Regulatory Division
1455 Market Street, 16th Floor
San Francisco, CA 94103-1398

US Army Corps of Engineers ®
San Francisco District

SAN FRANCISCO DISTRICT

PUBLIC NOTICE

PROJECT: Diamond Creek Development

PUBLIC NOTICE NUMBER: 2011-00416S
PUBLIC NOTICE DATE: 10-29-2012
COMMENTS DUE DATE: 11-29-2012

PERMIT MANAGER: Katerina Galacatos TELEPHONE: 415-503-6778 E-MAIL: Katerina.Gaalcatos@usace.army.mil

1. **INTRODUCTION**: MH Engineering Company, 16075 Vineyard Boulevard, Morgan Hill, CA 95037, (POC: Bethany Liou, 408-887-8281), through its agent, Olberding Environmental, Inc., (POC: Jeff Olberding, 925-866-2111), has applied to the U.S. Army Corps of Engineers (USACE), San Francisco District, for a Department of the Army Permit to construct the Diamond Creek Development Project. This Department of the Army permit application is being processed pursuant to the provisions of Section 404 of the Clean Water Act of 1972, as amended (33 U.S.C. § 1344 *et seq*).

2. **PROPOSED PROJECT**:

Project Site Location: The project site is located on the south side of Monterey Road, between Vineyard Boulevard and Watsonville Road, in Morgan Hill, Santa Clara County, California (APN's 767-23-026, 767-23-027, and 767-23-029) (Figure 1- Site Map).

Project Site Description: The 9.44 acres project site has an existing house and associated buildings located in the southern end of the project site and commercial buildings in the northern end along Monterey Road. The majority of the central project site has historically been in agricultural development. The vegetation is this central area site is dominated by upland vegetation (*Convovulus arvensis*, *Cichorium intybus*, *Bromus diandrus*, and *Avena fatua*). The project site is bisected by the historic channel of Little Llagas Creek, that has 0.09 acre of in-stream wetlands. The stream and its in-stream wetlands are jurisdictional waters of the U.S pursuant to Section 404 of the Clean Water Act (Figure 2 - Jurisdictional Determination Map).

Project Description: The applicant is proposing to construct 101 condominiums and 29 townhouses, two commercial lots and associated infrastructure on the project site (Figure 3 - Development Plan).

Basic Project Purpose: The basic project purpose comprises the fundamental, essential, or irreducible purpose of the project, and is used by USACE to determine whether the project is water dependent. The basic project purpose is to construct housing and commercial development.

Overall Project Purpose: The overall project purpose serves as the basis for the Section 404(b)(1) alternatives analysis, and is determined by further defining the basic project purpose in a manner that more specifically describes the applicant's goals for the project, while allowing a reasonable range of alternatives to be analyzed. The overall project purpose is to construct housing and commercial development within the city of Morgan Hill.

Project Impacts: The proposed project would permanently fill 566 linear feet of existing stream and 0.09 acres of in-stream wetlands (Figure 4 - JD map with Development Plan).

Proposed Mitigation: The applicant is proposing to mitigate for the 566 linear feet of stream impacts by establishing approximately 1,020 linear feet of vegetated swale along the northern and western property boundary. The primary purpose of the vegetated swale would be for stormwater clarification and water quality purposes (Figures 5a and 5b - Stormwater Areas and Stormwater Details). The applicant is also proposing the reestablishment of approximately 847 linear feet (0.38 acres) of mixed riparian woodland along the northern

embankment of Edmundson Creek located 0.65 miles to the northeast (Figure 6 - Riparian Planting along Edmundson Creek).

Project Alternatives: The applicant has submitted an alternative analysis that has identified two off-site alternatives and four on-site alternatives. The first off-site alternative would have greater impacts to waters of the U.S. The second off-site alternative would require significant investment of capital and changes to local zoning. The three on-site alternatives identified would result in the loss of enough residential units and/or commercial space to make the alternatives infeasible.

3. **STATE AND LOCAL APPROVALS**:

Water Quality Certification: State water quality certification or a waiver is a prerequisite for the issuance of a Department of the Army Permit to conduct any activity which may result in a fill or pollutant discharge into waters of the United States, pursuant to Section 401 of the Clean Water Act of 1972, as amended (33 U.S.C. § 1341 *et seq*.). The applicant has recently submitted an application to the California Regional Water Quality Control Board (RWQCB) to obtain water quality certification for the project. No Department of the Army Permit will be issued until the applicant obtains the required certification or a waiver of certification. A waiver can be explicit, or it may be presumed, if the RWQCB fails or refuses to act on a complete application for water quality certification within 60 days of receipt, unless the District Engineer determines a shorter or longer period is a reasonable time for the RWQCB to act.

Water quality issues should be directed to the Executive Officer, California Regional Water Quality Control Board, Central Coast Region, 895 Aerovista Place, Suite 101, San Luis Obispo, California 93401, by the close of the comment period.

Coastal Zone Management: Section 307(c) of the Coastal Zone Management Act of 1972, as amended (16 U.S.C. § 1456(c) *et seq*.), requires a non-Federal applicant seeking a federal license or permit to conduct any activity occurring in or affecting the coastal zone to obtain a Consistency Certification that indicates the activity conforms with the State's coastal zone management program. Generally, no federal license or permit will be granted until the appropriate State agency has issued a Consistency Certification or has waived its right to do so. The project does not occur in the coastal zone, and a *preliminary* review by USACE indicates the project would not likely affect coastal zone resources. This presumption of effect, however, remains subject to a final determination by the San Francisco Bay Conservation and Development Commission.

