DIPSEA RANCH APPEAL OF PLANNING COMMISSION JULY 27, 2020 DECISIONS

1. Inadequate Public Notice to Interested parties and no Posting on Site
2. Tentative Map and Zoning Contested
3. Inadequate Mitigations in IS/Mitigated Negative Declarations
4. Need for Independent site assessment and EIR.
5. Redwood Creek Watershed’s Regulatory Agencies’ policies, recovery plans, projects, conflict with the Mitigated Negative Declaration

APPEAL PUBLIC HEARING OCT. 6, 2020 Board of Supervisors

WATERSHED ALLIANCE OF MARIN
150 FRIENDS OF MUIR WOODS PARK
SIERRA CLUB MARIN GROUP
• **Current State of the Property**

- 8.29 Acre property
- Surrounded by creeks on 2 sides and also on the property.
- Headwaters of Redwood Creek in Muir Woods and Mt. Tamalpais State Park that has coho and steelhead.
- Numerous large trees have been removed in recent years and several acres of invasive plants and black acacias have taken over the lower parcels.
- Current state of property.
• Overview of property from 2011

Environmental baseline has been altered and continues to be. (2011)
Figure 4-1
Proposed Land Division and Conservation Areas
Unpermitted Road building
A new estimate of 2500 cubic yards was mentioned. The National Wetland Inventory acknowledges the creek.
• WORK DONE AT THE HEIGHT OF THE RAINY SEASON – MARCH 8-28, 2014

• NO BEST MANAGEMENT PRACTICES
• Diversted Creek that would have been at road headwaters

• Failure to maintain drains and inroad ditch flooded 446 Panoramic Hwy.

• Diversted Flows Erosion
VIEW FROM DIPSEA TRAIL LOOKING TOWARDS PROPERTY - HERITAGE TREE STILL ON PROMONTORY
The CWP and the California Environmental Quality Act require that controversial projects should have a thorough environmental vetting. The following issues were not properly addressed by the Mitigated Negative Declaration (MND). Many of these are flaws in the assumptions made about the project, which resulted in inadequate study of these issues.

1) Absent or Deficient analysis of Project Consistency with Land Use Policies:
   A) The proposal conflicts with policies of the Countywide Plan. The Property has a density range of 1 unit per 10 acres to 1 unit per two acres. Countywide Plan Policy CD-5.e states that when considering density on a lot without sewer or water, density should be kept to the lowest density (1 unit per ten acres.) A misinterpretation of the Tam Plan is cited in staff memorandum as justification for density above that required by CWP CD-5.e, and applies maximum density allowed by its RMP-0.5 zoning (1 unit per 2 acres.)
   B) The proposed subdivision creates a parcel well below the 2 acre minimum (.89 acre). Justification of this cites the density range on the parcel being applied, but leaves out other aspects of the application of this flexible zoning designation that would suppress density.
   C) Tam Community Plan was disregarded. The Tam Plan calls for rezoning of the parcel to analyze appropriate density. Policies (LU 2.1 & LU 2.3)

2) MND Traffic and Utilities Analysis is Legally and Technically Inadequate
   A) The traffic report only looked at 3 units on the property when 6-9(+) total housing units could result (by right) via ADUs and JADUs.
   “Potential to negatively impact visitors to Muir Woods... and current residents in the local community with increased automobile traffic.” was cited as a major concern in a letter from the U.S. Department of Interior to the County, dated March 6, 2017, in regard to impacts of a future project on this site, and is not adequately addressed by the MND.
   At least three traffic accidents in the past 5 years occurred in the owner’s driveway. This is a serious public safety hazard due to poor sight-lines, narrow twisting road and many cyclists.
   B) Traffic report did not use traffic loading required by County (2.3 persons per unit) and instead used data from the out of date ITE Trip Generation Manual of 2012.
   C) Property owner has already secured approval from the Homestead Valley Sewer agency and LAFCO to bring a sewer line up to this property, which could result in a much larger project than what was addressed in the MND.
   D) Cost to the County to repair wear and tear caused by the multiple heavy truck construction trips as an ultimate result of this project was not addressed. Road cracks on Panoramic Highway already show serious decay, including on very recent repairs. Cars and bikes are presently swerving into other lanes to avoid potholes and this danger will worsen.
3) Deficient analysis of Impacts to Jurisdictional Wetland:
   A) Grading and Construction is proposed within the 100’ setback of the jurisdictional wetland protection area and is not addressed in the MND. The 100’ wetland protection area is not shown on any of the applicant’s plans. Stormwater runoff for future house and driveway is shown directed to a culvert within the 100’ setback of the jurisdictional wetlands, recognized by the Army Corps of Engineers. The impact of required culvert work within the wetland conservation area has not been studied. The work would require a permit from the Army Corps of Engineers. Without written approval of the Corps for this work, the County may be approving a lot that could claim hardship or have inadequate drainage. “Potential for less than adequate storm water improvements proposed for the subdivision access roads and driveways” was cited as a major concern in a letter from the U.S. National Park Service to the County, dated March 6, 2017.
   B) The impact of the illegal, unpermitted fill in a wetland that was allowed to remain since 2014 has not been addressed in the MND. 1200 cubic yards of dirt road, cited as unstable in the Herzog geotechnical report, has remained on top of Wetland and watercourse above federal listed critical habitat for salmon, 1/2 mile downstream. This area should be studied for full restoration. Additionally, the MND fails to assess the cumulative impacts to the wetland of the previous illegal construction and fill combined with the Project’s construction and polluted runoff.

4) Deficient analysis of Impacts to Riparian Habitat:
   A) Rainfall data is inaccurate for this site. Independent 2020 hydrologist’s report (hired by Appeal applicants) refutes rainfall data in Developer’s hydrology report.
   B) Hydrology Report is flawed. Stream length and status are not correctly assessed, resulting in less protection.
   C) Property was not properly investigated for wildlife presence and corridors. Observational Field work was not done during all seasons, no cameras were installed and no night studies were conducted.
   D) Biologist’s report is deficient. California Dept. of Fish and Wildlife wrote in response to the Draft MND that the biologist’s report was out of date. Prunuske-Chatham (PC) is referenced as having verified the 2015 biological report but no report from PC exists (email 09/23/2020 by Planning staff.) Actual verification of all comments in the biological report are therefore questionable.
   E) The length of the eastern tributary is improperly classified. The upper portion is improperly classified as a drainage ditch, rather than ephemeral stream and watercourse.

5) Deficient analysis of Impacts to Endangered Species:
   A) Coho Salmon endangerment is not properly addressed in the MND. Muir Woods MOU: The protections for coho recovery will be impacted by this development. NOAA NMFS 2012 California Coho Recovery Plan specifically calls out any development in this watershed as a “high risk” stressor for salmonids. They state that any additional development in the watershed puts the coho of Muir Woods at risk of extirpation. Only one red nest was counted last season. Under Section “Objectives”, the MOU states that the County agrees the goals is: “To protect, preserve and enhance the health of Redwood Creek watershed, including its salmonids”
Dipsea Ranch - Reasons for Full EIR

B) Northern Spotted Owls and Pacific Giant Salamander, known to be in this area, were not properly investigated. LSA did not do protocol level surveys for NSO as required by CDFW and US Fish and Wildlife Service. The data cited is out of date and does not reflect recent sitings. Latest science shows NSO expanding their range into this area. Dusky footed wood rats are found in the area, which is the favorite food of NSOs.

