation fees and the reduction in stream fees were specifically based on Conservancy experience, cost information from other wetland restoration projects in East County and elsewhere, as well as interviews with wetland restoration experts. This research is documented in the March 17th EPS Memorandum and demonstrates that the current wetland mitigation fees are insufficient to fund the required wetland restoration under the HCP/NCCP. The proposed wetland mitigation fee increases are below the increases required if they were set solely on Conservancy experience to date. It is, however, hoped that additional economies of scale and expertise may be captured in future projects. The Brion Memorandum does not provide any alternative wetland restoration cost data or information to support its comments.

Comment 60: "Based on the scant "audit" record presented by the Conservancy, the City is unable to establish that these wetland category fees "do not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed" as required by the Mitigation Fee Act. They also will likely hinder economic growth in contravention of the Act due to the huge cost burden on new development. In sum, the wetland mitigation fee slate is unsupported and must be rejected."

Response 60: The recommended changes in wetland mitigation fees is specifically based on Conservancy experience, cost information from other wetland restoration projects in East County and elsewhere, as well as interviews with wetland restoration experts. This research is documented in the March 17th EPS Memorandum and demonstrates that wetland mitigation fees need to be increased to cover the expected costs of wetland restoration.

Comment 61: "Although the Conservancy is implementing the HCP Plan, it does not have the legal authority to impose the mitigation fees. Rather, since the participating cities bear responsibility for assessing and imposing the fees, they also bear full legal responsibility for ensuring that the fees meet all of the constitutional, statutory and case law standards for imposition of such fees. Thus, the City must either obtain from the Conservancy and independently verify, or it must develop on its own, all Fee Audit necessary information to ensure that these legal requirements are satisfied."

Response 61: The Resources Law Group memorandum addresses this comment.

Comment 62: "The January 27, 2007 Implementing Agreement, to which the City is a signatory, puts certain important contractual responsibilities on the Conservancy. Among other things, the Conservancy is contractually obligated (in section 13.1) for "[a]uditing HCP/NCCP implementation fee revenues to determine whether the fees must be increased or decreased, in accordance with Chapter 9 of the HCP/NCCP." Moreover, the Conservancy must provide "technical support and advice to Permitees [including the City] about what HCP/NCCP measures apply to Covered Activities they implement or approve and how they should be applied, including, but not limited to, avoidance and minimization measures and the amount of fee payments." Id."

Response 62: The Resources Law Group memorandum addresses this comment.

Comment 63: "With regard to this "thorough fee audit," it is clear that the Conservancy has failed to live up to its contractual obligations. The "audit" that it has presented is not economically rigorous, lacks key economic and cost information to support its conclusions, contains many computational errors and leaps in logic, and provides no acceptable basis for justifying adoption of the proposed fee schedule. The Brion Report documents these deficiencies in detail. As a result, the City lacks any solid evidentiary basis for making the factual and legal findings necessary to support imposition of this fee schedule."

Response 63: The fee update provides the appropriate research, data, and analysis to support the recommended fees consistent with the HCP/NCCP. It is also consistent with other habitat mitigation fee updates. As discussed above, the Brion Memorandum does not establish the need for any changes in the habitat mitigation fee recommendations.

Comment 64: "Nonetheless, it is evident from the limited information already available that the amount of development and wetland mitigation fees necessary to support the HCP Plan facilities, and the reasonable cost to provide the associated services, in the current real estate market and regional economy is significantly less than what the Conservancy proposes in the current fee schedule. In addition, when analyzing the financial feasibility of the fees today, the extremely high aggregate cost burdens (ranging from 24% to 28%) that would be imposed on new development by the new fees will render new development infeasible and should not be adopted. By any measure, the fees are excessive and will likely stifle new development at a critical time."

Response 64: The Brion and Farella Memorandum do not provide information on mitigation costs to support their recommended fee reductions. As noted previously, changes in mitigation fees must be tied to mitigation costs and cannot be altered on the basis of financial feasibility analysis. Without the appropriate habitat mitigation fees, the regional HCP/NCCP would be under-funded and the terms of the permit would not be met. Without the regional HCP/NCCP, developers would return to the more complex process of case-by-case consultation with State and federal regulatory agencies to obtain take permits. Developers would lose the streamlined opportunity to obtain these permits by paying habitat mitigation fees and/or conducting the specified mitigation themselves. Any financial feasibility associated with habitat mitigation fees recommendations should also be careful to compare the mitigation costs under the HCP/NCCP (through fees or through the developer option to conduct own mitigation) with mitigation costs under case-by-case permitting with the State and federal regulatory agencies.

Comment 65: "Accordingly, Discovery Builders requests that the City exercise its discretion to impose a temporary two-year reduction of each individual HCP Plan development and wetland mitigation fee by at least 25% to bring these fees more into line with the actual HCP land acquisition construction cost reductions and to improve the financial feasibility of potential development projects. Once the required fee audit has been produced and a more refined analysis can be conducted, further reductions or other modifications to the fees can be considered."

Response 65: The Farella Memorandum recommendation of a 25 reduction in mitigation fees is not based on any supporting evidence, such as land value data, wetland restoration cost data, or other cost data. The outcome of this recommendation would be to under-fund the mitigation requirements and, as a result, the terms of the permit would not be met.

Comment 66: "We also request that the City evaluate alternative mechanisms for deferral of all or a portion of the fees so that the fee payments correspond more closely with sales generated by development projects."

Response 66: The imposition of fees is typically tied closely to the timing of the "impact". Habitat mitigation fees are then typically due prior to infrastructure fees as the impact occurs at time of grading, rather than time of building. The HCP/NCCP requires fee payment in advance of grading impacts, but provides the option for one-third of the fee obligation to be paid over time by imposing an assessment on the new development. Deferring mitigation fee payment beyond the time of impact may also cause nexus challenges in cases where land ownership changes after the impact occurs.

Comment 67: "The City has no factual or legal basis upon which to impose the new set of fees suggested by the Conservancy. In fact, the available information on current land acquisition costs demonstrates that fee reductions of 40% or more could easily be justified. For all of the reasons set forth above, Discovery Builders requests that the City reject the Conservancy's proposed slate of new fees, instruct the Conservancy to prepare the "thorough fee audit" required by the HCP Plan and Implementing Agreement, and adopt an interim two-year fee reduction and fee deferral program."

Response 67: The March 17th EPS Memorandum provides substantial research, data, and analysis in support of the proposed habitat mitigation fees. The Brion and Farella Memoranda provide no alternative information on land values and incorrectly suggest that the available information supports a 40 percent reduction in expected total land values. The Farella Memorandum's 25 percent fee reduction recommendation would result in the under-funding of the HCP/NCCP and an inability to meet the terms of the permit.

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APPENDIX B:

Brion and Farella Memoranda
with Comment Numbering

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BRION & ASSOCIATES

PEER REVIEW MEMORANDUM

To: Mayor Ben Johnson and Members of the City Council, City of Pittsburg

cc: John Kopchik, ECCC Habitat Conservancy
Paul P. "Skip" Spaulding, III, Farella Braun + Martel LLP

From: Joanne Brion, Brion & Associates

Subject: Peer Review Analysis Regarding Proposed Adoption of "City Council Resolution Approving an Update to the Habitat Conservation/Natural Community Conservation Plan (HCP Mitigation Fees," dated January 4, 2012

Date: April 2, 2012

Brion & Associates has been retained by Discovery Builders, Inc. to perform a peer review analysis of the proposed fee update prepared by Economic & Planning Systems, Inc. (EPS) for the HCP, as included in "City (Pittsburg) Council Resolution Approving an Update to the Habitat Conservation/Natural Community Conservation Plan (HCP) Mitigation Fees," dated January 4, 2012. HCP mitigation fees include a number of fees, such as a development fee for purchasing land and a wetland fee for re-creating and restoring wetlands and other similar types of habitat in the Eastern Contra Costa County (ECCC) Conservation Plan area. We would like to stress that neither Discovery Builders, Inc. nor Brion & Associates take issue with the general environmental goal of the HCP and consolidated permit effort. This peer review analysis focuses on financial aspects of the fees and related methodological problems we have found during our review.

1 According to the requirements of the original ECCC HCP, which was adopted in 2006-2007, the Eastern Contra Costa Habitat Conservancy (Conservancy) must prepare a "thorough fee audit" for the fee program every three, six, ten years, etc. As we understand it, the fee update prepared by EPS is intended to be the first "fee audit" under the plan. However, the documents submitted do not represent a fee audit of the entire HCP Plan. The documents submitted by EPS represent a fee update only. Prior years' changes in fee rates have been based on the adopted formula for inflation. At this point, the majority of our comments and

concerns are based on analysis and information contained in two memoranda (Fee Memoranda) prepared by EPS, namely:

- Memorandum to John Kopchik, Contra Costa County from Teifion Rice-Evans and Catherine Meresak, Economic & Planning Systems, Inc. Subject: East Contra Costa County HCP/NCCP: 2011 Mitigation Fee Update; EPS #20149, Dated: March 17, 2011; and

- Memorandum to John Kopchik, Contra Costa County from Teifion Rice-Evans and Catherine Meresak, Economic & Planning Systems, Inc. Subject: East Contra Costa County HCP/NCCP: 2011 Mitigation Fee Update; Additional Information, EPS #20149, Dated: July 15, 2011.

In order to understand the Fee Memoranda, it was necessary to reference and review the original HCP Plan including the Funding Analysis in Chapter 9, and Appendices G and H of the HCP. Overall, we believe that the proposed revisions to the HCP fees are not merited because they are not supported by the underlying Fee Memoranda. At this time, we have identified the following areas of concern:

1. Current Economic Market Conditions and Housing Values in ECCC
2. Financial Feasibility and Cost Burden of New Fees
3. Wetland Construction Costs and Inclusion of Staff Costs
4. Development Fee Land Values
5. Failure to Prepare a Fee Audit, Lack of Clarity and Insufficient Supporting information in the Fee Memoranda

Our significant concerns, questions, and recommendations in each of these areas follow below. Our comments herein are meant to improve the HCP program and to ensure that the adopted fee schedule is reasonable, justified and in accordance with current principles pertaining to impact fees, which will allow new development to move forward in these difficult economic times.

For ease of reference, **Table 1** summarizes the HCP fees in 2006 and 2011 (indexed and recommended) and calculates the percent change in each fee rate.

Table 1
Comparison of Mitigation Fee Amounts at the Time of HCP/NCCP Approval with Current and Recommended Fees
Discovery Homes Fee Peer Review

Fee Type/Category		2006 Original Fee per Acre (2006 Dollars)	2011 Current (1) Fee per Acre (2011 Dollars)	2011 Recommended Fee per Acre (2011 Dollars)	Indexed 2006-2011 Amount Change	Indexed 2006-2011 Percent Change	Recommended 2006-2011 Amount Change	Recommended 2006-2011 Percent Change	Recommended Index versus Rec'd Amount Change	Recommended Index versus Rec'd Percent Change
Development Fees										
Zone I		$11,919	$10,662	$10,662	($1,257)	-10.5%	($1,257)	-10.5%	$0	0%
Zone II		$23,838	$21,324	$21,324	($2,514)	-10.5%	($2,514)	-10.5%	$0	0%
Zone III		$5,960	$5,332	$5,332	($628)	-10.5%	($628)	-10.5%	$0	0%
Zone IV	(2)	$17,879	$15,993	$15,993	($1,886)	-10.5%	($1,886)	-10.5%	$0	0%
Wetlands Mitigation Fee										
Riparian Woodland/Scrub		$58,140	$64,750	$68,000	$6,610	11.4%	$9,860	17.0%	$3,250	5.0%
Perennial Wetland		$79,550	$88,359	$117,000	$8,809	11.1%	$37,450	47.1%	$28,641	32.4%
Seasonal Wetland		$172,380	$191,445	$245,000	$19,065	11.1%	$72,620	42.1%	$53,555	28.0%
Alkali Wetland		$163,200	$181,250	$228,000	$18,050	11.1%	$64,800	39.7%	$46,750	25.8%
Ponds		$86,700	$96,289	$117,000	$9,589	11.1%	$30,300	34.9%	$20,711	21.5%
Aquatic (Open Water)		$43,860	$48,711	$58,000	$4,851	11.1%	$14,140	32.2%	$9,289	19.1%
Slough/Channel		$98,940	$109,883	$124,000	$10,943	11.1%	$25,060	25.3%	$14,117	12.8%
Steams 25 Ft Wide or Less	(3)	$474	$526	$407	$52	11.0%	($67)	-14.1%	($119)	-22.6%
Streams > than 25 Ft Wide	(3)	$714	$793	$613	$79	11.1%	($101)	-14.1%	($180)	-22.7%

Note: Rates are from EPS, Inc. Table 1 - Attachment 2; amount and percent change figures are calculated by Brion & Associates.
See Memorandum, To: John Kopchik, Contra Costa County, From Teifion Rice-Evans and Catherine Meresak, Economic & Planning Systems, Inc.
Subject: East Contra Costs County HCP/NCCP: 2011 Mitigation Fee Update; EPS #20149, Date: March 17, 2011.
(1) Current Fee Levels reflect application of an automatic adjustment to the original fees.
(2) Zone IV applies to certain covered projects within Antioch, such as EBART, HCP/NCCP provides that fees in this area will be an average of Zone I and Zone II fees.
(3) Per linear feet.