4. **COMPLIANCE WITH VARIOUS FEDERAL LAWS**:

National Environmental Policy Act (NEPA): Upon review of the Department of the Army permit application and other supporting documentation, USACE has made a *preliminary* determination that the project neither qualifies for a Categorical Exclusion nor requires the preparation of an Environmental Impact Statement for the purposes of NEPA. At the conclusion of the public comment period, USACE will assess the environmental impacts of the project in accordance with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321-4347), the Council on Environmental Quality's Regulations at 40 C.F.R. Parts 1500-1508, and USACE Regulations at 33 C.F.R. Part 325. The final NEPA analysis will normally address the direct, indirect, and cumulative impacts that result from regulated activities within the jurisdiction of USACE and other non-regulated activities USACE determines to be within its purview of Federal control and responsibility to justify an expanded scope of analysis for NEPA purposes. The final NEPA analysis will be incorporated in the decision documentation that provides the rationale for issuing or denying a Department of the Army Permit for the project. The final NEPA analysis and supporting documentation will be on file with the San Francisco District, Regulatory Division.

Endangered Species Act (ESA): Section 7(a)(2) of the ESA of 1973, as amended (16 U.S.C. § 1531 *et seq*.), requires Federal agencies to consult with either the U.S. Fish and Wildlife Service (USFWS) or the National Marine Fisheries Service (NMFS) to ensure actions authorized, funded, or undertaken by the agency are not likely to jeopardize the continued existence of any Federally-listed species or result in the adverse modification of designated critical habitat. As the Federal lead agency for this project, USACE has conducted a review of the California Natural Diversity Data Base, digital maps prepared by USFWS and NMFS depicting critical habitat, and other information provided by the applicant, to determine the presence or absence of such species and critical habitat in the project area. Based on this review, USACE has made a *preliminary*

determination that Federally-listed species and designated critical habitat are not present at the project location or in its vicinity, and that consultation will not be required. USACE will render a final determination on the need for consultation at the close of the comment period, taking into account any comments provided by USFWS and/or NMFS.

Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA): Section 305(b)(2) of the MSFCMA of 1966, as amended (16 U.S.C. § 1801 *et seq*.), requires Federal agencies to consult with the NMFS on all proposed actions authorized, funded, or undertaken by the agency that may adversely affect essential fish habitat (EFH). EFH is defined as those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity. EFH is designated only for those species managed under a Federal Fisheries Management Plan (FMP), such as the *Pacific Groundfish FMP*, the *Coastal Pelagics FMP, and* the *Pacific Coast Salmon FMP*. As the Federal lead agency for this project, USACE has conducted a review of digital maps prepared by NMFS depicting EFH to determine the presence or absence of EFH in the project area. Based on this review, USACE has made a *preliminary* determination that EFH is not present at the project location or in its vicinity, and that consultation will not be required. USACE will render a final determination on the need for consultation at the close of the comment period, taking into account any comments provided by NMFS.

Marine Protection, Research, and Sanctuaries Act (MPRSA): Section 302 of the MPRS of 1972, as amended (16 U.S.C. § 1432 *et seq*.), authorizes the Secretary of Commerce, in part, to designate areas of ocean waters, such as the Cordell Bank, Gulf of the Farallones, and Monterey Bay, as National Marine Sanctuaries for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or aesthetic values. After such designation, activities in sanctuary waters authorized under other authorities are valid only if the Secretary of Commerce certifies that the activities are consistent with Title III of the Act. No Department of the Army Permit will be issued until the applicant obtains the required certification or permit. The project does not occur in sanctuary waters, and a *preliminary* review by USACE indicates the project would not likely affect sanctuary resources. This presumption of effect, however, remains subject to a final determination by the Secretary of Commerce, or his designee.

National Historic Preservation Act (NHPA): Section 106 of the NHPA of 1966, as amended (16 U.S.C. § 470 *et seq*.), requires Federal agencies to consult with the appropriate State Historic Preservation Officer to take into account the effects of their undertakings on historic properties listed in or eligible for listing in the *National Register of Historic Places*. Section 106 of the Act further requires Federal agencies to consult with the appropriate Tribal Historic Preservation Officer or any Indian tribe to take into account the effects of their undertakings on historic properties, including traditional cultural properties, trust resources, and sacred sites, to which Indian tribes attach historic, religious, and cultural significance. As the Federal lead agency for this undertaking, USACE will request that the applicant conducted a review of latest published version of the *National Register of Historic Places*, survey information on file with various city and county municipalities, and other information provided by the applicant, to determine the presence or absence of historic and archaeological resources within the permit area. USACE will render a final determination on the need for consultation at the close of the comment period, taking into account any comments provided by the State Historic Preservation Officer, the Tribal Historic Preservation Officer, the Advisory Council on Historic Preservation, and Native American Nations or other tribal governments. If unrecorded archaeological resources are discovered during project implementation, those operations affecting such resources will be temporarily suspended until USACE concludes Section 106 consultation with the State Historic Preservation Officer or the Tribal Historic Preservation Officer to take into account any project related impacts to those resources.

Other Local Approvals: The applicant has applied for the following additional governmental authorizations for the project: a Lake and Streambed Alteration Agreement to be issued by the California Department of Fish and Game.

5. **COMPLIANCE WITH THE SECTION 404(b)(1) GUIDELINES**: Projects resulting in discharges of dredged or fill material into waters of the United States must comply with the Guidelines promulgated by the Administrator of the Environmental Protection Agency under Section 404(b) of the Clean Water Act (33 U.S.C. § 1344(b)). An evaluation pursuant to the Guidelines indicates the project is not dependent on location in or proximity to waters of the United States to achieve the basic project purposes. This conclusion raises the

(rebuttable) presumption of the availability of a less environmentally damaging practicable alternative to the project that does not require the discharge of dredged or fill material into special aquatic sites. The applicant has submitted an analysis of project alternatives which is being reviewed by USACE.