C) Allowable Noise levels from Construction, as cited by CA Fish and Wildlife in Draft MND is simplistic and deficient. A US Fish and Wildlife analysis, with cumulative ambient noise needs to be analyzed to make sure that the noise levels can be met. If there is a conflict between Fed and State regs on NSO, the county should err on the side of caution and use the more protective level. Established federal, state and County protocols must be compared and followed, and are not addressed in the MND.

6) Deficient Analysis of Wildfire Danger:
A) MND did not address wildfire risks, required as part of CEQA regulations in effect December 28, 2018. The required analysis includes risk to evacuation routes, increased traffic and potential landslide results. Given the proximity of Muir Woods and the number of visitors and no emergency plan for evacuation, Panoramic could become a death trap for visitors and residents.

B) The unpermitted “fire access road” is unusable for fire fighting. The road was analyzed with six separate soil borings along the road. The downhill side of the road is determined to be “subject to yielding and instability” (p. 7 Herzog) in the Geotechnical report. Station Chief at Throckmorton Ridge station has verbally stated that the road has no purpose for them as firefighters. (B. Ayling, local resident) Jason Weber in conversation at the BOS retreat at Throckmorton Ridge station said that he would not put a fire truck on that road because it was not properly engineered. (L. Chariton, local resident)

C) MND concludes with no evidence that there is no significant fire danger from future construction. Property is a known high fire hazard area, such that two major FireSafe grants were awarded to reduce fuels and clear invasive plants, which have now grown back. Construction equipment can easily cause fire in a high fire area.

7) Deficient Analysis of Septic Impact:
A) Septic systems not properly analyzed for either existing or potential numbers of septic systems and their cumulative impacts. The septic systems were not analyzed for the parcels with ADU’s, allowed by right. Without this analysis, the County is essentially approving a subdivision that could claim special exceptions because of hardship. “Need for a septic/sewage disposal plan designed to avoid impacts to the Watershed” was cited as a major concern in a letter from the National Park Service to the County, dated March 6, 2017, in regard to impacts of a future project on this site, and is not adequately addressed by the MND.

B) Protected Trees conflict with proposed septic: The location tested for the proposed septic system on the large parcel would require the removal of 5 protected trees at a minimum. If the parcel map is approved, and no other appropriate locations have been identified for the septic because of wetland setbacks and landslides (13 on site), then a future landowner could claim hardship, and justify removal of protected trees. CEQA requires that such future foreseeable impacts be assessed.
8) Deficient Community Input:

A) Improper Notification of Concerned Parties: County CWP policy states that controversial projects should be carefully noticed, so that the public can be fully informed and comment. CEQA also requires that agencies and tribes be notified. Cannot confirm if any/all other state, federal or local regulatory agencies were properly noticed because they do not appear to have commented or are not on the contact list. The contact list used is years out of date. Below are some of the agencies we believe have not been noticed.

1. The National Park Service requested notification of all plans for this site. As stated in the Muir Woods MOU, the County is to: “communicate about individual environmental compliance requirements within their responsibility, where applicable, including the National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA).”
2. The GG National Parks Conservancy is not listed anywhere. Christine Lehnertz is current head.
3. There is still no site notice for the Appeal hearing, in violation of Marin County code; 22.118.020.
4. Muir Woods Park Community Association has not been contacted.
5. Sierra Club and Watershed Alliance of Marin (located across the street from the project) both sent in comment letters in January, but were not noticed for the Planning Commission hearing. Notices were sent to a four year out of date PO box for Sierra Club, yet current addresses, snail mail and email, were on the comment letters.
7. Zoom information on Planning Commission website was incorrect, so that the public could not call in.

B) 150 residents signed the appeal opposing the MND and tentative parcel map.
C) More than 1200 people have now signed the change.org petition to stop this project.
D) More than 50 residents showed up at the 2017 TDRB meeting with overwhelming opposition to this parcel map without something in return. Most asked that the 1200 cubic yards of illegal fill be removed and the wetlands restored. The TDRB compromised on density in exchange for a deed restriction on the rest of the property. Curtis Havel, County representative at the meeting, did not inform the TDRB or public that a deed restriction could not be required of the owner/applicant.

C) The County failed to fulfill the PRA requested regarding development proposal on this property. The County has failed to produce all documents requested. Many that were sent are unable to be opened, or become deactivated and do not have their cited attachments. This puts an obstacle on the public seeking information.

In conclusion: The complexity of this project, the sensitivity and international significance of the land as a biodiversity hotspot, the millions of dollars spent downstream to save the salmon, the MOU between the County and National Park Service, and the long history of the project under many planners--with the loss of institutional memory that entails--demands an EIR be prepared to fully analyze all the potential impacts of this proposed subdivision.

(4 of 4)
Dipsea Ranch: Tree Removal Analysis Deficient in MND

Arborist states 6 Protected & 1 Heritage tree is to be removed.

This is the analysis of tree removal from the MND, page 62, the analysis of native trees to be removed:

The Project would result in the removal of three non-native trees, including a 10” diameter trunk English laurel, 23” diameter trunk red flowering gum, and 24” diameter incense cedar (Urban Forestry Associates, 2018). The Applicant proposes to construct a small rock retaining wall near a Marin County Code “protected tree” – a multi-trunk coast live oak. Tree protection fencing would be placed to protect this tree. An additional coast live oak would be protected near proposed excavation. In addition, some minor pruning of other trees may be required to accommodate construction of the residences or new vehicle access. Development of individual lots and septic disposal areas may result in tree removal depending on the specific site plan. Development could adversely affect existing trees through root damage from construction activities within the root zone of protected trees and tree mortality could occur. Trimming activities could also damage existing trees if completed during a time of year that could impact growth. The loss of trees could be inconsistent with the local tree ordinance, and the impact would be significant.

The removal of protected or heritage trees is not acknowledged, and the MND states their removal would be significant.

The following page illustrates the planned septic systems with the critical root zone of protected and heritage trees (CRZ based on tree radius x 1.5, per MND) overlaid, showing damage to 8 protected and 2 (or 3) heritage trees, more than described in both reports.

Although the MND states that the septic systems may affect native trees, the proposed locations are not addressed. If the subdivision is approved, and no other suitable sites can be located, the site will be considered to have a hardship and tree removal permits would be demanded by the property owner.
PARCEL ONE SEPTIC SYSTEMS LOCATED WITHIN CRITICAL ROOT ZONE OF:
2 (OR 3) HERITAGE REDWOOD TREES,
1 (OR 2) PROTECTED REDWOOD TREES

PROPOSED PARCEL 1 SEPTIC SYSTEM EASEMENT IN PARCEL 3
PARCEL 1 EXISTING LEACHFIELD
PROPOSED SEPTIC EASEMENT ON PARCEL 3

BASEMENT IN PARCEL 3 FOR PARCEL 1 SEPTIC SYSTEM AND DISPOSAL AREA

WEISSMAN SUBDIVISION

PARCEL TWO SEPTIC SYSTEMS LOCATED WITHIN CRITICAL ROOT ZONE: 3 PROTECTED REDWOOD TREES, 1 PROTECTED LIVE OAK TREE

PARCEL THREE SEPTIC SYSTEMS LOCATED WITHIN CRITICAL ROOT ZONE OF:
2 PROTECTED REDWOOD TREES
Dipsea Ranch - MND is deficient in Analysis of Wetland Impacts

The wetland conservation area was not shown on any of the applicant’s plans. Below is the on-site drainage plan overlaid with a 100’ wetland conservation area overlaid at the proper scale. It is very clear that the on-site drainage is planned to run through the conservation area.

