

**August 27, 2019
CITY OF ORINDA
CITY COUNCIL MINUTES**

6:30 PM. – SPECIAL SESSION – COMMUNITY CENTER – MAIN AUDITORIUM

A. WORKSHOP ON PRIVATE ROADS

A.1. Workshop Outline/Agenda

Jim Bourgart, Facilitator, spoke about the protocols for questions, answers, and presentations for the workshop and stated no action or deliberation by Councilmembers will occur.

He said Assistant City Manager/Public Works Director Larry Theis will first give a presentation about the data with respect to roads, followed by City Attorney Osa Wolff who will provide a brief presentation regarding legal issues, and then a presentation from citizens representing those who are living on private roads will be given. Following this, Finance Director Paul Rankin will discuss current and future road funding in Orinda.

Afterwards, he will summarize issues and themes heard. He will then present the list of ideas that came up throughout the process and hear feedback from staff and the public. Thereafter, public comments will be taken and he briefly addressed protocols for speaking, creature comforts and meeting logistics.

A.2. Workshop on Private Roads

Recommendation:

This Workshop is being held to discuss issues related to the background, ownership, maintenance, and funding for maintenance of private roads in the City of Orinda. This Workshop will be led by a non-City employed facilitator. City Councilmembers and other City Commission/Committee members may be present and participate in the discussion just as members of the public may. No Council action will be taken at this meeting. Facilitator will prepare a summary of Workshop for Council Discussion and Direction at October 1, 2019 City Council Meeting.

Assistant City Manager/Public Works Director Larry Theis gave a brief presentation covering the following topics:

- Public Roadway Network identifying road class, centerline miles, area by square feet, percent of system, average PCI and estimated PCI after 2019 project.
- Private Roadway Network, noting that ± 30 miles of "named: residential private roads in Orinda BUT they are not all the same, and he described their types.
- Public Road Acceptance Policy: Originally approved by Resolution 56-90 and recently updated by Resolution 59-18.

City Attorney Osa Wolff then continued the presentation and provided a legal perspective, as follows:

- Review of legal issues as detailed in the April 10, 2018 staff report:
 - Road categories/subdivision law
 - Public road offer and acceptance
 - Potential City liability
 - Gift of public funds doctrine
 - Private road maintenance agreements/disputes (Civil Code Section 845)
 - Future legal research/analysis

A.3. Citizens for Fair Road Funding - Talking Points

Charles Porges stated he is part of a group petitioning the City for equal treatment with regards to road maintenance for all residents. He said 6 residents will present their thoughts on various aspects in the hopes the workshop will create a dialogue to come up with solutions.

He likened the City's residential roads as old, narrow and winding, some publicly maintained and others not. In 2012, taxes and bond measures were passed for repairs of public residential roads that all voters pay for which he believes is unfair. They wish to explore what the City could legally do, determine cost and explore possible funding mechanisms. Road maintenance is a basic public service that will be provided for all of Orinda's roads equally and this should replace the current policy of Resolution 59-18.

All residential streets mapped and unmapped should be treated equally as they all provide the public benefit of access to homes. The impact of catastrophic road failure must be mitigated and then it should be determined what it will cost to repair and maintain all of Orinda's roads, including its stormwater drainage system. Lastly, the means to finance all costs needs to be explored and this requires creative solutions and may require another workshop.

Bob Diorro, introduced his wife Joanie, and is part of the Orinda Downs Owners Association with 1.3 to 1.5 miles of private road currently maintained by their HOA. He spoke of the differences between private and public residential streets that are privately or publicly maintained and said there are no differences other than who owns the streets. They all provide access to residents, emergency vehicles, garbage trucks, service vehicles for utilities, etc.

The City admitted there is no rationale as to why there are public residential roads and private residential roads and the process is arbitrary and lacks any uniform criteria. Much of this was done prior to the City's incorporation and continues today, as witnessed by Wilder Ranch. All residents on both types of streets pay the same amount of taxes proportionally but are not treated equally. The City has now spent a lot of money to bring public roads to a reasonable standard and private roads have not benefitted, while paying their fair share of the taxes.

