



# Moraga-Orinda Fire District

## Board of Directors

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### CALL AND NOTICE OF A SPECIAL MEETING

January 16, 2024 – 3:30 PM  
\*\*CLOSED SESSION ONLY\*\*

MEETING LOCATION:  
Sarge Littlehale Room  
22 Orinda Way  
Orinda, CA 94563

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**This meeting will be conducted in person only.**

**For In-person Attendees,** face coverings are strongly encouraged and attendees are encouraged to be up-to-date on the COVID-19 vaccine. Social distance should be maintained when practical.

**SPEAKER CARDS:** Members of the public may comment on any item on the agenda before or during the Board's consideration of the item. If you would like to speak during the public forum or on an item listed on the agenda, you are invited to submit a speaker card to the District Clerk. You will be permitted to speak even if you elect not to submit a speaker card or decline to provide information requested on the card. After the Board of Directors has heard from everyone who submitted speaker cards, anyone electing not to submit a speaker card may form a line at the lectern. Public comment is limited to 3 minutes per speaker per agenda item.

**Submit Public Comment Before the Meeting:** Members of the public can provide public comment by sending an e-mail to [info@mofd.org](mailto:info@mofd.org) no later than 12:00 p.m. the day of the meeting. Those e-mails will be distributed to the Board of Directors and posted on the District's website as part of the public record by 1:00 p.m. on the day of the meeting. Note: any written public comments received after the deadline will not be distributed to the Board of Directors or posted on the District's website until the following day. Written comments will NOT be read into the record. All written public comments are available to view at [mofd.org/agendas](http://mofd.org/agendas)

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1. **OPENING CEREMONIES**

- Call the Meeting to Order
- Roll Call
- Pledge of Allegiance

2. **PUBLIC COMMENT - CLOSED SESSION ITEMS**

General public comment on any closed session item that will be heard. Comments may be limited to no more than three minutes pursuant to board policy.

3. **CLOSED SESSION**

3.1 [Liability Claim - Pete Nowicki](#)

(Government Code section 54956.95)

Claimant: Pete Nowicki

Agency Claimed Against: Moraga-Orinda Fire District

[Attachment: December 7, 2023 Pete Nowicki Government Claim](#)

3.2 [Conference with Legal Counsel - Existing Litigation](#)

(Paragraph (1) of subdivision (d) of Section 54956.9)

Name of Case: Sandia Pearson and Anita K. Pearson v. Moraga-Orinda Fire District

Case No. Case No. N23-2201

[Attachment: October 23, 2023 CEQA Notice Letter final.pdf](#)

[Attachment: October 25, 2023 Civil Case Cover Sheet.pdf](#)

[Attachment: October 25, 2023 Verified Petition for Writ of Mandate \[CEQA\]](#)

### 3.3 Public Employee Performance Evaluation

(Government Code Section 54957)

Public Employee Appointment Title: Fire Chief

#### 4. RECONVENE THE MEETING

- Call the Meeting to Order
- Roll Call

#### 5. REPORT OF CLOSED SESSION ACTION

#### 6. PUBLIC COMMENT – ITEMS NOT ON THE AGENDA

At the beginning of each regular District Board meeting, any member of the public may address the District Board concerning any item not on the Board's agenda but within the subject matter jurisdiction of the Board. Speakers will be limited to three (3) minutes unless otherwise specified by the Presiding Officer. The public will be given an opportunity to speak on each agenda item at the time it is called. The Board may discuss and/or take action regarding any or all of the items listed below. Once the public comment portion of any item on this agenda has been closed by the Board, no further comment from the public will be permitted unless authorized by the Board and if so authorized, said additional public comment shall be limited to the provision of information not previously provided to the Board or as otherwise limited by order of the Presiding Officer or the Board.

#### 7. ADJOURNMENT

*The Moraga-Orinda Fire Protection District ("District"), in complying with the Americans with Disabilities Act ("ADA"), requests individuals who require special accommodations to access, attend and/or participate in District Board meetings due to a disability, to please contact the District Chief's office, (925) 258-4501, at least one business day prior to the scheduled District Board meeting to ensure that we may assist you.*

Any disclosable public records related to an open session item on a Regular meeting agenda and distributed by the Moraga-Orinda Fire District to a majority of members of the Board of Directors less than 72 hours prior to that meeting are available for public inspections at 1280 Moraga Way, Moraga, during normal business hours, and available on our website at [www.mofd.org/agendas](http://www.mofd.org/agendas).

I hereby certify that this agenda in its entirety was posted on January 11, 2024, at the Moraga and Orinda Fire Administration offices, Stations 41, 42, 43, 44, and 45 and electronically at [www.mofd.org/agendas](http://www.mofd.org/agendas). Agenda provided to the Moraga Town Office (Hacienda) and Orinda City Hall.



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Marcia Holbrook  
District Secretary/Clerk



# Moraga-Orinda Fire District

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**TO:** Board of Directors

**FROM:** Jonathan Holtzman, District Counsel

**DATE:** January 16, 2024

**SUBJECT:** **Item 3.1 Liability Claim - Pete Nowicki**

## **BACKGROUND**

On December 11, 2023, the District received a claim in the amount of [unlimited] from R. Benjamin Nelson Law Group on behalf of Claimant Pete Nowicki. The dates, place, and other circumstances of the occurrences or transactions that gave rise to the claimant's assertions are in the attached Government Claim dated December 7, 2023.

## **RECOMMENDATION**

(Government Code section 54956.95)

Claimant: Pete Nowicki

Agency Claimed Against: Moraga-Orinda Fire District

## **ATTACHMENT**

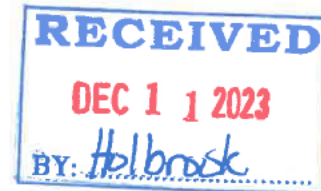
[Attachment: December 7, 2023 Pete Nowicki Government Claim](#)



R. Benjamin Nelson  
rbnelson@rbnelsonlaw.com  
(415) 390-5999

December 7, 2023

**By Mail**



Marcia Holbrook  
District Secretary/District Clerk  
MOFD  
1280 Moraga Way  
Moraga, CA 94556

**Re: Pete Nowicki's Government Claim**

Dear Ms. Holbrook:

I write to present a Government Claim to the Moraga-Orinda Fire District ("MOFD") on behalf of Claimant Pete Nowicki. Please find additional information below per the requirements of Government Code section 910.

- **Claimant's Address:** The name and post office address of Claimant:

Pete Nowicki



- **My Address:** The post office address to which the person presenting the claim desires notices to be sent:

R. Benjamin Nelson  
2108 N St., Ste. 8567  
Sacramento, CA 95816

- **Circumstances:** The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted are the following:

On February 1, 2009, Mr. Nowicki retired from his position as Fire Chief for MOFD and began receiving a monthly retirement benefit under the retirement plan administered by the Contra Costa County Employees' Retirement Association ("CCCERA") in the amount of \$20,076.00.

On September 9, 2015, the CCCERA Board held a hearing regarding Mr. Nowicki's pension benefits. During the hearing, board members and an attorney for CCCERA made various misstatements about Mr. Nowicki. For example, counsel falsely represented that Mr. Nowicki was present in the boardroom during discussions of amendments to his

contract. Another board member stated that retroactive labor contracts were illegal, which they are not. These are only examples of the many misstatements and errors of law and fact made during the hearing. CCCERA has continued to make these and other misstatements regarding Mr. Nowicki, the pension process, and the actions of CCCERA up to the present date and, on information and belief, has relayed these misstatements to members of the press. MOFD has failed to correct these statements that CCCERA made on its behalf.

During the hearing, board members also accused Mr. Nowicki of gaming the pension system and that Mr. Nowicki could not rely on the pension recommendations of his CCCERA counselor. This was a betrayal of the trust that Mr. Nowicki placed in CCCERA and MOFD.

On September 21, 2015, Kurt Schneider sent Mr. Nowicki a letter stating that Mr. Nowicki received overpayments of retirement benefits in the amount of \$585,802.90, including interest and that CCCERA required Mr. Nowicki to select one of three options for repayment of that amount. Notwithstanding Mr. Nowicki's refusal to select a repayment option, CCCERA decreased Mr. Nowicki's payments going forward beginning on November 1, 2015 and clawed back payments that it made previously. MOFD acquiesced in CCCERA's decision to decrease Mr. Nowicki's payments and wrongfully decreased the monthly payments that it made to Mr. Nowicki.

