



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Katy Allen
Jennifer A. Maguire

SUBJECT: SEE BELOW

DATE: 06-02-08

Approved

Date

6/5/08

COUNCIL DISTRICT: 8

SNI: King/Ocala

SUBJECT: FINDING AND DETERMINING THE PUBLIC INTEREST AND NECESSITY FOR CONDEMNING TWO EASEMENTS OVER REAL PROPERTY OWNED BY PACIFIC GAS AND ELECTRIC COMPANY, A CALIFORNIA CORPORATION ("PG&E" or "OWNER") FOR PURPOSES OF THE LOWER SILVER CREEK TRAIL PROJECT AND AUTHORIZING THE ACQUISITION OF THESE INTERESTS BY EMINENT DOMAIN AND ADOPTION OF APPROPRIATION ORDINANCE AMENDMENTS IN THE CONSTRUCTION TAX AND PROPERTY CONVEYANCE TAX FUND: PARKS PURPOSES COUNCIL DISTRICT 5 FOR THE TRAIL: LOWER SILVER CREEK/SILVERSTONE PLACE PROJECT.

RECOMMENDATION

- (a) Adoption of a resolution determining that the public interest and necessity requires acquisition of two blanket easements over parcels located at Silverstone Place, San José, CA (Assessors Parcel Numbers 486-39-029 and 486-30-100) from PG&E.
- (b) Adoption of a resolution authorizing and directing the City Attorney to file suit in eminent domain to acquire such property interest, to apply for an order for possession before judgment, and to prosecute the action to final judgment and authorizing the deposit of money in court for possession of the property from the funds lawfully available.
- (c) Adoption of the following Appropriation Ordinance amendments in the Construction Tax and Property Conveyance Tax Fund: Parks Purposes Council District 5 (Fund 382):
 - 1. Increase the appropriation to the Parks, Recreation and Neighborhood Services Department in the amount of \$100,000 for the Trail: Lower Silver Creek/Silverstone Place project; and
 - 2. Decrease the Ending Fund Balance by \$100,000.

OUTCOME

Staff is requesting that the City utilize its power of eminent domain under Sections 1240.010, 1240.110, and 1240.120 of the California Code of Civil Procedure, all of which authorize the City to acquire the subject property interests from PG&E.

If a Resolution of Necessity is adopted, the City Attorney will then file the necessary papers with the court to commence an eminent domain action. Upon the filing of an eminent domain action, a deposit of probable compensation may be made. A request for an Order for Prejudgment Possession may also be made which would allow the City to take possession of the property interests before the issue of just compensation is determined.

Approval of the recommended resolution will facilitate land acquisition and property rights necessary to complete the Lower Silver Creek Trail. Also included in this memorandum is a recommendation to appropriate funding totaling \$100,000 in the Council District 5 Construction and Conveyance Tax Fund for costs associated with the acquisition of this land.

EXECUTIVE SUMMARY

The purpose of this memorandum is to recommend adoption of a resolution determining that the public interest and necessity requires the acquisition of two blanket easements on land owned by PG&E. The parcels are currently improved with two transmission line towers as well as natural gas transmission lines below ground. The purpose of acquiring these easements is for building a portion of the Lower Silver Creek Trail. Negotiations have not been successful and filing of an eminent domain action is recommended at this time.

BACKGROUND

The City Council approved the Lower Silver Creek Trail Master Plan on December 4, 2007 (item 2.3). The plan defined a paved trail system. The alignment follows Lower Silver Creek, from Coyote Creek to Dobern Avenue Bridge. The remaining alignment generally follows the public utilities easement from Dobern Avenue Bridge to Lake Cunningham Park. The Silverstone Place development is within the latter reach of the trail.

The master plan defined the Silverstone Place reach from Foxdale Drive to Ocala Avenue. Pedestrian access is available from adjacent streets and sidewalks.

The project is part of the King Ocala Neighborhood Area (K.O.N.A.) Strong Neighborhoods Initiative (SNI). The community seeks to improve the community's streetscape by adding landscaping enhancements, under grounding utilities, and street plantings to improve the appearance of the neighborhood.