6. **PUBLIC INTEREST EVALUTION**: The decision on whether to issue a Department of the Army Permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the project and its intended use on the public interest. Evaluation of the probable impacts requires a careful weighing of the public interest factors relevant in each particular case. The benefits that may accrue from the project must be balanced against any reasonably foreseeable detriments of project implementation. The decision on permit issuance will, therefore, reflect the national concern for both protection and utilization of important resources. Public interest factors which may be relevant to the decision process include conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and, in general, the needs and welfare of the people.

7. **CONSIDERATION OF COMMENTS**: USACE is soliciting comments from the public; Federal, State and local agencies and officials; Native American Nations or other tribal governments; and other interested parties in order to consider and evaluate the impacts of the project. All comments received by USACE will be considered in the decision on whether to issue, modify, condition, or deny a Department of the Army Permit for the project. To make this decision, comments are used to assess impacts on endangered species, historic properties, water quality, and other environmental or public interest factors addressed in a final environmental assessment or environmental impact statement. Comments are also used to determine the need for a public hearing and to determine the overall public interest of the project.

8. **SUBMITTING COMMENTS**: During the specified comment period, interested parties may submit written comments to Katerina Galacatos, San Francisco District, Regulatory Division, 1455 Market Street, 16th Floor, San Francisco, California 94103-1398; comment letters should cite the project name, applicant name, and public notice number to facilitate review by the Regulatory Permit Manager. Comments may include a request for a public hearing on the project prior to a determination on the Department of the Army permit application; such requests shall state, with particularity, the reasons for holding a public hearing. All substantive comments will be forwarded to the applicant for resolution or rebuttal. Additional project information or details on any subsequent project modifications of a minor nature may be obtained from the applicant and/or agent, or by contacting the Regulatory Permit Manager by telephone or e-mail cited in the public notice letterhead. An electronic version of this public notice may be viewed under the *Current Public Notices* tab on the USACE website: http://www.spn.usace.army.mil/regulatory/.