On page 59, the MND states: “on-site drainage systems are set back at least 100’ from the wetland and would therefore have no effect on (it).”

This is clearly a mistake. No analysis was preformed on the impacts of the site drainage on the wetland.

100’ wetland Conservation Area overlaid on Proposed Drainage Plan
Dipsea Ranch - MND is deficient in Analysis of Unstable Road Use

When the Design Review Board reviewed this project in 2017, it asked for a deed restriction on the fire road so that it would never be used for anything other than fire fighting access in the future. Mr. Weissman refused.

If he retains the right to use this road, then the use of the road should have been included in the initial study. It was not.

The geotechnical report analyzed the existing “fire road and found that the downslope sides are “subject to yielding and instability”.

The existing roads traversing the site were generally created by excavating into the hillside on the upslope sides and by placing fill along the downslope edges. The existing cuts are steeper than permitted by current engineering standards, and typically expose weak colluvial soils and deeply weathered and highly fractured bedrock which have experienced varying degrees of soughing and sliding. The fill banks on the downslope sides of the dirt roads consist of varying thicknesses of relatively poor compacted fills which are not keyed or underdrained, and which are subject to yielding and instability. (Herzog, 2015, p.7)

Yet on page 80 of the Neg Dec, it says ‘The Fire Road grading stabilized a slope composed of landslide debris.” This is clearly a mistake and has no factual basis.

The updated geotech report re-affirms that the road is unstable, and then describes massive amounts of construction that would be required to stabilize the road. See attached.

The Initial Study and MND completely fail to address the use of this road by the applicant. It is very possible that use of this road by any automobile could cause severe environmental damage to both the adjacent wetland and the streams below it by causing more landslides.
May 1, 2018
Project Number 2147-02-15

Mr. Dan Weissman
455 Panoramic Highway
Mill Valley, California 94941

RE: Report Update
Preliminary Geotechnical Investigation
455 Panoramic Highway (AP# 46-161-11 & 46-221-07)
Mill Valley, California

Dear Mr. Weissman:

This presents our update of the Preliminary Geotechnical Investigation report in connection with the proposed residential development at 455 Panoramic Highway in Mill Valley, California. We previously performed a preliminary geotechnical investigation for a proposed thirteen lot residential development at the site, and summarized the results in our report dated November 3, 2015. The project has since been revised to three parcels, which the existing residence on one of the parcels. The project is shown on the Tentative Map by Malott Architects dated January 15, 2018. Our work is being provided in accordance with the terms and conditions outlined in our professional services agreement dated October 2, 2015.

GEOTECHNICAL REPORT UPDATE

We conclude that the preliminary conclusions and recommendations presented in our November 3, 2015 report are applicable to the proposed project with the following modifications:

Exploration Plan/Geologic Map

An updated Exploration Plan/Geologic Map for the project is attached.

Seismic Design Criteria

The following updated seismic design criteria were developed in accordance with the California Building Code (2016) and ASCE 7-10 (July 2013 errata):
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<th>C</th>
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<tr>
<td>Site Coefficient $F_V$</td>
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</tr>
<tr>
<td>0.2 sec Spectral Acceleration $S_S$</td>
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**Driveway Fill Banks**

Proposed fill banks steeper than 2:1 (horizontal:vertical) should be reinforced with geogrid to mitigate sloughing and instability. For planning purposes, reinforcing should be assumed to be required every 1 vertical foot and to consist of Tensar BX1200 biaxial geogrid, or an approved equivalent. The geogrid reinforcement should extend at least 4-1/2 feet back from the face of the bank. The first lift of primary geogrid reinforcement should be located 1 foot above the base of the fill. Fills should be placed on benches excavated into bedrock located below a 1:1 plane projected up from the base of existing cut banks. Overexcavation and fill placement should be performed in accordance with the recommendations presented in our November 3, 2015 report, and geogrid installation should conform to the manufacturer’s specifications. The actual geogrid layout and specifications should be verified during construction based on strength testing of the proposed fill material.

**SUPPLEMENTAL SERVICES**

Prior to design of improvements at the site, Herzog Geotechnical should perform a design-level geotechnical investigation with additional subsurface exploration to evaluate subsurface conditions and to develop appropriate geotechnical recommendations for design and construction. In addition, we should be retained to review the project plans and specifications to evaluate if they are consistent with our recommendations, and to provide observation and testing during geotechnical-related construction. We cannot comment on the adequacy of items we are not notified to observe and test.

**LIMITATIONS**

Our services consist of professional opinions and conclusions developed in accordance with generally-accepted geotechnical engineering principles and practices. We provide no other
warranty, either expressed or implied. Our conclusions and recommendations are based on the information provided us regarding the proposed construction, the results of our field exploration and laboratory testing programs, and professional judgment. Verification of our conclusions and recommendations is subject to our review of the project plans and specifications, and our observation of construction.

Our work was limited to the proposed improvements, and did not address the existing residence. Our work did not include an environmental assessment or an investigation of the presence or absence of hazardous, toxic or corrosive materials in the soil, surface water, ground water or air, on or below, or around the site, nor did it include an evaluation or investigation of the presence or absence of wetlands. Our work also did not include an evaluation of any potential mold hazard at the site.

We appreciate the opportunity to be of service to you. If you have any questions, please call us at (415) 388-8355.

Sincerely,
HERZOG GEOTECHNICAL

Craig Herzog, P.E. #2383
Principal Engineer

Attachments: Exploration Plan/Geologic Map (Plate 1)
LEGEND

- Recent Herzog Geotechnical Boring (2015)
- Previous Herzog Geotechnical Boring (2007)

Ks
Cretaceous Sedimentary Bedrock; primarily sandstone and shale

fm
Franciscan Melange; typically consists of heterogeneous mixture of sandstone, shale, metavolcanic rock, serpentine and chert

Qls
Landslide Deposits

Qaf
Artificial Fill

Reference: Utility Plan by Ziegler Civil Engineering, dated 1/15/18.
January 28, 2020

Via Email

Sabrina Sihakom, Planner
Marin County Community Development Agency
3501 Civic Center Drive, Suite 308
San Rafael, CA 94941
ssihaokom@marincounty.org

Re: Comments on Mitigated Negative Declaration for the Dipsea Ranch Land Division (455 Panoramic Highway; APN 046-161-11; tentative map and grading permit)

Dear Ms. Sihakom:

We submit these comments regarding the above-referenced Dipsea Ranch Land Division (“Project”) on behalf of the Watershed Alliance of Marin (“WAM”), a public benefit non-profit corporation organized in 2014 that promotes informed watershed stewardship in Marin County, with a specific focus on restoring and protecting imperiled fish and wildlife including Central California Coastal steelhead trout and coho salmon, species protected under the Endangered Species Act that inhabit Redwood Creek downslope from this Project. We incorporate by reference the detailed comments on this Project that are being submitted directly by WAM (“WAM Comments”).

