

## Ivy Drive Voluntary Road Association

Post Office Box 152  
Ross, CA 94957

31 August 2020

Julie McMillan, Mayor  
Joe Chinn, Town Manager  
Richard Simonitch, Public Works Director  
Town of Ross  
P.O. Box 320  
Ross, CA 94957

Re: Road Impact Fees

Dear Mayor McMillan, Manager Chinn and Director Simonitch,

We are writing this letter to bring attention to an issue of fairness relating to road impact fees. During the annual meeting of the Ivy Drive Voluntary Road Association (the "Road Association") held on July 25, 2020, a new business item involving the Town of Ross Road Impact Fees was discussed. As we understand it, under Town of Ross Resolution 1504, dated July 11, 2002, the Town of Ross imposes a 1% Road Impact Fee on the construction costs of all permitted homeowner projects. These fees are intended to cover the additional wear and tear to Town roads attributed to such projects. While fees are collected from all homeowners, none of the Road Impact Fees are applied to mitigate the damage to private roads.

Ivy Drive is currently classified by the Town of Ross as a private road and is one of approximately 19 private roads in Ross. Ivy Drive is comprised of 10 residences who use Ivy Drive as their primary access and 9 residences who rely on Ivy Drive for secondary access including emergency vehicles, garbage and deliveries. If we consider only the 10 primary residences on Ivy Drive impacted by Resolution 1504, these 10 residences constitute over 1% of all homes in Ross and over 1% of the population of residents in Ross. Across all private roads in Ross, this percentage is significant. We are aware that Manager Chinn has claimed that public funds cannot be used on private roads. (Halstead, Richard. "Ross Residents Seek Town Help for Private Roads." *Marin IJ*, 8 July 2019.) Nonetheless, other cities in Marin such as San Anselmo have overcome such simple divisions and have acted to address this issue more equitably by allowing private road homeowners to benefit from impact fees and not be left out of efforts to mitigate all road damage caused by any individual homeowner's construction.

The purpose of this letter is not simply to complain or ask to have the Road Impact Fees waived or reduced for owners who live on private roads (as that would benefit only the homeowner creating the increased road use and not the private road residents who also

Mayor McMillan, Manager Chinni  
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We would also like to include in our meeting the opportunity to further discuss why street cleaning services cannot be made available to all residents of Ross. Street cleaning vehicles have no greater difficulty accessing private roads than public safety, garbage, delivery and construction vehicles and represent an important service funded by our tax dollars which we also currently do not benefit from.

Sincerely,

Kay and Edward Lee  
Co-Presidents  
Ivy Drive Voluntary Road Association  
Edward email: leee9774@gmail.com  
Kay email: kayleevc75@gmail.com

## Ivy Drive Voluntary Road Association

Post Office Box 152

Ross, CA 94957

October 6, 2020

Julie McMillan, Mayor  
Joe Chinn, Town Manager  
Richard Simonitch, Public Works Director  
Town of Ross  
P.O. Box 320  
Ross, CA 94957

Re: Road Impact Fees & Staff Report dated October 8, 2020

Dear Mayor McMillan, Manager Chinn and Director Simonitch,

Thank you for sharing the Staff Report. We appreciate the response to the issues raised in our letter to you dated 31 August 2020. After review we still must object to the conclusions reached and have a few specific items to respond to. We must also restate that we are not asking the Town to maintain private roads. We are asking the Town to develop an equitable method that allows private road owners to benefit from Road Impact Fees and monies paid into the General Fund for street sweeping.

In essence, the Staff Report provides three basic reasons why the Town cannot treat the significant number of private road residents more equitably. To summarize our fairness position, public road residents enjoy Town funded maintenance and street sweeping for all of the roads that are necessary for their access to their homes. This benefit is funded in part by Road Impact Fees and taxes paid into the General Fund by both public and private road residents. Private road residents on the other hand receive no fiscal support for road maintenance or repair exacerbated by construction projects on their very road (not even from Impact Fees charged to the property owner on such private road that affects the use of other residents on such private road).

The three basic reasons why the Town cannot consider a more equitable approach appear as justifications to do nothing further, rather than as concerns to be worked through. Our response is as follows:

1. Government Code Section 65913.8. *The Town cannot aid private road residents because Sec 65913.8 of Government Code precludes it.* That section applies to every municipality in California and yet other towns have found ways to provide some fairness to private road residents without hiding behind the Government Code. Either they are permitted to do so or the Town believes other towns are violating California law. Since we presume other Towns have also considered the provisions of the Government Code when doing so, we are led to conclude there is a way the Town could address the inequity of this issue without violating Government Code Section 65913.8 if it were willing to do so.
2. Risk Factors. *If the Town provides some funding to private road associations, that assistance is tantamount to asserting "control" over the private road repairs.* This funding would trigger a parade of horrors such as (i) deemed acceptance of the road as a public road, (ii) increased liability risk to the Town associated with private road repair, (iii) prevailing wage requirements on private road maintenance projects.

Private road residents are not asking the Town to become involved in or assert any control over private road repairs caused by a private residence construction project. Private road residents are not asking the Town to determine what repairs are needed, when they should be done, who should be contracted to perform the repairs or how to manage such repairs. Oddly enough given the level of Town participation and oversight in design and engineering review of repairs of private roads (which incidentally increases the cost of road repairs to private road residents) it seems a bit odd to claim "control" over road repairs simply from an equitable distribution of Road Impact Fees or other funds. To assume "control" is to overstate the actual risk and present hypothetical obstacles to acting fairly.

3. Fiscal Impacts. *An equitable distribution of Road Impact Fees would impair the efficient funding of Town obligations.* It is difficult to accept the Town's position that by denying a significant percentage of Town residents a public benefit that is available to all other residents and is funded in part with their taxes and fees, the Town is now better able to be "financially responsible" and "financially stable."

Denying fair treatment to all residents cannot be a principle of Town fiscal management.

Of particular significance, the Report makes no mention of the amount of contributions private road residents make to the Town of Ross compared with public road residents. In evaluating fairness, this would seem a fact worth knowing. What is the fiscal contribution of private road residents to the General Fund and Road Impact Fees? And if this contribution is significant, how can the Town justify its refusal based on fiscal responsibility?

We would be interested in the Town answering this question and expect many Town residents would as well. A fiscal analysis of the contributions of public and private road residents to Road Impact Fees and the General Fund would better inform all parties addressing this issue.

