

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

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## Executive Summary

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

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

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

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

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

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

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

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

## **Background**

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

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

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

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

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

## **Pre-Workshop Findings**

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

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

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

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

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

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

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

## **Workshop Presentations**

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

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

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

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

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

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

Finance Director Paul Rankin:

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

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

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

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

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

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

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

## **Workshop Discussion**

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

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

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

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

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

### **Observations Regarding Workshop Results**

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

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

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

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

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

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

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

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

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

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

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