CCCERA did not conduct an adequate investigation before reducing Mr. Nowicki's benefits. CCCERA's counsel even admitted that he had obtained information purportedly supporting CCCERA's actions from unverified newspaper editorials. On information and belief, MOFD acquiesced in CCCERA's inadequate investigation and did not conduct an adequate investigation of its own.

On October 13, 2015, Mr. Nowicki filed suit against CCCERA seeking to reinstate his pension benefits as originally calculated and to be made whole. Throughout the litigation, Mr. Nowicki provided evidence and arguments supporting his entitlement to his pension benefits as originally calculated, but CCCERA refused to reinstate his pension and continued to make misstatements and betray Mr. Nowicki's trust. Mr. Nowicki also sued MOFD, but MOFD refused to reinstate Mr. Nowicki's pension.

On February 19, 2020, the Honorable Charles B. Burch, Contra Costa County Superior Court entered judgment for CCCERA. On August 10, 2021, however, the First Appellate District reversed the trial court's judgment, holding that CCCERA's actions to date were an abuse of discretion and that CCCERA had no authority to decrease Mr. Nowicki's pension.

Thereafter, CCCERA, working with MOFD, purported to reinstate Mr. Nowicki's pension going forward and to return his previously confiscated pension benefits. On June 6, 2022, CCCERA issued a check for \$265,835.24 to JP Morgan Securities and a check for \$217,501.56 to Pershing LLC. In a letter dated June 7, 2022 and signed by Jimmy Lambert, Member Services Supervisor, CCCERA states that "these checks represent the

‘Direct Rollover’ of your taxable contributions” and that “[a]ll distributions from your IRA will be considered ordinary income.”

On July 22, 2022, MOFD sent a check to Mr. Nowicki for \$367,560.50 for gross pay of \$514,790.61, which included withholding for federal income tax of \$113,253.93 and California state income tax of \$33,976.18.

On December 21, 2022, CCCERA sent Mr. Nowicki a letter stating that he had until December 27, 2022 to inform CCCERA of his desired withholding amounts for the “amount of overpayments recouped by CCCERA but originally paid to [Mr. Nowicki] out of the Moraga Fire District (MOFD) Replacement Benefit Plan (RBP).” On information and belief, CCCERA was acting as MOFD’s agent when it sent Mr. Nowicki this letter and took these actions.

On February 24, 2023, CCCERA sent Mr. Nowicki a “corrective distribution amount of \$383,310.75.” In CCCERA’s letter dated February 24, 2023, CCCERA stated that “the enclosed check shows Federal taxes withheld represent the mandatory 10% withholding of \$38,331.08 and California State taxes of 2% or \$7,666.22.”

The repayments made by CCCERA and MOFD to date do not fully compensate Mr. Nowicki for the harm that CCCERA and MOFD have caused and continue to cause.

- **Damages:** A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim:

MOFD repaid Mr. Nowicki the amount that it took from him, but MOFD has refused to pay interest on that amount.

In addition, Mr. Nowicki has lost income from investments that he had to sell to make up for the shortfall in income caused by CCCERA’s and MOFD’s underpayments, and on information and belief, CCCERA and MOFD have wrongfully profited from the underpayments of Mr. Nowicki’s confiscated pension benefits by investing Mr. Nowicki’s benefits and retaining the gains.

CCCERA’s and MOFD’s repayments subjected Mr. Nowicki to additional tax obligations that he would not have incurred if CCCERA and MOFD had not confiscated his pension. These tax obligations include being taxed twice on his benefits and incurring a higher tax rate on all of his income regardless of source due to CCCERA’s and MOFD’s repayment of years of confiscated benefits in a single lump sum.

The lump sum payments have also increased Mr. Nowicki’s taxable income in 2022, and Mr. Nowicki anticipates that the payments will increase his taxable income in 2023. As a result of the unjustified increase in Mr. Nowicki’s taxable income, Mr. Nowicki and his family will incur additional harm. For example, on November 22, 2023, Mr. and Mrs. Nowicki both learned that their monthly Medicare premiums would be increasing from

\$279.50 per month to \$419.30 per month, amounting to an annual increase of \$3,355.20 per year for Mr. and Mrs. Nowicki.

Mr. Nowicki has also suffered emotional distress.

As a result of CCCERA's and MOFD's actions, Mr. Nowicki has been forced to take legal action and has incurred attorney's fees and costs.

- **Names of MOFD Employees:** The name or names of the public employee or employees causing the injury, damage, or loss, if known, are the following:

Fire Chief Stephen Healy  
Fire Chief Randy Bradley  
Fire Chief Dave Winnacker  
Retired Director Barber  
Retired Director Famulener  
Retired Director Weil  
Retired Director Anderson  
Retired Director Evans  
Retired Director Donner  
Retired Director Baitx  
Director Craig Jorgens  
Director Steven Danziger  
Director John Jex  
Director Greg Hasler  
Director Mike Roemer  
Steve Meyers  
John Bakker  
Linda Ross  
Jonathan Holtzman

- **Amount:** The claim would be an unlimited civil case.

We welcome the opportunity to discuss this matter further at your earliest convenience. Please do not hesitate to give me a call at (415) 390-5999.

Sincerely,



R. Benjamin Nelson

Cc: Greg Hasler, Secretary, Board of Directors, MOFD  
John Jex, President, Board of Directors, MOFD  
Steven Danziger, Director, Board of Directors, MOFD  
Mike Roemer, Vice President, Board of Directors, MOFD

Marcia Holbrook  
December 7, 2023  
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Craig Jorgens, Treasurer, Board of Directors, MOFD  
Gregg McLean Adam, Messing Adam & Jasmine  
Pete Nowicki



# Moraga-Orinda Fire District

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**TO:** Board of Directors

**FROM:** Jonathan Holtzman, District Counsel

**DATE:** January 16, 2024

**SUBJECT:** **Item 3.2 Conference with Legal Counsel - Existing Litigation**

**RECOMMENDATION**

(Paragraph (1) of subdivision (d) of Section 54956.9)

Name of Case: Sandia Pearson and Anita K. Pearson v. Moraga-Orinda Fire District

Case No. Case No. N23-2201

**ATTACHMENT**

[Attachment: October 23, 2023 CEQA Notice Letter final.pdf](#)

[Attachment: October 25, 2023 Civil Case Cover Sheet.pdf](#)

[Attachment: October 25, 2023 Verified Petition for Writ of Mandate \[CEQA\]](#)



SUSANN M. BRADFORD  
2748 Adeline Street, Suite A  
Berkeley, CA 94703  
Phone: (510) 900-9502  
Email: sbradford@greenfirelaw.com  
www.greenfirelaw.com

October 23, 2023

*By Email and U.S. Mail*

Moraga-Orinda Fire District  
Fire Chief Dave Winnacker  
President John Jex  
1280 Moraga Way  
Moraga, CA 94556  
Email: info@mofd.org,  
Dwinnacker@mofd.org,  
mmjjex@gmail.com

**Re: Notice of Commencement of CEQA Litigation Challenging the Approval of Amended Fuel Break Ordinance No. 23-08 Without Conducting Environmental Review**

Dear Moraga-Orinda Fire District Board of Directors and Fire Chief:

This letter is to notify you that Orinda residents, Sandia Pearson And Anita K. Pearson, will file suit against Moraga-Orinda Fire District (“the District”) for failure to observe the requirements of the California Environmental Quality Act (“CEQA”), Public Resources Code, section 21000 et seq., the CEQA Guidelines, California Code of Regulations, section 15000 et seq., in approving Amended Fuel Break Ordinance No. 23-08 without first conducting an environmental review, and for issuing a Notice of Exemption that misrepresents the administrative record. This notice is given pursuant to Public Resources Code section 21167.5.

Please note that, under Public Resources Code section 21167.6, the record of proceedings for the Department’s actions includes, among other items, all “internal agency communications, including staff notes and memoranda related to the project or to compliance with [CEQA].” Because all e-mails and other internal communications related to the Amended Fuel Break Ordinance are part of the administrative record for the lawsuit to be filed by the Pearsons, the Department may not destroy or delete such documents prior to preparation of the record in this case.