The Initial Study prepared for this Project is deficient because it understates or overlooks potentially significant Project impacts. Accordingly, the County may not approve the Initial Study and Mitigated Negative Declaration that were signed prematurely on December 4, 2019. Based on this Project’s potential for causing significant environmental impacts, an Environmental Impact Report (“EIR”) must be prepared, as discussed below.

**LEGAL BACKGROUND**

The California Environmental Quality Act, Public Resources Code section 21000 et seq. (“CEQA”), is California’s primary statutory mandate for environmental protection. It requires public agencies like the County to “first identify the [significant] environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives.” *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1233. Its most important substantive imperative requires “public agencies to deny approval of a project with significant adverse effects when feasible alternatives or feasible mitigation measures can substantially lessen such effects.” *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 41;
Public Resources Code §§ 21002, 21002.1. CEQA’s mandate for detailed environmental review “ensures that members of the [governmental decision-making body] will fully consider the information necessary to render decisions that intelligently take into account the environmental consequences” of their proposed action. *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 133; Public Resources Code §§ 21080.5(d)(2)(D), 21091(d)(2); CEQA Guidelines [14 C.C.R. (“Guidelines”)] § 15088. The CEQA process thus “protects not only the environment but also informed self-government.” *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

All California “public agencies” and “local agencies” must comply with CEQA when they approve discretionary projects. Public Resources Code § 21080(a). The California Secretary for Resources has promulgated Guidelines, which appear in Title 14, section 15000 et seq. of the California Code of Regulations, to assist agencies in the proper interpretation and implementation of CEQA. The County is both a “public agency” and a “local agency” subject to CEQA. Public Resources Code §§ 21062, 21063; Guidelines §§ 15368, 15379.

A proposed governmental action requires environmental review under CEQA if (1) the agency is contemplating an “approval” of an action as defined by Guidelines section 15352, (2) the subject matter of the contemplated approval constitutes a “project” under Public Resources Code section 21065 and Guidelines section 15378(a), and (3) the project to be approved does not fall within a statutory exemption under Public Resources Code section 21080(b) – as recognized in Guidelines sections 15260-15285 – or a categorical exemption, pursuant to Public Resources Code section 21084(a) and Guidelines sections 15061(b)(2), 15300-15333 and 15354. The County has agreed, and confirmed by preparing its draft Mitigated Negative Declaration, that the Project is a discretionary “project” subject to CEQA.

When an agency determines that a project is subject to CEQA, as the County did here, it prepares an “initial study” to determine the level of environmental review that is required for CEQA compliance. Guidelines § 15063. This initial study must describe the project, the environmental setting, the project’s effects, ways to mitigate those effects, and the project’s consistency “with existing zoning, plans, and other applicable land use controls.” Guidelines § 15063(d)(1)-(5). The agency must also informally consult with “all responsible agencies and all trustee agencies responsible for resources affected by the project.” Guidelines § 15063(g); Public Resources Code § 21080.3(a).

If the agency concludes that a mitigated negative declaration, rather than an EIR, is the appropriate environmental document, then the initial study must document the agency’s reasoning in reaching that conclusion. Guidelines § 15063(c)(5) (purpose of an initial study is to “[p]rovide documentation of the factual basis for the finding in a negative declaration that a project will not have a significant effect on the environment”).

A lead agency may adopt a mitigated negative declaration when an “initial study identifies potentially significant effects on the environment, but (1) revisions in the project . . . made by, or
agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid . . . or mitigate the effects to a point where clearly no significant effects on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.” Guidelines § 15369.5 (emphases added). By contrast, “the high objectives of [CEQA] require[] the preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have [a] significant environmental impact.” No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 75; Communities for a Better Environment v. South Coast Air Quality Management Dist. (2010) 48 Cal.4th 310, 319-320.

Informed public comments, as WAM has provided here, that provide substantial evidence that a project may have a significant effect on the environment are sufficient to require preparation of an EIR. The Pocket Protectors v. City of Sacramento (2004) 124 Cal.App.4th 903, 927-930. Indeed, even “[r]elevant personal observations of area residents on non-technical subjects may qualify as substantial evidence for a fair argument.” Id. at 928 (citing cases).

The Guidelines use “‘[e]ffects’ and ‘impacts’ . . . synonymous[ly].” Effects are both “[d]irect or primary” – “caused by the project” and occurring “at the same time and place” – and “[i]ndirect or secondary” – “caused by the project” but occurring “later in time or farther removed in distance.” Guidelines §§ 15358, 15358(a)(1).

“‘Cumulative Impacts’ refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.” Guidelines § 15355. “The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” Guidelines § 15355(b). “An EIR must be prepared if the cumulative impact may be significant or the project’s incremental effect, though individually limited, is cumulatively considerable. ‘Cumulatively considerable’ means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” Guidelines § 15064(h)(1).

“[T]he lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.” Keep Our Mountains Quiet v. County of Santa Clara (2015) 236 Cal.App.4th 714, 729 (quoting Guidelines § 15064(g)). Thus, if the initial study or proposed mitigated negative declaration and public comment thereon indicate that there is substantial evidence that one or more significant environmental impacts may occur, then the lead agency must prepare an EIR to analyze those effects and study feasible alternatives and mitigations to reduce or avoid those effects while still achieving most of the basic objectives. Public Resources Code §§ 21002, 21002.1, 21061; Guidelines §§ 15080-15096, 15120-15132, 15160-
Here, the informed public comment summarized below as well as the County’s own, albeit deficient, Initial Study show that the Project may have a significant effect on the environment. Therefore an EIR must be prepared.

**FACTUAL BACKGROUND**

According to the Initial Study, the proposed Project would be built upslope from Redwood Creek, which provides documented habitat for Central California Coastal coho salmon (*Oncorhynchus kisutch*), a species federally and state listed as endangered, and Central California Coastal steelhead (*Oncorhynchus mykiss irideus*), a species federally listed as threatened. Initial Study 15, 52-53. According to the same document, the “average slope [on the Project site] is 36.76 percent,” a gradient which is considered “steep” under the Countywide General Plan. Initial Study 3. “Two ephemeral streams, both tributary to Redwood Creek, flow along the western and eastern edges of the Project site, and meet just south of the Project boundary.” *Id.* Thus, soil erosion anywhere on the site will introduce sediment into these tributaries of Redwood Creek, and over time, ultimately into Redwood Creek itself, degrading its salmonid habitat.

The Project applicant’s proposed development of this site will involve substantial cutting (1,709 cubic yards) and filling (1,565 cubic yards) of soil. Initial Study 12. Because the quantity of material to be removed exceeds by about 145 cubic yards the quantity to be used on site for fill, the Project will generate excess soil that must be placed somewhere. *Id.* But the Initial Study fails to specify where this excess material will be placed. This is not an insignificant quantity of soil, and its placement will have consequences somewhere. Those consequences must be disclosed and examined, not ignored.