Regarding public benefits, he explained that as long as everybody has access to residential roads there is no difference between public and private roads. He then provided statistics of private and public roads, cul-de-sacs or loops, City funding that brings public roads up to standards, and asked that all residents be treated fairly moving forward.

Steve Cohn said he has been involved with the topic since the infrastructure report was released in 2006. The big issue and question is money in including all private streets into the public street system. He spoke about deferred maintenance and currently funded maintenance by HOAs, noting that 5 of the 20 miles would need to be brought up to City PCI standards. Long-term maintenance costs for private roads, HOAs and individual streets is about \$20,000 per mile. The majority of damage comes from garbage trucks and they believe \$20,000 per mile would cover these streets.

Regarding liability for catastrophic failure and/or lawsuits, this comes mostly from poor maintenance from sewer drainage systems, and the City can gauge the amount of cost which is large, depending on lack of maintenance over time.

He then presented a chart of costs to repair public and private roads, a bond for storm drains of \$35 million, which would be \$8 million a year now and escalating over time. Of that \$8 million, the 20% of the roads residents live on would cost about 10%. The public roads the City spent \$50 million in repairing and \$2 million a year to maintain is 50% of the total. He said it would take \$500,000 to \$600,000 a year for maintenance, \$200,000 to amortize a \$5 million bond for repairs which totals \$700,000 which is \$100 per household per year, or 30 cents a day which Orinda residents could afford. He asked to include private road owners into the community.

Joel Libove said he bought a vacant lot in 1989 and spoke with the City about what makes his property a private road. He was told that the reason is because its width is less than 16 feet and unless it can be expanded it will remain a private road. They built a house and in recent years they have paid taxes which have been used to maintain public roads. He is the President of his road association. All those living on the road pay \$360/year and have built up \$30,000 in reserves and take care of their road.

There are smaller roads around theirs and said private road homeowners cannot meet certain conditions but he thinks a request for acceptance could be signed by the legally required percentage of record owners of the road and he recognized the process is complex, but they could start with a new resolution for the matter. He noted that every part of Section E in the current resolution cannot be met by any of the public roads so he questioned why private road owners are being asked to meet this.

Lastly, he suggested starting the process by saying any road currently categorized as privately maintained but accessible to the public shall, upon legally valid request by its current residents or established HOA hereinafter receive publicly provided maintenance, repairs, disaster mitigation and all other public services that are provided for publicly funded residential roads, given they are paying the same taxes.

Melissa Roeder said she lives on a private road and believes there is a method and process to arrive at a solution. She suggested creating a policy that treats all streets equally because it is the right thing to do. She believes the Council can accomplish this gradually or immediately, with the roads most in need to be addressed first. Deferred maintenance will need more discussion as some roads are in better shape than others. She believes incorporating private roads is completely affordable over time where everybody can absorb the increment. She thinks very few people understand how municipal finance works and spoke about potential state and federal grant funds. She was in favor of a survey being done to have some basis and data for determining costs based on the number of miles of road, which she thinks will be manageable and believes this is an important safety issue.

Kathy Finch said she is a resident of Wilder and spoke of its wonderful streets but their streets are private because of their development agreement and open to the public as well. They pay high HOA dues which go towards a reserve for repairs and maintenance, yet they do not meet the standards to become public streets. In 2018, staff recommended that any streets that belong to HOAs be immediately removed from consideration. She spoke of public use of private streets, thinks using public funds for these streets provides for the public good, also spoke of some Southern California cities that believe roads are a community system shared by all and talked about what they offer. She urged the City to hold more workshops to discuss the matter.