Respectfully,

Susann M. Bradford

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):  
 Jessica L. Blome (CBN: 314898); Susann M. Bradford (CBN: 341338)  
 2748 Adeline Street, Ste. A, Berkeley, CA 94703

TELEPHONE NO.: 510-900-9502 FAX NO. (Optional): 510-900-9502  
 E-MAIL ADDRESS: jblome@greenfirelaw.com; sbradford@greefirelaw.com  
 ATTORNEY FOR (Name): Sandia Pearson and Anita K. Pearson

**FOR COURT USE ONLY**

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA**  
 STREET ADDRESS: 750 Court Street  
 MAILING ADDRESS:  
 CITY AND ZIP CODE: Martinez, CA 94553  
 BRANCH NAME: Wakefield Taylor Courthouse

CASE NAME:  
 SANDIA PEARSON AND ANITA K. PEARSON v MORAGA-ORINDA FIRE DISTRICT

<p><b>CIVIL CASE COVER SHEET</b></p> <p><input checked="" type="checkbox"/> <b>Unlimited</b> (Amount demanded exceeds \$25,000)      <input type="checkbox"/> <b>Limited</b> (Amount demanded is \$25,000 or less)</p>	<p><b>Complex Case Designation</b></p> <p><input type="checkbox"/> Counter      <input type="checkbox"/> Joinder</p> <p>Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)</p>	<p>CASE NUMBER:</p> <hr/> <p>JUDGE:</p> <p>DEPT.:</p>
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*Items 1–6 below must be completed (see instructions on page 2).*

1. Check **one** box below for the case type that best describes this case:

<p><b>Auto Tort</b></p> <p><input type="checkbox"/> Auto (22)</p> <p><input type="checkbox"/> Uninsured motorist (46)</p> <p><b>Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort</b></p> <p><input type="checkbox"/> Asbestos (04)</p> <p><input type="checkbox"/> Product liability (24)</p> <p><input type="checkbox"/> Medical malpractice (45)</p> <p><input type="checkbox"/> Other PI/PD/WD (23)</p> <p><b>Non-PI/PD/WD (Other) Tort</b></p> <p><input type="checkbox"/> Business tort/unfair business practice (07)</p> <p><input type="checkbox"/> Civil rights (08)</p> <p><input type="checkbox"/> Defamation (13)</p> <p><input type="checkbox"/> Fraud (16)</p> <p><input type="checkbox"/> Intellectual property (19)</p> <p><input type="checkbox"/> Professional negligence (25)</p> <p><input type="checkbox"/> Other non-PI/PD/WD tort (35)</p> <p><b>Employment</b></p> <p><input type="checkbox"/> Wrongful termination (36)</p> <p><input type="checkbox"/> Other employment (15)</p>	<p><b>Contract</b></p> <p><input type="checkbox"/> Breach of contract/warranty (06)</p> <p><input type="checkbox"/> Rule 3.740 collections (09)</p> <p><input type="checkbox"/> Other collections (09)</p> <p><input type="checkbox"/> Insurance coverage (18)</p> <p><input type="checkbox"/> Other contract (37)</p> <p><b>Real Property</b></p> <p><input type="checkbox"/> Eminent domain/Inverse condemnation (14)</p> <p><input type="checkbox"/> Wrongful eviction (33)</p> <p><input type="checkbox"/> Other real property (26)</p> <p><b>Unlawful Detainer</b></p> <p><input type="checkbox"/> Commercial (31)</p> <p><input type="checkbox"/> Residential (32)</p> <p><input type="checkbox"/> Drugs (38)</p> <p><b>Judicial Review</b></p> <p><input type="checkbox"/> Asset forfeiture (05)</p> <p><input type="checkbox"/> Petition re: arbitration award (11)</p> <p><input checked="" type="checkbox"/> Writ of mandate (02)</p> <p><input type="checkbox"/> Other judicial review (39)</p>	<p><b>Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400–3.403)</b></p> <p><input type="checkbox"/> Antitrust/Trade regulation (03)</p> <p><input type="checkbox"/> Construction defect (10)</p> <p><input type="checkbox"/> Mass tort (40)</p> <p><input type="checkbox"/> Securities litigation (28)</p> <p><input type="checkbox"/> Environmental/Toxic tort (30)</p> <p><input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41)</p> <p><b>Enforcement of Judgment</b></p> <p><input type="checkbox"/> Enforcement of judgment (20)</p> <p><b>Miscellaneous Civil Complaint</b></p> <p><input type="checkbox"/> RICO (27)</p> <p><input type="checkbox"/> Other complaint (not specified above) (42)</p> <p><b>Miscellaneous Civil Petition</b></p> <p><input type="checkbox"/> Partnership and corporate governance (21)</p> <p><input type="checkbox"/> Other petition (not specified above) (43)</p>
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2. This case  is  is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- |  |  |
|--|--|
| a. <input type="checkbox"/> Large number of separately represented parties   | d. <input type="checkbox"/> Large number of witnesses  |
| b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court |
| c. <input type="checkbox"/> Substantial amount of documentary evidence   | f. <input type="checkbox"/> Substantial postjudgment judicial supervision  |
3. Remedies sought (check all that apply): a.  monetary b.  nonmonetary; declaratory or injunctive relief c.  punitive
4. Number of causes of action (specify): two (2)
5. This case  is  is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: October 25, 2023  
 Jessica L. Blome

  
 (SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

**NOTICE**

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

**INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET**

**To Plaintiffs and Others Filing First Papers.** If you are filing a first paper (for example, a complaint) in a civil case, you must complete and file, along with your first paper, the Civil Case Cover Sheet contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check **one** box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the **primary** cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

**To Parties in Rule 3.740 Collections Cases.** A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than \$25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

**To Parties in Complex Cases.** In complex cases only, parties must also use the Civil Case Cover Sheet to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

**CASE TYPES AND EXAMPLES**

**Auto Tort**

- Auto (22)–Personal Injury/Property Damage/Wrongful Death
- Uninsured Motorist (46) *(if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto)*

**Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort**

- Asbestos (04)
  - Asbestos Property Damage
  - Asbestos Personal Injury/Wrongful Death
- Product Liability *(not asbestos or toxic/environmental)* (24)
- Medical Malpractice (45)
  - Medical Malpractice–Physicians & Surgeons
- Other Professional Health Care Malpractice
- Other PI/PD/WD (23)
  - Premises Liability (e.g., slip and fall)
  - Intentional Bodily Injury/PD/WD (e.g., assault, vandalism)
  - Intentional Infliction of Emotional Distress
  - Negligent Infliction of Emotional Distress

**Non-PI/PD/WD (Other) Tort**

- Business Tort/Unfair Business Practice (07)
- Civil Rights (e.g., discrimination, false arrest) *(not civil harassment)* (08)
- Defamation (e.g., slander, libel) (13)
- Fraud (16)
- Intellectual Property (19)
- Professional Negligence (25)
  - Legal Malpractice
  - Other Professional Malpractice *(not medical or legal)*
- Other Non-PI/PD/WD Tort (35)

**Employment**

- Wrongful Termination (36)
- Other Employment (15)

**Contract**

- Breach of Contract/Warranty (06)
- Breach of Rental/Lease
  - Contract *(not unlawful detainer or wrongful eviction)*
- Contract/Warranty Breach–Seller Plaintiff *(not fraud or negligence)*
- Negligent Breach of Contract/Warranty
- Other Breach of Contract/Warranty
- Collections (e.g., money owed, open book accounts) (09)
- Collection Case–Seller Plaintiff
- Other Promissory Note/Collections Case
- Insurance Coverage *(not provisionally complex)* (18)
  - Auto Subrogation
  - Other Coverage
- Other Contract (37)
  - Contractual Fraud
  - Other Contract Dispute

**Real Property**

- Eminent Domain/Inverse Condemnation (14)
- Wrongful Eviction (33)
- Other Real Property (e.g., quiet title) (26)
  - Writ of Possession of Real Property
  - Mortgage Foreclosure
  - Quiet Title
  - Other Real Property *(not eminent domain, landlord/tenant, or foreclosure)*

**Unlawful Detainer**

- Commercial (31)
- Residential (32)
- Drugs (38) *(if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential)*

**Judicial Review**

- Asset Forfeiture (05)
- Petition Re: Arbitration Award (11)
- Writ of Mandate (02)
  - Writ–Administrative Mandamus
  - Writ–Mandamus on Limited Court Case Matter
  - Writ–Other Limited Court Case Review
- Other Judicial Review (39)
  - Review of Health Officer Order
  - Notice of Appeal–Labor Commissioner Appeals

**Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)**

- Antitrust/Trade Regulation (03)
- Construction Defect (10)
- Claims Involving Mass Tort (40)
- Securities Litigation (28)
- Environmental/Toxic Tort (30)
- Insurance Coverage Claims *(arising from provisionally complex case type listed above)* (41)

**Enforcement of Judgment**

- Enforcement of Judgment (20)
  - Abstract of Judgment (Out of County)
  - Confession of Judgment *(non-domestic relations)*
  - Sister State Judgment
  - Administrative Agency Award *(not unpaid taxes)*
  - Petition/Certification of Entry of Judgment on Unpaid Taxes
  - Other Enforcement of Judgment Case

**Miscellaneous Civil Complaint**

- RICO (27)
- Other Complaint *(not specified above)* (42)
  - Declaratory Relief Only
  - Injunctive Relief Only *(non-harassment)*
  - Mechanics Lien
  - Other Commercial Complaint Case *(non-tort/non-complex)*
  - Other Civil Complaint *(non-tort/non-complex)*

**Miscellaneous Civil Petition**

- Partnership and Corporate Governance (21)
- Other Petition *(not specified above)* (43)
  - Civil Harassment
  - Workplace Violence
  - Elder/Dependent Adult Abuse
  - Election Contest
  - Petition for Name Change
  - Petition for Relief From Late Claim
  - Other Civil Petition

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Per local Rule, This case is assigned to  
Judge Treat, Charles S, for all purposes.