In our view, the Town would do well to reframe the issue we raise: Are there ways the Town of Ross can make Road Impact Fees and General Fund street sweeping more equitable for private road homeowners?

For example, one solution the Town could consider that would provide greater fairness to private road residents would be to simply create a "credit" against a portion of the Town imposed Road Impact Fees. In response to possible violations of Government Code Section 65913.8, no Town funds would then be used or paid to fund private road repairs or maintenance as the credit would simply serve to reduce fees or taxes paid to the Town. This solution would also address the Town's position that funding private road repair amounts to "control" over such private road repairs since there would be no "funding" by the Town of any repairs or maintenance.

As the Report makes clear, 45% of the Town's roads are private and the Town undertakes no responsibility to maintain them. The Town does, however, have a responsibility to treat all of its residents fairly.

In closing, we request that our letter dated 31 August 2020 from the Ivy Drive Voluntary Road Association be included in the Staff Report dated October 8, 2020. We believe these issues are of significance to a meaningful proportion of Ross residents and

Mayor McMillan, Manager Chinn  
& Director Simonitch  
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request the record more accurately reflect the broader conversations taking place and the larger number of affected residents.

Sincerely,

Kay and Edward Lee  
Co-Presidents  
Ivy Drive Voluntary Road Association  
Edward email: [leeeg9774@gmail.com](mailto:leeeg9774@gmail.com)  
Kay email: [kayleevc75@gmail.com](mailto:kayleevc75@gmail.com)

Andrea and Daniel Elkort  
Residents of Ivy Drive  
[amielkort@gmail.com](mailto:amielkort@gmail.com)  
[daniel.elkort@gmail.com](mailto:daniel.elkort@gmail.com)

## Linda Lopez

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**From:** Joe Chinn - Town Manager  
**Sent:** Wednesday, October 7, 2020 11:03 AM  
**To:** Linda Lopez; Richard Simonitch  
**Subject:** FW: Comments and suggestions for Agenda Item 11

**From:** Gina Nellesen <gina.nellesen@gmail.com>  
**Sent:** Wednesday, October 07, 2020 10:15 AM  
**To:** CouncilAll <towncouncil@townofross.org>  
**Subject:** Comments and suggestions for Agenda Item 11

Dear Councilmembers,

I appreciate the Town's position and agree with many of the legitimate points in the Staff Report for Agenda item 11 on 10-8-20. I agree that it's not financially feasible for the Town to accept responsibility for the maintenance of private roads, and that both liability and maintenance duties are legitimate concerns of every Town resident. It's possible, however, that the Report misreads their risk in suggesting that using funds more equitably would trigger liability and ongoing maintenance responsibilities. I would advocate for a more equitable distribution of vehicle impact fees and road maintenance taxes paid by private road residents, with the goal of fairness for private road residents and improved safety for the benefit of all. The credit concept that was put forward but the residents of Ivy Drive would not establish a pattern of maintenance and residents could use such funds to improve the safety of private roads, thereby limiting their liability as well as the Town's.

### Liability and Safety

The Staff Report doesn't address safety and it seems that the Town should have a compelling interest in the safety of its private roads since 6.6 miles of the Town's total 17.6 miles of roadway are privately-maintained. I believe that the Town remains accountable for the safety of its fire personnel, police and ambulance service-people responding to calls from residents on private roads. As recently as June 2020, a refuse driver was killed on Meadowsweet Drive where Mill Valley intersects with Corte Madera. His truck left the roadway and rolled over in an area that's similar to some of the hillside private roads here, which are steep and narrow. The current policy of not contributing to the safety of private roads could have dangerous implications in that homeowners on private roads pay a full share of taxes to support maintenance of public roads and various road impact fees (paid to the Town of Ross), and yet they may still be held liable for accidents. Refuse vehicle impact fees collected by the Town from Marin Sanitary are used to maintain only the public roads, but heavy trucks also deteriorate private roads and higher collection fees are passed through onto private road residents. It's apparent to a fair number of people that assessing residents for taxes and fees for public road maintenance, and at the same time not contributing to private road maintenance, could set the stage for a possible accident here in Ross.

The Staff Report also refers to privately-maintained streets as "publicly accessible," (p. 1, para. 2, line 9 and throughout). Although these terms are used loosely, they suggest rights where there are currently no duties. Most private roads don't lead to authorized public destinations and if the residents living along those roads need to evacuate quickly, it's dangerous to allow or encourage public drivers to use the private roads to detour, park, or cut-through. Doing so also exposes individual homeowners to liabilities that the public road residents are protected from. These are the same liabilities that the Town seeks to avoid ("*The risk and liability cost is greater for private roads than public roads because none of the private roads were constructed to Town standards...there is a greater likelihood of road failures and accidents due to road conditions on these roads compared to Town public roads,*" Staff Report at p. 3, para. 5). Staff notes that "*an injured party may allege that the Town is in a position to prevent, remedy and/or guard against dangerous conditions including conditions related to normal wear and tear, and deterioration of road quality,*" Staff Report at p. 3, para. 4). Private road residents also seek to limit their liability and thus wish to discourage public use.

### Recent Case Law

It's true that a situation of implied dedication and acceptance may arise when a government agency establishes a pattern over time of improving, maintaining or cleaning private land by the expenditure of public funds. But recent California cases have greatly restricted the implied-dedication / acceptance doctrine and may insulate the Town from claims of acceptance by prescription. For example, Staff's statement, "*The Town need not formally accept a road into its road system for that road to be considered a public road,*" page 4, para. 4 (first enumerated paragraph) should be checked against Mikkelsen v. Hansen (2019 WL 15370619). In this case from early last year, the Court of Appeal applied the State Supreme Court's decision in Scher v. Burke (2017 3 Cal.5th 136), and held that there can be no implied dedication or acceptance of a road on private property because Civil Code Section 1009(b) bars all use of private real property after March 1972 (*Gion*), not just recreational use, from ever ripening into a public dedication absent an express, written, irrevocable offer of such property to such use, *and an express, written acceptance by the public body* to which the offer of dedication was made. Generally speaking then, turning private road ownership, liability and maintenance responsibilities into public ones must be done expressly.

At the council meeting, it would be helpful to have transparency on the amount of impact fees and taxes collected as well as an open discussion about safety and private road homeowners' liabilities.