Mr. Bourgart thanked the group of speakers for their presentation, and stated Mr. Theis will speak about funding and Mr. Rankin will discuss other financing opportunities

Mr. Theis then provided slides and comments about funding sources:

1. A general tax of approximately \$1 million a year which is an added sales tax which has been specifically allocated for roads.
2. Two bond measures totaling \$45 million has been used and the City has spent \$830,000 on residential roads. These are capital costs to get roads rehabilitated to their optimum condition.
3. The City also receives about \$900,000 in total gas tax funds through SB 1 and \$100,000 was given to the City because it is a self-help City. As a result, the City has gained more benefits in the future from these funding sources.
4. The County passed Measure C and Measure J which provides \$450,000 a year which is CCTA Return to Source funding.
5. Road Maintenance Fee was recently adopted by the Council and is an impact fee from garbage trucks on all roads. It is based on trip travels on all roads which are currently approximately \$650,000.

Mr. Theis stated total funding in revenue is \$3.2 million. What is dedicated to the construction portion of the road is about \$2.8 million because gas tax is road related but is used for other things such as for local matches for bridge projects, sidewalk, ADA curb ramps, traffic calming, staffing costs and traffic signal maintenance.

He then presented a slide from the last Council meeting as presented by the Chair of the COIC about the future approach. Staff found from recent data that it costs about \$830,000/mile and staff also has calculated going forward that it will cost about \$35,000/year/mile for road maintenance and this is what the City is planning on spending on public residential roads.

He then pointed to a chart of deferred maintenance which indicates that costs skyrocket quickly after 2022 if the City does not apply additional funds other than just \$1.6 million per year, which he described.

Finance Director Paul Rankin stated there will be requirements for additional revenue even for the current roads and he reviewed potential future funding items, challenges and the process involved as background and context for local government finance and some of the challenges the City faces.

He described differences between special and general taxes, timing of elections and differences in their cost and the County Transportation Authority's consideration to place a half-cent sales tax measure on the March 2020 ballot that would extend to 2055 and the City could receive up to \$900,000 for the next 14 years.

He then discussed previous funding measures which would end in March 2023 and an extension would need to be considered in November 2020 or 2022 in order to avoid a lapse. The City gets a share for general sales tax which is 1% and the local ad-on tax of one-half cent generates more than the statewide 1% because of the cost to purchase and register vehicles.

General obligation bonds are a way to finance capital project expenditures and this can be done at a lower interest rate. Proceeds need to be expended within 3 years and careful consideration should go into the planning and structuring of an issuance due to costs.

Regarding other potential funding options, a parcel tax would typically be for a special purpose and must be linked to those properties paying the fee or parcel tax. There are taxes some communities have such as a utility user tax which is an additional fee on whatever utilities the agencies select to charge. If looked to as a funding source for road maintenance, it is not very directly linked to the use of roads or need for road maintenance. Also, those taxes with the change to solar have also seen their revenue streams change.

Another area discussed is documentary transfer tax paid upon the sale of real property, and he lastly described the bill to change the 2/3 majority vote change to 55% for bonds and taxes, which failed.

Mr. Bourgart summarized main issues and important themes and the suggested avenues for exploration heard during the discussion:

Concerns include:

1. Routine road maintenance issues
2. Possibility of severe or catastrophic road failure
3. Drainage system or culvert maintenance or upgrade which may be related to road conditions or failure.
4. Limitations on the use of public funds at the state and federal levels as stated by the City Attorney.
5. CCTA's potential placement of a measure on the ballot.
6. The gift of public funds and various interpretations of what constitutes a public benefit.
7. Perceived pros and cons regarding the City taking over some or all responsibility for private roads from the perspective of each entity or group.
 - o From the City's perspective, taking on private roads entails a financial commitment including general liability and the City's limited opportunity to raise funds.
 - o It also presents an opportunity to serve a segment of the community that is dissatisfied with the status quo.
8. From the private road homeowners, it represents a relief from financial burden or risk plus a perception there is a fairness issue. On the other hand, City adoption does mean those residents lose control over the roads including when, which, how and who maintains those roads.
9. From the perspective of residents of public roads, it means that limited resources of the City would be spread around to a larger inventory of roads, thereby lessening funds available for the current public roads. On the other hand, it would mean they would experience uniformly maintained roads wherever they travel in Orinda.