*Attorneys for Petitioners*

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF CONTRA COSTA**

SANDIA PEARSON AND ANITA K.  
PEARSON, individual residents of Orinda,

Petitioners,

v.

MORAGA-ORINDA FIRE DISTRICT

Respondent.

Case No.:           N23-2201          

**VERIFIED PETITION FOR WRIT OF  
MANDATE [CEQA]**

(Code Civ. Proc., § 1085 (Mandamus),  
Pub. Res. Code, §§ 21000, et seq. (CEQA))

Complaint Filed: October 25, 2023  
Trial Date: TBD

1 This action alleges that the Moraga-Orinda Fire District (“MOFD”) violated the California  
2 Environmental Quality Act (“CEQA”) in approving Amended Fuel Break Ordinance No. 23-08  
3 without conducting an environmental review and in issuing a Notice of Exemption that misrepresents  
4 the administrative record. The Amended Ordinance, which MOFD claims is exempt from CEQA  
5 review, requires residents and landowners throughout the Moraga-Orinda area to clear large areas of  
6 vegetation from the entire perimeters of their properties causing potentially significant adverse  
7 impacts to the environment. Through this lawsuit, petitioners seek to compel MOFD to comply with  
8 CEQA by conducting an environmental review of the Amended Ordinance to identify and mitigate  
9 against any potentially significant impacts on the environment. In support of this petition, petitioners  
10 allege as follows:

11 **PARTIES**

12 1. Petitioners Anita K. Pearson and Sandia (“Sandy”) Pearson are individuals residing in  
13 Orinda, California. Their family trust owns a 9.5-acre parcel of undeveloped property at 629 Miner  
14 Road in Orinda, which they have maintained as natural habitat for native species.

15 2. Respondent Moraga-Orinda Fire District is a fire protection district that provides fire  
16 protection and emergency medical services to the communities of Moraga and Orinda and the  
17 surrounding unincorporated areas, including the communities of Canyon and Bollinger Canyon. It  
18 was formed in 1997, through the consolidation of predecessor districts and operates under the  
19 authority of the Fire Protection District Law of 1987. (See Cal. Health & Safety Code, §§ 13800 *et*  
20 *seq.*).

21 **JURISDICTION AND VENUE**

22 3. This Court has jurisdiction over this action pursuant to Code of Civil Procedure,  
23 section 1085 (traditional writ of mandate) and Public Resources Code, sections 21168.5 and 21168.9  
24 (CEQA).

25 4. Venue is proper in this Court pursuant to Code of Civil Procedure, section 394,  
26 because respondent is a local agency whose principal office is located in Contra Costa County, and  
27 because the challenged action and associated environmental impacts affect real property and natural  
28

1 resources located entirely within Contra Costa County.

2 5. The petition initiating this action was timely filed within 35 days after respondent  
3 issued a Notice of Exemption in accordance with CEQA Guidelines, section 15062 and Public  
4 Resources Code, section 21167, subdivision (d).

5 6. On October 23, 2023, petitioners complied with Public Resources Code, section  
6 21167.5 by serving a written notice on respondent regarding the petitioner’s commencement of this  
7 action. A true and correct copy of the notice is attached hereto as Exhibit A.

8 7. Petitioners are sending a copy of this Petition and Complaint to the California  
9 Attorney General concurrently with filing, thereby complying with the requirements of Public  
10 Resources Code section 21167.7 and Code of Civil Procedure section 388.

11 **GENERAL ALLEGATIONS OF FACT**

12 **A. Introduction.**

13 8. On September 20, 2023, MOFD approved Amended Fuel Break Ordinance No. 23-08  
14 (“Amended Ordinance”) over the objections of numerous area residents and despite the City of  
15 Orinda’s request for additional time for review and collaboration.

16 9. The Amended Ordinance replaces the MOFD’s previous Fuel Break Ordinance No.  
17 23-04, which went into effect on February 15, 2023, without conducting any CEQA review and  
18 without issuing a Notice of Exemption (“NOE”).

19 10. On June 7, 2023, MOFD served Petitioner Anita K. Pearson with a “Pre-Citation  
20 Notification” demanding that she comply with Fuel Break Ordinance No. 23-04 by creating a 100-  
21 foot fuel break around the entire perimeter of her family’s 9.5 acre property located at 629 Miner  
22 Road in Orinda.

23 11. This Notification declared that “[f]uel mitigation and defensible space work shall be  
24 conducted in a manner that the activities will not result in the taking of endangered, rare or threatened  
25 plant or animal species or cause significant erosion and sedimentation of surface waters in accordance  
26 with California Environmental Quality Guidelines Section 15304” (MOFD Notification, June 7,  
27 2023), but offered no guidance concerning how to determine whether such species were present or  
28 how to prevent such harm.

1           12.     The Notification, in effect, delegated CEQA compliance to ordinary citizens affected  
2 by the ordinance.

3           13.     On August 2, 2023, petitioners notified MOFD that their approval of Fuel Break  
4 Ordinance 23-04 had violated CEQA and expressed their intent to enforce CEQA through litigation if  
5 necessary.

6           14.     In response to petitioners' notice, MOFD entered into a tolling agreement to extend the  
7 time for challenging Ordinance 23-04 until September 30, 2023, and agreed to stay enforcement of  
8 Ordinance 23-04 while they developed the Amended Ordinance.

9           15.     The Amended Ordinance, which repealed and replaced Ordinance 23-04, was  
10 introduced at a Special Board Meeting of the MOFD Board of Directors on September 6, 2023, and  
11 approved by the Board at its regular board meeting just two weeks later.

12           16.     MOFD conducted no environmental review to determine whether the Amended  
13 Ordinance may have potentially significant environmental impacts on the environment prior to its  
14 approval of the Amended Ordinance.

15           17.     MOFD contends that the Amended Ordinance is exempt from CEQA review, claiming  
16 exemptions under CEQA Guidelines sections 15307 and 15308 (categorical exemptions), CEQA  
17 Guidelines section 15269 and Public Resources Code section 21080(a)(4) (emergency exemption),  
18 and CEQA Guidelines section 15601(b)(3) (commonsense exemption). (Amend. Ord. No. 23-08, § 9.)

19           18.     MOFD rejected the City of Orinda's offer to intervene and facilitate a more robust  
20 community process, which it expressed in public comments stating that "it is advisable for the District  
21 to slow down and engage in a community consultation to ensure a shared understanding of  
22 alternatives which were considered, including how other communities have approached the matter  
23 and how to best communicate to property owners how they can comply with the District's  
24 requirements." (Public comments of City of Orinda (Sept.6, 2023).)

25           19.     Petitioners submitted timely public comments objecting to MOFD's failure to conduct  
26 any CEQA review for the Amended Ordinance, identifying potentially significant impacts of the  
27 Ordinance, and explaining why each of the proposed exemptions is not applicable.

28           20.     MOFD has no procedures in place to provide for administrative appeals of Board

1 actions.

2 21. MOFD filed a Notice of Exemption (“NOE”) with the County Clerk of Contra Costa  
3 County on September 21, 2023.

4 22. Attachment C to the NOE, contains a document entitled “Responses to Select Public  
5 Comments” that was not included in the Board’s Agenda Packet or available for public review prior  
6 to the Board’s approval of the Amended Ordinance.