ANALYSIS

The proposed surface easements include the construction and maintenance of landscaping and recreational trail improvements including a 12' wide paved trail, irrigation, landscaping, and trees. Tree species will be selected to not grow over 15-feet in height at maturity, in order to comply with PG&E guidelines and prevent potential conflicts with overhead electrical lines. The Trail is expected to provide a park/recreational environment that will improve the overall appearance of the neighborhood.

The two easements to be acquired on the PG&E property are commonly known as APN 486-39-029 and 486-30-100. The first easement measures approximately 1.85 acres and at Foxglen Drive its width is about 42 feet and widens to about 86-feet at Sunny Glen Drive. The second easement measures approximately 1.08 acres and at Sunny Glen Drive its width is 84 feet wide and grows to 184 feet along Ocala Avenue. Sunny Glen Drive, a residential street serving the homes directly to the west, separates the two assessor's parcels.

The subject easement areas are more fully described in Exhibit A (Project Location), Exhibit B (Plat Maps), and Exhibit C (proposed site plan).

Acquisition of Property Rights

An appraisal completed on March 22, 2008, by Smith and Associates, Inc., valued the acquisition of the two easements owned by PG&E at \$100,000. City staff prepared an offer of just compensation in the amount of \$100,000 which was mailed by certified, return-receipt requested mail together with a copy of the appraisal reports containing a legal description and plat map, preliminary title reports and an informational brochure to Mr. Alfred Poon, Land Agent, Technical & Land Services, the property Owner's representative, in accordance with Government Code Section § 7267.2 on April 18, 2008.

On May 1, 2008 a Second Offer to Purchase letter with the same terms, conditions and attachments was sent by certified, return receipt requested mail to the property Owner's representative. As of May 13, 2008 no response to the offer has been submitted by Owner and therefore negotiations have reached an impasse.

City staff has determined that acquisition of the property rights for the two easements on the PG&E property (APN 486-39-029 and 486-30-100) are necessary and in the best interest of the public in order to construct the Silverstone Place Reach 7 of the Lower Silver Creek Trail. Therefore, the only means available to acquire the necessary property rights is through the eminent domain process.

Resolution of Necessity

On June 6, 2008, a notice was sent to Pacific Gas and Electric Company, a California corporation, the owner of record, notifying it that a hearing is scheduled on June 10, 2008, before

the City Council to consider the adoption of a Resolution of Necessity determining the following issues:

- 1. Whether the public interest and necessity require the proposed project**
The City Council approved the Lower Silver Creek Master Plan on December 4, 2007. The master plan defined a phased approach to trail development. The under-utilized parcels used for public utilities provide an opportunity for recreational trail development that does not impact access for maintenance. Development of a landscaped trail within these properties is consistent with recent trail development nearby. The Dobern Avenue Bridge and Wenlock Drive trail projects are located along the same utility alignment and provide paved trails and landscaped open space.
- 2. Whether the proposed project is planned and located in a manner that would be most compatible with the greatest public good and the least private injury.**
PG&E's parcels are currently unimproved apart from overhead electrical wires and a transmission tower traversing each parcel. The proposed trail is designed not to interfere with PG&E's use of the property. The easement interest to be taken will permit PG&E to continue access to the property for, operation, repair, replacement, maintenance or relocation of its improvements if such does not unreasonably impair the use of the City's public-use trail. PG&E will be able to continue using the surface of the subject site for accessing the existing utility infrastructure. In addition, the construction, operation and maintenance of the trail by the City will relieve PG&E of certain maintenance responsibility for the property.
- 3. Whether the property sought to be acquired is necessary for the project.**
The location of PG&E's property is within an overhead-high-tension electrical line "corridor" and, as such, constitutes the only unimproved property in the neighborhood. This makes it the only feasible location for the trail as defined by the Lower Silver Creek Trail Master Plan.
- 4. Whether the offer required by Section 7267.2 of the Government Code has been made to the owners of record.**
The Preliminary Title Report dated February 14, 2008, indicates that the owner of record of APN 486-39-029 and 486-30-100 is "Pacific Gas and Electric Company." In compliance with Government Code Section 7267.2, an offer to purchase letter was sent to Pacific Gas and Electric Company, a California corporation, on April 18, 2008, together with a copy of a Smith and Associates, Inc., March 22, 2008, appraisal reports which contained a legal description, plat map and informational brochure. The offer of \$100,000 was for the full-appraised amount, based upon the appraisal report, for the two easement areas located on the PG&E property. On May 1, 2008 a Second Offer to Purchase letter with the same terms, conditions and attachments was sent by certified, return receipt requested mail to the property owner's representative. As of May 13, 2008, no response to the offers has been submitted by the owner of record or their representative.