Ideas for possible exploration:

- A. Modify City policy for road acceptance; not a realistic option.
- B. City acceptance of a sub-set of roads such as thru roads or roads offered to the City or County but not accepted in the past or roads privately owned but commonly used to access a public facility.
- C. Seek state legislation which makes it easier to form a private road maintenance association. Concerns expressed include one or more homeowners could thwart the majority to agree to assess themselves. New legislation could address the free-rider problem.
- D. Traditional assessment districts.
- E. Include drainage facilities including those on or affecting private roads in the next road or sales tax and/or bond measure.
- F. Propose a tax measure that deals solely with drainage issues.
- G. A geologic hazard assessment district expansion (GHAD).
- H. An insurance policy; whether the City could get a better rate for insurance coverage paid by private individuals or HOAs.
- I. Help with making private road residents eligible for federal or state emergency funds.
- J. Real estate transfer taxes.

Mr. Bourgart then opened the Public Forum.

Leslie Wagstaff spoke of a perspective not mentioned for Mira Loma and other areas, stating PG&E has a high voltage line adjacent to her road and crews frequently access the lines with their trucks which cause impact, as well as pedestrian use between Lake Cascade and the Senior Center. The developer included pedestrian paths that lead downhill from Mira Loma which are publicly accessible and asked to recognize these streets as connectors which would increase the City's walkability factor.

Mr. Bourgart asked the City Attorney what effect if any pedestrian access might have on the public benefit definition or determination.

Ms. Wolff stated ultimately this will be for the City Council to evaluate on a street by street basis under the public benefit analysis.

Chandler Bisher asked and confirmed residents would not receive any funds from garbage truck damages. Civil Code 845 calls for a proportional payment and he asked for the definition of this.

Ms. Wolff asked for time to review the Civil Code section so she could answer.

Mr. Theis commented that there is a nexus study relative to the amount of garbage truck impacts and the study only considers the public road impact. If a private road was added to the public system it would be calculated into another nexus for additional mileage of road system.

Kathy Finch commented that garbage rates increased 30% even though people live on a private road and this is money they cannot take advantage of.

Jonathan Superan referred to the Civil Code 845, stating he lives on a Road of Hacienda Homes and had a drainage pipe which took out about 15 feet of soil on the side of the road. It took two years of meeting with Roads of Hacienda Homes and attending their board meetings at which point they referred to Civil Code 845 which states, "All people that have access to an easement must proportionally share the maintenance of that easement." He has paid fees to them for 24 years and they surveyed it, videoed it, spent about \$8000 and stated it would cost \$180,000 to fix and they asked residents to pay the rest. In dealing with this issue, a reputable firm came out and said they would need to get the Department of Fish and Game, Army Corps of Engineers, etc. involved. He thinks it is impossible for the City to think individual homeowners to deal with this.

Chuck Brotman said he has watched PG&E and garbage trucks destroy the road and voiced frustration. He asked that the City work with these utilities and thinks road maintenance is a basic service the City should provide.

Craig Jorgens said whatever method is used for funding maintenance should provide some sort of discount to those living on a private road so they pay a little less than the overall cost.

America Bates said she represents Hilldale Road residents, which is not “on the map” and PG&E lines and huge poles were placed right behind the Hilldale Road houses. They argued about this and residents spent \$100,000 of their own money to fix the road and now the roads are broken again from PG&E and garbage trucks and she asked the City to fix all roads.

Susan Sufran cited three pages of regulations the City Council passed starting on page 16 which states “revised policy for acceptance of certain existing private streets into the City’s public roadway network.” It provides information about what private streets must do to comply in order to be considered by the City Council.

Richard Nelson said he lives on a residential public road and thanked the City for fixing the public roads. He also supported Mr. Jorgens’ comments, noting there are various solutions in converting private roads to public roads and supported providing discounts and he provided a copy of this to staff.