7 **B. Background.**

8 23. According to the California Fire Safe Regulations, a “fuel break” is a “strategically  
9 located area where the volume and arrangement of vegetation has been managed to limit fire  
10 intensity, fire severity, rate of spread, crown fire potential, and/or ember production.” (Cal. Code  
11 Regs., tit. 14, § 1270.01, subd. (n).)

12 24. Fuel breaks are one tool used by fire districts to reduce fire risk.

13 25. The Fire Safe Regulation addressing fuel breaks (“Fuel Break Regulation”) indicates  
14 that “[l]ocal Jurisdiction[s] shall determine the need and location for Fuel Breaks in consultation with  
15 the Fire Authority,” and does not contemplate unilateral action by fire districts. (See Cal. Code Regs.,  
16 tit. 14, § 1276.03.)

17 26. The Fuel Break Regulation also states that “Fuel Breaks shall have, at a minimum, one  
18 point of entry for fire fighters and any Fire Apparatus. The specific number of entry points and entry  
19 requirements shall be determined by the Local Jurisdiction, in consultation with the Fire Authority.”  
20 (Cal. Code Regs., tit. 14, § 1276.03, subd. (c).) And, “[f]uel Breaks shall be constructed using the  
21 most ecologically and site appropriate treatment option.” (*Id.* at subd. (f).)

22 27. In addition, Public Resources Code section 4117 provides that:

23 Any county, city, or district may adopt ordinances, rules, or regulations to provide  
24 fire prevention restrictions or regulations that are necessary to meet local  
25 conditions of weather, vegetation, or other fire hazards. Such ordinances, rules, or  
26 regulations may be more restrictive than state statutes in order to meet local fire  
27 hazard conditions.

28 (Cal. Pub. Resources Code § 4117 (emphasis added).)

29 28. In 2022, MOFD enacted a fuel break ordinance, Ordinance No. 22-02, that required

1 fuel breaks of 30 feet around the perimeter of undeveloped parcels between one and ten acres in size.  
2 (MOFD Ord. No. 22-02.) Only developed parcels, meaning those with at least one habitable structure,  
3 and undeveloped parcels over 10 acres in size were required to construct 100-foot fuel breaks. The  
4 ordinance allowed contiguous parcels controlled by the same party to be treated as a single parcel for  
5 purposes of the ordinance.

6 29. In February 2023, MOFD adopted Fuel Break Ordinance No. 23-04, which replaced  
7 Ordinance 22-02 and extended the 100-foot fuel break requirement to all undeveloped parcels greater  
8 than one acre. No reason was given for this expansion, although the MOFD fire chief, during public  
9 meetings, expressed the opinion that the 2022 ordinance was too confusing for landowners. (See e.g.,  
10 MOFD Special Board Meeting (Sept. 6, 2020), Recording at 49:50 – 50:17 (“It really had to do with  
11 reducing the complexity and the uncertainty surrounding which requirements applied where.”).)

12 30. No evidence was identified to support the fire chief’s opinion.

13 31. These fuel breaks are in addition to the defensible space clearings and fuel breaks  
14 required around structures and along access roads, as mandated by MOFD Ordinance No. 23-03 and  
15 state standards.

16 32. The recently adopted Amended Ordinance maintains the uniform 100-foot fuel break  
17 requirement but added a new definition of “Affected Parcels” that includes all parcels within or  
18 adjacent to a “Community at Risk,”<sup>1</sup> and all parcels within unincorporated areas that have at least one  
19 habitable structure or are adjacent to a parcel with at least one habitable structure. (Amend. Ord. No.  
20 23-08 § 4(b).)

21 33. In effect, the Amended Ordinance applies to all parcels located within Moraga and  
22 Orinda, and all parcels within unincorporated areas of the Fire District, except for those that are (1)  
23 undeveloped, (2) not adjacent to a developed parcel, and (3) not adjacent to an incorporated city or  
24 town. Again, no rationale was given for these changes. In addition, all parcels of one acre or less must

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25 <sup>1</sup> The “Communities at Risk” list is maintained by the California Department of Forestry and Fire Protection  
26 (“CalFIRE”) for the purpose of identifying funding eligibility for risk-reduction projects. (See  
27 <https://osfm.fire.ca.gov/divisions/community-wildfire-preparedness-and-mitigation/fire-plan/communities-at-risk/>.) Both Moraga and Orinda, as well as the community of Canyon and the neighboring city of Lafayette, are included on this eligibility list. The Amended Ordinance does not address funding for projects.

1 be cleared so the entire parcel meets the fuel break standards.

2 34. The Amended Ordinance provides no map or estimate of the total number of parcels  
3 affected, and no estimate of how many acres of land are required to be cleared by the Amended  
4 Ordinance.

5 35. The 100-foot fuel breaks required in 2023 ordinances are significantly larger than the  
6 30-foot fuel breaks required in 2022, which substantially increases the potential for adverse  
7 environmental impacts, as well as the cost to residents and landowners.<sup>2</sup>

8 36. To put this in perspective, the Amended Ordinance requires the owner of a 5-acre  
9 parcel (217,800 sq. ft.),<sup>3</sup> measuring 600 ft. x 363 ft., to clear an area of 152,600 sq. ft., which is 3.5  
10 acres—or 70% of the entire property. In contrast, the 2022 ordinance would have required the owner  
11 of the same parcel to clear an area of 54,180 sq. ft., which is just under 1.25 acres—or 25% of the  
12 property.

13 37. Insofar as the owners of adjoining parcels are both required to construct fuel breaks,  
14 the size of the area to be cleared along property lines was actually increased from 60 feet to 200 feet.  
15 In comparison, the width of a standard football field is only 160 feet.

16 38. MOFD has provided no evidence that the increase in size from 30-foot to 100-foot fuel  
17 breaks is necessary for fire prevention purposes.

18 39. In fact, MOFD Fire Chief Dave Winnacker has stated publicly that “there does not  
19 appear to be a body of evidence supporting the efficacy of fuel breaks, shaded or otherwise,” and  
20 admitted that fuel breaks are often ineffective, particularly when they are remote from roadways,  
21 lacking vehicular access for firefighters, or not strategically placed along ridgetops. (See Daily  
22 Dispatch Guest Column, “We Can Do It Better” (Aug. 7, 2023).<sup>4</sup>)

23 40. The fuel breaks required by the Amended Ordinance do not provide for vehicular  
24 access for firefighters and are not strategically placed. Instead, the Ordinance mandates the same one-

25 <sup>2</sup> Area residents report that cost estimates of \$15,000 to \$20,000 per property—just for the first year—are  
not uncommon.

26 <sup>3</sup> One acre is 43,560 sq. ft.

27 <sup>4</sup> Available at <https://www.dailydispatch.com/Columns/GuestColumn.aspx>.

1 size-fits-all prescription for every affected parcel.

2 41. The fuel breaks are required to meet the following standards:

3 (A) Grasses cut to less than 3”.

4 (B) Removal of all Hazardous Vegetation.

5 (C) Non-irrigated brush removed such that the minimum space between shrubs is as follows:

6 a. On flat or mild slopes (less than 20%): Two times the height of the shrub

7 b. On mild to moderate slopes (20-40%): Four times the height of the shrub

8 c. On moderate to steep slopes (greater than 40%): Six times the height of the shrub.

9 (D) Removal of all Combustible Material.

10 (E) Removal of dead, diseased, or dying trees.

11 (F) Maintain trees to remove Ladder Fuels so that foliage, twigs, or branches are

12 (1) greater than 6 feet above the ground for trees fifteen feet or taller and (2) at

13 least one-third of the height of the tree above the ground for trees less than fifteen feet tall.

14 (Amend. Ord. No. 23-08 § 4.) Implementation of these measures across large areas of the landscape, including as much as 70% of the affected parcels, constitutes a large scale habitat disturbance.

15 42. The Amended Ordinance defines “hazardous vegetation” as follows:

16 Vegetation that is combustible and endangers the public safety by creating a Fire Hazard, including but not limited to bark, mulch, seasonal and recurrent grasses, weeds, stubble, dry leaves, dry needles, or any other vegetation identified by the Fire Code Official. Hazardous Vegetation shall not include healthy, mature, scenic, trees.

17 (Amend. Ord. No. 23-08 § 3.)

18 43. The Amended Ordinance purports to address environmental concerns by simply declaring that there will be no impacts and asserting that:

19 The Fuel Break requirements of this Ordinance shall be interpreted and applied to avoid the taking of endangered, rare, or threatened plant or animal species, significant erosion and sedimentation of surface waters, and the removal of healthy, mature, scenic trees.