DETAILED COMMENTS

1. Current Economic Market Conditions and Housing Values in ECCC

2 The Fee Memoranda has been prepared in a vacuum without regard for the economic realities facing new development. It fails to acknowledge the current economic situation, the weak housing market, and the crisis that has hit housing in ECCC particularly hard. The 3 Fee Memoranda recommends using the indexed adjustment for the development fee, which results in a fee reduction of 10.5% from 2006 to 2011. There is no fee reduction proposed for 2011 to 2012. This is not consistent with recent changes in the economy (see 4 **Table 1**). Furthermore this minimal adjustment does not bear any relationship to actual changes in housing prices, land prices, or market conditions faced by developers. As 5 identified in the EPS report, land prices have dropped 8% to 48% between 2006 and 2011, depending on the parcel size. The only exception to this trend is small parcels of 0 to 5 acres, which increased 65% on average. We raise further questions about this increase below. Any increase of this magnitude is completely contrary to the reduced land values throughout East Contra Costa County.

6 Current economic conditions in the housing market are strikingly different than the conditions that prevailed in 2006, considered by some to be the peak of the housing boom in California. Housing prices in the ECCC[1] have plummeted since 2006 and the market has been flooded with foreclosed, recently constructed homes. **Attachment A** contains a market assessment of housing prices in the ECCC used in this analysis, which has been prepared by S.L. State & Associates for this effort.

Between 1999 and 2006, the ECCC market area added about 20,000 new homes. Many of these new homes are now selling at greatly reduced prices. The following chart summarizes price changes from 2006 to 2011 for all unit types. Prices have dropped by 56% in Contra Costa County and by 65% in Pittsburg. Nonetheless, the actual number of homes sold hasn't changed significantly from 2006 to 2011. However, the type of home that is selling has changed. Now the market is dominated by resales and foreclosures and includes very few new homes. Currently, new home sales are 4% to 5% of total sales; in the past this figure was closer to 20% in the ECCC market area. While the number of units sold in 2011 was only 6% less than in 2006 the average price has been reduced by 56%. This represents a fundamental change in the pricing structure of residential sales in the ECCC market.

CONTRA COSTA COUNTY AND ECCC CITY MEDIAN HOME PRICES - 2006 (PEAK) TO YEAR END 2011

County/City/Area	# of Units Sold	Year 2006	# of Units Sold	Year 2011	Net Change, 2006 to 2011	Percent Change, 2006-2011
Contra Costa County	**17,783**	**$575,000**	**16,753**	**$255,000**	**($320,000)**	**-56%**
ANTIOCH	1,763	$500,000	2,040	$180,000	**($320,000)**	-64%
BRENTWOOD	1,506	$643,000	1,301	$301,000	**($342,000)**	-53%
BYRON	469	$653,000	8	$225,000	**($428,000)**	-66%
OAKLEY	1,096	$525,000	812	$210,000	**($315,000)**	-60%
PITTSBURG	1,292	$460,000	1,440	$160,000	**($300,000)**	-65%

Sources: DataQuick; S.L.State & Associates.

7 Today, new home construction in ECCC is competing with existing resale, short sales and foreclosed units. In the past there was a 15% to 20% price premium that any newly constructed home could command. In the ECCC market, this price premium has eroded. In order to compete with the resale market, home builders are selling new homes at prices equal or similar to those of recent resale closings. In addition, builders are forced to offer homes that are significantly larger than homes on the resale market to achieve the same average prices.

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[1] Eastern Contra Costa County is roughly the same area that the HCP/NCCP Plan covers, and includes Pittsburg, Antioch, Brentwood, Oakland, Clayton, and other unincorporated areas in the County. Antioch however is not a signatory to the HCP/NCCP Plan.

In today's ECCC market, thousands of recently constructed homes are available at very low prices and many of these homes are in comparable condition to new homes. The following chart summarizes recent average sales prices by city in the ECCC market in the past six months.

EAST CONTRA COSTA COUNTY RESALE CLOSING SUMMARY
HOMES CLOSED IN THE PAST 6 MONTHS

City	Average Size	Average Price	Average Price Per Sqft	Average Bedrooms	Average Baths	Average Year Built	Average Lot Size
Antioch	1,929	$195,951	$103	3.6	2.4	1984	7,150
Bay Point	1,579	$169,994	$104	3.3	2.1	1977	6,077
Brentwood	2,380	$296,323	$128	3.7	2.7	1999	7,617
Oakley	1,974	$202,759	$107	3.6	2.4	1993	7,752
Pittsburg	1,686	$179,000	$107	3.5	2.1	1981	6,409

Sources: Metroscan; S.L. State & Associates.

Newly constructed homes are also not moving, and developers have to offer increased amenities and significantly more square footage in order to compete with resales and foreclosures in the market. S.L. State & Associates (see **Attachment A**) finds that housing prices overall have dropped at least 50% since the housing boom, when the prices which formed the basis of the original HCP fees prevailed. Indeed, as shown above, this figure is even higher in every city in the ECCC market area. While housing prices are significantly lower than when the HCP was adopted in 2006, some city impact fees have not decreased. This means that the overall impact of the fees on project feasibility is much greater than in the past, as discussed below under Comment #2.

8 Since new homes and resale homes are essentially competing for the same buyers, any significant costs imposed by public agencies on new development that are not imposed on resale homes will make new homes that much more expensive, thereby undercutting their competitiveness. Resale homes are not required to pay these mitigation fees or other impact fees (although they are assumed to have historically caused many of the environmental impacts covered by the HCP fees). Consequently, the HCP fees imposed on new development projects are causing an economic impediment to new construction in the current and foreseeable future market and will significantly impair the ability of new homes to compete with resale homes.

9 Unemployment rates also remain extremely high in the ECCC area compared to other locations in the Bay Area, as discussed in **Attachment A**. This means that homeownership is out of reach for many residents in the plan area. The unemployment rates in Bay Point and Pittsburg are about 18% and 15%, respectively, and significantly higher than the County average of 9.3%. In Brentwood and Oakley, rates are slightly lower than the County average. Antioch's rate is 10.6%, higher than the County average. The extremely high rates of unemployment mean that the demand for new residential homes is weaker than usual,

contributing to the current oversupply of units on the market and significantly lowering home prices.

10 S.L. State & Associates predicts that it will be five years or more before the ECCC market stabilizes. Some public agencies are reducing impact fees to stimulate local development. For example, the East Contra Costa County Regional Fee & Finance Authority (ECCRFFA) recently lowered the Regional Transportation Impact Fee by 50% for the next two years. Fee waivers, fee payment plans, fee reductions/adjustments and fee deferrals are also being considered or have been adopted by some cities in California (Vacaville, Oakley,
11 Fairfield, and Brentwood). One of the largest impediments to current projects is the fact that the HCP fee is due in total at the very beginning of project development, prior to issuance of a grading permit. Most development fees are paid when building permits for vertical house construction are pulled and can be reasonably expected to be funded by housing sales. In many jurisdictions, including Pittsburg, a fee deferral plan has been adopted that allows developers to defer paying permit fees.

12 **Recommendations:** The City of Pittsburg should deny the Conservancy's current request for modification of the mitigation fees and direct the Conservancy to evaluate the financial feasibility of the updated fees in the context of a dramatically lower median house prices and the effects of resale housing competition on new home prices in each of the participant jurisdictions. The City of Pittsburg should consider a 25% or more reduction in fees as well. In addition, the City of Pittsburg should request the Conservancy to look at fee payment plans, and/or fee deferrals. The agency needs to incorporate current housing market conditions into the analysis so decision makers can make informed decisions regarding the implications of new fee rates.

2. Financial Feasibility / Cost Burden of New Fees

13 The proposed fee update does not take into account the impact of the fees on the financial feasibility of new development. The adjustment to the development fee is minimal and insignificant (it is down by 10.5% since 2006), but wetland fees have increased significantly. Current economic conditions, discussed above, are radically different than in 2006 when the plan and fees were adopted.

The failure of the Fee Memoranda to analyze the cost burden of the proposed fee structure on new development is a gross oversight that undermines the resulting fee program. The original HCP incorrectly asserted that financial feasibility was a distinct methodology for determining or establishing fee programs and implied that it was not relevant to the establishment of the HCP fees.[2] However, financial feasibility analysis, sometimes called "cost burden," is not a separate methodology for establishing fees. Rather, it is a method

[2] See Appendix H of the HCP/NCCP Plan, Technical Memorandum from EPS, Inc. to John Kopchik, ECCC Habitat Conservation Plan Association, dated August 3, 2006, page 3.

for evaluating results of a proposed fee methodology in the context of local conditions, no matter what type of fee is being considered.

14 It is well accepted that the financial feasibility, or cost burden, of proposed mitigation fees should always be examined before approving new fees. EPS and others, including Brion & Associates, always consider financial feasibility when conducting a fee mitigation study. Not to do so would be irresponsible and contrary to established norms in the urban economics
15 field. **Attachment B** lists several citations of EPS studies that consider financial feasibility and cost burden in the preparation of fee studies, public financing plans, financial feasibility studies, etc. In several recent studies, articles and a power point presentation, EPS has stressed that in these difficult economic times, evaluating the financial burden placed on new development is key to ensuring that development can proceed. Here are two quotes from citations and references in EPS documents listed in **Attachment B**.

- Typical Components of New Single-Family Home Construction, identifying “infrastructure cost burden” as 15 to 20% of market value.[3]

- The infrastructure cost burden has to be realistic (no more than 20 percent of the building sales price) when balanced with land, entitlement and construction costs for projects to make sense, Gomes says. “We need to bring cost structures back into alignment with the new reality of pricing, in order to get the economy back on track,” he says.[4]

All fees must be considered in the context of current market and economic conditions in the affected jurisdiction(s). Fees may meet some form of cost allocation on a fair share basis, but may still be too high to allow new development to move forward. EPS has prepared hundreds of fee studies and fee-based public financing plans that consider cost burden and the financial feasibility of the proposed fee program. The omission of financial feasibility analysis from the original HCP and subsequent Fee Memoranda is a gross oversight.

16 A development impact fee may be adopted at 100% of its calculated fair share rate or burden, but it cannot be adopted at a higher rate. However, a jurisdiction may choose to adopt a lower fee either permanently or temporarily to address economic conditions and concerns of financial feasibility. The role of the economist in such fee studies is to evaluate <u>all</u> the implications (including financial feasibility) of a proposed fee program while establishing nexus. If a fee is so high as to render new development infeasible, then the

[3] Gomes, Jaime and Economic & Planning Systems, Inc. “El Dorado County Development Feasibility Study.” November 2010. PowerPoint Presentation slides 21 to 25. This document is provided as **Attachment C**.
[4] Long, J.T. “Developers and local governments strike a balance.” *Comstock Magazine* February 2011. *(James Gomes, Principal, Economic & Planning Systems, Inc. is quoted in this article about reducing fees, infrastructure standards, and cost burdens needing to be under 20%.)*

goals of the fee program are not met, and new infrastructure and facilities are not purchased or built, and the community does not benefit.

In sum, fees must be reasonable and proportional but also take economics and market conditions into consideration. In this fee update, EPS has not considered the significant changes to the housing market conditions in the ECCC since the fees were originally established, as discussed above and documented in **Attachment A**.

17 The original HCP defines financial feasibility as a separate fee methodology for establishing fees and then dismisses it outright. Financial feasibility is not a valid method for establishing or calculating a fee. It is a method for evaluating the impacts of a proposed fee based on some form of cost allocation. The original HCP dismisses this important step in establishing a development fee by labeling it a “method” rather than an “evaluation tool.” To use financial feasibility as a “method” would imply that a fee could be set to the maximum level that the market can bear without consideration of nexus, reasonableness, and proportionality of the impact created by new development. State law does not allow this. Financial feasibility analyses, including cost burden assessments, provide information that allows decision makers to understand the implications of the proposed fee program in the context of existing adopted fees and market conditions. In this case, the important economic conditions are housing prices, an abundance of supply on the market, the effects of the housing foreclosure crisis on home prices, and the difficulty of obtaining financing.

18 For this peer review we have prepared a summary of the 2012 estimated fees that would be charged to a new single family home in Pittsburg, at two densities. **Table 2** summarizes the current impact fees that would apply to two single family units: one 2,350 sqft unit at 3.5 units per acre and one 1,700 sqft unit at 6.5 units per acre. The 2012 City and County fees for these units total about $51,960 and $46,130, respectively. With the proposed HCP fees in Zone II, the total fees for each unit type would be about $58,000 and $49,400, as shown. The average market price for units of this size is $228,000 and $179,000, respectively, including resales, new construction, and foreclosures. As discussed above, the overall average market price is important here. In addition, each percent increase in the cost burden, represents a significant increase in costs to builders. For context, the proposed HCP fees represent from 6% to 10% of total fees due for projects in Pittsburg, depending on the HCP Zone.

The proposed updated HCP fees, combined with current City and other fees are extremely high in comparison to current market prices. The proposed HCP fees, in combination with all other impact fees in Pittsburg, equal about 24% to 25% of market value of a 2,350 sqft unit and 27% to 28% of the market value of a 1,700 sqft house (depending on the HCP Zone). Total fees should not exceed 15% to 20% of market value, a measure that EPS established in the 1990s and still uses extensively (see **Attachment B**). As the analysis in **Table 2** shows, the current fee burden in Pittsburg significantly exceeds this measure of burden irrespective of density or HCP Zone. In addition, for lower density projects, the HCP fees are even higher on a cost per unit basis.