Sincerely,  
Gina Nellesen

## Linda Lopez

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**From:** Howard Schomer <hschomer@gmail.com>  
**Sent:** Thursday, October 8, 2020 10:16 AM  
**To:** Linda Lopez  
**Subject:** Comments on Private Road Issue for Oct 8 Meeting

Hello Linda,

I hope you are well.

For the Town Council with respect to tonight's meeting:

- The Town Staff report does not provide the Council with balanced information to make a decision. It feels very *Us vs Them* instead of "**We**" focused. I may be naive about local governance, but I would hope the Town Council would be looking for even-handed solutions that benefit ALL constituents. That would require Town Staff to provide a full and even analysis of the situation so that the Council can make a fully informed decision. *This report feels more like advocacy for one outcome only, the status quo.*

- The Town report does not include the San Anselmo (or other towns') solution to this issue. It would be valuable for the Council to review what these Towns have done to find an even-handed solution, as clearly they did not come to the same conclusion the Town Staff report has.

- It would be helpful if the Town could report what amount of money is collected from Private Roads on an annualized basis (road impact fees, Marin Sanitary, etc.), so we could all discuss a fair apportionment of these funds. No one is suggesting 100% of these funds be returned to Private Roads, but fairness would dictate a reasonable percentage.

- With respect to liability, the Town argues only worst case and advocates for the status quo, rather than providing an even analysis for review. It is my understanding that if the Town only engages with Private Roads (and their Associations, etc.) financially (as opposed to actually engaging in repair, maintenance, etc.), then the liability issue is mitigated substantially. I would hope the Town Staff could provide an even analysis of the situation in order to provide the Council with ALL information to make an informed decision.

- Finally, I urge the Council members not to recuse themselves based on whether or not they live on a Private Road. Every member has a stake one way or the other in this decision, so it would seem either all or none would recuse. I also urge the Council to request a more full and even review and analysis of all options before rendering a decision, so that this can further the cohesive "We" of Ross rather than furtherance of an *Us Vs. Them* mentality.

Thank you.

Howard Schomer

## Linda Lopez

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**From:** Howard Schomer <hschomer@gmail.com>  
**Sent:** Thursday, October 8, 2020 4:08 PM  
**To:** Linda Lopez  
**Subject:** Backup Documents - Oct 8 Meeting - Private Roads Issue - Orinda and San Anselmo Documents  
**Attachments:** Town Resolution for a Policy of Assistance - Drainage Improvement Projects.pdf; Town Resolution for a Policy of Assistance - Pavement Improvement Projects.pdf; Orinda Workshop Report - by Facilitator Jim Bourgart.pdf

Hello Linda -

To the extent that the Town Staff has not secured and provided these relevant documents to Town Council, please find attached. These should be readily available for Town Council as they are important support for the Private Road issue as well as providing options for discussion.

1. Two relevant documents from San Anselmo on this subject and
2. A workshop document from Orinda in 2019 dealing with the same issue and outlining some possible solutions.

Thank you.

Howard Schomer

RESOLUTION NO. 3363

A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF SAN ANSELMO SETTING A POLICY FOR TOWN ASSISTANCE TOWARDS COOPERATIVE EFFORTS IN DRAINAGE IMPROVEMENT PROJECTS

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WHEREAS, there are drainage facilities in San Anselmo that fall into disrepair; and

WHEREAS, property owners may join together to raise funds and make arrangements to improve drainage facilities in their neighborhood; and

WHEREAS, there is a community interest in encouraging the improvement of drainage facilities in neighborhoods,

NOW, THEREFORE, BE IT HEREBY RESOLVED that the Town will consider proposals by property owners of Town maintain roads and non-Town maintained roads for financial assistance in making improvements to drainage facilities, using the following criteria to evaluate an appropriate funding level, if any, for such proposals:

1. Participation by other public agencies. Priority may be given to projects to which other public and/or private agencies are making contributions.
2. Town participation as leverage for project accomplishment. To what extent does the Town participation facilitate performance of the project? What is the percentage of Town versus private contribution relative to total project cost. Is the Town being asked to fund more than half of the repair/improvement?
3. Fundraising. Are the property owners making other efforts to raise funds?
4. Property owner participation. What is the percentage of property owners affected who are participating? How much are they contributing?
5. Condition of drainage facility. Has there been a failure, or is the proposal to prevent a failure? How does the condition of this drain compare with the condition of other drains in Town - both public and private?
6. Use of facility. How large is the watershed draining into the proposed improvement? What are the number of properties affected? Preference will be given to projects affecting more than one property.
7. Cost benefit of the proposed improvement. Is there a savings to the Town? Does it save funds on improvements to public drainage facilities?
8. Town property. Is it within a public, but unaccepted right-of-way? Higher priority will be given to drains in the public right-of-way.
9. Cost of repair. Smaller requests will be given higher consideration than larger requests, in order to spread the funds over many projects.
10. Degree of risk. What is the threat of damage and amount of potential damage if the improvements are not made?

11. **Private work that is necessitated by a Town project.** Is there a public project that depends on work being done that is private property owner responsibility?

BE IT FURTHER RESOLVED that the following conditions will apply to contributions for drainage improvements:

- A. Agreement to accept a cash contribution without Town oversight of project beyond that of standard residential developments. The Town will not design, contract, administer, or exercise dominion and control on the project.
- B. Agreement that maintenance responsibility remains with the property owners.
- C. Agreement to indemnify the Town against any claim or litigation related to the improvements performed with the Town contribution.
- D. Agreement to hold the Town harmless for any actions, or lack thereof, related to the filing of a proposal for Town contribution, whether or not the proposal is funded.

BE IT FURTHER RESOLVED that the Town will:

- 1) Waive permit fees for the improvements.
- 2) If desired by the property owners, provide a holding account for funds contributed by property owners and other agencies.
- 3) Coordinate with local utilities for any work that needs to be done prior to the start of paving.
- 4) Not provide technical assistance, except for the inspection of private improvements.
- 5) Consider contribution of Town funds, contingent upon the availability of funds and applicability of the criteria in this resolution to the proposed drainage improvement project.
- 6) Endorse requests for funding for other public or private sources.

BE IT FURTHER RESOLVED that Town assistance in the improvements of drainage facilities on non-Town maintained roads or private property does not obligate the Town to perform maintenance on these improvements, or be liable for any consequences of these improvements.