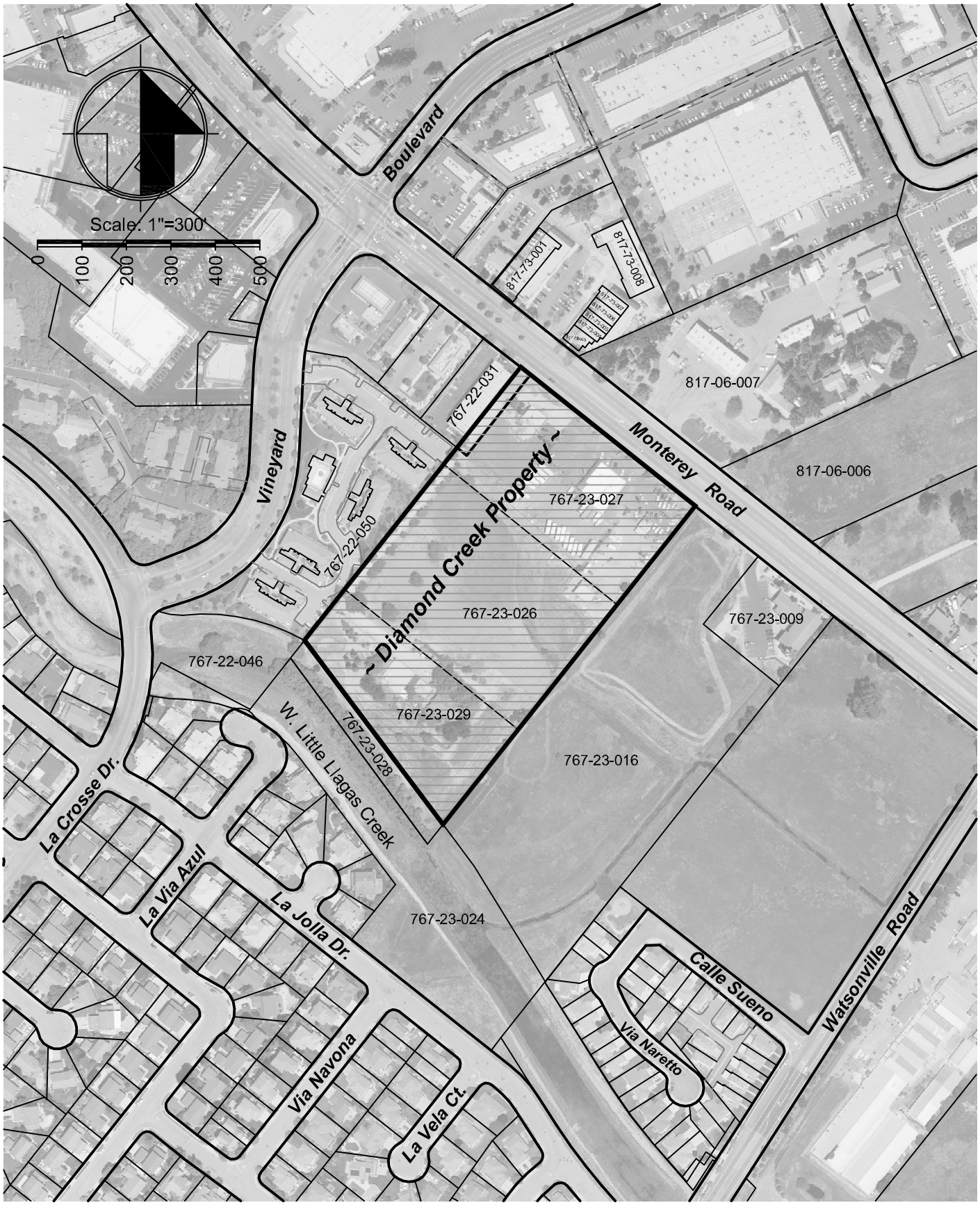

Figure 1 - Site Map

MH engineering Co.
16075 VINEYARD BOULEVARD MORGAN HILL, CA 95037

SCALE: 1"=300'	JOB #: 26019.2	SHEET
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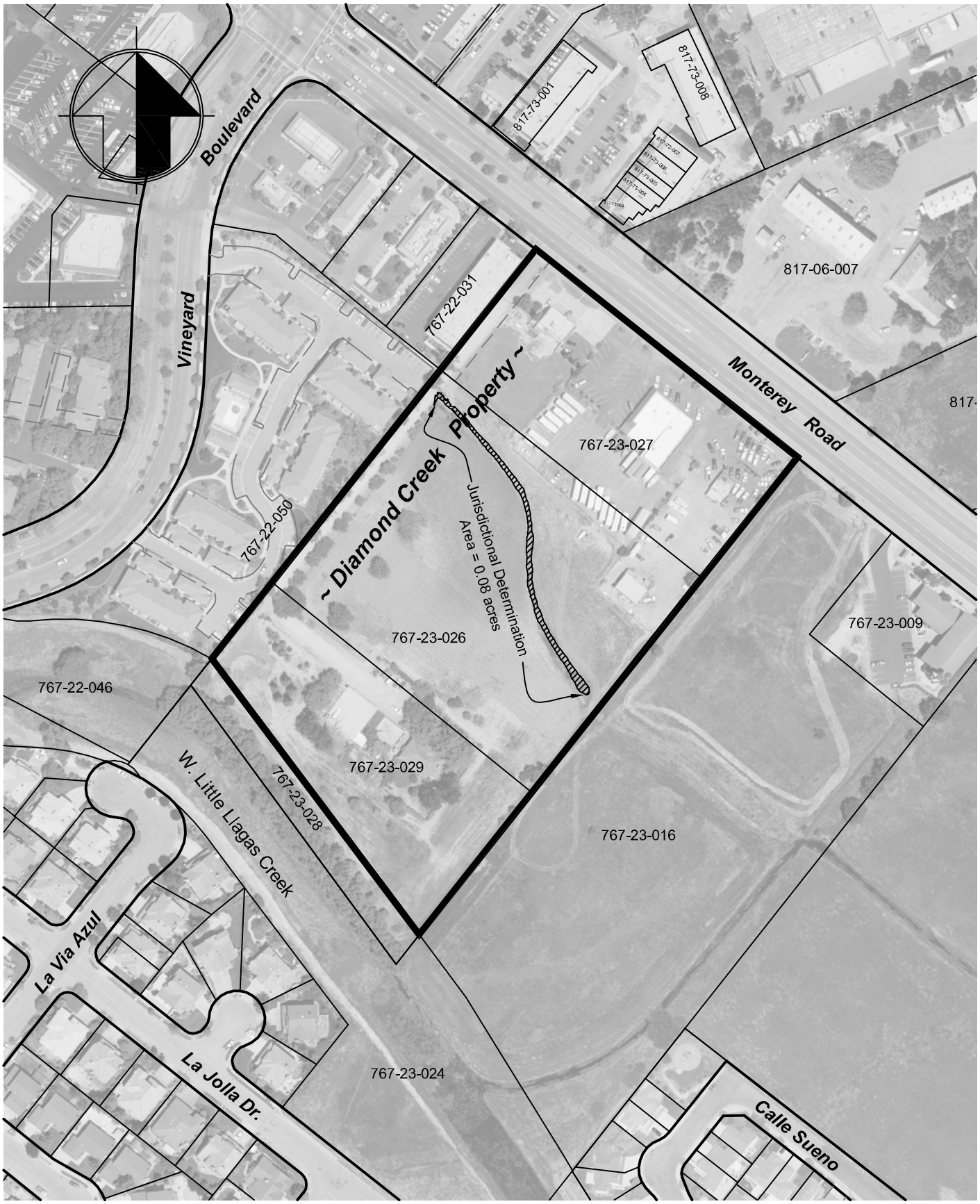