Table 2
Summary of Total Impact and Development Related Fees in City of Pittsburg and Cost Burden Analysis
HCP/NCCP Habitat Mitigation Fee Peer Review

Item			SF Unit		SF Unit	
Average Gross Units per Acre			3.5		6.5	
Average Size Unit in Sqft			2,350		1,700	
Average Current Sales Price			$228,000	(1)	$179,000	(2)
Current City Fees	(3)					
Local Traffic Fees	(4)		$7,285		$7,285	
Park Dedication Fees	(4)		$1,942		$1,045	
Water Treatment and Other Fees	(3)		$2,590		$2,590	
Street Encroachment	(3)		$180		$180	
Fire District Adm Fee	(3)		$42		$42	
Total Local/City Fees			**$12,039**		**$11,142**	
Other Agency/District Fees	(3)					
School Impact Fees		**$2.97**	$6,980		$5,049	
Fire Protection Fees			$247		$247	
Regional Traffic Fees			$15,795		$15,795	
Sewer Connection	(4)		$4,524		$4,524	
Water Connection			$4,873		$4,873	
Co. Storm Drainage			$7,500		$4,500	
Total Other Fees			**$39,919**		**$34,988**	
Total Fees per Unit			**$51,958**		**$46,130**	
HCP/NCCP Proposed Fees	(4)	Per Acre				
HCP Mitigation Fee	Zone I	$10,662	**$3,046**		**$1,640**	
HCP Mitigation Fee	Zone II	$21,334	**$6,095**		**$3,282**	
HCP Wetland Fees	(5)					
Total, All Fees with HCP Fees						
Zone I			**$55,004**		**$47,770**	
Zone II			**$58,053**		**$49,412**	
Total Fees as % of Market Price						
Zone I			24%		27%	
Zone II			25%		28%	

(1) Housing price and size for this size unit are as of November 2011 to January 2012 in Pittsburg, from S.L. Slate & Associates, market reports dated March 1, 2012. Average prices include all single family housing types, resales, new construction and foreclosures.
(2) Housing price and size for this size unit are as of November 2011 to January 2012 in Pittsburg, from S.L. Slate & Associates, market reports dated March 1, 2012. Average prices include all single family housing types, resales, new construction and foreclosures.
(3) Fee rates are from Discovery Homes current project files and the City of Pittsburg Master Fee Schedule. Excludes all normal plan check and building permit fees, including deposits, and staff time.
(4) Based on fee rates from 2012 Single Parcel Fee Summary, from the City of Pittsburg Engineering Dept.
(4) HCP/NCCP fees are from EPS Memorandum dated March 17, 2012.
(5) Wetland fees are not included because not all projects would impact wetlands.
Sources: City of Pittsburg; Discovery Homes; Brion & Associates.

Today, compared with 2006, the total cost burden of the proposed fees is significantly higher. The cost burden is approximately double what it would have been in 2006.

19 In order to stimulate new development in a difficult market, many jurisdictions are lowering impact and other fees or at least not increasing them. The City of Oakley has just cut their fees by 50%.[5] While the HCP development fee has only decreased by 10.5% since 2006, this reduction is not proportionate to the significant reduction in housing and land prices. When wetland fees are taken into account, the cost burden is even higher. We have not included wetland fees in this analysis because they are too difficult to estimate for a single unit.

20 **Recommendations:** The City of Pittsburg should deny the Conservancy's request for approval of these fees and require that the Conservancy conduct a rigorous financial analysis of the fee update in the context of the dramatically changed market conditions facing the development industry and the cost burden of this fee. This economic analysis needs to evaluate the potential negative impacts of imposing higher fees at this time in light of all other fees on new development. The Conservancy itself would not be negatively impacted if development does not occur, but the local jurisdictions that implement the fee would be harmed.

3. Development Fee Land Values

21 There are a variety of problems with the land values used to establish the Development Fees. First, the use of old comps from the 2004 to 2008 period improperly skews the land values upward, as this data omits most effects of the economic recession. In addition, the
22 "blending" of purchase costs across categories has the effect of hiding true land cost savings, resulting in estimates of land cost that significantly overstate actual value. Even
23 using the Conservancy's methods, land costs have decreased between 80% and 48% for parcels of 5 acres or more. Chapter 9 of the HCP Plan states that the land acquisition costs are approximately 67% of total HCP development fee expenditures. Furthermore, the current fee update study does not make clear how much of the proposed Development Fee amount (or rate) is derived from land cost versus staff and other non-land costs.

24 There also appears to be erroneous data used in the land values for the 0 to 5 acre parcel category (See Table B-1 of EPS March 17, 2011 Memo). All current land comps for land values have dropped significantly since 2006, but the land value for parcels in this category has supposedly increased by 65%. This increase conflicts with all of the other data presented. It could be that the comps used for this parcel size category are inappropriate. Most are listed as Residential Land. It appears that perhaps these parcels were improved

[5] See City of Oakley, Memorandum from Bryan Montgomery, City Manager to City Council, "Resolution clarifying the approved City Development Fee Reduction and Incentive Program" dated March 27, 2012. The 50% fee reduction applies to fire and parks fees, the smaller General Plan and South Oakley Infrastructure Fee, and 40% of the Oakland Traffic Impaction fee.

residential land with infrastructure, which would account for average per acre costs that are significantly higher than those for all other land comps in the analysis.

While the footnote indicates that these transactions had zero or little improvement value, the prices paid seem incompatible with this statement, unless they are high end residential parcels in a planned residential neighborhood. But if this is the case, these comps would not be appropriate for this land category. We would expect that the conservancy is not going to purchase high end, improved, master planned lots.

25 **Recommendation**: The City of Pittsburg should deny the Conservancy's request for approval of these fees and require that the Conservancy conduct a more thorough review of actual land costs and related staff costs. Comparable sales data of land transactions from 2009 to 2011 should be used exclusively.

4. Wetland Construction Costs and Inclusion of Staff Costs

26 The Wetland Mitigation Fee is proposed to increase by as much as 32% (when compared to the 2006 rates) as shown in **Table 1** depending on the type of wetland or habitat. There are nine wetland related fee categories, including riparian stream restoration.

Staff costs per acre of wetland are estimated at $12,300 per acre. No data is presented to support these costs, and they do not vary per type of wetland created (see Table 5 of the
27 March 17 memorandum). Contingency costs are an additional 20%. Total non-construction related costs of the proposed wetland fee rates are about 48% of the total fee rate, for most of the fee categories; with the exception of Riparian Restoration at 54%, and Stream Impact at 27%. The non-construction related costs component of each fee is excessive. **Table 3** below shows that if the contingency factor is lowered to a more reasonable 10%, the total wetland fee costs would be reduced by almost $4.7 million, or about 17%. The wetland cost data in the Fee Memoranda from the Santa Clara HCP uses a 12% contingency rate, for example.

28 **Recommendations:** The City of Pittsburg should direct that the Conservancy revisit the data used in the wetland fee component of the fee program. Excessive staff and other non-construction costs need to be reduced in the analysis, and a more reasonable contingency factor needs to be included. This would help make the fee more reasonable while not impacting the program.

Table 3
2011 East Contra Costa HCP/NCCP Wetland Mitigation Fee Estimates
with Suggested Changes and Revisions
Discovery Homes Fee Peer Review

Cost Category		Riparian Restoration Acres	Stream Impact LF	Perennial Wetland Acres	Seasonal Wetland Acres	Alkali Wetland Acres	Slough Channel Acres	Open Water Impact Acres	Pond Impact Acres	Total
Construction Costs		$31,625	$299	$60,822	$63,697	$58,672	$64,822	$60,322	$60,322	
Staff and Related Costs		$12,300	$20	$12,300	$12,300	$12,300	$12,300	$12,300	$12,300	
% of Total Costs		39%	7%	20%	19%	21%	19%	20%	20%	
Construction Related Costs		$13,050	$69	$24,729	$25,879	$23,869	$26,329	$24,529	$24,529	
% of Total Costs		**41%**	**23%**	**41%**	**41%**	**41%**	**41%**	**41%**	**41%**	
Contingency	20%	$11,395	$19	$19,570	$20,375	$18,968	$20,690	$19,430	$19,430	
Total Per Acre or LF		**$68,370**	**$407**	**$117,421**	**$122,251**	**$113,809**	**$124,141**	**$116,581**	**$116,581**	
Non Construction Costs as % of Construction Costs		**54%**	**27%**	**48%**	**48%**	**48%**	**48%**	**48%**	**48%**	
Proposed Mitigation Fee		**$68,000**	**$407**	**$117,000**	**$245,000 (1)**	**$228,000 (1)**	**$124,000**	**$58,500 (2)**	**$117,000**	
Costs with Lower Contingency	10%	$56,975	$388	$97,851	$101,876	$94,841	$103,451	$97,151	$97,151	
Adjusted Mitigation Fee w/ Lower Cont.		**$57,000**	**$388**	**$98,000**	**$204,000**	**$190,000**	**$103,000**	**$49,000**	**$97,000**	
Proposed Wetland Impacts (Max UDA)		35	4,224	75	16	10	73	17	8	234
Proposed Mitigation Costs		$2,380,000	$1,719,168	$8,775,000	$3,920,000	$2,280,000	$9,052,000	$994,500	$936,000	$28,337,500
Revised Mitigation Costs		**$1,995,000**	**$1,639,334**	**$7,350,000**	**$3,264,000**	**$1,900,000**	**$7,519,000**	**$833,000**	**$776,000**	**$23,637,000**
Net Change		($385,000)	($79,834)	($1,425,000)	($656,000)	($380,000)	($1,533,000)	($161,500)	($160,000)	($4,700,500)

Note Mitigation is one to one unless otherwise noted below.
(1) Mitigation is 2:1 for these two categories.
(2) Mitigation is .5:1 for this category.

Sources: Economic & Planning Systems, Inc.; Brion & Associates

5. Failure to Prepare a Fee Audit, Lack of Clarity and Insufficient Supporting information in the Fee Memoranda

29 When the City of Pittsburg approved the original HCP Plan, it approved the requirement
that the Conservancy conduct a "thorough fee audit" that will be completed by March 15 of
year 3, 6, 10, etc. of the HCP Plan implementation period. The Conservancy is required to
hire "an outside, independent financial auditor" to prepare the Fee Audit. The two
memoranda prepared by EPS do not constitute a Fee Audit. First, EPS does not qualify as an
outside independent auditor for this particular Fee Audit. Second, these memoranda, with
a handful of charts, do not have the content, rigor, backup information or any other
30 characteristics of a true fee audit. The Fee Memoranda do not attempt to audit the
administrative costs of the Conservancy or analyze in any respect the actual costs of
operating, maintaining and managing the preserve system. By no means do these
31 memoranda meet the professional requirements for a thorough fee audit. The Fee
Memoranda represents a fee update only but the Conservancy is required to conduct a
thorough fee audit.

32 Overall, the data is presented in a convoluted manner throughout the two EPS memoranda on the fee update (March 17 and July 15, 2011) and the memoranda omit significant

information needed to understand how the fees are derived. Based on the data presented, the fee update figures cannot be replicated. Much of the original data on acreage by zone and type is left out. Numerous data on land comps and wetland mitigation project costs are presented without explanation on how this data is used. Even with the original HCP documents, it is not possible to replicate the calculations and figures.

33 a) There are two specific projects that have extraordinary costs on a per acre basis, i.e. $345,000 and $755,000 (see page 2 of July 15, 2011 memorandum). Firstly, these costs are excessive and not in line with any other costs presented in the original plan and the March 17, 2011 memorandum. Secondly, it is not clearly documented how these costs are integrated into the analysis and the subsequent new fees.

34 b) Some numbers are different from one table to another. It is not clear which final
35 numbers are used in the calculations. For instance, the number of acres by parcel size needs to be shown in each table used to calculate the new development fee so the reader can understand how each new land value affects the overall development fee. These tables do not show how much land is assumed to be purchased in each size category.

36 c) The Fee Memoranda does not indicate the amount of actual land purchased to date by the Agency, or the amount remaining to be acquired. It does not assess how much progress has been made towards HCP goals. This is typically included in a true fee audit.

Overall, the Fee Memoranda are fragmented and the analysis is separated from the context of the original HCP Plan. Some of the original HCP funding tables are updated but not all of them. The analysis should be presented in a clear linear fashion so that readers unfamiliar with the original plan can understand how the fees are calculated. Table A-1 in particular should be taken apart and put into three separate tables. The source of the data in section 3 on total acres of impact is not clear from the table. The analysis would benefit from an outside "audit" by someone not directly involved in the original plan and analysis.

37 **Recommendation**: The City of Pittsburg should request a thorough and independent audit of the HCP Plan fees and plan as required in Chapter 9 of the HCP Plan. The information presented is a fee update, but it is not a fee audit as required. An audit needs to be provided by an independent third party. EPS was the original consultant on the financial analysis for the HCP Plan. While they are knowledgeable they are not independent.

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Attachment A
EAST CONTRA COSTA COUNTY
INFLUENCE OF RESALES ON NEW HOME PRICES

Presented To: Brion & Associates
Submitted By: S. L. State & Associates
March 6, 2012

Overview of Market Conditions

- S L State & Associates has been providing market feasibility studies to developers, builders, and institutional financing firms throughout the West Coast of the U.S. since 1979.

- During the last three decades, we have seen many changes, but none like we have seen during the paradigm shift that took place in 2008.

- Although the market shift affected locations like the East Bay earlier (2006 in East Contra Costa County), the most dramatic shift took place in 2008, and it affected even the highest-demand locations in the Bay Area.

- The high degree to which the market shift took place was largely influenced by two variables. The first major variable influencing home-buying decisions is the proximity of the home to high-paying jobs.

- In those locations, (Silicon Valley, San Francisco, the San Mateo Peninsula) the descent was less severe and took longer to manifest.