I hereby certify that the foregoing resolution was duly passed and adopted on the 10<sup>th</sup> day of September, 1996, by the following vote, to wit:

AYES: Breen, Chignell, Kroot, Hodgens, Yarish

NOES: (None)

ABSENT: (None)

ATTEST:

Debra Stutsman

## TOWN OF SAN ANSELMO

### PROCEDURE TO REQUEST FINANCIAL ASSISTANCE TOWARDS DRAINAGE IMPROVEMENT PROJECTS

Drainage facilities on non-Town maintained roads are the responsibility of the adjacent property owners, as are drainage facilities on private property. Sometimes, neighbors join together in an effort to make improvements to the drainage facilities in their neighborhood that are their responsibility.

The San Anselmo Town Council has adopted Resolution No. 3363, which establishes criteria for its consideration of proposals from neighborhoods for financial assistance from the Town towards drainage improvement projects. Council has also designated for the next three years, or more, up to \$50,000 each year for appropriation to paving and drainage improvements on non-Town maintained roads.

To have a proposal considered for funding contribution, the procedure is:

1. A total of \$50,000 is allocated for neighborhood paving and drainage projects, as long as \$50,000 is budgeted in the Measure G capital improvement program for that purpose.
2. The neighborhood designates a primary contact to interact with Town staff regarding the proposal process.
3. Staff advises the neighborhood contact on the process for submitting information related to the funding criteria in Resolution No. 3363.
4. A proposal from the neighborhood is received by the Town by May 1, beginning in May, 1997.
5. In May of each year, Council designates either a Council subcommittee, or a separate committee such as one with engineering expertise, to review the proposals. The Public Works Director/Town Engineer serves as a staff liaison to this subcommittee or committee.
6. The subcommittee or committee reviews the proposals in relation to the criteria and conditions in Resolution No. 3363, and makes a recommendation to the Council on funding of the proposals for paving and/or drainage improvements.
7. Council takes an action on the proposals.
8. The neighborhood arranges for the design and construction of the improvements, makes provisions with staff - if needed - to set up a holding account for the neighborhood contributions, and the work is performed.

RESOLUTION NO. 3268

A RESOLUTION OF THE SAN ANSELMO TOWN COUNCIL SETTING A POLICY FOR TOWN ASSISTANCE TOWARDS COOPERATIVE EFFORTS IN PAVEMENT IMPROVEMENT PROJECTS

WHEREAS, there are public roads in the Town of San Anselmo that, with usage and time, fall into disrepair; and

WHEREAS, property owners may joint together to raise funds and make arrangements to repave the roads in their neighborhood; and

WHEREAS, there is a Town interest in encouraging property owners to participate in paving projects in order to improve the condition of roadways in the community,

NOW, THEREFORE, BE IT HEREBY RESOLVED that the Town will consider proposals by property owners of Town maintained streets and non-Town maintained streets for assistance in paving projects, using the following criteria:

- a) **Participation by other public agencies:** Priority may be given to projects to which other public and/or private agencies are making contributions.
- b) **Town participation as leverage for project accomplishment.** To what extent does the Town participation facilitate performance of the project?
- c) **Fundraising:** Are the property owners making other efforts to raise funds?
- d) **Property owner participation:** What is the percentage of property owners who are participating? How much are they contributing?
- e) **Condition of roadway.** How does the condition of this roadway compare with the condition of other roadways in Town - both Town-maintained and non-Town maintained?
- f) **Traffic volume/use of roadway.** To what extent is this roadway used by other Town residents? Is it a dead-end road, or does it provide access to other roads that are Town-maintained and/or used by Town residents?
- g) **Cost benefit of the proposed improvement.** Is the road improvement being proposed appropriate with respect to the condition of the roadway and available solution?. Is the improvement a good investment for maintenance of the road?
- h) **Town property.** Does the Town own any property that is being served by this roadway? Is the Town an adjacent property owner on the road?

BE IT FURTHER RESOLVED that after, Council may make a determination of the appropriate level of Town assistance in the following areas:

1. Waiver of permit and inspection fees for the roadway improvements.

2. Provide technical assistance such as review of design details and contractor walk through.
3. Provide holding account for funds contributed by property owners and other agencies.
4. Coordination with local utilities for any work that needs to be done prior to the start of paving.
5. Contribution of funds from the Town, contingent upon availability of Town funds.
6. Endorsement of requests for funding from other public or private sources.

BE IT FURTHER RESOLVED that Town assistance in the paving of non-Town maintained roads does not obligate the Town to perform maintenance on those roads.

I hereby certify that the foregoing resolution was duly passed and adopted on the 28th day of June, 1994, by the following vote, to wit:

AYES: Breen, Kroot, Yarish, Zaharoff, Chignell

NOES: (None)

ABSENT: (None)

  
\_\_\_\_\_  
MAYOR

ATTEST:

  
\_\_\_\_\_  
Town Clerk

# Orinda Private Roads: Report on the August 27, 2019 Public Workshop with the Orinda City Council

Prepared by Jim Bourgart, Consultant to the City of Orinda. September 2019.

## Executive Summary

On August 27, 2019, the Orinda City Council held a workshop on the issue of the private roads in the City and their relationship to the City's public roads. This issue has been a recurring subject over the years, and a group of residents on private roads have requested that the City take over responsibility for upgrading and maintaining those roads. The workshop provided substantial time for the residents to make their case and explore the issues in depth, plus time for City staff to present information on the subject.

The workshop included formal presentations by the residents group and by members of City staff, including the Public Works Director, City Attorney and Finance Director. The residents' presentation was made by six spokespersons. These presentations are described in this report, and they are available in greater detail in the Box Link for the August 27, 2019 Workshop: [\[LINK\]](#). Here is a summary of key points.

- The Public Works Director presented the data regarding public and private roads. He outlined the different categories of private roads. He described the funding of public roads and the work that has been done in the past several years. He also explained the additional risk and extra cost incurred when road maintenance is deferred for too long.
- The City Attorney explained the legal complexity involved in acceptance of private roads by the City, possible City maintenance of private roads and possible City funding toward private road maintenance and assumption of liability. All would involve substantial legal work. She cited the "public benefit" test that would be applied. Drainage law is related and is also complicated.
- The Finance Director explained the options for securing additional funding through a variety of potential ballot measures. He explained the difference between a general tax and a special tax and their different voting requirements.
- The private road residents group made the case that the treatment of maintenance of their roads is unfair, in that they are paying taxes and fees without deriving the same benefit as public road residents. Private roads and public roads have similar physical characteristics. There is a need for condition surveys of private roads and drainage.