Figure 2 - Jurisdictional Determination Map

MH engineering Co.
16075 VINEYARD BOULEVARD MORGAN HILL, CA 95037

SCALE: 1"=200'	JOB #: 26019.2	SHEET
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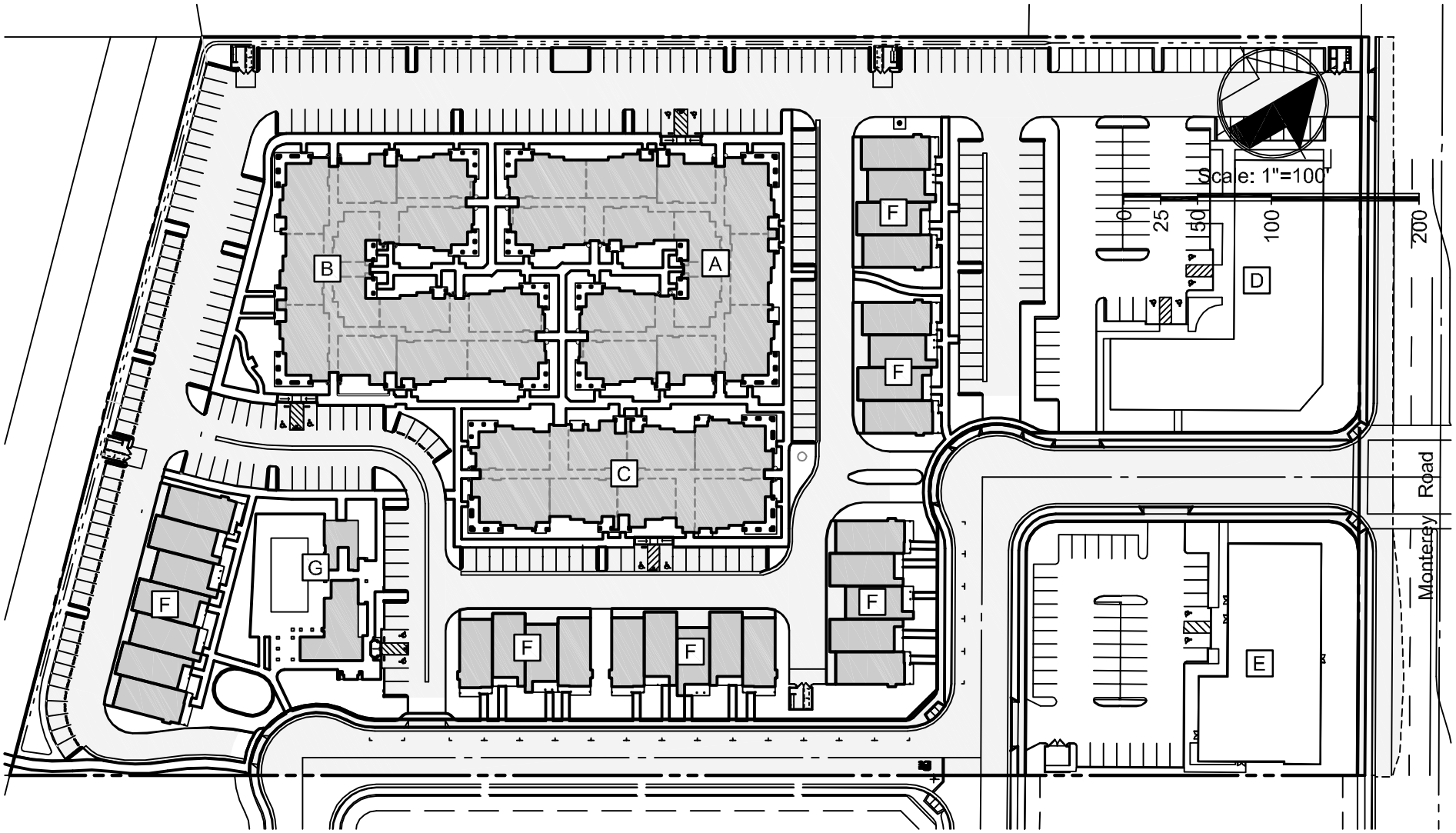

- A 3 Story Condo building
- B 3 Story Condo building
- C 3 Story Condo building
- D Future commercial development
- E Future commercial development
- F Townhomes
- G Community building & pool

Figure 3 - Development Plan

MH engineering Co. 16075 VINEYARD BOULEVARD MORGAN HILL, CA 95037	Diamond Creek Development Plan	SCALE: 1"=100'	JOB #: 26019.2	SHEET
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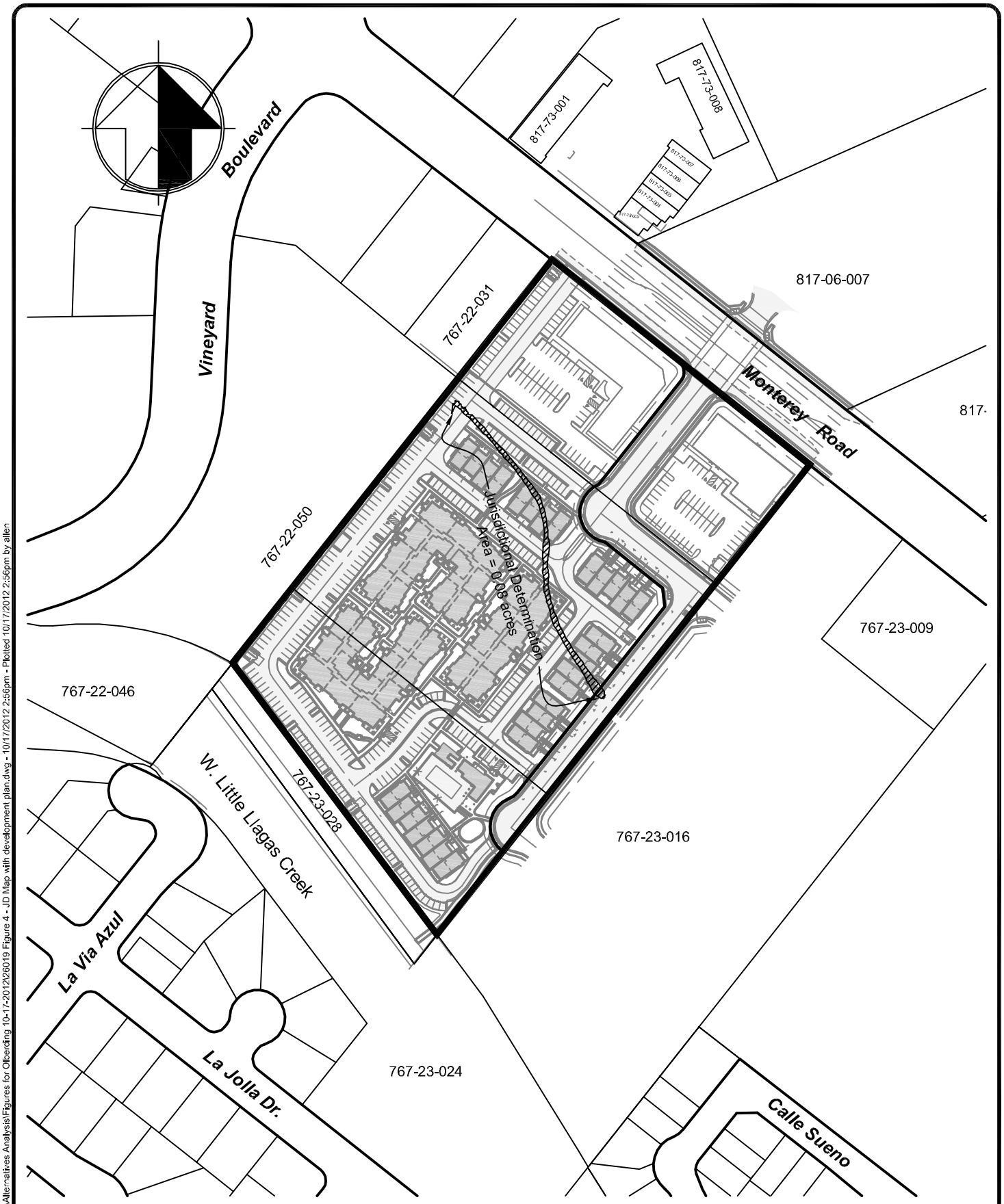