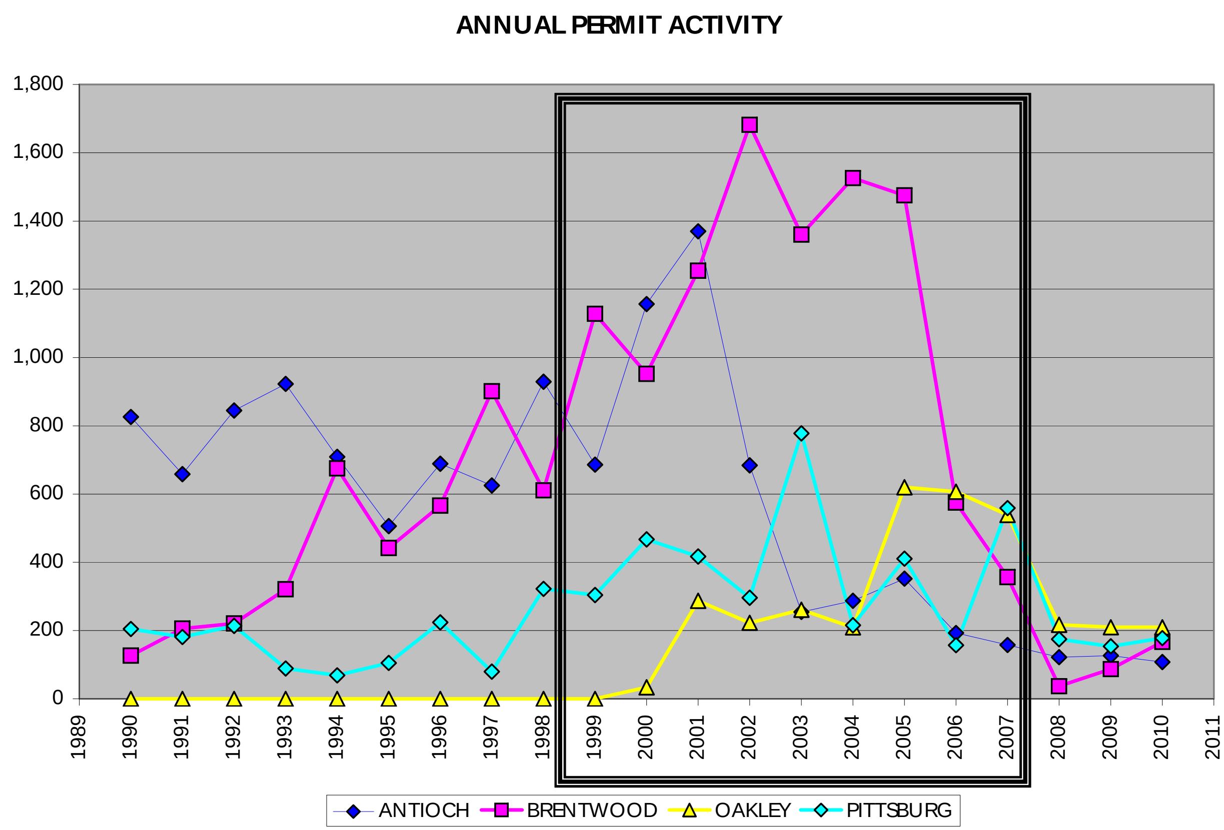
- They are also the locations that are coming back more quickly.

- The second major variable is the amount of new construction that took place in locations further away from major employment.

- In those locations, such as Antioch, Brentwood, Oakley, Pittsburg, Solano County, Mountain House, and into the Central Valley), development activity was extremely high during the most recent real estate boom.

- These areas suffered through this recession quickly, and swiftly.

- East Contra Costa County experienced a surge of construction activity unlike many other locations in the Bay Area from 1999 through 2006. From 1999 to 2006, Antioch, Brentwood, Oakley, and Pittsburg had just over 20,000 new homes built. It is no surprise that with the lending practices taking place during that time, a huge percentage of these homes ended up as short-sales or foreclosures. Therefore, the impact of new construction on the dynamics of the market became much more volatile in this sub-market compared to many other locations in the Bay Area.



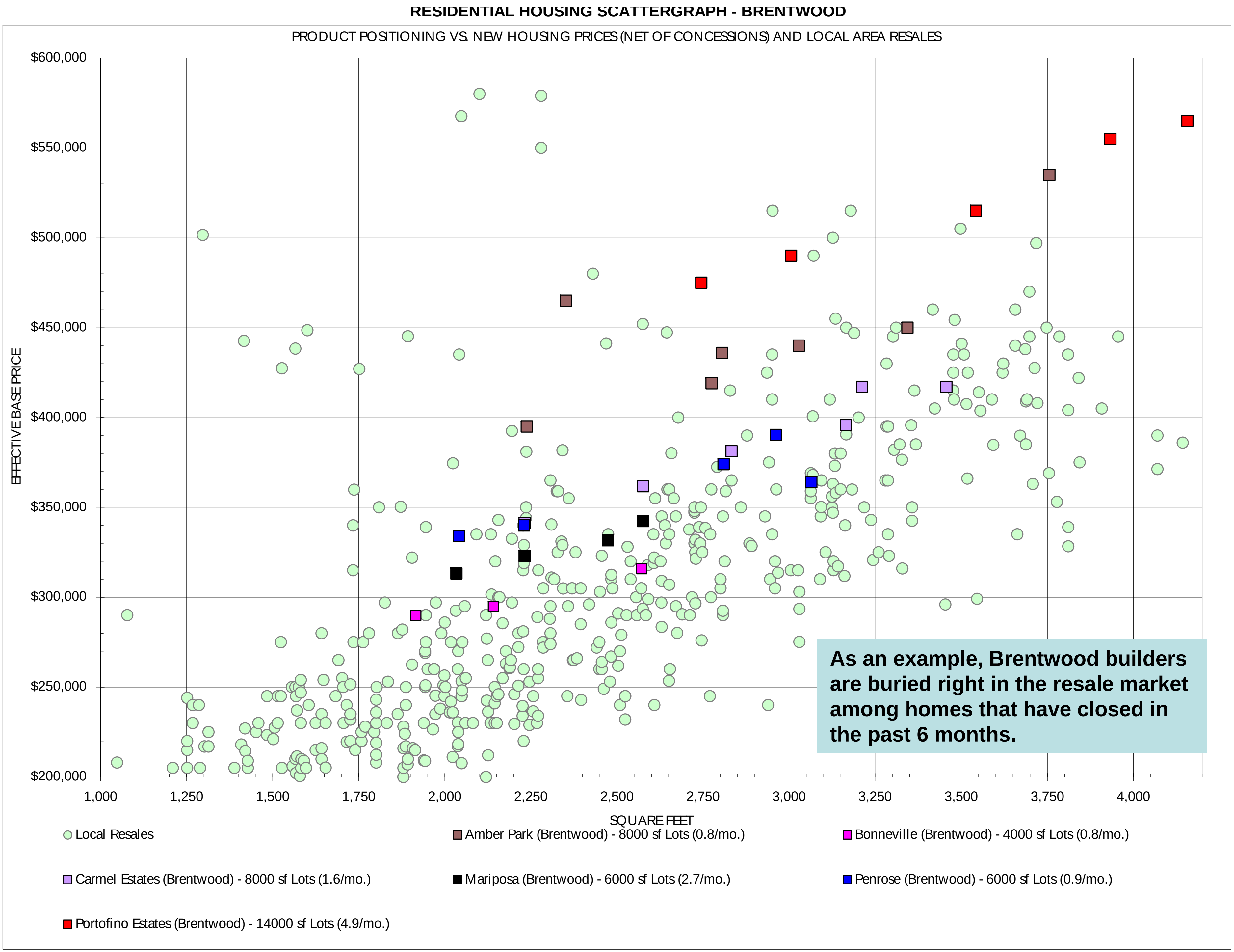
- For homeowners, buying a new home compared to buying a resale has been a fairly easy decision, even with the typical premium that a new home receives. Some of the reasons often cited by homeowners are in the table below, with a new home premium supported.

- During a normal market, we would expect to see a new home selling between 15% to 20% above the resale market.

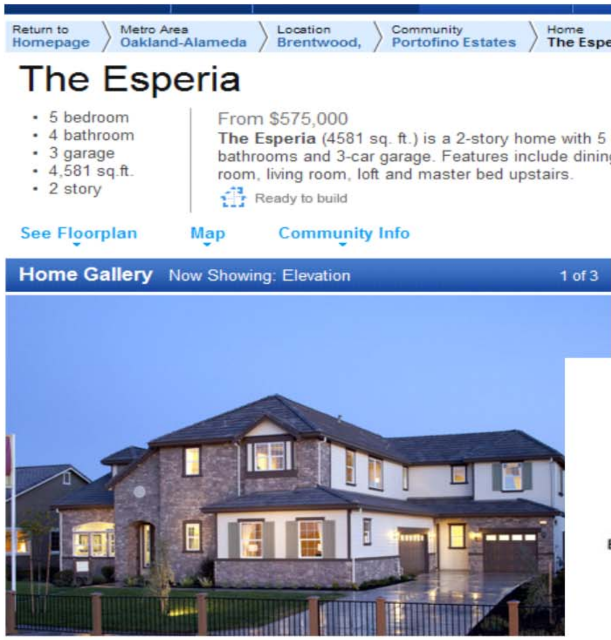
- That is NOT what we are finding in East Contra Costa at this time. Because of the glut of new homes built, and because buyers are picking up exceptional deals in the resale market (many of which are homes that are only 3-6 years old), the typical delta that we would expect to see between new versus resale have dissipated. In order for new home builders to compete with the resale market, we are seeing prices for new equal to resale closings prices.

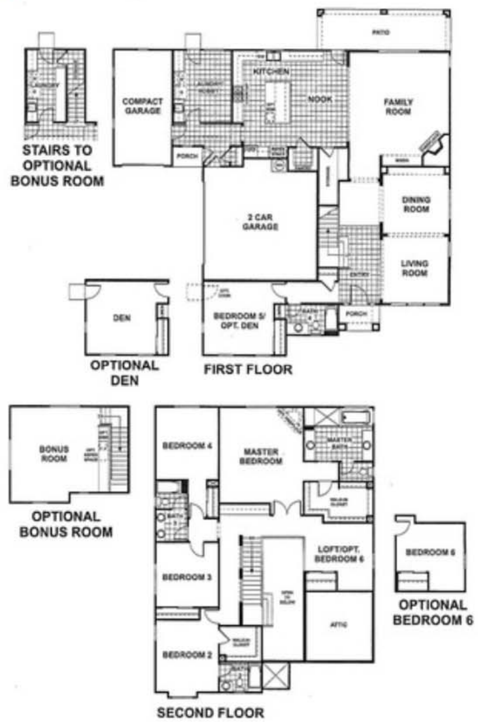
- This dynamic is not true throughout all of the Bay Area. New home communities in the more dynamic locations close to jobs in Silicon Valley or San Francisco are starting to experience premiums over the resale markets. Those developments that are further away from major employment centers are finding some push-back from buyers who are concerned about both the cost to commute and the time, and they are often opting for smaller homes in these closer-in locations. The result is that in order to compete, new homes are being forced to fall at or below resale prices in order to generate absorption.

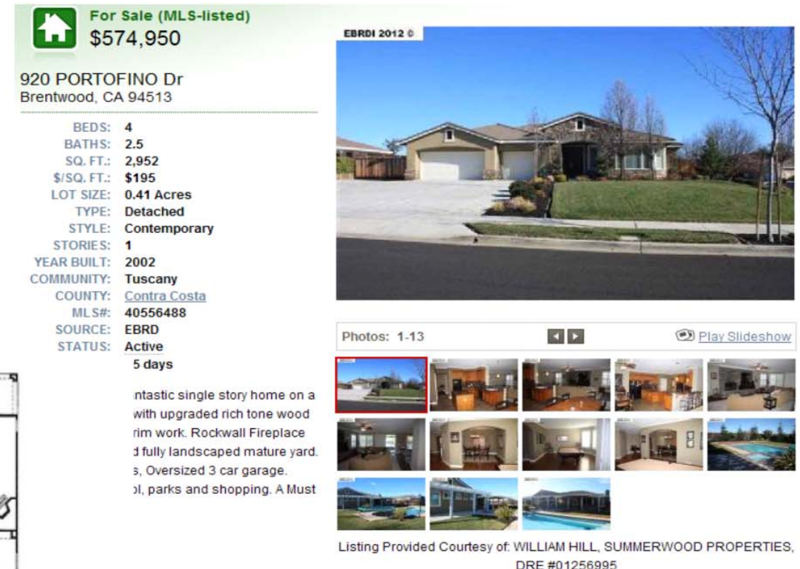
NEW HOME	VERSUS	RESALE HOME
Choice of Builder and Construction Materials		Builder and Construction Materials may be Unknown
Structural Warranty		Warranty Usually Expired
Builder Warranty		Defects Often go Undetected
High Insulation Standards		Dated Insulation and Higher Utility Costs
On-Site Service Department		A Handyman Special?
Choice of Lot, Location, Financing, Floor Plan, and Exterior Design		Home is Sold "As-Is"
Fully Equipped Modern Kitchen		Outdated Appliances
Choice of Interior Options and Color Selections		No Choice of Interior Options
Latest Architectural Designs		Dated Floor Plans


RESIDENTIAL HOUSING SCATTERGRAPH - BRENTWOOD
PRODUCT POSITIONING VS. NEW HOUSING PRICES (NET OF CONCESSIONS) AND LOCAL AREA RESALES
EFFECTIVE BASE PRICE
$600,000
$550,000
$500,000
$450,000
$400,000
$350,000
$300,000
$250,000
$200,000
1,000
1,250
1,500
1,750
2,000
2,250
2,500
2,750
3,000
3,250
3,500
3,750
4,000
SQUARE FEET
Local Resales
Amber Park (Brentwood) - 8000 sf Lots (0.8/mo.)
Bonneville (Brentwood) - 4000 sf Lots (0.8/mo.)
Carmel Estates (Brentwood) - 8000 sf Lots (1.6/mo.)
Mariposa (Brentwood) - 6000 sf Lots (2.7/mo.)
Penrose (Brentwood) - 6000 sf Lots (0.9/mo.)
Portofino Estates (Brentwood) - 14000 sf Lots (4.9/mo.)
As an example, Brentwood builders are buried right in the resale market among homes that have closed in the past 6 months.