Based on the course of discussions between City staff and PG&E, staff does not believe that a purchase agreement can be concluded. Accordingly, a notice of the June 24, 2008 hearing was sent to PG&E on June 6, 2008.

For all the reasons set forth above, the proposed public trail use is compatible with PG&E's existing use because it will not interfere with the operation, maintenance, repair, replacement, relocated, upgrade, or improvement of the utility installations on the site . The project has been designed with PG&E's continued use in mind and the only impact on PG&E will be potential expenses that PG&E may incur to repair any damage it may do to the trail improvements the City will construct.

PG&E retains the right as property owner to utilize the parcel for purposes of maintenance, operation and repair even if these activities interrupt the public's use of the future City trail improvements for any period up to four (4) months in any given 12 month period .

Included in this memorandum is a recommendation to appropriate funding totaling \$100,000 in the Council District 5 Construction and Conveyance Tax Fund for costs associated with the acquisition of PG&E's property. These costs were not included in the original cost estimate for the project since the land appraisal had not yet been completed.

EVALUATION AND FOLLOW-UP

Staff will seek City Council approval at a later date for the appropriation of funds for the design and construction of the trail as defined by the Lower Silver Creek Trail master Plan.

POLICY ALTERNATIVES

Alternative # 1: Abandon the plans for the construction of the trail improvements.

Pros: This approach does not require any further City Council action or the expenditure of any additional City resources.

Cons: This does not permit development of the trail as defined by the City Council approved master plan.

Reason for not recommending: Inconsistent with the City Council's past actions associated with the trail project.

Alternative # 2: Select an alternative site in the immediate area.

Pros: This approach would not require the securing of easements from PG&E.

Cons: Preparation of the master plan included an Opportunities and Constraints Analysis of all access opportunities and it was documented that the utility corridor provides the only open space trail alignment in the vicinity.

Reason for not recommending: There are no alternative alignments in the immediate area.

Alternative # 3: Continue to negotiate with the property owner in an effort to reach an agreement.

Pros: Potential for acquiring the subject property without eminent domain.

Cons: There have been numerous attempts to reach an agreement with the property owner without a single response back from the owner. Therefore, the likelihood of the property owner changing direction over time is highly remote and the costs associated with development and construction will continue to escalate possibly to the point where the project is no longer financially feasible.

Reason for not recommending: The adverse impacts to the project resulting from further delay would be significantly greater than those incurred by the owner of the property interests being acquired with this alternative. Therefore, staff does not recommend this alternative.

PUBLIC OUTREACH/INTEREST

- Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

This action does not meet any of the above listed criteria; however this memorandum will be posted on the City's website for the June 24, 2008 Council Agenda.

Public outreach consisted of community meetings and additional community outreach by posting conceptual project information on the Trail Program Web page. A survey was also created and site visitors were asked to review each document and provide further input. People attending the first community meeting were notified of the Web site survey, as were others who expressed an interest in the project. The surveys returned indicated continued support for the project in general and supportive comments for the landscaping plan along the Silverstone Place segment of the trail.

In accordance with the Code of Civil Procedure §1253.025, the property owner has been sent a letter on May 14, 2008, stating that the property owner may hire an appraiser and be reimbursed for the reasonable costs of that appraisal, not to exceed \$5,000.

COORDINATION

Preparation of this memorandum has been coordinated with the Planning, Building and Code Enforcement Department, the City Attorney’s Office, the Department of Parks, Recreation and Neighborhood Services, and the Council District 8 Council Office.

FISCAL/POLICY ALIGNMENT

This project is consistent with the Council-approved Greenprint that defined a 100-mile trail network to increase access to recreation and open space. The City Council-approved Lower Silver Creek Trail Master Plan defined a future trail alignment along the Lower Silver Creek. The future project would link to the Coyote Creek Trail system and the Thompson Creek Trail system. This project is also consistent with the Council-approved Budget Strategy to continue with capital improvement projects that keep money flowing to our local economy.