According to the Initial Study, in 2014 the Project applicant deposited “about 1,200 cubic yards of fill” on the Project site—roughly 240 standard 5 cubic yard dump truck loads—without a grading permit. *Id.* The County admits that this massive unpermitted “grading may have resulted in some delivery of sediment to the stream system.” Initial Study 65. Although the Initial Study claims (at pages 2 and 12) that the impacts of this unpermitted grading are addressed as part of this Project in the Initial Study, in fact they are not. Indeed, the most important impact—sedimentation of Redwood Creek and its ephemeral tributaries—is never quantified, let alone analyzed. Instead, the Initial Study dodges the issue by pretending that the impact may be dismissed with the meaningless words “may” and “some.” But this is not an inconsequential issue that may be casually swept under the rug. Instead, as WAM documents in its separately filed comments and photographs, contemporaneous heavy rainfall transported much of this unconsolidated fill downslope, and very probably into the adjacent streams, and thence into Redwood Creek.

The County’s attempt to downplay this significant Project impact on Redwood Creek may not be so casually brushed aside. CEQA demands specificity and certainty, not generalities and speculation.
Kings County Farm Bureau Federation v. City of Hanford (1990) 221 Cal.App.3d 692, 736 (an EIR must contain “facts and analysis” rather than mere conclusory words); Sierra Club v. County of Fresno (2018) 6 Cal 5th 502, 519 (an EIR must explain the “nature and magnitude of the impact”). Because the Initial Study fails to do so, it is inadequate.

The site’s steep slopes are unstable and prone to erosion. According to the Initial Study, “[t]here are areas of slope instability on the Project site, namely the old landslide in the eastern portion and slump failure along the southern slopes adjacent to the drainages and roads.” Initial Study 79. Although according to the same document these unstable areas “are not . . . expected to adversely impact slope stability conditions within the building envelopes of the proposed lots,” in fact, the “fire roads” which are proposed to be used for “vegetation management” do overlap these unstable areas. The Initial Study acknowledges that “[t]he area where the unpermitted grading for the Fire Road occurred overlies an old landslide identified by previous regional mapping and confirmed by [geologist] Herzog’s geotechnical investigation” in 2015. Id. Hence, the Project as a whole does pose a potential for slope failure and erosion, which in turn poses a potential for sedimentation of the adjacent ephemeral streams that flow into Redwood Creek below the Project site, and thus of Redwood Creek itself.

Even if it were true, as the Initial Study implies without actual documentation, that the unpermitted grading done in 2014 has not in the few years since then again deposited sediment into the ephemeral streams and Redwood Creek, that happenstance does not mean that it will not do so in the future. Such impacts may be triggered by high rainfall events of greater duration and magnitude than have been experienced since 2014. It is well known that slope failure and soil erosion are magnified exponentially when soils have become saturated following lengthy rains. Moreover, as noted the County has acknowledged that it must treat the unpermitted grading done in 2014 as if it were part of the Project. Accordingly, the incompletely reported erosion and sedimentation impacts of that grading are cause alone for preparation of an EIR.

It is likewise well known that erosion and sedimentation are a primary cause of the steep drop in salmonid populations along the California coast over the past several decades, leading to their listing under the Endangered Species Act. Sediment fills the interstices in spawning gravels, thereby destroying the large gravel and cobble structure required for successful spawning activity, and preventing access to oxygen by the salmonid eggs that are deposited and the alevins that emerge. It also fills pools and reduces water depth, thereby increasing water temperature above tolerable ranges, eliminating effective cover and exposing fish to greater predation. All of these impacts have a “substantial adverse effect, either directly or through habitat modifications,” on the salmonids residing in Redwood Creek. CEQA Guidelines, Appendix G, section IV(a). Therefore these impacts pose a potentially significant effect on the environment requiring preparation of an EIR.

Many other potentially significant impacts are documented in the separate comments submitted directly by Watershed Alliance of Marin, including loss of terrestrial wildlife habitat and migration corridors, potential loss of Native American cultural resources, and conflicts with land use policies.
designed to reduce rather than exacerbate urban-interface wildfire hazards. Each of those impacts must be thoroughly examined in an EIR.

**BECAUSE THE PROJECT MAY CAUSE SIGNIFICANT EFFECTS, AN EIR IS REQUIRED**

The County may not lawfully adopt the Initial Study and Mitigated Negative Declaration and approve the Project because both the Initial Study itself, as well as informed public comments, show that the Project has already caused, and will cause again if construction is allowed, significant impacts on the environment. These impacts include erosion and sedimentation from the Project’s geological and hydrologic hazards including the site’s steep and unstable slopes, leading to significant cumulative watershed impacts on the water quality and salmon habitat of Redwood Creek. The Initial Study failed to address the Project’s inconsistency with the General Plan’s watershed protections, despite indisputable evidence that the Project is located in an area with a documented history of unstable slopes and active landslides, and potential for further instability. *See* Marin 1994 Countywide Plan Policy EQ-3.7. Additionally, the County has failed to evaluate and adopt adequate mitigation measures to avoid and reduce to insignificance the Project’s potentially significant watershed impacts.

**CONCLUSION**

For each of the foregoing reasons, an EIR must be prepared for this Project. Please include these comments in the public record for this Project.

Thank you for your attention.

Respectfully submitted,

Stephan C. Volker  
Attorney for Watershed Alliance of Marin

cc: Rachel Reid, Marin County Environmental Planning Manager
October 1, 2020

Board of Supervisors
County of Marin
Marin County Civic Center
Address: 3501 Civic Center Dr # 330, San Rafael, CA 94903

RE: Appeal of the County’s Dipsea Ranch (Weissman) Land Division (Tentative Map) and Mitigated Negative Declaration 455 Panoramic Highway, Mill Valley Assessor Parcel 046-161-11

Dear Board Members:

I represent Watershed Alliance of Marin, the Sierra Club Marin Group and Friends of Muir Park in regard to their appeal of the County’s Dipsea Ranch approvals and entitlements (“Project”). My clients represent hundreds of local members and over 6000 countywide members who object to the County’s stunted and incomplete review of the applicant’s plan to build up to 12 units on the property. The property is an area that your own Tamalpais Area Community Plan cites as part of “significant local and regional open space value of the Muir Wood park Area.” (Tam Plan Objective LU3.1.)

In brief, an approval of the project would result in the following violations of the Subdivision Map Act (“SMA”), California Environmental Quality Act (“CEQA”), state Planning and Zoning Law (“PZL”), and Marin County Municipal Code:

- The County has failed to comply with the SMA and the PZL because the tentative map approval is not consistent with the County Wide Plan (“CWP”) and Tamalpais Area Community Plan (“TAP”). The County’s sloppy and erroneous conclusion that CWP Policy Cd5.e does not apply to the Project is directly contradicted by state law. The County’s curt dismissals of its own environmental and open space policies and the Tam Area Design Review Board’s conclusions also render the tentative map illegal.

- The record contains clear evidence that the County is aware that developer can and will request future development of an easily foreseeable additional 12 units. CEQA requires that agencies assess the impacts of reasonably foreseeable related future projects. Thus, the Mitigated Negative Declaration (“MND”) is legally inadequate
because the County adamantly refused to assess environmental impacts from the construction of the additional “by right” units on the Property.

- The MND is inadequate because it fails to provide evidence for its conclusions that there will be no impacts to geological, hydrological and biological resources. California Department of Fish and Wildlife has strongly criticized the CEQA analysis and the developer and County’s own consultants admit that wetlands are on the site. My client’s experts have also demonstrated that the MND relies on faulty hydrological and biological resources methodology, including regarding sediment loading impacts to endangered Coho salmon in Redwood Creek.