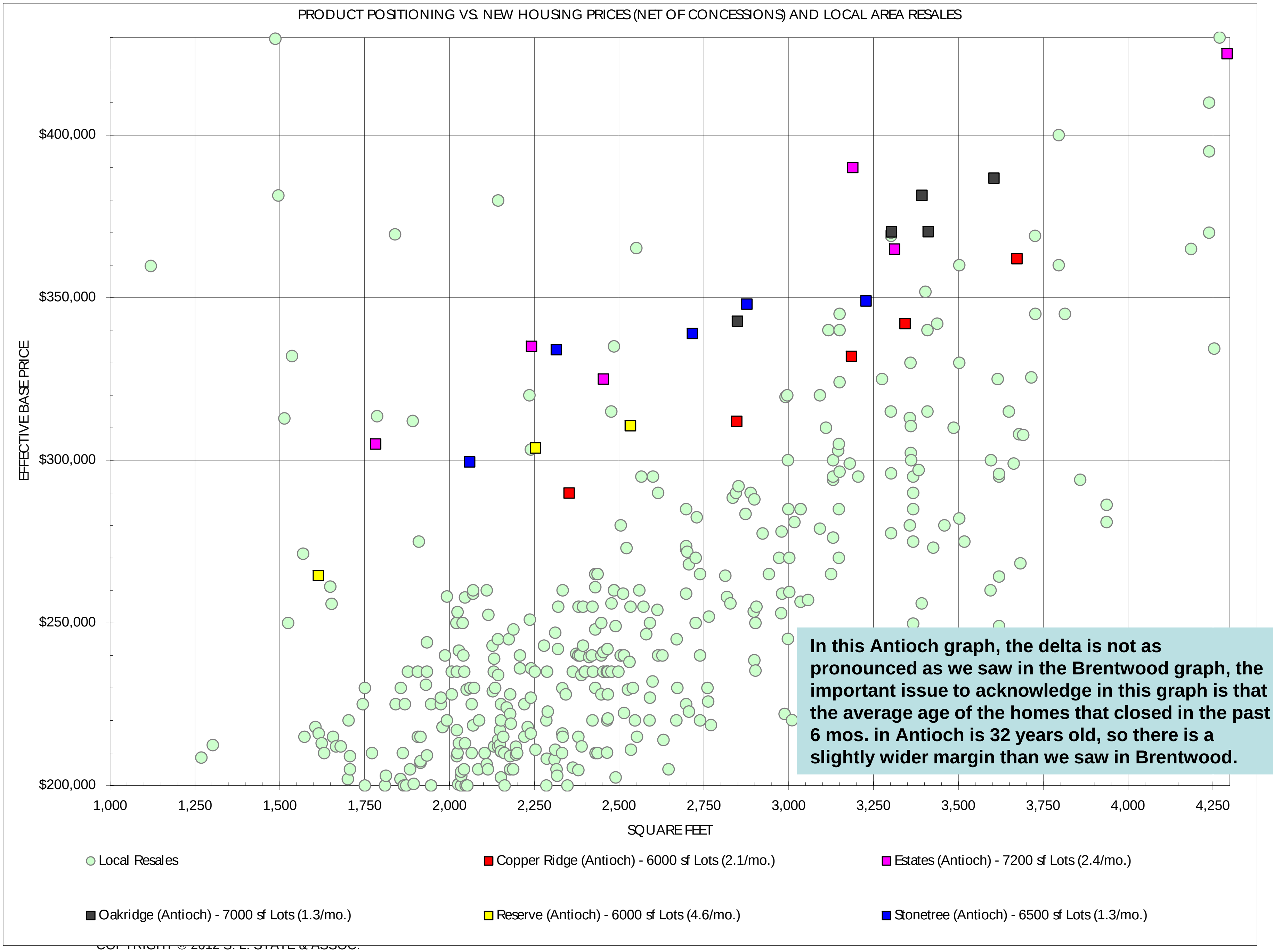
- Here is an example of what builders are having to do in order to compete. The resale listing on the right is for a 2,952 sf home built in 2002, and is listed for $574,950. The new home on the left is also listed for $575,000, but in order to achieve that price-point, they are having to offer 4,581 sf. That represents a home that is 45% larger AND new, compared to this resale listing, but in order to achieve any absorption rate, builders are having to present better than the resale market.





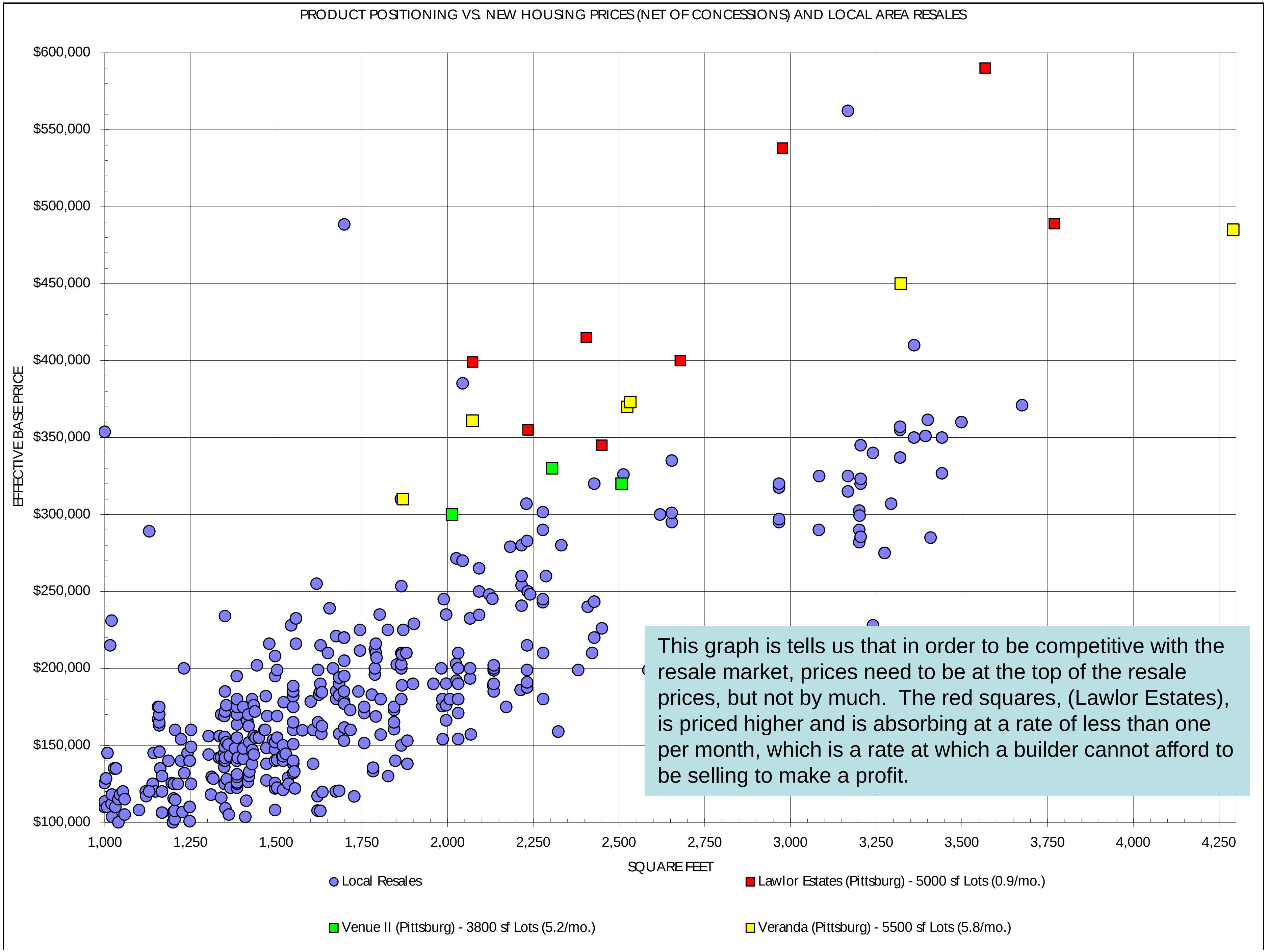


RESIDENTIAL HOUSING SCATTERGRAPH - ANTIOCH



In this Antioch graph, the delta is not as pronounced as we saw in the Brentwood graph, the important issue to acknowledge in this graph is that the average age of the homes that closed in the past 6 mos. in Antioch is 32 years old, so there is a slightly wider margin than we saw in Brentwood.

RESIDENTIAL HOUSING SCATTERGRAPH - PITTSBURG



Monthly Labor Force Data for Cities and Census Designated Places (CDP)
December 2011 - Preliminary
Data Not Seasonally Adjusted

CITY	LABOR FORCE	EMPLOYMENT	UNEMPLOYMENT NUMBER	UNEMPLOYMENT RATE
Contra Costa County	519,400	470,900	48,500	9.3%
Bay Point	11,200	9,200	2,000	18.2%
Pittsburg	30,200	25,800	4,500	14.8%
Antioch	48,700	43,500	5,100	10.6%
Brentwood	10,800	9,900	900	8.3%
Oakley	13,600	12,700	900	6.7%

- In our opinion, it will take over 5 years before East Contra Costa County stabilizes.

- Unemployment in the East Bay is presently high and there are large numbers in the "under utilized" workers in the Bureau of Labor Statistics data. This means that a large number of the population has simply stopped looking for work and that there are many persons out of the labor force who would re-enter at some point in the future. These factors indicate that several years of sustained economic and employment growth are needed to return employment to the levels observed in years past.

- This region lost an estimated 62,400 non-farm jobs-during Year 2009 – a 6.1% loss of the total non-farm job base for the biggest loss in decades. During Year 2010, an additional loss of 19,608 jobs occurred. Unfortunately, job losses will continue through much of Year 2011.

- Employees face several more years of disruption in labor markets as some industries contract or disappear and others emerge or strengthen. Emerging and strengthening industries will find labor plentiful and willing to work for wages that would have appeared modest only a few years earlier.

DataQuick MEDIAN HOME PRICES - 2006 (PEAK) TO YEAR END 2011

County/City/Area	# of Units Sold	Year 2006	# of Units Sold	Year 2011	Net Change, 2006 to 2011	Percent Change, 2006-2011
Contra Costa County	**17,783**	**$575,000**	**16,753**	**$255,000**	**$320,000**	**56%**
ANTIOCH	1,763	$500,000	2,040	$180,000	$320,000	64%
BRENTWOOD	1,506	$643,000	1,301	$301,000	$342,000	53%
OAKLEY	1,096	$525,000	812	$210,000	$315,000	60%
PITTSBURG	1,292	$460,000	1,440	$160,000	$300,000	65%

- The median home price in the MSA has fallen 28.8% from 2007. In Contra Costa County, from the peak in 2006 to the end of 2011, the median price for SF and SFD units combined dropped by 56% or from $575,000 to $320,000. In Eastern Contra Costa cities this decline was even greater. In Pittsburg and Antioch, prices have dropped by 65% to an average of $160,000 and $180,000, respectively. Overall, in Eastern Contra Costa County prices have dropped significantly.

- Following a low point to be reached in 2011, prices rise slightly in 2012. Mild price appreciation patterns are likely to be relatively gradual during the next few years but will show momentum as the economy begins to improve and distressed inventory is depleted. By 2016, the median home price is forecast to increase a healthy 7.4%. Despite this increase by 2016, the resultant forecast median price will remain below the unsupportable peak level achieved in 2007.

- Until then, it is our opinion that builders will continue to have to compete with the resale market in order to achieve absorption.

Attachment B: Selected List of Studies, PowerPoint Presentations and Articles by Economic & Planning Systems, Inc. (EPS)

The following documents analyze the financial feasibility and cost burden of proposed fees. This does not by any means represent the entire list of EPS studies that use the cost burden measure; they are simply studies published on the internet or otherwise readily available to the author.[1]

These studies are listed in chronological order with the most recent studies listed first. Internet Links as of March 28, 2012 are provided when available. Studies older than 1999 are not available on the internet but copies can be made available, if needed.

1. Long, J.T. "Developers and local governments strike a balance." *Comstock Magazine* February 2011. *(James Gomes, Principal, Economic & Planning Systems, Inc. is quoted in this article about reducing fees, infrastructure standards, and cost burdens need to be under 20%.)*
http://www.comstocksmag.com/Archive/0211_F_Impact-Fees.aspx

2. Gomes, Jaime and Economic & Planning Systems, Inc. "El Dorado County Development Feasibility Study." November 2010. PowerPoint Presentation. *(This presentation includes several charts and tables that demonstrate the cost burden measure and how if the measure is below 20% the proposed fees fail the feasibility test.)*
http://www.cityofplacerville.org/civica/filebank/blobdload.asp?BlobID=5006

3. Economic & Planning Systems, Inc. "Sacramento Regional County Sanitation District Potential Fee Increase Feasibility Analysis." Final Report prepared for North State Building Industry Association. October 2010. *(See Table 2 on Page 4 which illustrates the cost burden measure, including how burdens over 20% fail the measure test of financial feasibility.)*
http://www.sacdeltasolutions.com/pdf/bia-fee-study.pdf

4. Economic & Planning Systems, Inc. "Hillcrest Station Area Specific Plan Infrastructure Financing Plan." Technical Report prepared for the City of Antioch. July 2010. *(This study tests the financial feasibility of several financing mechanisms using the cost burden measure).*
http://www.ci.antioch.ca.us/Community/transportation/HillcrestInfrastructurePlan.pdf

[1] Joanne Brion worked at EPS, Inc. from 1990 to 2000 and worked on many studies that use the cost burden measure of feasibility.