20 (Amend. Ord. No. 23-08 § 4(d).) However, the Amended Ordinance provides no means of enforcing this requirement, in effect, delegating compliance to the individuals who control each parcel.

21 44. Although the Amended Ordinance adds language to highlight MOFD’s process for requesting “modifications” of the fuel break requirements, this provision also places the burden of

1 initiating environmental compliance on the affected public. (See Amend. Ord. No. 23-08 § 5.)

2 45. Requests for modifications to accommodate endangered species or slope stability and  
3 erosion require the person who owns or controls the property to submit a report and site prescription  
4 prepared by a certified biologist or geologist.<sup>5</sup>

5 46. Other requested modifications are subject to discretionary approval by the fire chief or  
6 his designee, and may be granted only if (1) the modification is found to be necessary to address an  
7 environmental concern, or (2) in cases where strict compliance would be impractical and the  
8 modification complies with the intent and purpose of the ordinance, and would achieve the same  
9 practical effect. (See Amend. Ord. No. 23-08 § 5(a).)

10 47. Persons requesting modifications may also choose to submit individualized fire  
11 protection plans to mitigate other issues, which may be approved if they comply with the California  
12 Fire Code, section 4903. (See Amend. Ord. No. 23-08 § 5(b).) Such plans are subject to rigorous  
13 standards set forth in Fire Code sections 4903.2.1.1 and 4903.2.1.2, and thus likely to require  
14 professional surveys and consulting services to prepare. (See Cal. Code Regs., tit. 24, §§ 4902 et seq.)

15 48. The Amended Ordinance also mandates that the individual landowners, lessees, or  
16 managers of parcels with sensitive or protected resources “shall request a modification,” but provides  
17 no information to assist them in determining what parcels fall into this category. (*Id.*, § 4(d).) Unless  
18 the individuals who controls each parcel are aware of the sensitive plants, habitat, or other natural  
19 resources on their property and willing to go out of their way to seek protection for these, there is no  
20 assurance that such resources will be identified or protected.

21 49. In addition, the Amended Ordinance states that failure to comply with any of its  
22 provisions constitutes a public nuisance and is subject to fines and civil penalties or misdemeanor  
23 charges. (Amend. Ord. No. 23-08 § 6.) MOFD Ordinance 23-06 allows the district to abate nuisances  
24 at the property owner’s expense or place a lien on the property. The threat of penalties has already  
25 encouraged many landowners to construct fuel breaks without investigating whether sensitive  
26 resources could be adversely impacted. (*See* public comments.)

27 <sup>5</sup> This requirement is explained on the MOFD website: “Modification/Extension Request Form,”  
28 <https://www.mofd.org/business/forms-applications/modification-extension-request-form>.

1           50.     In short, MOFD has delegated all responsibility for environmental protection to  
2 individual landowners.

3 **C.     Environmental Impacts of Amended Ordinance.**

4           51.     The removal of natural ground cover and native vegetation from large areas  
5 surrounding each property may have significant adverse effects on the environment, including  
6 impacts on native plants and wildlife, sensitive and protected species, soil erosion, and water quality.

7           52.     The Orinda-Moraga area is home to an abundance of native wildlife and sensitive  
8 natural plant communities.

9           53.     The Orinda General Plan notes that: “Information from the Natural Diversity Data  
10 Base of the California Department of Fish and Game shows that several rare or endangered species  
11 have been located in or near the Orinda Planning Area. State and federal law protects rare, threatened  
12 and endangered animal species by preserving habitats.” (Orinda General Plan, at 4-1.)

13           54.     Threatened and endangered species known to occur within the Orinda-Moraga area  
14 include California red-legged frog,<sup>6</sup> Alameda whipsnake,<sup>7</sup> and pallid manzanita.<sup>8</sup> Many other special  
15 status species are also known to occur in and around this area.<sup>9</sup> However, MOFD conducted no  
16 surveys or literature reviews to identify what species could be adversely impacted by large scale  
17 habitat disturbance.

18           55.     The Endangered Species Act (ESA) prohibits the unauthorized “take” of endangered  
19 species, which includes actions that kill, harass, or harm such species. (16 U.S.C. §§ 1538 (B), 1532  
20 (19)). As defined by the Act’s implementing regulations, “harm” includes “significant habitat

21 \_\_\_\_\_  
22 <sup>6</sup> U.S. Fish and Wildlife Service, “California Red-Legged Frog,” <https://www.fws.gov/species/california-red-leggedfrog-rana-draytonii> (last visited September 14, 2023).

23 <sup>7</sup> U.S. Fish and Wildlife Service, “Alameda Whipsnake,” <https://www.fws.gov/species/alameda-whipsnake-masticophis-lateralis-euryxanthus> (last visited September 14, 2023).

24 <sup>8</sup> California Dept. of Fish and Wildlife, “Pallid Manzanita,” <https://wildlife.ca.gov/Conservation/Plants/Endangered/Arctostaphylos-pallida> (last visited September 14, 2023).

25 <sup>9</sup> See CDFW, California Natural Diversity Database, <https://wildlife.ca.gov/Data/CNDDDB>; see also,  
26 Diablo Firesafe council (March 2009), Best Management Practices Guidebook for Hazardous Fuel  
27 Treatments in Contra Costa County, <https://diablofiresafe.org/s/Best-Management-Practices-Hazardous-Fuel-Contra-Costa-2009.pdf>.

1 modification or degradation” that “kills or injures wildlife by significantly impairing essential  
2 behavioral patterns, including breeding, feeding or sheltering.” (50 CFR § 17.3).

3 56. The removal of vegetation to create football-field-sized fuel breaks along property  
4 lines throughout the affected area is likely to cause significant habitat modification that could easily  
5 disrupt the normal behavior of protected species through the elimination of food plants, food plants of  
6 prey species, denning and mating sites, and cover.

7 57. Other special-status species are also known to occur, or likely to occur, within the  
8 affected area. For example, public comments included a site review of a 6-acre parcel on Miner Road,  
9 located near the petitioners’ property, that identified 15 protected-status species that have the  
10 potential to occur in this area, and confirmed the presence of San Francisco dusky-footed woodrat  
11 (*Neotoma fuscipes annectens*), a state species of special concern. (See Public comments of Tyler Rust  
12 (Sept. 4, 2023).)

13 58. Dusky footed woodrats favor habitat with well-developed understory and to use  
14 natural ground litter to build nests—landscape features that would be largely eliminated from areas  
15 converted into fuel breaks. Woodrat nests also create habitat for other species, including small  
16 mammals, reptiles, amphibians, and arthropods, thereby enhancing biodiversity. San Francisco  
17 dusky-footed woodrats are also known to be sensitive to habitat disturbances and have abandoned  
18 nests that were exposed by clearcuts. They also rely on native plants that occur in the understory as  
19 their principal food source. (*Id.*)

20 59. Petitioners have observed signs of San Francisco dusky-footed woodrats on their  
21 property as well—and recently found a dead woodrat near the area where a neighbor recently  
22 installed a fuel break.

23 60. Other public comments have noted the potential occurrence of migratory birds within  
24 the area. (See public comments of Barbara Malloch Leitner (Sept. 6, 2023).) MOFD conducted no  
25 surveys or literature review to examine what bird species could be adversely impacted by large scale  
26 habitat disturbance and ground cover removal.

27 61. The requirement to remove dead trees from fuel breaks also includes snags that  
28 provide habitat for a variety of species. Snags provide perches and nest sites for raptors, habitat for

1 insects that serve as food sources for birds and small mammals, and hollow cavities provide nesting  
2 and food storage sites for birds and small mammals. For example, petitioners have observed acorn  
3 woodpeckers in the area, which inhabit hollow trees and construct granaries in dead trees to store  
4 acorns. A single snag may support a colony of a dozen or more woodpeckers. (*See* Public comments  
5 of Sandy Pearson (Sept.2, 2023).)

6 62. Habitat disturbance and removal of vegetative cover also impacts native species in the  
7 surrounding areas due to habitat fragmentation, elimination of habitat corridors, and changes to the  
8 micro-climate, including impacts on temperature or humidity.<sup>10</sup> Large open areas may effectively cut  
9 off species from accessing areas of habitat located across a fuel break due to the absence of protective  
10 cover and linkage. These impacts can reduce biodiversity and impact species reproduction, decreasing  
11 the viability of localized populations.

12 63. The Amended Ordinance also contains no provisions to ensure the protection of  
13 riparian areas, which provide important habitat for a wide variety of native species and migratory  
14 birds, as well as aquatic species. As noted in public comments, other fire districts provide guidance  
15 for avoiding impacts to riparian areas and associated species, and noting that actions affecting stream  
16 banks may require streambed alteration agreements or water quality permits.<sup>11</sup> (*See e.g.*, Fish and  
17 Game Code § 1602.)