COST SUMMARY/IMPLICATIONS

1. AMOUNT RECOMMENDED FOR THE ACQUISITION:
Amount of City’s offer to be deposited with filing of condemnation in court: \$100,000
(Note: Total cost may vary depending on outcome of court proceedings)
2. SOURCE OF FUNDING: Fund 382 – Construction Tax and Property Conveyance
Tax Fund: Parks Purposes Council District 5
3. OPERATING COST: Upon construction, maintenance of the Lower Silver Creek Park Trail is estimated at \$34,000 annually. This funding was included in the 2009-2013 General Fund Forecast, released February 29, 2008.

BUDGET REFERENCE

The table below identifies the fund and appropriation proposed to fund the contract recommended as part of this memorandum and remaining project costs, including project delivery, construction, and contingency costs.

Fund #	Appn #	Appn. Name	RC #	Total Appn	Amt. for Acquisition	Adopted Budget (Page)	Last Budget Action (Date, Ord. No.)
Current Funding Available							
382	6135	Trail: Lower Silver Creek/Silverstone Place	150181	\$188,000		V-419	
Funding in Future Years of CIP							
382	6135	Trail: Lower Silver Creek/Silverstone Place	150181	\$1,544,000		V-419	
Additional Funding Recommended*							
382	8999	Ending Fund Balance	150181	\$100,000	\$100,000	V-413	3/11/08, Ord. No. 28267
Total Funding for Projects				\$1,832,000	\$100,000		

HONORABLE MAYOR AND CITY COUNCIL

06-02-08

Subject: Public Use and Necessity for PG&E Easements for Lower Silver Creek Reach 7 Project

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*Included in this memorandum is a request to appropriate \$100,000 from the Council District 5 Construction and Conveyance Tax Fund Ending Fund Balance (appropriation totals \$4,223,816) to provide sufficient funding for costs associated with the acquisition of land for this project.

CEQA

CEQA: Mitigated Negative Declaration, PP07-106

Katy Allen

KATY ALLEN

Director, Public Works Department

Margaret McCahan

JENNIFER A. MAGUIRE

Acting Budget Director

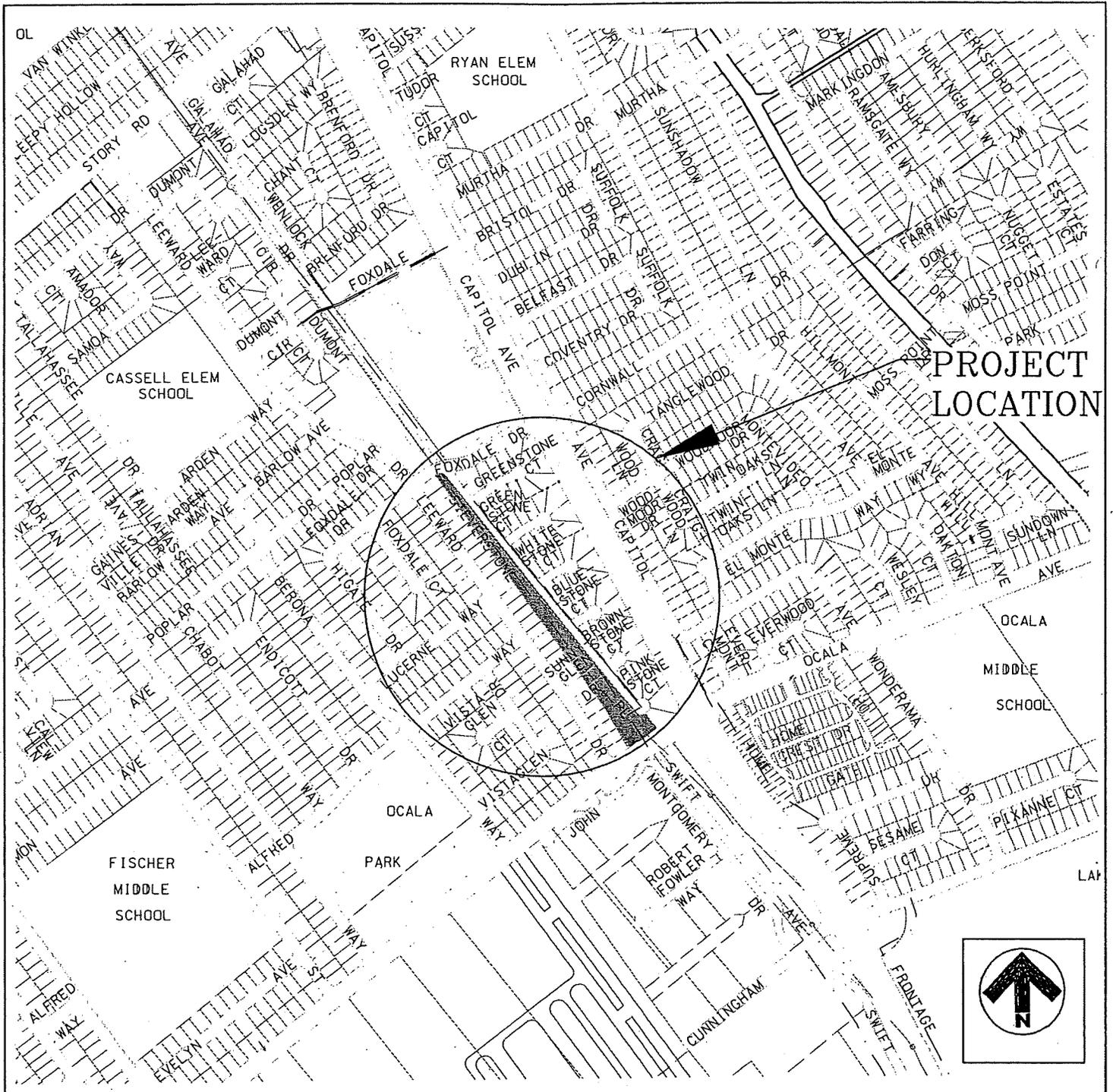
For questions please contact DAVID SYKES, ASSISTANT DIRECTOR, PUBLIC WORKS DEPARTMENT, at (408) 535 -8300.