5. Economic & Planning Systems, Inc. "Rio del Oro Specific Plan Public Facilities Financing Plan (Chapter V)." Public Review Draft Report prepared for the City of Rio del Oro, December 8, 2006. *(This study tests the financial feasibility of the proposed financing of plan area public facilities using the cost burden measure).*

6. Economic & Planning Systems, Inc. "Economic Analysis in the Context of 404(b)1 Alternative Analysis." White Paper prepared for Corps of Engineers San Francisco Bay Area District, September 1999. *(This study was prepared for the Corps of Engineers staff, and other agencies that permit wetlands and review 404(b)1 Alternatives Analysis; it is a primer on economic analysis and includes a discussion of the cost burden measure.)* http://www.epsys.com/wp-content/uploads/2011/02/economic-analysis-in-the-context-of-the-404b1-alternatives.pdf

7. Economic & Planning Systems, Inc. "Financing Plan for the Evergreen Specific Plan." Draft Final Report, prepared for the City of San Jose. May 1991. *(Financing plan that used the cost burden measure.)*

8. Economic & Planning Systems, Inc., Calthorpe Associates, and WQB Engineering. "Southeast Orlando Development Plan." Final Report prepared for City of Orlando, Florida. August 1997. *(Financing plan that used the cost burden measure.)*

El Dorado County Development Feasibility Study

November 9, 2010

Economic & Planning Systems, Inc.

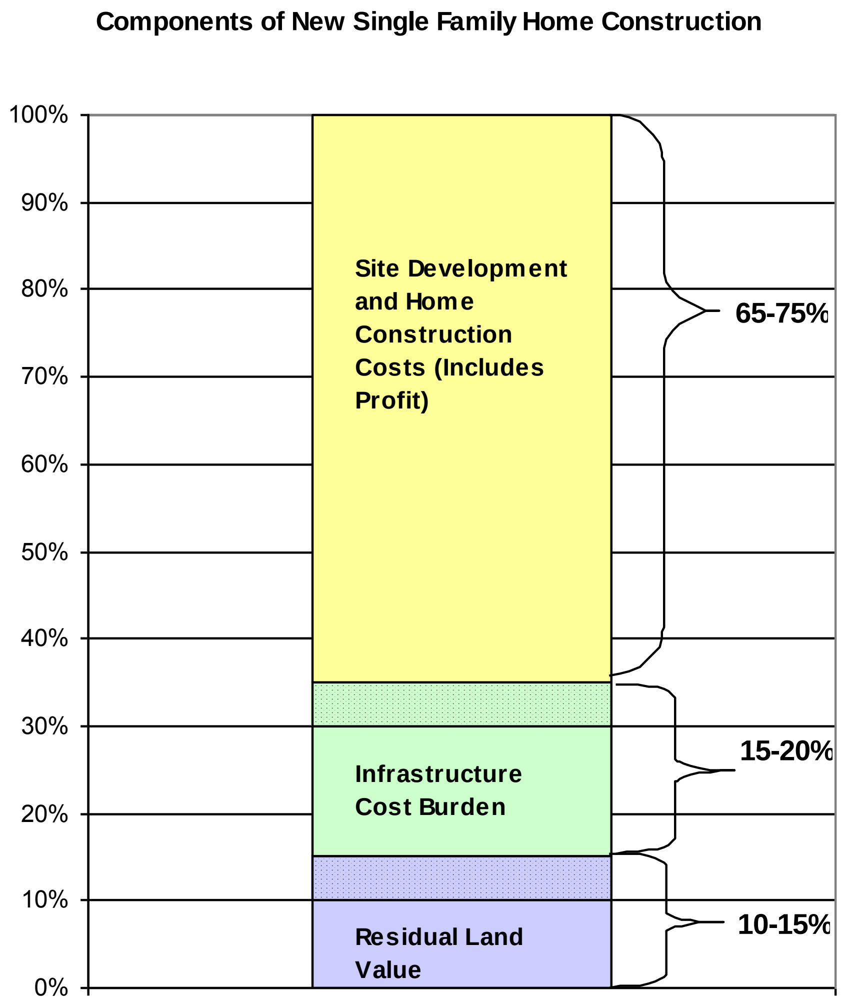
Public Finance • Real Estate Economics • Regional Economics • Land Use Policy

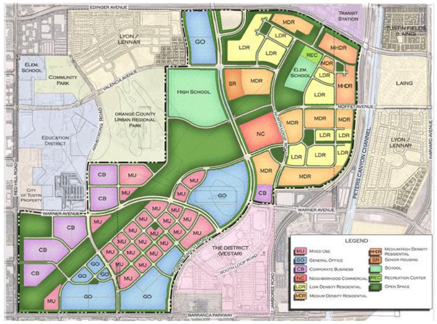
Presented by:
Jamie Gomes

Key Findings

- Magnitude of home price appreciation (2000-2005) was not sustainable in the long run. Future appreciation at the same scale is not likely to occur.
- Feasibility analysis should be based on historical relations between housing prices and income levels and traditional mortgage financing.
- For most entry-level and mid-range housing products, <u>current infrastructure costs and fees exceed feasible ranges</u>.

Typical Components of New Single-Family Home Construction





Residual Land Value Calculation – Single-Family Development

Item	Target %	Actual % of Selling Price - Single Family			
		El Dorado Hills	Cameron Hills	Oak Highlands	Placerville Estates
Home Price		$400,000	$340,000	$300,000	$354,000
Infrastructure Burden	**No more than 15-20%**	**26%**	**29%**	**27%**	**19%**
Unit Development		69%	80%	70%	93%
Total Cost of Unit		95%	109%	97%	112%
Residual Land Value	**No less than 10-15%**	**5%**	**-9%**	**3%**	**-12%**
Feasibility Test		**FAILS**	**FAILS**	**FAILS**	**FAILS**

Residual Land Value Calculation – Single-Family Pro Forma Examples

Feasibility Targets

Item	Feasibility Range	Residual Land Value			
		El Dorado Hills		Placerville Estates	
		Total	% of Selling Price	Total	% of Selling Price
Assumed Home Price		$400,000	**100%**	$354,000	**100%**
Infrastructure Burden					
City/County, Plan Area, & School Fees		$86,000	22%	$68,000	19%
Other Backbone Infrastructure Costs		$17,347	4%	-	0%
Subtotal Infrastructure Burden	**15-20%**	**$103,347**	**26%**	**$68,000**	**19%**
Unit Development					
Cost of Unit Construction		$136,875	34%	$143,000	40%
In-tract Subdivision Infrastructure		$60,412	15%	$101,534	29%
Soft Cost (20% of In-tract + Unit Const. Cost)		$39,457	10%	$48,907	14%
Builder Profit (10% of Sale Price)		$40,000	10%	$35,400	10%
Subtotal Unit Development Cost		**$276,744**	**69%**	**$328,840**	**93%**
TOTAL COST OF UNIT		**$380,091**	**95%**	**$396,840**	**112%**
Residual Land Value (Paper Lot) [5]	**10-15%**	**$19,909**	**5%**	**($42,840)**	**-12%**
Feasibility Tests					
Infrastructure Burden			**FAIL**		**Marginal**
Residual Land Value			**FAIL**		**FAIL**

"sfr_lvf"

Source: EPS

Residual Land Value Calculation – Multifamily Development

		Attached Multifamily - For-Sale		Multifamily - For-Rent
Item	**Target %**	Cameron Park	Oak Highlands	El Dorado Hills
Home Price		$240,000	$210,000	$151,000
Infrastructure Burden	**No more than 15-20%**	**30%**	**28%**	**45%**
Unit Development		69%	76%	106%
Total Cost of Unit		99%	104%	151%
Residual Land Value	**No less than 10-15%**	**1%**	**-4%**	**-51%**
Feasibility Test		**FAILS**	**FAILS**	**FAILS**

Impact on Funding Infrastructure

- Industry standard assumptions: ≤ 15%-20% of home price.
- Example Peak and Current Market Conditions:

	Assumptions	Peak	Current
Average Home Price		$600,000	$400,000
Feasibility Range For Backbone Infrastructure and Public Facilities	15% to 20%	$90,000 to $120,000	$60,000 to $80,000

Decrease of approximately $30,000-$40,000 per unit.

EPS

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April 2, 2012

Via Hand Delivery

Mayor Ben Johnson
Members of the City Council
City of Pittsburg
65 Civic Avenue
Pittsburg, California 94565

Re: **Continued City Council Agenda Item on Adoption of a City Council Resolution Regarding Proposed Update to the Habitat Conservation Plan/Natural Community Conservation Plan (HCP/NCCP) Mitigation Fees**

Dear Mayor Johnson and Members of the City Council:

38 We represent Discovery Builders, Inc. ("Discovery Builders") in connection with the proposed development mitigation fees associated with the East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan ("HCP Plan"). For the reasons described in detail below, we urge the Pittsburg City Council ("City") to reject adoption of the proposed new mitigation fees and to instruct the East Contra Costa Habitat Conservancy ("Conservancy") to prepare a thorough fee audit that can support a revised and more credible fee proposal. In the meantime, the City should exercise its discretion to immediately adopt an interim two-year fee structure that reduces each of the individual HCP development and wetland mitigation fees by at least 25% and defers payment of portions of the imposed HCP fees.

BACKGROUND FACTS

As the City is aware, the Conservancy prepared an HCP Plan that was approved by the City in April 2007. On November 5, 2007, the City adopted a resolution adopting an initial set of fees based on the HCP Plan and, on November 19, 2007, the City adopted Ordinance No. 07-1293 to codify the HCP Plan into the Pittsburg Municipal Code.

One important component of the HCP Plan is the initial triennial audit and corresponding revision of mitigation fees to ensure that these fees comply with all legal and HCP Plan requirements. Thus, Chapter 9 of the HCP requires that a "thorough fee audit" be completed by March 15 every three years in the first six years of the Plan. HCP Plan, at 9-31. To accomplish this audit, the Conservancy is required to hire "an outside, independent financial auditor." *Id.*

This review is intended as a robust analysis to review "the costs and their underlying assumptions that were developed as part of the original funding plan." *Id.* Although much of the analysis focuses on actual costs and land sales, all key assumptions and methodologies are to be reviewed. One important goal of the audit is: "If either portion of the fees [land acquisition or preserve management] is found to be higher than needed to offset the fee share of actual costs, then the fees will be reduced." *Id.*

In this case, the Conservancy has been late in providing the fee audit report. Despite the requirement that this report be provided by March 15, 2010, the Board did not actually approve an "audit report" until July 2011. Moreover, rather than engaging an "outside, independent financial auditor," it engaged the firm of Economic & Planning Systems, Inc ("EPS"), which prepared the initial financial modeling, fee structure and fee schedules for the original HCP Plan. Since EPS authored the original economic methodology and calculated the fee amounts for the original HCP Plan, it does not qualify as an outside independent auditor.

39 Instead of preparing a comprehensive audit report regarding the mitigation fees, EPS originally prepared only a seven-page memorandum dated March 17, 2011 with a few tables to support its conclusions that development fees (which are ultimately expected to generate over $150 million in revenue for the HCP Plan) should essentially stay at their current level and that
40 most wetland fees ($30 million in expected revenue) should be increased substantially. After the Conservancy's staff requested that EPS "evaluate the impact of the recommended fee adjustments on the fee burden to be born [sic] by the covered projects," EPS prepared a July 15, 2011 memorandum containing only two pages of text and two tables. Based on this supposedly "thorough fee audit," the Conservancy Board approved the "audit report" and recommended that the participating cities revise their fees accordingly.

41 As the peer review analysis by Brion & Associates ("Brion Report") demonstrates, these two memoranda fall far short of the "thorough fee audit" contemplated by the HCP Plan and cannot form an appropriate factual basis for assessment of these mitigation fees or validation of associated fee methodology.

LEGAL FRAMEWORK

42 As the City knows, there is a well-developed set of legal standards – constitutional, statutory and case law – governing the imposition of development fees. I am not going to summarize the applicable standards in this letter. However, these standards are addressed in a series of U.S. Supreme Court, California Supreme Court and California Court of Appeal decisions which discuss the key nexus, relationship and proportionality standards required by law. It is absolutely essential for a city like Pittsburg that is considering the imposition of development fees, including any HCP Plan fees, to scrupulously observe these standards.

Many of these applicable standards are set forth in the Mitigation Fee Act, California Government Code §§ 66000-25. Under this Act, the City has important responsibilities when establishing, increasing or imposing mitigation fees for development projects. For example, the agency must identify the purpose of the fee and the use to which the fee is put. *Id*, § 66001(a). It must establish "a reasonable relationship" between "the fee's use and the type of development project on which the fee is imposed" and also between "the need for the public facility and the type of development project on which the fee is imposed." *Id.*

There are also important requirements in the Mitigation Fee Act relating to the amount and timing of the fees, including the following:

- The City must determine that there is "a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed." *Id.*, § 66001(b).

- The City must also ensure that any fees or exactions on proposed development "shall not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed." *Id.,* § 66005(a).

- The City must also closely heed the Legislature's finding that "untimely or improper allocation of development fees hinders economic growth and is, therefore, a matter of statewide interest and concern." *Id.*, § 66006(d).

43 In this case, for the reasons below, the fees being proposed, based on the Conservancy's inadequate "audit report," are not justified and should not be adopted. This insufficient record fails to establish the requisite nexus, proportionality and reasonable relationship requirements
44 that are embodied in the federal and state constitutions and the Mitigation Fee Act. Moreover, there is absolutely no evidence in the record to analyze the financial feasibility and cost burden on development projects and therefore determine whether the State policy against such fees hindering economic development has been satisfied.