Additionally, in my 35 years of practicing environmental and municipal law, I have never seen an agency damage its own potential legal defense as the Community Development Department has in Ms. Cardoza’s Supplemental Memorandum of July 24, 2020 (“Supplemental Memo”). The Memo’s quoting of constitutional law on government “takings” of private property – even if erroneously as here – cannot be used against my clients but only provides a safe harbor for any developer against the County’s own legal authority to regulate.

This language unfortunately demonstrates County staff’s willingness to forward the developer’s own legal arguments that undercut the County’s own legal defense. If County Counsel is responsible for that argument, then the insertion of such language is an exponentially worse mistake.

Given these issues, I urge your Board to grant the appeal, reject the application and return the entire approval project to the Planning Department for preparation of an Environmental Impact Report.

LEGAL REQUIREMENTS AND APPLICATION TO DIPSEA RANCH

1. The County’s Approval Of Three Lots Violates The SMA Requirement That Subdivision Must Be Consistent With The Zoning Ordinance.

State law requires that a tentative map be consistent with the General Plan/Community Plans. Gov’t Code § 66473 states:

A local agency shall disapprove a map for failure to meet or perform any of the requirements or conditions imposed by this division or local ordinance enacted pursuant thereto; provided that a final map shall be disapproved only for failure to meet or perform requirements or conditions which were applicable to the subdivision at the time of approval of the tentative map. See also Gov’t Code § 66474.2(a).
Case law bolsters this, holding that a subdivision must be consistent with the zoning at the time of the tentative act approval. *(Youngblood v Board of Supervisors* (1978) 22 C3d 644, 654. The County Subdivision Ordinance also requires such consistency. 22.84.050 requires the County to review and evaluate each Tentative Map with respect to its compliance and consistency with applicable provisions of the Development Code and other applicable County ordinances, the Marin Countywide Plan, any applicable Community Plan or Specific Plan, and the Map Act.

The County Subdivision Ordinance also specifically requires that proposed subdivisions must comply with minimum lot area requirements in the County General Plan and Development Code. Muni Code § 22.82.050(a); 22.84.060. 22.82.050(c) states that:

*Proposed subdivisions shall be designed so that each parcel complies with the minimum lot area requirements of this Chapter, in addition to the minimum lot area requirements of Article II (Zoning Districts and Allowable Land Uses) and Article V established for each zoning district.*

My clients, Sierra Club, WAM, and FOMP and members of the public submitted letters contending that the County failed to consider and apply density policies in the Marin Community Wide Plan (“CWP”) and the Tam Area Community Plan (“TAP”) when considering project approvals. Specifically, my clients have contended that the County must consider CWP Policy CD-5.e, which limits development in the project area to one unit per 10 acres. 1 The County responded by arguing that TAP Program LU3.12 ostensibly establishes a home building density maximum policy for the property and would not consider Policy CD-5.e. The County Community Development Department’s Supplemental Memo states:

*The TACP identifies the subject property as a property of interest and more specifically provides a maximum allowable density of five units given the limitations associated with septic systems. Because of the specificity associated with Policy LU31.1, the proposed 3-lot subdivision is consistent with the community plan, and by extension the CWP. The project would result in three lots and building envelopes that would cluster any future development on the upper portion of the property identified as the “ridge” in the policy.*

But this conclusion is sloppy and poorly reasoned for three reasons. **First,** there is no conflict between Program LU3.1 and Policy CD-5.e. Program LU 3.1 is a statement referencing groundwater concerns and suggests a “possible” range of number of units.  

1 *(CWP) Policy CD-5.e: Limit density for areas without water or sewer connections.* Calculate density at the lowest end of the Countywide plan density range for new development proposed in areas without public water or sewer service. Densities higher than the lowest end of the applicable density range may be considered on a case by case basis for new housing units affordable to very low and low income households…

2 LU 3.1 (TAP) Program LU3.1.1a: Given septic tank regulations a maximum of five units is possible. The community desires this site to remain open in appearance.
Policy CD 5.e is a building density limit. The two have different purposes and both can be applied to the project without any conflict.

Second, even where there are conflicts in general plan policies, state law requires agencies must reconcile them because all elements of the general plan have equal legal status. Sierra Club v. Board of Supervisors of Kern County (1981) 126 Cal.App.3d 698. Therefore, the County’s contention that only a supposedly more specific policy trumps a general policy is contradicted by state law. The court of appeals in Sierra Club struck down just such a specificity clause in the Kern County because it violated the internal consistency requirement under Government Code section 65300.5. This holding affirmed the principle that no element is legally subordinate to another; the general plan must resolve potential conflicts among its elements through clear language and policy consistency. (Ibid.)

Similarly the septic tank range statement in LU3.1 can be reconciled with the density policies in TAP Policy LU2.1, which like CD 5.e is concerned with building density and with TAP Policy LU 2.3, which is concerned with an appropriate zoning designation. As contrasted with LU 3.1, which is a “program,” both LU2.1 and LU2.3 are “policies” and contain operative density terms and references. Further, LU 2.3 references and thus, incorporates the zoning code which provides a density limit for properties zoned RMP .5 as one unit per 2 acres. Since Policies LU2.1 and LU2.3 are applicable and the County ignored those policies in its findings, it cannot have complied with the SMA’s requirement that the Project is consistent with the TAP.

Third, since CD-5.e actually has a density limit, then it is actually the more specific policy in regard to density limits. In contrast, LU3.1 is simply a statement about possible range of units given the environmental constraints of the area. LU3.1 is not a policy for home density. It includes no reference to “building,” “density” or minimum or maximum FAR or lot size and includes no operative modifiers that would make it an operative density policy, such as must, or limit. Instead, it is simply a “possible” “range” for units, as related to groundwater capacity. Thus, the range can be one to five units.

Finally, the County has ignored an apparent previous subdivision, which further renders the consistency analysis invalid. County Subdivision Ordinance section 22.82.025, states that “the maximum number of residential lots allowed for proposed subdivisions shall be modified based on a calculation of the net lot area of the original lot….” (Emphasis

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3 TAP Policy LU2.1 states that: “All undeveloped properties in the Planning Area should be evaluated in terms of their environmental constraints and rezoned to a density which is compatible with identified constraints. TAP Policy LU 2.3 “Rezoning” states that: To rezone properties in the Tamalpais Area to a zoning district which will ensure that proposed development adequately addresses access and visual impacts.
The MND is Legally Inadequate because it did not assess impacts from Reasonably Foreseeable Future Projects.


must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.

CEQA documents must include some degree of forecasting in evaluating a project’s environmental impacts. (CEQA Guidelines § 15144.) The principle that CEQA requires foreseeable forecasts is well established in case law. (CEB, Practice Under the CEQA, § 11.32., citing *San Francisco Ecology Center v. City and County of San Francisco.* (1975) 48 CA 3d 584, 595.)

Lead Agencies must use their best efforts to find out and disclose all that they reasonably can. (CEQA Guidelines § 15144.) If a precise technical analysis of an environmental impact is not practical, the agency must make a reasonable effort to pursue a less exacting analysis. *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 CA 3d 421, 432. Agencies have alternatives such as tiered analysis but they can’t ignore the requirements added.) The current APN is 146-161-11 and the County based its calculations of four total lots on the current acreage of 146-161-11 of 8.50 acres.