Figure 4 - JD Map with Development Plan

MH engineering Co.
16075 VINEYARD BOULEVARD MORGAN HILL, CA 95037

SCALE: 1"=200'	JOB #: 26019.2	SHEET
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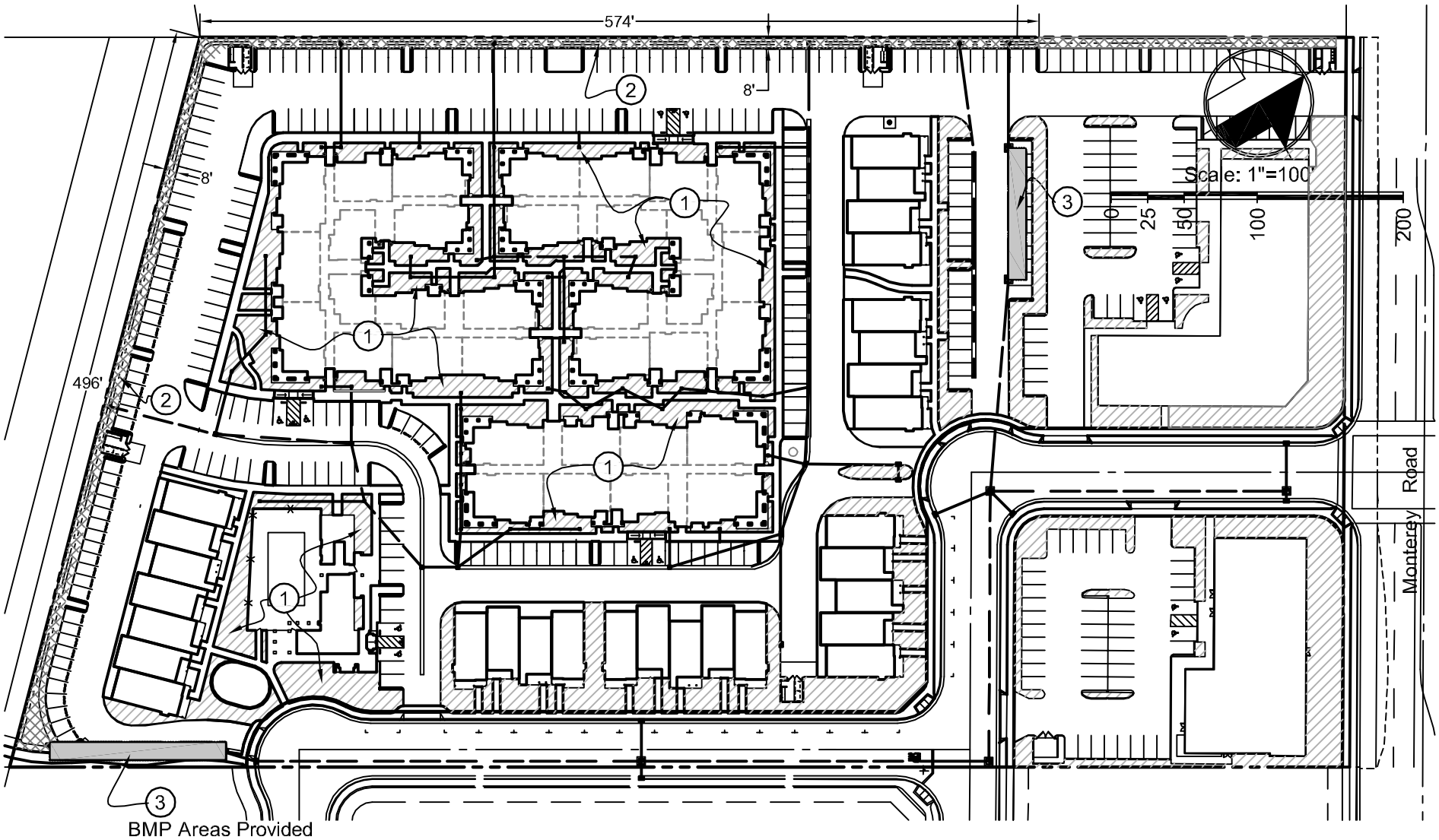