MITIGATION FEE DEFICIENCIES

A. The Conservancy Failed to Obtain A Thorough Fee Audit By An Outside, Independent Financial Auditor As Required By The HCP Plan.

When the City approved the original HCP Plan, it approved the requirement embedded in Section 9.3.1 that the Conservancy commission a "thorough fee audit" that will be completed by March 15 of year 3 of the HCP Plan implementation period ("Fee Audit"). Moreover, the Conservancy is required to hire "an outside, independent financial auditor" to prepare the Fee Audit. This Fee Audit is an integral and important part of the process of setting development and wetland mitigation fees because it ensures that the fees meet the stringent requirements of both the HCP Plan and existing law.

45 It is beyond dispute that the two memoranda prepared by EPS do not constitute a Fee Audit. First, as explained above, EPS does not qualify as an outside, independent auditor for this particular Fee Audit. Second, these memoranda, with a handful of charts, do not have the content, rigor, backup information or any other characteristics of a true fee audit. Contrary to the HCP Plan, they do not attempt to audit the administrative costs of the Conservancy or analyze in any respect the actual costs of operating, maintaining and managing the preserve system. *See* HCP Plan, at 9-31. By no means do these memoranda meet the professional requirements for a thorough fee audit and, in fact, they compare extremely poorly to actual fee audits prepared for other public entities. Indeed, even EPS appears to concede this fact – it calls the two documents "fee update reports."

46 The Conservancy's failure to timely or competently perform its Fee Audit responsibilities is a breach of its legal responsibilities under the Implementing Agreement to which the City is a party. This is a particularly serious problem because the Conservancy hopes to have Pittsburg and the other participating cities continue collecting approximately $180 million in development and wetland mitigation fees on the basis of this deficient analysis. However, these informal documents fail to provide any credible factual basis for the City to make the necessary findings to impose the proposed fee schedule. The Conservancy must be held to its legal obligations, particularly given the size and scope of the fees being requested.

47 In short, the City should reject the Conservancy's new proposed slate of fees and instruct the Conservancy to immediately obtain a Fee Audit, from an outside independent auditor, that is required by the HCP Plan. In the meantime, for all the reasons contained in this letter, the City should immediately impose at least a 25% reduction from 2011 levels for each of the individual development and wetland fees until the required analysis is provided and the appropriate level of fees can be set.

B. The Proposed Development Fee Greatly Exceeds The Reasonable Cost of HCP Plan Land Acquisition And Other Services And It Does Not Bear A Reasonable Relationship To HCP Plan Mitigation Costs.

48 When the initial HCP Plan was prepared and adopted, the land and housing markets in eastern Contra Costa County were reaching the end of an unprecedented boom period. As set forth in the Brion Report, housing prices had reached record high levels. In 2006, the median sales price of a home in Contra Costa County was $575,000 and in Pittsburg was $460,000. The cost of undeveloped land was similarly at its highest level. The HCP Plan mitigation fees adopted by Pittsburg and other participating cities in 2007 reflected these upward trends and the resulting record prices.

Unfortunately, as we all know, the real estate market took a nosedive beginning around 2008. By 2011, the median price of a home in the County had decreased by 56% to only $255,000 and the corresponding decrease in Pittsburg has been an astounding 65% to a 2011 median price of $160,000. Today, as the Brion Report explains, new home construction in eastern Contra Costa County is competing with existing resales and foreclosures, which has eliminated the price premium that new homes traditionally have enjoyed. As a result, a new home developer like Discovery Builders not only has to try to sell homes at extremely low prices, but must also offer more space and many costly amenities to make its homes attractive when competing with other types of housing on the market. The HCP fees, which are not assessed on resales or foreclosure properties, put new home developers at an even greater economic disadvantage and create an infeasible, unrealistic cost burden.

49 These dramatic changes in home prices are very relevant to the amount of the HCP fees that are imposed to purchase undeveloped land because, as the HCP Plan states, "housing prices generally provide a more accurate index for land cost inflation than measures of general inflation." HCP Plan, at 9-30. If home prices are decreasing substantially, the market value of undeveloped land can be expected to do so as well.

50 In fact, these same market price reductions have occurred for the type of land that the Conservancy plans to purchase in eastern Contra Costa County to implement the HCP. As demonstrated by the Brion Report, the price of undeveloped land over five acres in size has decreased from 8% to 48% (depending on parcel size) from 2006 to 2011 as reflected in the EPS report information. Even utilizing the Conservancy's figures (which are suspect for the reasons set forth in the Brion Report), the average cost of land for parcels greater than five acres in size has decreased overall by 48%. In addition, by excluding land sale comparables before 2009 from this analysis, the average land value for the 5-10 acre and 10-40 acre parcel category are reduced 17% and 38%, respectively, from the EPS figures.

51 The HCP Plan provides that, when the "thorough fee audit" is performed, both the land acquisition and the operations/maintenance portions of the development fee should be examined. The land acquisition cost is by far the largest component of these costs in the HCP at approximately 67% of the total expected costs. The land cost is reviewed in several respects, including the actual land sale results of the Conservancy, which show the significant price decline described above.

52 The other component (operations/maintenance) to be reviewed includes the "actual costs of operating, maintaining, and managing the Preserve System." *Id.*, at 9-31. However, the audit report states that "there is limited information on many other plan costs, such as the costs of preserve management and maintenance, the costs of monitoring research, and adaptive management, or the overall administrative costs." It is difficult to believe (indeed it is not credible) that, after five years of operation, the Conservancy is unable to provide any information on its administrative or management costs. However, rather than undertake the "actual cost" analysis mandated by the HCP Plan, the consultant instead reverted to an "inflation-related index" (consumer price index) to increase these non-land costs by approximately 13%. As the Conservancy concedes, it has absolutely no actual preserve mitigation, monitoring or administrative cost data to support this proposed increase.

53 In sum, the current proposal to modify the HCP development fee is unsupported and erroneous and should be rejected. The changes in home prices in Pittsburg (which the HCP Plan identifies as "a more accurate index for land cost inflation") has decreased by 65% during this period and the actual land sale cost to the Conservancy for parcels over five acres in size based on recent comparables has decreased by 8% to 48%. Thus, the land acquisition component of this fee (which comprises the vast majority of the fee amount) should be substantially reduced. The Conservancy has failed to provide any information whatsoever on the other, lesser component of the fee based on its actual management costs. Thus, the Conservancy is improperly proposing fee imposition based on inadequate analysis and supporting data in contravention of the HCP Plan.

54 In sum, the City is unable to ensure that there is a reasonable relationship between the amount of the development mitigation fee and the cost of the facility attributable to the fee. Moreover, the City cannot ensure that the fee does not exceed the reasonable cost of providing the HCP benefits for which the fee is imposed. Particularly in this difficult economy and real estate market, it is essential that the City require from the Conservancy the rigorous nexus and reasonable relationship information to justify the fees, given that the City will have to defend the imposition of these new fees on development.

C. The Aggregate Cost Burden, When The Proposed Development and Wetland Mitigation Fees Are Included, Fails Accepted Financial Feasibility Tests And Will Likely Stifle New Development At A Critical Time.

55 The Legislature embedded in the Mitigation Fee Act a strong public policy of ensuring that development fees do not hinder economic development. In this case, it is evident that neither the Conservancy nor the City has made any analysis of the financial feasibility or cost burden of the proposed mitigation fees, together with other existing fees and exactions, on developers of new residential projects in the current economy. The City, as the entity imposing the fees, must ensure that the impact of the fee in combination with all other fees does not create a situation where new development is infeasible.

56 Indeed, although it did not address "financial feasibility" in its current HCP Plan fee memoranda, EPS is very familiar with the importance and need for a developer cost burden analysis. It has developed a "measure of development feasibility" which it calls the "Infrastructure Cost Burden as a Percentage of Finished Home Sales Price." EPS, "El Dorado County Development Feasibility Study," PowerPoint slides dated November 9, 2010. In another document, it explains this feasibility benchmark as follows:

> The infrastructure cost burden of development to a property owner can be used to assess the financial feasibility of a development project. The total infrastructure cost burden consists of all costs (e.g., developer funding and the bond debt associated with special taxes and assessments) plus

> applicable fees (e.g., county development impact fees, school mitigation fees). A project is financially feasible if the total cost burden is less than 15 to 20 percent of the finished home price. Typically, residential units with a cost burden percentage below 15 percent are clearly financially feasible, while units with a cost burden percentage above 20 percent are likely to be financially infeasible.

EPS Public Review Draft Report, Rio del Oro Specific Plan Public Facilities Financing Plan, December 8, 2006, at 68.

Thus, according to EPS, a new residential home development project is considered feasible if the cost burden is less than 15% of the sales price, is considered within the range of feasibility if the cost burden is 15% to 20% and is generally considered infeasible if the cost burden is over 20%. EPS Final Report, "Sacramento Regional County Sanitation District Potential Fee Increase Feasibility Analysis, October 8, 2010 ("Sacramento Study"). The 15% to 20% feasibility range is also further qualified as follows: "Of note, development with a Cost Burden at the higher end of the range (i.e., 17 to 20 percent) are only typically feasible coupled with positive trends, such as strong housing markets, financial markets, or job growth." *Id.*, at 6. Since none of these positive economic trends are present in this economy, EPS would presumably establish the maximum cost burden for residential development feasibility in the Pittsburg regional economy at approximately no more than 16% of the finished home price.

In the Sacramento Study, EPS concluded that its calculated developer cost burden (ranging from 20% to 32%) that included new sewer fees "would essentially render all new residential and nonresidential development infeasible, with the exception of very high-end residential units and warehouse distribution buildings." *Id.,* at 3. Moreover, it would assertedly "have disastrous effects on the Sacramento regional economy," just as the region "is starting to emerge from the great recession of 2007 through 2010." *Id.* EPS points out that "[cities, counties, and developers have been working over the past few years to reset the infrastructure burdens to feasible levels." *Id.* As explained below, these same dynamics exist today in the Pittsburg area economy.

The Conservancy's "audit" is conspicuously silent on the projected cost burden of the aggregate fees, including the proposed HCP Plan fees, on new development. The original March 17, 2011 consultant report fails to analyze this important benchmark for mitigation fees.
57 According to a July 22, 2011 memorandum from Conservancy Staff to the Conservancy Governing Board, Staff "requested that EPS evaluate the impact of the recommended fee adjustments on the fee burden to be born [sic] by covered projects." Remarkably, however, the July 15, 2011 consultant report that followed this request again fails to address this issue. So there is no information whatsoever in the "audit" materials submitted by the Conservancy to analyze the developer cost burden.

58 However, the Brion Report does address this issue and reaches some significant conclusions. The Report demonstrates that, under the proposed new fee schedule, the 2012 combined fee burden for a 1,700 square foot house in Pittsburg would be about 24% to 25% of its fair market value and the corresponding burden for a 2,350 square foot unit would be 26% to 27% of its market value (i.e., average home price), depending on whether Zone I or II HCP fees are applicable. The equivalent cost burdens in 2006, under the original set of HCP fees and then-existing home prices, reportedly were under the EPS 15% feasibility benchmark.

This huge fee burden is far in excess of any cost burden on new development that is considered feasible or appropriate. These fees on new residential home development, with the proposed new HCP Plan fees, fail the EPS cost burden feasibility benchmarks by a wide margin. Indeed, just as EPS points out in the Sacramento Study, these extremely high costs burdens may have a dramatic adverse effect on the Pittsburg regional economy at a delicate time when cities and developers are taking steps to encourage development to improve the economy.

Indeed, this kind of disproportionate cost burden has led several cities to lower fees to eliminate this significant economic barrier to new residential home development. For example, in June 2011, the Oakley City Council approved a development fee reduction incentive program that reduced City-controlled development fees by 50%. Similarly, in November 2011, the East Contra Costa Regional Fee and Financing Authority implemented a two-year fee program that provides a 50% rebate of regional transportation impact fees to all applicants for homes and other residential units. Many other cities in northern California (including Sacramento, Merced and Stockton) have adopted similar mitigation fee reduction or deferral programs.

The Conservancy's consultant (EPS) has been engaged by several cities in these mitigation fee reduction or deferral efforts. For example, EPS prepared February 2012 reports for the cities of Fairfield and Vacaville which evaluate their development impact fee programs. In one report, it confirms that "[t]he market for new housing throughout most of California is trapped in a downturn that is driven by a lack of overall demand for housing and made worse by the unprecedented availability of existing housing stock." EPS, "Development Impact Fee Program Review," City of Fairfield (February 17, 2012), at 11. EPS also emphasizes the "importance of establishing aggregate fee levels that strike a city-by-city appropriate balance between providing an appropriate level of facilities/infrastructure to new City residents and businesses consistent with the City's goals/vision, while avoiding placing excessive costs on development and thereby slowing the impact of development." *Id.*, at 14.

Most importantly, in the Fairfield/Vacaville Reports, EPS stresses the importance of carefully assessing the cost burden of fees on new development. It states, in no uncertain terms, that "no increases in development impact fees should be made without consideration of the potential impacts on development feasibility and the associated pace of new development." *Id.*, at 14. It then goes on to recite the EPS feasibility benchmarks identified above (including the "traditional overall maximum infrastructure cost burden feasibility standard of 15 to 20 percent") and further states that "under current market conditions, even meeting this 15 to 20 percent standard does not ensure feasibility as the traditional margins between vertical development costs and home prices have been squeezed." *Id.*, at 24.

We agree entirely with the general principle that any proposed development fees imposed by a city must undergo a stringent analysis "to ensure feasibility" before they are imposed. It is undisputed that neither the Conservancy nor its consultant EPS has done so for these proposed HCP Plan fees. Accordingly, the City must either conduct this analysis itself or require it to be accomplished by the Conservancy and then independently verified by the City.