However, the original lot, APN 046-161-04, that was zoned RMP 0.5 in Ordinance No. 2266 (11-25-1975), has apparently *already* been subdivided and it is that “original lot” upon which the current subdivision consistency in Section 66473 must be based. There is no evidence in the record on the size or history of the original lot (or APN 046-161-10 identified in the TAP) and therefore the County does not have evidence on which to base its findings that RMP 0.5 allows for four new lots on the current parcel 146-161-011.

Thus, the approvals violate the SMA because the tentative map is not consistent with the general plan and incorporated zoning ordinances.4 Since the three proposed lots are not consistent with the general plan or development code, the proposed subdivision is illegal.

4 As described infra, the lack of consistency also violates the Planning and Zoning Code and CEQA.

My clients have alleged that the MND inadequate because it does not take into account reasonably foreseeable future development on the site. The MND only assesses the environmental impacts from the three units in the developer’s most recent application. The developer, though, has said he plans to develop more units and arguably, he could build 12 units of right e.g. Accessory Dwelling Units (“ADU”). The County rejected the request that the impacts of reasonably foreseeable future development be considered in the Supplemental Memorandum:

The applicant has submitted an application to subdivide the property into three lots. Besides future residential construction on each of the two newly created lots (an existing house will remain on the third lot, proposed Lot 1), the applicant has neither signified intentions to pursue future subdivision nor requested that such development potential on proposed Lot 3 be eliminated with this project.

This contention is disingenuous and demonstrably false because the County is well aware that the applicant intends to avail himself of these additional units on each parcel and that such development is reasonably foreseeable for the following reasons:

1. *The MND itself acknowledges potential future development* and actually includes (sparse) aesthetics and air quality analyses of the impacts from additional units. (MND, p. 13, 25, 113, 135.)\(^5\) The MND, despite *admitting* that greater development is probable and foreseeable, ignores this potential future development in the more important environmental impact areas of biological, hydrological, geological and fire hazards.

2. The applicant has allegedly obtained approvals for sewer hookups from the Local Area Formation Commission and Homestead Valley Community Services District. The former concluded that the County can potentially approve four units “*along with accompanying intensity allowances, such as second units.*” (See Marin Local Agency Formation Commission Agenda Report Item No. 10, December 8, 2016, p. 3.) Three members of the Board of Supervisors are members of the LAFCO and are obviously aware of plans and possibilities that they themselves approved to allow sewer hookups to four units and additional ADU units on the project property. The County’s protestations that it is not aware of this possibility are not credible.

3. The County has been informed that the applicant intends to build more than 3 units and the County has admitted that the lot can be further subdivided. In a “Status Letter

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\(^5\) While the MND acknowledges future second units it continually contradicts itself by concluding either 2, 4 or 8 total units including ADUs are permitted by right. In fact, it is none of those but instead a potential total of 12.
to the Applicant,” the County communicated such knowledge of future plans to the developer on April 2, 2018 (Letter from Jocelyn Drake, Senior Planner):

[I]n your application materials, you indicate that four of the 13 lots proposed on the larger lot, APN 046-161-11, are intended to be developed with affordable senior housing units.

As reflected in your application materials, following Master Plan approval, you intend to subdivide the larger lot into 13 separate lots. Twelve new single-family residences (the lot is currently developed with one residence), including nine market-rate units and four affordable housing units, would then be constructed on the newly created lots.

Moving forward, the path of least resistance would be to revise your project to include residential units devoid of age restrictions that also utilizes the 35% State density bonus, for a total of 7 units (not including Accessory Dwelling Units).

4. Currently, the Marin County Development Code, Sections 22.10.30, 22.32.120, allow for Residential Accessory Dwelling Units essentially “by right.” That is, the County must approve such ADUs if they meet basic setback requirements.

In addition, new State law arguably allows the owner to build 2 additional units on each lot. 2019’s Assembly Bill 68 (Government Code Section 65852.2 et seq.), requires a jurisdiction to ministerial approve a permit application for building two ADUs (one of which can be detached) in addition to the primary residence, for a total of 3 housing units. It also greatly relaxes ADUs’ development standards (E.g. parking, size requirements, setbacks, etc.)

Therefore, future development of up to 12 units on those three lots is reasonably foreseeable and CEQA requires that the reasonably foreseeable environmental impacts of those units be assessed. This is especially important regarding the grading and placement of permeable surfaces necessary for development of the three or four highly sloped lots. As set out in the LSA Report, and the Appellants’ hydrology and biological reports, such density could adversely affect slope stability, polluted runoff, water quality and listed salmonid species in Redwood Creek.

3. CEQA – The MND is inadequate because it does not provide substantial evidence for its conclusions that there will be no impacts to geological, hydrological and biological resources.

CEQA requires that environmental review documents include descriptions of the physical environmental conditions in the vicinity of the Project to determine whether an impact is significant. (Guidelines §§ 15063, 15071(b); see also, CREED-21 v. City of San Diego (2015) 234 Cal.App.4th 488, 504.) Generalized references are not sufficient and that the description must be of the location and extent of riparian habitat on or near the Project property. (San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1994) 27 Cal.App.4th 713.)
There is a low threshold requirement for initial preparation of an EIR that reflects a preference for resolving doubts in favor of preparing an EIR: whether there is a “fair argument” of substantial evidence in the record of significant impacts. (Pub. Res. Code §§ 21080(c)(1), 21082.2; 14 Cal. Code Reg. (“CEQA Guidelines”) §§ 15064(a)(1), 15384(a.).)

The County, therefore, has the responsibility to ensure that it seriously examined all the evidence in the record to ensure there is no fair argument of significant impacts. Instead, the County only relied on evidence from the applicant’s consultants and rejected all of Petitioners’ evidence. However, in applying the fair-argument standard, “deference to the agency’s determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.” (Sierra Club v. County of Sonoma (1992) 6 Cal.App.4th, 1307.)

The County violated CEQA by ignoring or dismissing evidence provided by the California Department of Fish and Wildlife (CDFW) and Appellant’s scientific experts have provided evidence that there are impacts to water quality, wildlife and fire hazards. For instance, on January 15, 2020 CDFW (Letter from Greg from Greg Erickson CDFW to Sabrina Sihakoum, Marin County Community Development Agency) submitted a letter providing extensive evidence and arguments that there would be significant impacts to Northern Spotted Owl, bats, special status plant species and nesting birds. For instance, CDFW strongly criticizes the MND’s faulty environmental review and inappropriate reliance on outdated and inaccurate studies:

>[N]oise and activities at the Project site could potentially disturb NSO during nesting season and interrupt breeding or lead to nest failure. Population levels and vital rates for NSO continue to decline, so any reduction in successful nesting is a potentially significant impact.

Acceptable botanical surveys must be systematic, floristic surveys, and should occur multiple times within the blooming period of potential special-status plants on-site. Based on the IS/MND, it is unclear what level of botanical survey was conducted, and therefore difficult to conclude that special-status plants are absent. In addition, this survey is outdated as it was conducted five years ago. Potentially significant impacts to special-status plants, such as crushing and burying, are more likely to occur without sufficient survey information. (at 3-4, emphasis added.)