1	58,548 sf	grassy swales around buildings/parking
2	8,804 sf	Bio-Retention swales
3	2,521 sf	Underground stormwater infiltration facilities

Figure 5a - Stormwater BMP Areas

M.H engineering Co. 16075 VINEYARD BOULEVARD MORGAN HILL, CA 95037	**Diamond Creek BMP Treatment Areas**	SCALE: 1"=100'	JOB #: 26019.2	SHEET
		DRAWN BY: ATA	DATE: 10/17/2012	1 of 2

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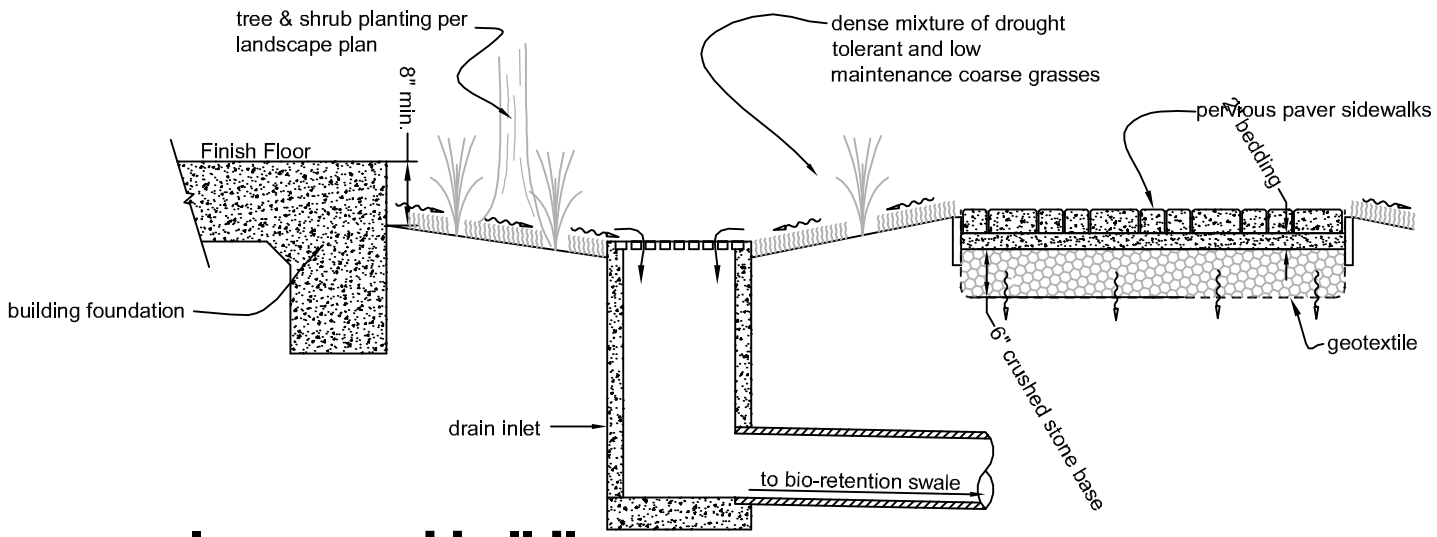
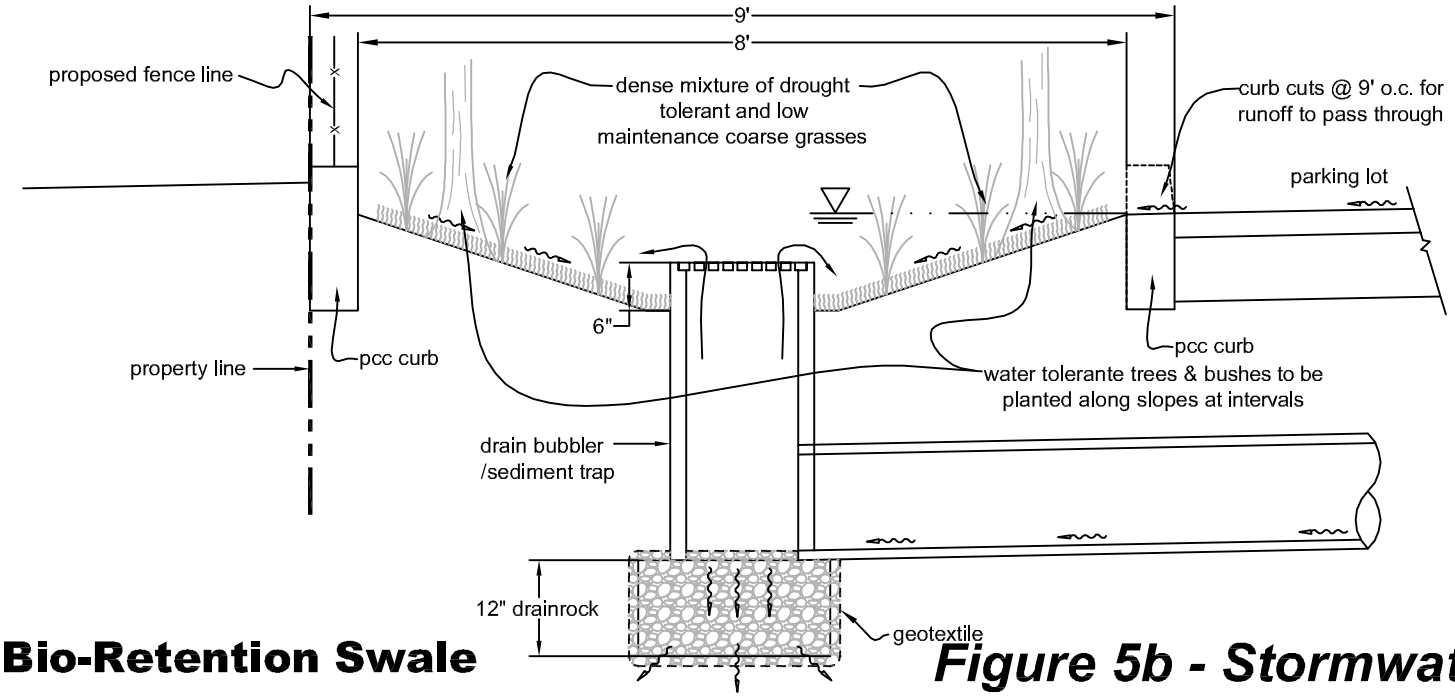