NS:mk

Attachment

EXHIBIT A

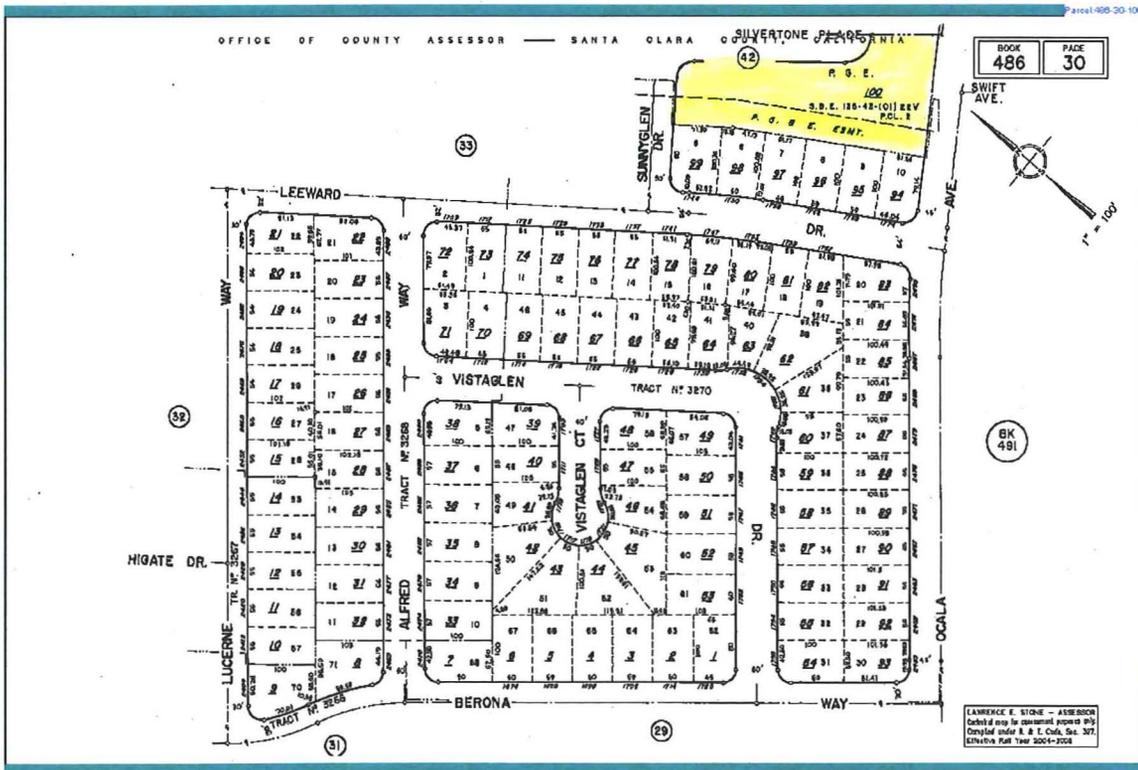
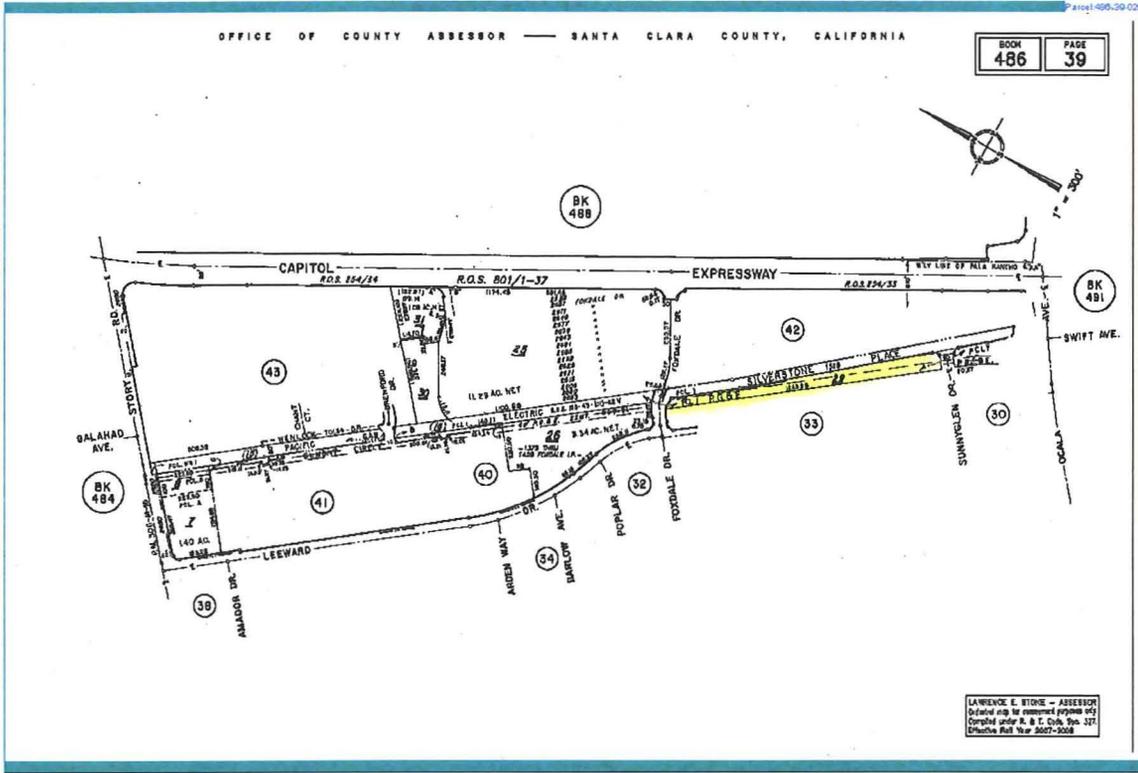
SITE MAP