During the course of preparing for the workshop through interviews of residents and staff and through the workshop itself, a number of ideas for addressing the issues were suggested. These are compiled in the list below. They are not recommendations, but ideas for possible exploration. The Council may choose to give direction to staff to pursue research and/or undertake additional analysis of any of these ideas and options.

1. Maintain the status quo. The City remains responsible only for roads formally accepted into the public system. Private road residents remain responsible for all

private roads, with the exception of consideration of a private road that meets terms set out in Resolution 59-18.

2. City accepts all private roads unconditionally.
3. Modify Resolution 59-18 to ease standards for consideration for private road acceptance.
4. Conduct condition assessment surveys of private roads and/or private drainage, to at least the level of specificity used for the public roads and drainage. Estimate costs to do the condition assessment.
5. Based on the results of the condition assessments, estimate short- and long-term cost of accepting all, or some subset, of private roads and/or drains into the public system. Variables may include relative condition of the facilities, categories of roads and/or drains, how many the City would accept, and what standards the City would apply to upgrade the newly-accepted facilities.
6. Explore taking private roads and/or drains into the public system that arguably provide a distinct and provable public benefit that many private roads and/or drains may not (e.g., connect to public facilities, connect through streets or are themselves through streets.)
7. Propose a funding source (most likely a parcel tax) to fix and maintain public facilities, for roads and/or drains that would exempt (partially or in full) private road residents from paying, if they do not in fact receive the direct benefit of the tax or fee.
8. Exempt private road residents from a portion of the Solid Waste Impact Fee. The administration of this approach would require further consultation and negotiations with the waste hauler.
9. Propose a sales tax extension of the existing tax or even additional ½% sales tax for ongoing maintenance. This could be for roads only, or possibly adding drainage facilities.
10. Propose a new bond measure for capital road improvements, plus drainage system capital improvements. The difference between the bond and the sales tax is that, if private road residents were not included in a bond measure, a rebate or exemption might be made to them (this requires further legal research).
11. Propose two separate ballot measures simultaneously, one for drainage and the other for roads. The two measures could both be bonds, both sales taxes, or one of each—sales tax for ongoing maintenance, bond for capital improvements. The drainage measure potentially affecting both public and private drainage.
12. Real Estate Transfer Tax. This would be a new—probably growing but potentially volatile—source of funds. It would require converting Orinda to a charter city.
13. Seek State legislation that makes it easier to form a private road and/or drainage maintenance association.
14. Regarding traditional assessment districts, the City could make it easier, or defray some costs, for private road residents to form and administer an assessment district.
15. Expand the Geologic Hazard Assessment District (GHAD). There is already a GHAD in Orinda. An expanded GHAD could serve as a partial “insurance policy” against catastrophic events.

16. Insurance policy. Could the City, through its buying power, cover—or obtain a better rate—for insurance paid for by private individuals or associations?
17. Emergency funds. Could the City assist with making private road residents eligible for Federal or State emergency funds?

Given the widespread recognition that Orinda infrastructure will require more funding than is presently available, the Council is expected to have further deliberations about how to frame future funding measures and what to include in them. The citizens of Orinda are likely to be asked to provide the City with more resources to address its infrastructure needs. The results of this workshop will greatly help guide those discussions.

### **Background**

In May 2019 I was engaged by the City of Orinda to prepare for and facilitate a workshop on the topic of the private roads in the City. The issue of the City's relationship with the private roads and residents has been a recurring subject on the City Council's agenda and of numerous communications over the years between residents and the Council.

In order to give sufficient time to explore the issue in greater depth and to hear all viewpoints, the Council directed staff to schedule a workshop that would fully air the issues. The workshop was scheduled and occurred on August 27, 2019. Between May and August I met individually with key City staff, a City Councilmember and a number of representative members of the public who have been actively involved with this issue.

The published agenda and backup material for August 27, 2019 Workshop can be accessed by clicking here: [\[LINK\]](#). Approximately 80 Orinda residents attended. All five Councilmembers were in attendance, but, by design, they were there to listen only and did not participate in the discussion. The duration of the workshop was approximately three hours.

The workshop agenda and program were posted online on August 23, but the residents who were planning to make a presentation were provided with drafts about 10 days in advance of the workshop. The workshop agenda included: (1) Presentations by City staff, including Larry Theis (Director of Public Works), Osa Wolff (City Attorney) and Paul Rankin (City Finance Director); (2) Presentations by a group of private road residents, represented by six spokespersons; (3) Observations about what was learned about the issues in meetings with residents and City staff, including a number of specific ideas and approaches that were suggested by them; and (4) Opportunity for all in the audience, including resident presenters, to make further comments and ask questions.

The remainder of this report will include: (1) Findings, themes and recurring points raised in pre-workshop meetings with City staff and residents; (2) Summary of presentations made by City staff and residents at the August 27 workshop; (3) Discussion and comments made by residents and staff during the workshop, plus a number of written communications from residents to the City on or near the day of the workshop available here: [\[LINK\]](#); (4) Potential ways forward and ideas for further research or exploration and next steps.

## **Pre-Workshop Findings**

In speaking with both a variety of residents and City staff, I heard many observations, arguments and ideas. What follows in this section is a summary of the main issues or themes that were raised.

In general, there are four critical categories of concern that I heard from private road residents. They are: (1) Bringing private roads up to the level to which public roads have reached as a result of the recent work funded by the sales tax increment and bond measures; (2) Routine road maintenance, current and in the future; (3) The possibility of severe or catastrophic road failure, and (4) Storm drainage system and culvert maintenance and upgrade.

In essence, most of the private road residents' expressed first choice would be for the City simply to take over or accept the private roads into the City system, thereby relieving them of the financial responsibility and risks, especially catastrophic failure risks and general liability. However, it was also pointed out by some interviewees that not all private road residents may want to have the City take over their roads, and they may seek to retain control of their roads.