Grassy swales around buildings



Bio-Retention Swale

Figure 5b - Stormwater BMP Details

MH engineering Co. 16075 VINEYARD BOULEVARD MORGAN HILL, CA 95037	**Diamond Creek BMP Treatment Area Details**	SCALE: 1"=100'	JOB #: 26019.2	SHEET
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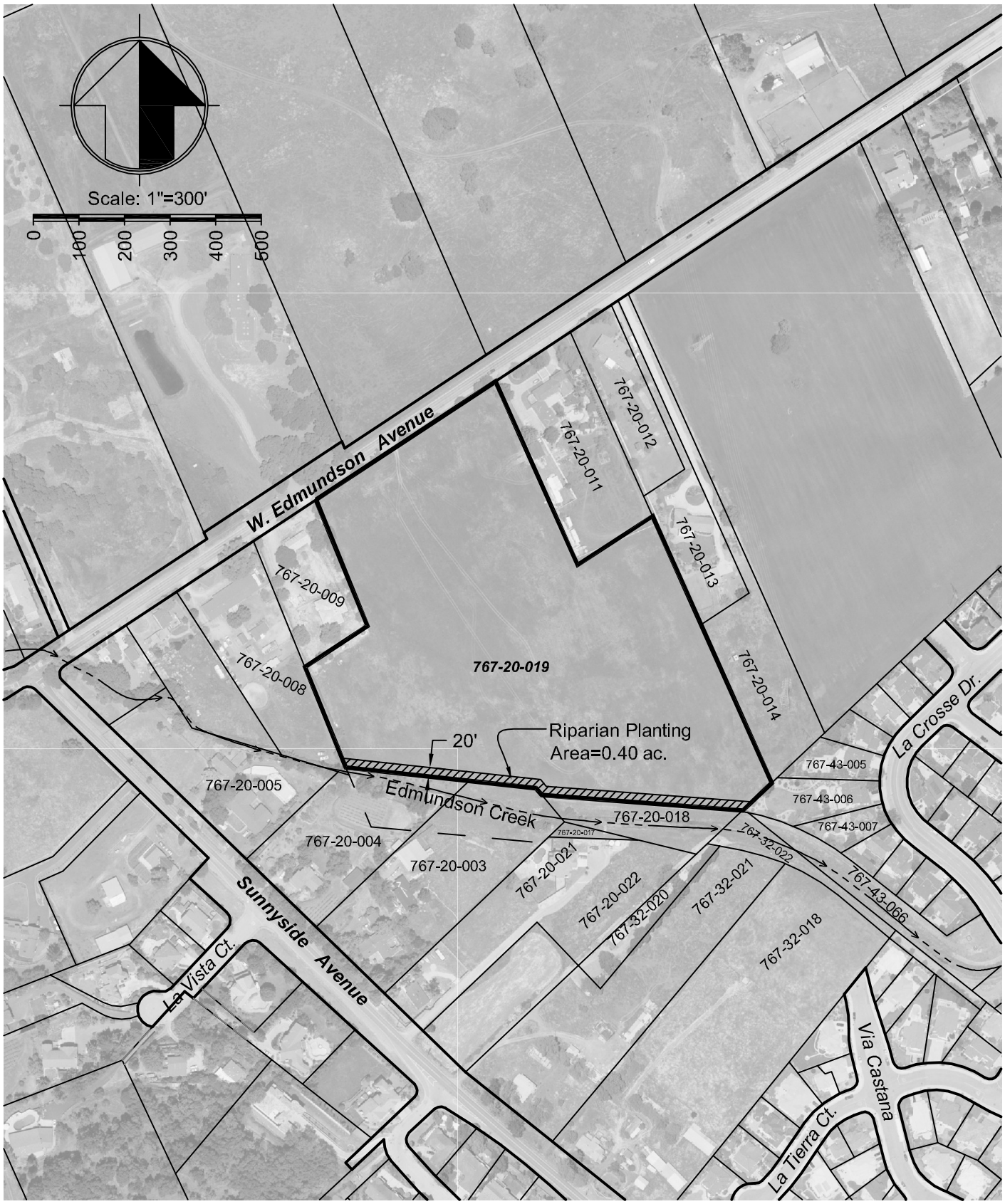

Figure 6 - Riparian Planting Location along Edmundson Creek

MH engineering Co.
16075 VINEYARD BOULEVARD MORGAN HILL, CA 95037

SCALE: 1"=300'	JOB #: 26019.2	SHEET
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