18 64. Removal of brush and ground cover may also impact sensitive natural plant  
19 communities, including important remnants of native woodlands, shrublands and grasslands that are  
20 already heavily impacted by development. Public comments submitted by the California Native Plant  
21 Society (CNPS) noted the potential impacts of indiscriminate mowing, which may adversely impact  
22 native bunchgrasses and other desirable vegetation and inadvertently facilitate encroachment by  
23 invasive weeds. (*See* Public comments of CNPS (Sept. 5, 2023).) These comments also identified

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24 <sup>10</sup> *See e.g.*, Miguel Lurgi (May 30, 2019), “Habitat loss doesn’t just affect species, it impacts networks of  
25 ecological relationships,” *The Conversation* (May 30, 2019), [https://theconversation.com/habitat-loss-  
26 doesnt-just-affect-species-it-impactsnetworks-of-ecological-relationships-117687](https://theconversation.com/habitat-loss-doesnt-just-affect-species-it-impactsnetworks-of-ecological-relationships-117687).

27 <sup>11</sup> *See e.g.*, Marin Wildfire Prevention Authority (June 9, 2022), “Ecologically Sound Practices for  
28 Vegetation Management,” <https://www.espmarin.org/esppractices>; Diablo Firesafe Council (March 2009),  
Best Management Practices Guidebook for Hazardous Fuel Treatments in Contra Costa County, at 67-70,  
79-80.

1 resources developed by other fire districts to prevent or mitigate such impacts. However, MOFD has  
2 made no effort to minimize or reduce the potentially significant impacts of fuel breaks on native plant  
3 communities.

4 65. Sensitive natural communities are required to be inventoried and mitigated for as part  
5 of CEQA. (See CDFW (March 18, 2018), Protocols for Surveying and Evaluating Impacts to Special  
6 Status Native Plant Populations and Sensitive Natural Communities.<sup>12</sup>)

7 66. Removal of vegetation from steep slopes also increases risk of soil disturbance and  
8 destabilization of steep slopes, which may contribute to risk of landslides and adversely impact water  
9 quality. (See Public comments of Friends of Orinda Creek (Sept. 5, 2023).)

10 67. The Contra Costa County General Plan notes that there are multiple landslide deposits  
11 within the Orinda-Moraga area, and finds that “the presence or absence of deep-rooted vegetation . . .  
12 can exert a controlling effect on the intensity of natural processes occurring on a particular hillside.”  
13 (Safety Element, at p. 10-22). While the Amended Ordinance acknowledges that the area is hilly and  
14 subject to landslides, which can impact evacuation routes and firefighting response times, it does not  
15 evaluate the potential for large scale vegetation removal to exacerbate this issue. (Amend. Ord. No.  
16 23-08 §§ 2(k)(iii)(A) and (B).)

17 68. Although MOFD’s Fire Chief stated in public meetings that the fuel breaks are not  
18 required to expose bare soil, public comments indicate that some contractors and residents have  
19 nevertheless cleared grasses and brush all the way to the soil. As noted in public comments submitted  
20 by the City of Orinda:

21 On-the-ground experience shows that compliance in and of itself is not necessarily  
22 bringing the totality of considerations into play. For example, one property owner  
23 takes the level of clearance to such a degree as to impact creek banks potentially  
24 causing landslides and water quality issues whereas a measured approach would  
25 have met the goals of the Ordinance without causing environmental harm had the  
26 homeowner known the rules were different for a creek area.

27 (Public comments of City of Orinda (Sept.6, 2023); *see also* Public comments of Friends of Orinda  
28 Creek (Sept. 5, 2023).) It is thus foreseeable that some property owners will interpret the requirement

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12 Document available at: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=18959&inline>.

1 to cut grasses to “less than 3 [inches]” and eliminate non-irrigated brush to mean they should remove  
2 as much of this vegetation as possible. In addition, some people may find clearing as much vegetation  
3 as possible to be an economical way to comply with the ordinance, given that the fuel breaks must be  
4 maintained year after year.

5 69. The potential for increased risk of mudslides and slope destabilization due to excessive  
6 vegetation clearing was also raised in other public comments documenting the susceptibility of some  
7 areas to mudflows during the rainy season. (See Public comments of Julia Hunting (Sept. 5, 2023.)  
8 Large fuel breaks may exacerbate this problem, potentially increasing risk of damage to homes and  
9 evacuation routes.

10 70. Similarly, excessive clearing within riparian zones can destabilize streambanks and  
11 increase water pollution by eliminating the vegetative buffer and allowing sediments from runoff to  
12 flow directly into creeks.<sup>13</sup>

13 71. Increased sediment loads can degrade aquatic habitat, harm fish and aquatic species by  
14 increasing siltation of stream beds, and contribute to the clogging and sedimentation of human  
15 constructed waterworks.<sup>14</sup> Notably, unauthorized discharges of sediment pollution into waterways are  
16 prohibited by the state Porter Cologne Act and by the federal Clean Water Act. (See Cal. Water Code,  
17 §§ 13000 et seq.; 33 U.S.C. §§ 1251 et seq.)

18 72. Based on these observations, comments, and resources, there is a high likelihood that  
19 the Amended Ordinance may cause potentially significant impacts on biological resources, geological  
20 conditions, and water quality.

21 **D. Proposed CEQA exemptions are not applicable.**

22 73. Categorical exemptions apply to “classes of projects that have been determined not to  
23 have a significant effect on the environment” by the Secretary of the Natural Resources Agency.  
24 (Pub. Resources Code, § 21084, subd. (a)). Categorical exemptions are improperly applied where a

25 <sup>13</sup> See e.g., California Riparian Habitat Restoration Handbook, 2nd ed. (July 2009),  
26 <https://coveredactions.deltacouncil.ca.gov/services/download.ashx?u=a3689597-31c2-4140-adb0-9200fa71c0e0>.

27 <sup>14</sup> See e.g., USDA Natural Resources Conservation Service, Water Quality Degradation: Sediment (March  
28 2012), [https://efotg.sc.egov.usda.gov/references/public/AR/Water\\_Quality\\_Degradation\\_Sediment.pdf](https://efotg.sc.egov.usda.gov/references/public/AR/Water_Quality_Degradation_Sediment.pdf).

1 project is shown to be distinguishable from other projects in the class or where there is substantial  
2 evidence that the project will have a significant effect on the environment. (*Berkeley Hillside Pres. v.*  
3 *City of Berkeley* (2015) 60 Cal. 4th 1086, 1105.)

4 74. Categorical exemptions are also inapplicable where “the cumulative impact of  
5 successive projects of the same type in the same place, over time is significant,” or “where there is a  
6 reasonable possibility that the activity will have a significant effect on the environment due to  
7 unusual circumstances.” (Cal. Code Regs., tit. 14, § 15300.2, subds. (b) and (c).)

8 75. Class seven categorical exemptions apply to “actions taken by regulatory agencies . . .  
9 to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory  
10 process involves procedures for protection of the environment.” (Cal. Code Regs., tit. 14, § 15307.)  
11 Here, the project will not assure the maintenance, restoration, or enhancement of native plant  
12 communities, wildlife habitat, slope stability, or water quality, and any benefit to a natural resource is  
13 incidental to project’s objective of advancing public health and safety.

14 76. Class eight categorical exemptions apply to “actions taken by regulatory agencies . . .  
15 to assure the maintenance, restoration, enhancement, or protection of the environment where the  
16 regulatory process involves procedures for protection of the environment.” (Cal. Code Regs., tit. 14, §  
17 15307.) Here, the project is not designed to maintain, restore, enhance, or protect native plant  
18 communities, wildlife habitat, slope stability, or water quality, and any protection of the natural  
19 environment is incidental is to the project’s objective of advancing public health and safety.

20 77. In addition, the Project is likely to have a significant effect on the environment due to  
21 the cumulative effect of hundreds of fuel breaks causing large scale habitat modifications within the  
22 same area together with other vegetation removal projects in the same area. (Cal. Code Regs., tit. 14,  
23 § 15300.2, subd. (b).) Unusual circumstances may also apply in areas at risk for soil erosion,  
24 mudslides, and areas of critical wildlife habitat. (Cal. Code Regs., tit. 14, § 15300.2, subd. (c).)