There was general agreement by all that, in any case, more funding will be needed in the future, from whatever the source and however distributed. There is recognition that there are limitations on the use of public funds, both at the state and federal levels, for private roads. There are strings attached to federal funds, and there are state laws pertaining to specific fund sources. More generally, there is the "gift of public funds" state constitutional issue that must be addressed. The interpretation of this term and what constitutes a "public benefit" are subject to differing outcomes, depending on the specific facts and circumstances of each situation.

The most frequently heard point made by private road residents is one made on the basis of fairness. The argument is that private road residents pay taxes and fees identical to those paid by public road residents, but they do not receive the same benefits in return for taxes and fees paid. Further, the physical characteristics of public residential roads are similar to those of private roads in many cases. However, some residents say that private road residents knew (or should have known) the situation regarding responsibility for private roads at the time of purchase, and the public road residents should not have to pick up the tab. Furthermore, they contend that the relative property value (compared to properties on public roads) was based on that knowledge by buyers and sellers.

From the City government perspective, taking on the private roads into the public system entails a financial commitment to maintain them, plus general liability. The City has limited funds and to date has used the bond measures and Orinda's supplementary half-percent sales tax to bring the public roads up to a satisfactory standard. It still needs to do the same for the remaining public arterial and collector roads. In addition, both City staff and residents have remarked on the unknown, but potentially substantial, need to address the storm drainage system throughout the City. Nevertheless, City staff also recognizes that a segment of the community has been for some time vocally dissatisfied with the status quo regarding their private roads and has raised the matter at a number of City Council meetings. The workshop was meant to fully elucidate the issues.

The residents and City staff understood that the purpose of this workshop preparation and the workshop itself was not just to clarify issues, but also to brainstorm about possible paths forward. The numerous ideas suggested by one or more of the people interviewed over several months in preparation for this workshop are included at the end of this report and in the Executive Summary. This is by no means an exclusive list, and further ideas are most welcome. This list is meant to get the City Council and the public thinking about various approaches to take.

### **Workshop Presentations**

The presentations made by the City included those from the Public Works Director, City Attorney and Finance Director were based on the Powerpoint presentation made at the August 27<sup>th</sup> Workshop and available here: [\[LINK\]](#). The outline and main points by each presenter were as follows.

#### **Public Works Director Larry Theis:**

- The City's public roadway network consists of approximately 92 centerline miles (65% residential, 19% arterials, 16% collectors). Their average Pavement Condition Index (PCI) will be an excellent 85 (out of maximum 100) after 2019 projects are completed.
- There are 6 different types of private roads in Orinda, and they consist of approximately 30 miles of "named "roads. They differ as to their history and current status. They came into existence over a period of about 100 years, with different, somewhat haphazard development arrangements made with the County before 1985 (after 1985 with the City). Some (29%) are maintained by private homeowner associations. Others (11%) were dedicated to the public but not accepted.
- Current road funding is about \$3.2 million annually, consisting of: \$1.2 million annually from the ½% sales tax (expires 2023); \$900,000 Gas Tax from State of California; \$450,000 from Contra Costa Transportation Authority (CCTA) Return to Source sales tax; and \$650,000 Solid Waste Impact Fee. About \$2.8 million of the total \$3.2 million is available to be used directly on the roadway, because some of the gas tax money is used for other road-related local projects such as signals and curbs.
- The two road repair bonds of 2014 and 2016 totaled \$45 million and will have been essentially expended by the end of 2019.
- Future funding projections show that the cost of deferred maintenance rises dramatically starting in about 10 years, if the roads are not kept in good repair on a continuing, regular basis in the early years. The upshot is that failure to invest in early years leads to orders of magnitude higher costs in later years, because the cost of fixing deferred maintenance damage is much more expensive.

#### **City Attorney Osa Wolff:**

- There is an important legal distinction between City "maintenance" of a road and public easements or rights.
- The status of roads often differs based on artifacts of how they were created (e.g., on a subdivision map processed by the County prior to City incorporation).

- The transition of a road from private to public is possible, but is sometimes complex and costly, as research and legal processes are required. Similar legal complexities would apply if the City were to pursue maintenance of private roads or provide City funding for private road maintenance. The precise nature and extent of those legal complexities would vary depending on the road.
- Liability considerations include: slope instability, accidents, drainage, and ongoing maintenance.
- Orinda has experienced substantial financial losses from catastrophic events after acceptance of privately-maintained roads (e.g., Candlestick Road).
- The “gift of public funds” doctrine will come into play and require an interpretation and finding of “public benefit” for particular situations.
- There is a significant legal difference between property ownership and a contractual arrangement. Transfer of property rights such as road easements is usually much more complex than forming, changing or terminating a contract.
- Author’s note: Some examples of potential options requiring further legal research are: Tax exemptions for residents on private roads; Pursuing acceptance of private roads previously offered on a subdivision map; Financial contributions to maintenance of private roads, without accepting them; and City undertaking maintenance of private roads without accepting them.

Finance Director Paul Rankin:

- Placing funding measures on the ballot entails a cost that the City pays to the County. November general elections cost less than primary or special elections. The next general election is November 2020.
- The CCTA is planning to place a new countywide ½% sales tax on the March 2020 ballot. It will be dedicated to transportation purposes. The measure will require a two-thirds voter approval to be enacted.
- The Orinda add-on general sales tax, which has been spent on roads, was approved in 2012 and expires in April 2023. This tax currently yields approximately \$1.2 million annually. If an extension of this tax is sought again as a general tax, i.e., it could technically be used by the City for any purpose. However, the stated intention and Council commitment could be to utilize it for roads, as was the case for the 2012 sales tax increment. A general sales tax would require only a simple majority affirmative vote by the electorate. However, a legally earmarked “special tax” (i.e., for a specific purpose only) for roads would require a two-thirds affirmative vote.
- General Obligation Bond measures were passed by the voters in 2014 and 2016, totaling \$45 million and spent on roads. Another bond would also require two-thirds voter approval. Any new bond obligations must be considered in the context of total debt burden obligations for all purposes and other future infrastructure needs.
- Parcel taxes for road, drainage or other ongoing needs are another possibility. They require a two-thirds voter approval. They are paid through the property tax mechanism.

- Other potential options, which could be general taxes, include Utility User Tax (based on consumption) and Documentary Transfer Tax on real estate exchanges. The latter would require Orinda transitioning from a General Law City to become a Charter City.