D. The Large Increases In The Proposed Wetland Mitigation Fees Are Wholly Unsupported And Must Be Rejected.

59 The Conservancy proposes that the wetland fee portion of the HCP mitigation fee package increase by up to 32.5% from 2011 levels, with the seasonal wetland mitigation fee topping out at $245,000 per acre, which is 42% higher than the 2006 corresponding fee of $172,380. These proposed increases are occurring at a time when home prices in Pittsburg have decreased by 65% and undeveloped land prices, according to EPS figures, for parcels over five acres in size have decreased by up to 48% over the same period.

As the Brion Report demonstrates, the Conservancy "audit" report fails to provide any solid economic basis for these fee increases. The staff costs per acre are simply set at an across--the-board number that has no rational economic basis, the contingency costs are unreasonably high, and the non-construction cost portion of these fees are also very high. Staff costs, contingency and non-construction related costs for wetlands projects are at about 48% of total costs, with the riparian restoration non-construction costs at 54%. In general, according to the Brion Report, staff and administrative, non-construction costs would be expected to be 10% to 20% of total construction costs and contingencies should be in the 10% range. Since no "fee audit" has been performed, there is no factual basis on which to verify or test these surprising figures.

60 Based on the scant "audit" record presented by the Conservancy, the City is unable to establish that these wetland category fees "do not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed" as required by the Mitigation Fee Act. They also will likely hinder economic growth in contravention of the Act due to the huge cost burden on new development. In sum, the wetland mitigation fee slate is unsupported and must be rejected.

E. The Conservancy's Fee Memoranda Fail To Provide An Acceptable Factual Basis For the Proposed HCP Fees.

61 Although the Conservancy is implementing the HCP Plan, it does not have the legal authority to impose the mitigation fees. Rather, since the participating cities bear responsibility for assessing and imposing the fees, they also bear full legal responsibility for ensuring that the fees meet all of the constitutional, statutory and case law standards for imposition of such fees.

Thus, the City must either obtain from the Conservancy and independently verify, or it must develop on its own, all Fee Audit necessary information to ensure that these legal requirements are satisfied.

62 The January 27, 2007 Implementing Agreement, to which the City is a signatory, puts certain important contractual responsibilities on the Conservancy. Among other things, the Conservancy is contractually obligated (in section 13.1) for "[a]uditing HCP/NCCP implementation fee revenues to determine whether the fees must be increased or decreased, in accordance with Chapter 9 of the HCP/NCCP." Moreover, the Conservancy must provide "technical support and advice to Permitees [including the City] about what HCP/NCCP measures apply to Covered Activities they implement or approve and how they should be applied, including, but not limited to, avoidance and minimization measures and the amount of fee payments." *Id.*

63 With regard to this "thorough fee audit," it is clear that the Conservancy has failed to live up to its contractual obligations. The "audit" that it has presented is not economically rigorous, lacks key economic and cost information to support its conclusions, contains many computational errors and leaps in logic, and provides no acceptable basis for justifying adoption of the proposed fee schedule. The Brion Report documents these deficiencies in detail. As a result, the City lacks any solid evidentiary basis for making the factual and legal findings necessary to support imposition of this fee schedule.

CITY INTERIM FEE MEASURES

The Conservancy has failed to provide the City with the "thorough fee audit" by an outside, independent financial auditor required by the adopted HCP Plan. As a result, the City does not have the information necessary to evaluate whether the new proposed fee slate meets the important requirements of the Mitigation Fee Act or other applicable law. In fact, given the audit and analysis work still necessary, it could take a year and perhaps longer before the necessary and required fee audit information is obtained.

64 Nonetheless, it is evident from the limited information already available that the amount of development and wetland mitigation fees necessary to support the HCP Plan facilities, and the reasonable cost to provide the associated services, in the current real estate market and regional economy is significantly less than what the Conservancy proposes in the current fee schedule. In addition, when analyzing the financial feasibility of the fees today, the extremely high aggregate cost burdens (ranging from 24% to 28%) that would be imposed on new development by the new fees will render new development infeasible and should not be adopted. By any measure, the fees are excessive and will likely stifle new development at a critical time.

65 Accordingly, Discovery Builders requests that the City exercise its discretion to impose a temporary two-year reduction of each individual HCP Plan development and wetland mitigation fee by at least 25% to bring these fees more into line with the actual HCP land acquisition and

construction cost reductions and to improve the financial feasibility of potential development projects. Once the required fee audit has been produced and a more refined analysis can be conducted, further reductions or other modifications to the fees can be considered. We also request that the City evaluate alternative mechanisms for deferral of all or a portion of the fees so that the fee payments correspond more closely with sales generated by development projects.

66

CONCLUSION

67 The City has no factual or legal basis upon which to impose the new set of fees suggested by the Conservancy. In fact, the available information on current land acquisition costs demonstrates that fee reductions of 40% or more could easily be justified. For all of the reasons set forth above, Discovery Builders requests that the City reject the Conservancy's proposed slate of new fees, instruct the Conservancy to prepare the "thorough fee audit" required by the HCP Plan and Implementing Agreement, and adopt an interim two-year fee reduction and fee deferral program.

Thank you for this opportunity to comment on the proposed HCP fees. Please let me know if I can answer any questions.

Very truly yours,

Paul P. Spaulding, III

Paul P. "Skip" Spaulding, III

PPS:bd

cc: Mr. Joe Sbranti, Pittsburg City Manager
Jeanne Pavao, Esq.
Brennan Quinn, Esq.

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Agenda item # 11, Part E

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May 4, 2012

VIA U.S. POSTAL SERVICE

John Kopchik
East Contra Costa County Habitat Conservancy
c/o Contra Costa County
Department of Conservation and Development
30 Muir Road
Martinez, CA 94553

Re: East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan – Periodic Audit and Adjustment of Mitigation Fees

Dear Mr. Kopchik:

You have asked for a brief explanation of the purpose of and requirements for the periodic audit and adjustment of mitigation fees for the East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan ("Conservation Plan" or "Plan"). Your request is in response to questions that were raised in an April 2, 2012 letter sent to the Mayor and City Council of the City of Pittsburg from Paul P. "Skip" Spaulding, III and an April 2, 2012 memo sent to the Mayor and City Council from Joanne Brion. Both the letter and the memo were sent on behalf of Discovery Builders, Inc.

Answer in Brief

The purpose of the periodic audit and adjustment is to ensure that the fee revenues generated by development and other covered activities cover the portion of Conservation Plan costs necessary to mitigate development impacts. The Conservation Plan's only requirements for the periodic audit are that it must be conducted by an "outside, independent, financial auditor" and must:

- review implementation costs and the assumptions in the Conservation Plan about such costs;
- evaluate actual land sales and compare them to the land cost assumptions in the Conservation Plan to determine changes in land acquisition costs; and

- compare the actual cost of operating, maintaining and managing the Preserve System with the estimates in the Conservation Plan to determine changes in such costs.

Explanation

The Conservation Plan is a "habitat conservation plan" under the federal Endangered Species Act (16 U.S.C.A. §1532, et seq.) (the "ESA") and a "natural community conservation plan" under the California Natural Community Conservation Planning Act (Cal. F. & Game Code section 2800, et seq.) (the "NCCPA"). Under both the ESA and the NCCPA, the Conservation Plan must ensure adequate funding for implementation. (16 U.S.C.A. section 1539(a)(2)(B)(10); Cal. F. & Game Code section 2820(a)(10).)

The Conservation Plan contains a chapter (Chapter 9) dedicated to funding that includes an estimate of implementation costs and identifies the funding sources that ensure adequate funding for implementation. The Plan identifies a variety of sources, including federal and state funding, as well as local funding. The primary sources of local funding for plan implementation are a development fee, a rural road fee, a wetland fee, and a temporary impact fee (collectively, "mitigation fees"). (Chapter 9.3.1.) These mitigation fees are intended to cover Plan implementation costs associated with land acquisition and management, wetland restoration, and other related actions necessary to mitigate the impacts of development. The Plan specifically apportions a share of overall implementation costs that must be funded by the mitigation fees--between 43% and 52%, depending on the overall amount of development. (See Appendix H of the Conservation Plan.)

To ensure that the amounts of the mitigation fees are sufficient to fund the portion of the Plan necessary to mitigate the impacts of development, the fees are subject to two types of review and adjustment. The first type of adjustment is an automatic, annual adjustment based on specified indices. For example, the portion of each fee intended to cover land acquisition costs is adjusted upward or downward each year based on the Home Price Index for the Oakland-Fremont-Hayward, CA Metropolitan Division, for the prior calendar year. These annual adjustments must occur by March 15 of each year and are determined automatically by the indices set forth in the Plan. (Chapter 9.3.1.)

The second type of adjustment is based on a periodic "fee audit," which must occur in the 3rd, 6th, 10th, 15th, 20th, and 25th years of Plan implementation. The audit must be "thorough." However, the purpose of the audit is relatively limited. It is intended "[t]o ensure that the fees generated by development and other covered activities are adequately covering their share of Plan costs . . ." (See Chapter 9.3.1, page 9-30.) The Plan identifies three areas of analysis for the fee audit, which are used to determine whether the mitigation fees may be adjusted. The fee audit must:

- review implementation costs and the assumptions in the Conservation Plan about such costs;

- evaluate actual land sales and compare them to the land cost assumptions in the Conservation Plan to determine changes in land acquisition costs; and
- compare the actual cost of operating, maintaining and managing the Preserve System with the estimates in the Conservation Plan to determine changes in such costs. (See Chapter 9.3.1, page 9-30.)

Based on the fee audit's analysis in these areas, the mitigation fees may be adjusted upward or downward. However, the mitigation fees must always reflect the apportionment of Plan costs to development in Appendix H.

2011 Independent Fee Audit

Last year, an independent fee audit was performed by Teifion Rice-Evans of Economic & Planning Systems, Inc. The fee audit was presented to the Conservancy, the United States Fish & Wildlife Service ("USFWS") and the California Department of Fish and Game ("CDFG") in a March 17, 2011 memo and a July 15, 2011 memo ("EPS fee audit"). The EPS fee audit concluded that it was unnecessary to raise the development fee, the rural road fee and the temporary impact fee and recommended an increase in the wetland fee. The EPS fee audit was accepted by the Conservancy at its July 22, 2011 meeting and, as I understand it, was also deemed acceptable by the USFWS and CDFG. In my opinion, the fee audit meets the requirements of the Conservation Plan.

Mr. Spaulding and Ms. Brion criticize the fee audit for several reasons and suggest that it is inadequate in four general ways: that it is not sufficiently detailed or comprehensive to be an "audit"; that it lacks independence; that it does not analyze the feasibility of housing development; and that it does not fulfill the requirements of the Mitigation Fee Act. These criticisms seem to reflect a misunderstanding of the purpose of and requirements for the fee audit. As explained above, the fee audit has a specific, limited, purpose derived from the Conservation Plan. It does not have the broader purposes or requirements ascribed to it by Mr. Spaulding and Ms. Brion.

The term "audit" as used in the Conservation Plan does not have a specific legal or technical meaning. It is distinct from, for example, the audit of the Conservancy's accounts required for compliance with the Joint Exercise of Powers Act. In the context of the HCP/NCCP, the term "audit" simply refers to the analysis of costs required in Chapter 9.3.1.

The fee audit must be conducted by "an outside, independent financial auditor" hired by the Conservancy. However, the requirement for an "independent" auditor should also be understood in the context of the purpose of the audit. The auditor cannot be the Conservancy or a Permittee (i.e., Contra Costa County or the cities participating under the Plan). The importance of independence for the audit is to ensure that it is credible to the USFWS and CDFG as a means of confirming that the Permittees are providing adequate funding to implement the Conservation Plan, as required by the ESA and the NCCPA. The auditor need not be independent from or uninvolved with the development of the Plan. The audit is not intended to re-evaluate the Plan or the basis for the fees. Instead, the purpose of the audit is to analyze Plan implementation costs and to ensure that the fees are adequate to meet the costs associated with development impacts. In my opinion, Mr. Rice-Evans is sufficiently "independent" of the Permittees to serve as the financial auditor for the fee audit.

The general feasibility of housing development or other types of development is not within the scope of the audit because it is not relevant to determining whether the fees are sufficient to meet implementation costs. Neither plan implementation costs, nor federal and State mitigation or permit requirements, vary with the feasibility of residential development.

The independent fee audit is also not intended to fulfill Mitigation Fee Act requirements, and Mitigation Fee Act requirements should not be read into the Conservation Plan's requirements for the audit. The Conservation Plan, the Implementing Agreement, the State and Federal Permits and the implementing ordinances adopted by each Permittee explain the basis for the mitigation fees in detail and provide the information necessary for each Permittee to comply with the Mitigation Fee Act. The independent fee audit is a relevant component of the Plan for purposes of the Mitigation Fee Act, but that is not the purpose of the audit.

Despite their conclusion that the independent fee audit does not provide an adequate basis for the City of Pittsburg to take action regarding the mitigation fees, Mr. Spaulding and Ms. Brion each recommend that the City adopt a 25% reduction in all of the mitigation fees. It is important to note that a 25% fee reduction would be inconsistent with the independent fee audit and, therefore, inconsistent with the HCP/NCCP. If a Permittee declined to maintain the fees at levels necessary to meet Plan implementation costs, as those costs are determined by an independent fee audit, it could put the State and Federal permits issued to the Permittees at risk. If the Permittee did not provide an alternative source of funding to replace the reduced fee revenues, the State and Federal agencies could find the Permittees in violation of the permits.

Please let me know if I haven't fully answered your question or if you have any additional questions.

Sincerely,

J. Christopher Beale
Attorney