LOWER SILVER CREEK TRAIL REACH #7
AT SILVERSTONE PLACE
LOCATION MAP

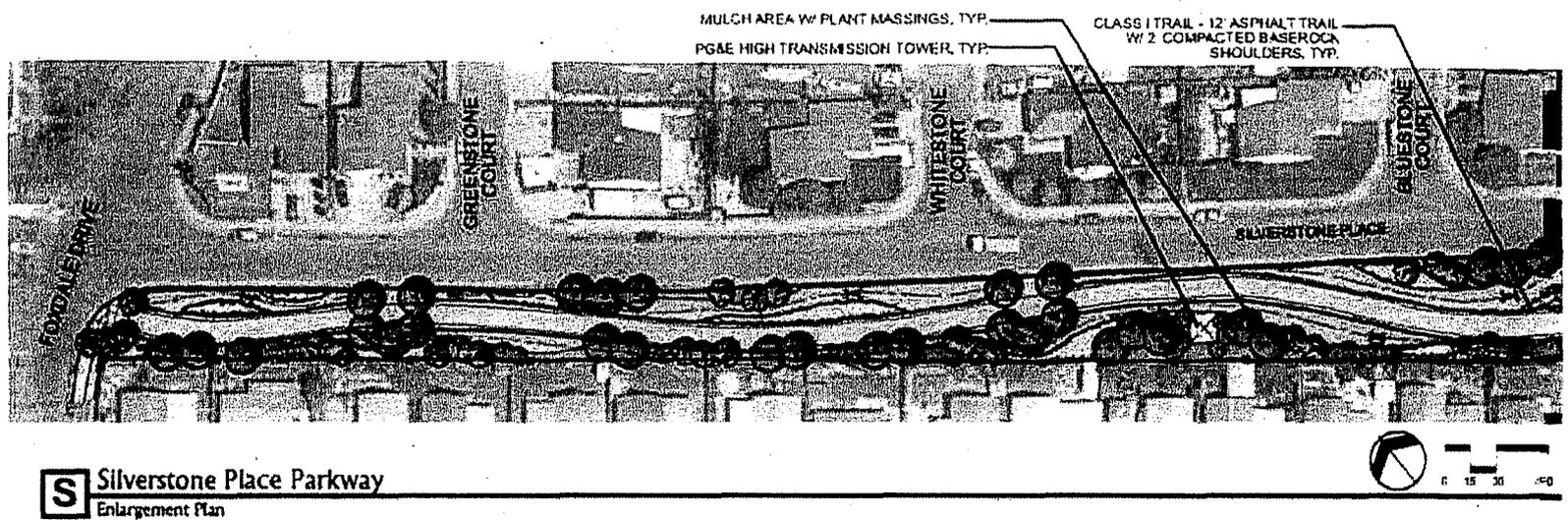
NO SCALE

EXHIBIT B PARCEL MAPS



TRAIL ALIGNMENT

Figure 31: Plan S



TRAIL ALIGNMENT

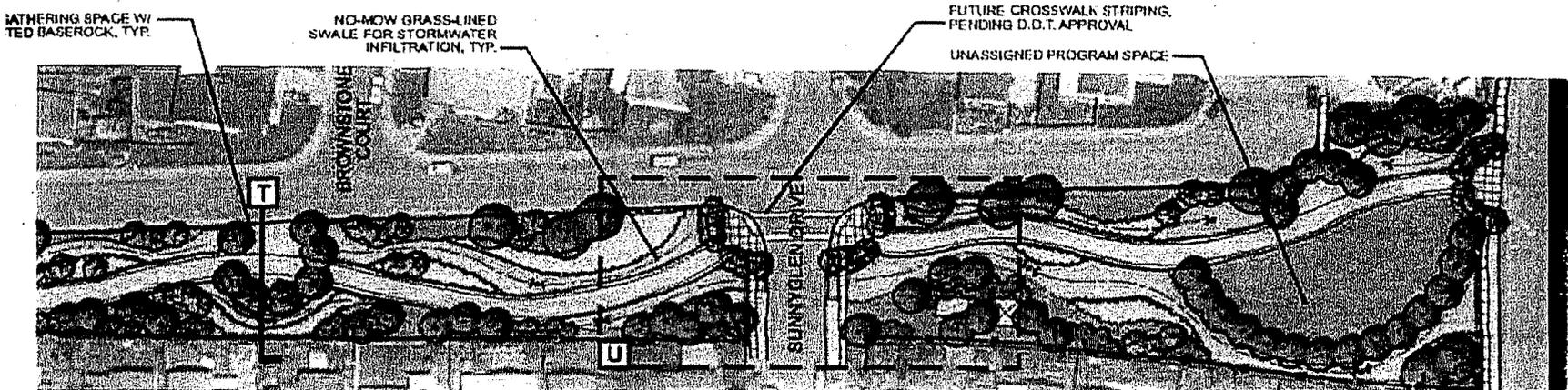


Figure 33: Plan U