Nick Waranoff said he lives on an unnamed, privately maintained street which he and his neighbors paid to repave years ago. He thinks the City’s drains are a much more important issue and asked that the City focus on these. He also spoke of his request for a legal opinion from the City Attorney regarding easements and drains, the City’s estimate for what will be done and the cost for public drains, and the City’s expenditure of money on capital improvements.

Jeff Violet said he lives on a private road that provides access to residents, utility companies and City crews. Residents paved their road and asked that consideration be made to be supported in the cost of this.

Carl Walker said he has undeveloped land at the top of Vista Delarinda and echoed speaker’s concerns about the public use of the road and asked for comprehensive planning to be done to properly pay for maintenance of all roads.

Rachelle Latimer said she lives on a public road and has a second home outside of the area on private roads in a private HOA where she serves as president. She noted that people understand when they buy their home that they are buying into a private HOA and that the association and residents are responsible to maintain their roads. She asked that the City conduct research about PG&E easements, their responsibility for trees around power lines, and she hoped the City will be able to work with the water district to solve problems. Regarding newer subdivisions on private roads, she asked to understand how driveways are defined to get away from avoiding fire safety rules and widths of streets.

Melissa Roeder commented in response to the notion that every street not publicly maintained needs to be evaluated for whether it has public benefit she said it becomes absurd and discriminatory to exclude some and including others, given there are many factors. She urged the Council to regard this as an inclusive idea instead and also consider the double standard and review existing private streets.

A speaker said not mentioned is the fact people will not want to vote for another bond issue because their streets are already addressed. She noted the private road residents constitute only 20% of the total City residents, and she asked that this be recognized.

A speaker said they have not heard about how public roads become private. He said a developer makes an agreement with the City and those roads are defined then to be private forever. Residents have no say in the matter, and he thinks the creation of private roads is the beginning of the inequity. One must go to court to get a prescriptive easement and this is another mechanism by which private roads can become public. He asked for an answer to Mr. Waranoff's question regarding maintenance of drains that drain public water on private properties. He also agreed with the impacts of PG&E and garbage trucks on streets and said residents should be paid for these impacts.

Ms. Wolff replied that she agrees with Mr. Waranoff's point when looking at potential liability that could flow from ownership and maintenance of a street, one must look beyond the pavement and the City should understand the drainage flows. Mr. Waranoff is also correct in that he has asked for a formal opinion from her. The Council has not asked her to do this and it is something she has never done in the past.

Informally, the argument Mr. Waranoff is making which is that the City, by virtue of being upstream from some private properties might result in some maintenance and/or easement obligations, this argument has been made by litigants in two published decisions/cases against the City and it has not prevailed.

Regarding prescriptive easements on roads, this goes back to what she started her presentation with; there is a difference between the public's right of access over privately maintained roads and the public/City's obligation of maintenance. It may well be that there are public access rights over roads, and those rights are adjudicated by the courts. While the City could potentially take a position on it, the city does not decide what the public's rights are in the situation of a privately maintained road. If the City has accepted the road as public, the public has a right of access. There are people who do object to public access to their private easements and roads and this will be very dependent upon the specific situation as to whether someone objects or not.

Ms. Wolff stated she did not think the Orinda Woods example was improper or illegal. Her point is that it is a policy decision and whether it is justifiable will be a question for the Council. She also indicated much will depend on specific characteristics of the road and the public's right of access.

In response to a question from an audience member, Ms. Wolff explained that the authority is the Attorney General's opinion regarding a privately maintained road in another county. In that case, the public had access rights and this was the basis for determining that the gift of public funds doctrine was not violated.

Mr. Theis then spoke about the City agreement with Orinda Woods HOA dated in 1992 and he clarified that the City agreed to accept responsibility for the routine maintenance of the paved surface areas of the designated streets of Village Gate Road, Ridge Gate Road, Watchwood Circle, including curb and gutters and excluding drainage facilities, lighting, sidewalks and landscaping and road embankment.