### **Private Roads Residents' Presentation**

The private roads residents gave a prepared presentation, with six speakers each taking a portion. Their Powerpoint presentation is found at [\[LINK\]](#). Their individual comments are recorded in the meeting minutes [\[LINK\]](#), attributing comments to each speaker. Following are the major points made by the speakers, in sequence:

- Residents of private roads are subject to unequal treatment. Since 2012 the City has spent considerable money from bonds and sales tax on public residential roads but none on private roads.
- Yet private road residents, representing about 20% of the City, are paying taxes the same as other residents without receiving the benefits.
- In many cases, there are no physical differences between public and private roads: many in both categories are old, narrow and winding, including numerous cul-de-sacs and loops.
- The goal of this workshop should be to begin the process of treating road maintenance as a basic public service equally available to all residents.
- The cost impact of catastrophic road failure would be devastating on individual residents, and the City could and should mitigate that risk for residents.
- In addition to roads, the issue of storm water drainage system must be considered.
- How to finance costs of repairing and maintaining these systems must be explored on behalf of residents on both private and public roads.
- The distinction between public and private roads is arbitrary, generally based on historical arrangements made at the time their developments were approved. Some originally private roads were later accepted by the County, while others were not.
- There is a public benefit to maintaining private roads, if they are as accessible to the public as the public roads are.
- There are several elements to road expenses: deferred maintenance; long-term routine maintenance; catastrophic failure; and liability lawsuits.
- A survey of private roads is needed to determine costs to rectify deferred maintenance.
- The private road group has estimated the number of miles and estimated costs. They contend that only five miles out of 30 miles of private roads are likely to require substantial expenditure to bring them up to City pavement standards.
- They estimate \$20,000 per mile for long-term maintenance on current private roads, compared to the City's estimate of \$35,000 per mile.
- They estimate of \$35 million for upgrade and maintenance of storm drains.
- Private road residents should be brought into the City system upon request of the homeowners.
- If private roads are brought into public system, some of them might be eligible for federal and state emergency funding under some circumstances. These funding

categories are opaque and difficult to understand, but the City owes it to residents to try to make them eligible.

- Roads with homeowner associations should also be given the opportunity to be considered for City acceptance, which they are not under the current Resolution.
- A survey of the private road conditions must be done to begin ascertaining accurate costs and do long-term planning.

### **Workshop Discussion**

After all formal presentations were concluded, the workshop was opened to comments and questions from all attendees, including those private road representatives who had made their presentations. A total of 21 comments/questions from the floor were made; those are amply documented in the meeting minutes [\[LINK\]](#). Also, 25 written communications were received by the City Clerk on or near the day of the workshop [\[LINK\]](#). Most written communications echoed what was said by participants who spoke at the workshop and supported them, namely that the City should take responsibility for the private roads and be treated equally with public roads. These comments were covered previously in this report and will not be repeated here.

The following were either new or substantively more elaborated points of significance that were made during the public discussion, beyond those made in the formal presentations. This also includes several dialogues between residents and staff on specific matters:

- PG&E frequently does work on private roads, and its vehicles do considerable damage. This is a public benefit to the entire City, and that means the City should take responsibility for those private roads.
- The same is true about public benefit when pedestrians routinely use private roads, so that these roads serve as connectors that enhance the City's walkability.
- Roads of Hacienda Homes failed to reimburse private road residents for a major drainage pipe failure.
- Whatever method is used for funding maintenance should take into account whether or not private roads are treated equally with public roads. If they are treated unequally, private road residents not receiving service should be given a discount on their taxes.
- Even roads that are "not on the map" should be given equal treatment.
- Storm drains are a more important issue than roads. There are prescriptive easements on private drains. This will require further legal research.
- People understood the requirements when they bought a home that on a private road. They knew when a homeowners association is responsible for road maintenance in some cases.
- The City should look into how "driveways" are defined and how they differ from roads.
- For success at the ballot box for future tax measures, it will be necessary to have support from residents in different categories. Residents on private roads constitute about 20% of residents, while the other 80% have already had their residential roads fixed.
- A dialogue ensued between a resident and City Attorney Wolff on drainage and private properties. The resident contended that the city acquires a prescriptive easement that

entails other responsibilities. Ms. Wolff said case law on this is complex and dependent upon specific circumstances.

- A dialogue also ensued regarding the Orindawoods HOA example, in which the City agreed by contract to maintain the pavement surface only, but did not bring the roads into the City system. This agreement excluded drainage facilities, sidewalks, and embankment. It also required the HOA to indemnify the City for any liability associated with street maintenance; also HOA insurance is primary coverage in the event of a loss. Ms. Wolff opined that this arrangement was legal. Mr. Theis also said the Orinda Woods agreement was proper; it is also subject to termination with five years notice.
- Mr. Theis said that the per mile cost to fix the public residential roads in the last five years was about \$830,000. He believes that the residents' group estimate is too low.
- Mr. Theis agrees with the estimate of \$35 million to fix and maintain public drains is reasonably accurate.
- Mr. Theis raised the possibility that some owners on private roads do not want their roads to be taken into the public realm. They should have an opt-out possibility.
- A dialogue ensued between Mr. Theis and several residents about the average condition of the private roads, whether or not it is generally better than the condition of the public roads were before the latest round of upgrades.
- All agreed that a survey of private roads' condition would be necessary to help resolve the cost issue. Mr. Theis pointed out that the survey could be either as detailed or as superficial as the Council wishes to conduct, but the cost of doing the survey would vary accordingly and could be substantial. The same is true of a survey of drainage system.
- Mr. Theis indicated that the City will need to hire additional staff (maintenance workers, inspector, administrators) to maintain a 33% increase in the public road system in the event the City takes on responsibility for all or some private roads. This cost was not included in any estimates presented by the private roads presenters.
- The drainage issue should be tied to the private roads issue.
- There may be polling to determine public sentiment about various options regarding long-term road maintenance, private road inclusion and drainage. The private road advocates offered to assist in fashioning the poll questions.

### **Observations Regarding Workshop Results**

The primary purpose of the workshop was to give residents, particularly those living on private roads, the opportunity to be heard fully and without customary City Council meeting time restrictions. The second purpose was to hear and flesh out ideas for how the City could move forward in addressing the residents' concerns. The workshop served these purposes. While this was not a typical City Council meeting where actions are taken or decisions made, it did illuminate the issues for the Council (all five Council members were present). Following are the key observations and conclusions I drew from the preparation for the workshop and from the workshop itself:

- There was general agreement—no matter how the private road issues are resolved—that more funding in the short- and long-term will be needed for both road and

drainage infrastructure. The local sales tax add-on expires in 2023; the two road bond measures are virtually all spent.