25 78. The commonsense exemption is not a categorical exemption, but applies only “[w]here  
26 it can be seen with certainty that there is no possibility that the activity in question may have a  
27 significant effect on the environment.” (Cal. Code Regs., tit 14, § 15061, subd. (b)(3).) Here, there is  
28 no such certainty, as clearing vegetation from hundreds of acres is likely to have a significant effect

1 on the environment.

2 79. The emergency exemption applies only to “[s]pecific actions necessary to prevent or  
3 mitigate an emergency.” (Pub. Resources Code, § 21080, subd. (b)(4).). Here, there is no evidence to  
4 support the finding that requiring fire breaks of this magnitude, placed non-selectively around every  
5 parcel within the affected area is necessary to prevent an emergency.

6 80. Pursuant to CEQA,

7 “Emergency” means a sudden, unexpected occurrence, involving a clear and  
8 imminent danger, demanding immediate action to prevent or mitigate loss of, or  
9 damage to, life, health, property, or essential public services. “Emergency”  
includes such occurrences as fire, flood, earthquake, or other soil or geologic  
movements, as well as such occurrences as riot, accident, or sabotage.

10 (Pub. Resources Code § 21060.3.) This does not mean every action to reduce the risk of wildfires  
11 qualifies for this exemption. (*Western Mun. Water Dist. v. Superior Court* (1986) 187 Cal.App.3d  
12 1104, 1111-12.) Here, the Fire Chief has also admitted that there is no evidence that fuel breaks are  
13 effective in preventing a fire emergency.

14 **FIRST CAUSE OF ACTION**  
15 **(Writ of Mandate under CCP, § 1085 and Pub. Resources Code, §§ 21000, et seq.,**  
16 **CEQA Compliance)**

17 81. Petitioner hereby realleges and incorporates by reference each of the above paragraphs  
18 as if fully set forth herein.

19 82. Under CEQA, a “project” is “an activity which may cause either a direct physical  
20 change in the environment, or a reasonably foreseeable indirect physical change in the environment.”  
21 (Pub. Resources Code, § 21065.) Here, the discretionary approval of the Amended Ordinance is a  
22 project because it requires landowners to make physical changes to the environment.

23 83. Before approving any “project,” a lead agency must first decide whether CEQA  
24 applies. Here, respondent is the “lead agency” under CEQA and has filed a Notice of Exemption  
25 asserting that CEQA does not apply to its approval of Amended Fuel Break Ordinance 23-08.

26 84. Respondent exempted the project from CEQA under sections 15307 and 15308 of the  
27 CEQA Guidelines (categorical exemptions); section 15269 of the CEQA Guidelines and Public  
28

1 Resources Code section 21080(a)(4) (emergency exemption), and CEQA Guidelines section  
2 15601(b)(3) (commonsense exemption).

3 85. Respondent failed to comply with CEQA by exempting the project from review when  
4 no exemption applies.

5 86. CEQA further requires that a lead agency's findings for the approval of a project be  
6 supported by substantial evidence in the administrative record. CEQA further requires that a lead  
7 agency provide an explanation of how evidence in the record supports the conclusions it has reached.

8 87. Respondent violated CEQA by adopting findings and a Notice of Exemption that are  
9 inadequate as a matter of law as they are not supported by substantial evidence in the record,  
10 including but not limited to the following:

- 11 a. Finding that the Amended Ordinance is exempt from CEQA pursuant to section  
12 15307 of the CEQA Guidelines.
- 13 b. Finding that the Amended Ordinance is exempt from CEQA pursuant to section  
14 15308 of the CEQA Guidelines.
- 15 c. Finding that the Amended Ordinance is exempt from CEQA pursuant to section  
16 15269 of the CEQA Guidelines.
- 17 d. Finding that the Amended Ordinance is exempt from CEQA pursuant to section  
18 15061, subdivision (b)(3) of the CEQA Guidelines.
- 19 e. Finding that no exception in CEQA Guidelines section 15300.2 applies to the  
20 Amended Ordinance.

21 88. As a result of the foregoing defects, respondents prejudicially abused their discretion  
22 by making determinations or adopting findings that do not comply with the requirements of CEQA  
23 and approving the Project in reliance thereon.

24 89. Respondents are capable of conducting a CEQA review to assess the potentially  
25 significant environmental effects of the Amended Ordinance but have chosen not to. Instead they  
26 claim a grab bag of exemptions to justify the decision to delegate their responsibility for  
27 environmental protection to individual property owners who may or may not have the knowledge,  
28

1 resources, or motivation to ensure that natural resources will be protected. MOFD will likely continue  
2 its refusal to evaluate the impacts of its actions unless compelled to do so by this Court.

3 90. Code of Civil Procedure, section 1085, and Public Resources Code section 21168.9,  
4 authorize this Court to issue a writ of mandate to compel a public agency to set aside the decision that  
5 fails to comply with CEQA.

6 **SECOND CAUSE OF ACTION**  
7 **(Writ of Mandate under CCP, § 1085 and Pub. Resources Code, §§ 21000, *et seq.*,**  
8 **CEQA Procedural Violation)**

9 91. Petitioner realleges and incorporates all of the above paragraphs as if fully set forth  
10 herein.

11 92. Respondents also violated CEQA by appending to the Notice of Exemption, as  
12 Attachment C, a document entitled “Responses to Select Public Comments” that was not part of the  
13 Board Agenda Packets or made available to the public prior to the Board of Directors’ approval of the  
14 Amended Ordinance. This document is not part of the public record but, rather, contains post hoc  
15 rationales for MOFD’s decision to approve the Amended Ordinance. As such, it should not be  
16 included in the NOE as if these responses informed the Board’s decision.

17 93. By including in its findings information that was not part of the public record at the  
18 time the agency made its decision, respondent has misrepresented the basis of its decision and thus  
19 failed to proceed in the manner required by law.

20 94. Therefore, respondent’s approval and exemption of the Project from CEQA must be  
21 set aside.

22 **PRAYER FOR RELIEF**

23 WHEREFORE, petitioner respectfully pray for the following relief:

- 24 a. For a peremptory writ of mandate requiring Moraga-Orinda Fire District to:
- 25 i. Vacate and set aside approval of Amended Ordinance 23-08 and the NOE.
- 26 ii. Conduct a sufficient environmental review under CEQA prior to authorizing any  
27 new or amended Fuel Break Ordinance.
- 28 b. Award petitioners their attorneys’ fees and costs of suit; and

1 c. Award such other relief as this court may deem just and proper.

2 Dated: October 25, 2023

GREENFIRE LAW, PC

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Jessica L. Blome

Susann M. Bradford

*Attorneys for petitioners*

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**VERIFICATION**

I, Sandia Pearson, spokesperson for the petitioners in this action, have read the foregoing Petition for Writ of Mandate and know its contents. The facts alleged in the above Petition are within my own knowledge and I know these facts to be true, except as to matters alleged therein on information and belief.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration is executed on October 24, 2023 at Orinda, California.

  
Sandia Pearson  
Sandia Pearson

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# Exhibit A



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October 23, 2023

*By Email and U.S. Mail*

Moraga-Orinda Fire District  
Fire Chief Dave Winnacker  
President John Jex  
1280 Moraga Way  
Moraga, CA 94556  
Email: info@mofd.org,  
Dwinnacker@mofd.org,  
mmjjex@gmail.com

**Re: Notice of Commencement of CEQA Litigation Challenging the Approval of Amended Fuel Break Ordinance No. 23-08 Without Conducting Environmental Review**

Dear Moraga-Orinda Fire District Board of Directors and Fire Chief:

This letter is to notify you that Orinda residents, Sandia Pearson And Anita K. Pearson, will file suit against Moraga-Orinda Fire District (“the District”) for failure to observe the requirements of the California Environmental Quality Act (“CEQA”), Public Resources Code, section 21000 et seq., the CEQA Guidelines, California Code of Regulations, section 15000 et seq., in approving Amended Fuel Break Ordinance No. 23-08 without first conducting an environmental review, and for issuing a Notice of Exemption that misrepresents the administrative record. This notice is given pursuant to Public Resources Code section 21167.5.

Please note that, under Public Resources Code section 21167.6, the record of proceedings for the Department’s actions includes, among other items, all “internal agency communications, including staff notes and memoranda related to the project or to compliance with [CEQA].” Because all e-mails and other internal communications related to the Amended Fuel Break Ordinance are part of the administrative record for the lawsuit to be filed by the Pearsons, the Department may not destroy or delete such documents prior to preparation of the record in this case.

Respectfully,

Susann M. Bradford