Also, the Orinda Woods HOA also indemnified the City and they shall defend and protect the City against all claims, etc. Therefore, there is some agreement for the City to provide some paved surface maintenance with this agreement and five years' notice must be given and the City has not given any notice of termination. So, it has some limited responsibilities and clearly, the City is not taking over the entire street and it is not dedicated to the City.

He noted that all residential roads per mile to fix what has been done over the last 5 years cost about \$830,000. In taking the total 30 miles and state they are equivalent in width, it would cost \$25 million to address this many miles of road. He has concerns that the \$5 million is low and he hopes people recognize there is a startup cost to fixing all roads and a maintenance cost to keep them in good condition. If the City performed 3 slurry seals in a row and an overlay in a 20 year period, it costs about \$35,000 per linear mile.

He agrees drainage is a big issue and Mr. Cohn included \$35 million which is close to what staff is starting to estimate for the public portion. His own assessment is that whatever the amount for private roads is, it probably needs to be tied to some kind of drainage because if just private roads are put out for a vote, he was unsure if the remaining 80% on public roads would vote just for the private roads. He suggested polling to see where the level of support is.

Lastly, he questioned what would occur if a particular private road does not want to be added to the public system. He thinks there should be some amount of voluntary basis for this because there are most likely a handful of residents on private roads who do not want the additional access from the public.

Kathy Finch said she thinks Steve Cohn's numbers are based upon the fact that at least one-third of private roads are under the guise of HOAs and are in pretty good shape so they would not require anything. The City should have the streets surveyed which would cost about \$30,000.

Mr. Theis said as a whole, he thinks the numbers are reasonable and \$35,000 is based upon what the City is planning on spending and this does not include the actual cost. In terms of the survey, it could be as inexpensive or as expensive as the City wants to look. The PTAP report only looks at the surface of the road and none of the private roads have been measured or linear mileage determined. Typically, the PTAP report is in the range of \$30,000 to \$40,000 every two years. However, this report does not look at any storm drains underneath the road. It is an assessment of a 100 foot section within a 1,000 foot stretch and they provide a score. The City needs to determine whether it wants to only look at 10% of the road or not at all and there will be additional costs beyond this.

Ms. Finch again recommended surveying the roads to see what is there and do what the City did with the public streets. While the 80% may not want to fund the 20%, she did not think any tax measure will be passed if 20% of the City is upset and those living on public streets will not vote for a tax increase. She thinks the City needs the private road homeowners as much as they need the City. She also suggested there be an opt-out for those who do not want to maintain their roads.

A speaker stated a study and a meaningful cost estimate are needed as well as addressing the drainage issue.

Another speaker said she likes the idea of a survey and attaching the drainage issue to expand the infrastructure budget with the private roads. Also, in terms of polling she would want to very much collaborate on whatever that survey is because the wording is crucial. She noted the City has not made any public roads public since 1985 and a citizen will pay the same but will be underserved.

A speaker agreed the roads and drainage need to be tied together and he spoke of landslide issues.

Mr. Theis said the City's goal is not a 50 PCI standard for the entire system. The City is trying to reduce its deferred maintenance cost and the real cost to provide everything equally is higher. Also not addressed is when adding 30 miles of road to the system, more staff would be needed. So, it would cost potentially another \$750,000 for the 4 employees as well as administrative support.

At the end of this year and completion of the work, all bond money and City funds will be gone. This addresses all public roads in the City and they will be at a PCI of 85 which is great and he then explained the high costs to fix roads if they are not maintained.

William Abriel said he lives on Mira Loma and was especially pleased to watch the City successfully approve bonds and taxes to get roads fixed and he supported that. Now that private road homeowners have paid for that, they would like to move forward to support a strong infrastructure with roads and drainage and asked to keep residents involved.

Mr. Bourgart concluded the workshop and asked people to send additional comments to the City Clerk at ssmith@cityoforinda.org. He thanked all participants for their input.

B. ADJOURNMENT

The meeting was adjourned at approximately 9:35 p.m. to the next Special Meeting of the Orinda City Council on Tuesday, September 3, 2019 at 7:00 p.m.

Sheri Marie Smith, City Clerk