- The private road residents make the case for City acceptance of their roads primarily on a fairness or equal treatment argument. They contend that the characteristics of private roads are generally the same as those of the public roads, and that they are paying taxes for a service they do not receive. Their advocacy was almost entirely on behalf of the City taking over responsibility for their roads.
- At the workshop, the private roads advocates generally did not bring up the interim or partial measures, which had arisen in pre-workshop interviews. The notable exceptions were the drainage-related ones, which were discussed during the workshop. This, of course, does not mean the City cannot further pursue any or all of these measures.
- There was general agreement that a more complete survey would need to be done in order to more accurately assess the condition of the private roads, if a reliable cost estimate to fix them is to be made. The same would be true for surveying the storm drainage system. This will obviously entail expenditure by the City to obtain the information. The private road advocates recommend that the surveys be done.
- The City Attorney made clear that the possibility of City acceptance of any private roads would require considerable legal/factual/historical research, due to the multiplicity of individual road situations. The same would be true if the City pursues the possibility of making financial contributions without accepting the private roads into the City system. Similarly, prescriptive easements pertaining to drainage will require research.

### **Ideas and Options for Further Consideration by the City Council**

Given this context, there are a number of options and approaches that arose during the preparation for and conduct of this workshop that the City Council might choose to undertake. Several of them concern funding proposals, because one proposition that all parties seem to agree on is that the City is in need of additional funding. This is especially true in view of the expiration of the add-on sales tax in 2023 and the complete expenditure of the bonds.

These ideas are not recommendations, nor are they mutually exclusive. They are mostly items the City may want to consider that represent changes to the status quo. Those ideas are listed at the end of the Executive Summary above and are not repeated here.

### **What Has Been Accomplished and Next Steps**

The process leading up to the workshop and the results of the workshop itself have been informative and productive. The private road residents have been provided the opportunity to make their full case, in a systematic presentation, regarding the relationship between private roads and the Orinda public road system. The City staff was able to provide in-depth information to the residents. As a result of interaction between City staff and residents with a variety of viewpoints, the City Council has been exposed to a wide range of issues that have been raised, including notably the need to broaden the roads discussion to address related storm drainage issues as well.

The Council will next deliberate and may choose to direct staff to do more research on the issues and on potential actions outlined in this report. This research could be legal, financial, historical or policy-related. It may entail additional physical surveys of existing conditions.

Given the widespread recognition that Orinda infrastructure will require more funding than is presently available, the Council is expected to have further deliberations about how to frame future funding measures and what to include in them. The citizens of Orinda are likely to be asked to provide the City with more resources to address its infrastructure needs. The results of this workshop will greatly help guide those discussions.

## Linda Lopez

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**From:** Gina Nellesen <gina.nellesen@gmail.com>  
**Sent:** Thursday, October 8, 2020 4:58 PM  
**To:** Linda Lopez  
**Subject:** Public comment  
**Attachments:** Town Resolution for a Policy of Assistance - Drainage Improvement Projects.pdf; Town Resolution for a Policy of Assistance - Pavement Improvement Projects.pdf

My name is Gina Nellesen of 33 Woodhaven and I'm advocating that the Town consider adopting a resolution similar to the ones that San Anselmo passed in 1992 and 1996. Resolution Numbers 3268 and 3363 both put forth a policy for Town financial and technical assistance toward cooperative efforts in pavement and drainage improvement projects. San Anselmo, with over 60 non-publicly maintained roads, acknowledges a community interest in encouraging property owners to participate in paving projects so that they can improve the condition of all roadways. San Anselmo sees the roads in their community as interconnected and they have completed several paving projects under this assistance program, including:

- Redwood Road
- Sequoia Drive
- Fernwood Drive, and
- Alameda between Berkeley and Indian Rock.

To limit their liability, San Anselmo requires hold harmless clauses and a signed agreement that perpetual maintenance responsibilities remain with the individual property owners.

In addition to providing up to 25% financial assistance toward paving and 50% financial assistance toward drainage, the Town will also consider:

- 1) Acting as the project engineer/manager.
- 2) Waiving permit fees for the improvements.
- 3) Providing technical assistance such as design review.
- 4) Providing a holding account for funds contributed by property owners.
- 5) Coordinating with local utilities for any work that needs to be done prior to the start of paving.
- 6) Endorsing requests for funding from other sources.

### Other actions that the Town of Ross might consider include:

- Reminding and encouraging all Ross residents living on private roads that signing and participating in a Road Maintenance Agreement is in their best interest and serves their obligations under Cal. Civil Code Section 845.
- Providing a summary of how much private road owners are contributing to Road Impact Fees and the General Fund.
- Exempting private road residents from a portion of the vehicle impact fees.
- Helping private road residents obtain better insurance rates and coverage through the Town's buying power.
- Helping to make private road residents eligible for federal or state emergency funds.
- Defraying costs associated with forming an assessment district.

### Safety and Limiting Liability

If the Town of Ross finds that it cannot assist residents of private roads as San Anselmo has done, then it should help to limit individual homeowners' liabilities along private roads by not condoning or advocating for public access. The Staff Report refers loosely to some privately-maintained roads as being "publicly accessible," but most private roads don't lead to authorized public destinations. They are cul-de-sacs, dead ends or may have unimproved paths that lead to other private property. If the residents living along those roads need to evacuate quickly, it's dangerous to encourage public drivers to use the private roads to detour, park obstructively, or cut-through because the roads are already narrow and steep.

When Staff suggests that there may be public access over private roads it does not serve the public good. It exposes individual homeowners to liabilities that the public road residents are protected from. These are the same liabilities that the Town seeks to avoid, which are outlined in detail at p. 3 of the Staff Report. Private road residents must also limit their liability and thus ask the Town Council and Staff to discourage public use, as the City of Sausalito has done very clearly with Wolfback Ridge, should they choose to leave maintenance responsibilities to the homeowners along the private roads. Specific easements for fire, water and sewage do not create general rights-of-way, especially when the roads are not 40-foot wide.