Thus, CDFW clearly disagreed with the findings of the MND but the County provided no evidence or expertise to dispute CDFW’s evidence and conclusions regarding impacts to biological resources. Thus, there is a fair argument that the County must prepare an EIR.

Therefore, as the CDFW Memo opines, no reliable mitigations can be based on data that is incomplete and based on accurate methodology. (AR 2476-78.) Thus, the Final MND conclusions about sediment, erosion, and water-quality impacts to Bidwell Creek are unsupported because landslide, spoils, and runoff from those spoils were not characterized or modeled. (AR 057-059, 080-081.)
Similarly, the community has submitted two reports by scientists with expertise in their fields of hydrology and biological resources that provide evidence and fair arguments that there will be significant impacts.

The September 25, 2020 report by Lotic Environmental Services disputes not just the conclusions in the MND hydrology section but the underlying methodology of the ND’s hydrological resources section. The Lotic Report determines that the MND and County Hydrology Study are based on incorrect modeling for precipitation totals. Thus, there is an additional fair argument that the County’s entire hydrological analysis is baseless and thus, the MND conclusions are undermined.

The Lotic Report also provides substantial evidence that the County’s hydrology report and MND’s conclusion that there is no permanent streambed is wrong and instead that: “The supporting evidence suggest that a channel with a defined bed and bank exists upstream of the riparian vegetation at the confluence of the main channel.”

Further, the MND does not include sufficient methodology or even any analysis for considering the quantity and impact of sediment from the project being deposited into the creek and into Redwood Creek. The Lotic Report states:

[T]he County of Marin Planning Department may want to give consideration to further protect the drainage given the potential for improved stream and wetland enhancement should land management practices improve as demonstrated by conditions shown in the 2014 photographs (Figures 8 and 9). The stability and health of ephemeral and intermittent headwater streams are crucial to mitigating stormwater impacts from urban development particularly for endangered Coho salmon in Redwood Creek.

Remarkably, these scientific finding are consistent with the applicant’s own consultant views that: 1) the Project area has wetlands (LSA January 3, 2018 Letter to Holly Costa, U.S. Army Corps of Engineers; and 2) that the Project could cause significant impacts to endangered Coho Salmon in Redwood Creek. The October 9, 2015 LSA Reconnaissance-Level Biological Assessment for 455 Panoramic Highway, Mill Valley, California concludes:

Silt and other materials which wash into this drainage are carried downstream into Redwood Creek. This material could cover or fill in gravel beds used by Coho and steelhead for spawning. (Page 4.)

Because the MND included little to no local characterization of geological strata, land stability, and erosion conditions, the MND lacks evidence to conclude that there will be no significant impacts to Redwood Creek. As such, the MND cannot identify adequate
mitigation measures which would allow the County to satisfy CEQA with an MND. (Pub. Res. Code § 21080(c)(2); Guidelines § 15070(b)).

Additionally, a Memorandum from Laura Chariton, MA Riparian Policy and Restoration supports the Lotic, CDFW and LSA conclusions that the MND conclusions on this issue are inadequate. This is because there were no protocol surveys or even any industry accepted surveys that could accurately determine: 1) the presence of wildlife, including Northern Spotted Owl, and impacts on that wildlife; 2) the quantity and impact of sediment from the project being deposited into Coho salmon and steelhead habitat in Redwood Creek; and 3) impacts to a wildlife corridor that connects lower riparian habitat to state, federal and water district wildlands. (See Exhibit 1.)

Finally, the NND fails to determine the cumulative water quality, water supply and biological resource impacts of the project including previous illegal road construction combined with the impacts of grading for the homes, and placement of impermeable surfaces.

4. CEQA – Where Experts Disagree, the Agency Must Prepare an EIR.

Where there is opposing expert credible evidence of significant impacts, CEQA requires agencies to prepare an EIR. City of Carmel-by-the-Sea v. Board of Supervisors (1986) 183 Cal.App.3d 229, 247-249. Brentwood Ass’n for No Drilling, Inc. v. City of Los Angeles (1982) 134 CA 3d 491, 504 held that when qualified experts present conflicting evidence on the nature or extent of the Project’s impacts, the agency must accept the evidence tending to show that the impact might occur. See also Rominger v. County of Colusa (2014) 229 Cal.App.4th 690, 721: “[T]he question is not whether Smith’s opinion constitutes proof that the greater traffic generating industrial development will occur in the subdivision. Rather, the question is whether Smith’s opinion constitutes substantial, credible evidence that supports a fair argument that such development may occur …;” City of Livermore (1986) 184 CA 3d 531, 541. “Opinion evidence submitted by a qualified expert, showing that significant impacts may occur, is usually conclusive.”

CDFW, Lotic Environmental and Ms. Chariton all criticized the MND’s specific methodologies, data and findings, and thus there is a fair argument of significant impacts. Since there is a conflict among experts, the County must afford such expert opinion deference. (Brentwood Ass’n for No Drilling supra 134 Cal.App.3d at 505) and prepare an EIR.

6 The MND concludes that post-MND mitigation measures are adequate for CEQA compliance. CEQA though, does not allow for such deferral of either the analysis or mitigation of impacts. Pub. Res. Code § 21080(c)(3); Gentry v. City of Murrieta (1995) 36 CA4th 1359, 1396. For instance, MND Mitigation Measures rely on future plans that have not been evaluated as to their feasibility as mitigation for the potential impacts to Geology and Soils and Biological Resources, including exposure to risks to life and property and indirectly to biological and water resources from landslides, fire hazards and surface runoff.
5. The County Violated both the Planning and Zoning Code and CEQA by Failing to Determine and Enforce Project Consistency with Local Plans and Policies.

Conflicts Between General Plan Policies. In counties and cities, zoning provisions must be consistent with the general plan (Gov. Code § 65860). “A General Plan must not only be internally consistent but vertically consistent with other land use and development approvals such as Specific Plans and the agency’s zoning and development regulations.” *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d, 553, 570.

See also *Lesher Communications, Inc. v. City of Walnut Creek*, (1990) 52 Cal. 3d 531, 545-546, which held that Section 65860(c) “mandates that such ordinances be conformed to the new general plan, but does not permit adoption of ordinances which are inconsistent with the general plan. The obvious purpose of subdivision (c) is to ensure an orderly process of bringing the regulatory law into conformity with a new or amended general plan, not to permit development that is inconsistent with that plan.”

Therefore, even if the County were correct in elevating Program LU3.1 to be a density requirement that supposedly conflicted and prevailed over other CWP and TAP policies, the County’s interpretation of LU3.1 is clearly in conflict with the CWP and possibly the property’s RMP .5 zoning. Thus any approval of the project fails to comply with state planning and zoning law that prohibits development.


Similarly, CEQA imposes a second obligation that cities and counties follow the CEQA Guidelines, which provide that a lead agency conducting environmental review of a project must consider whether the project would “conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over a project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect. (California Code of Regulation, Title 14, Chapter 3, (“CEQA Guidelines”) §15125(d); Appendix G, §X, Land Use and Planning.)

As described in the letter by Andrea Montalbano to your Board and incorporated into this letter and as described above, the County failed to determine and require the Project’s consistency with the TAP by: 1) incorrectly identifying TAP LU3.1 as a density allowance instead of a allowable range; 2) not adequately considering CWP CD 5.1e density restrictions by incorrectly dismissing its applicability; and 3) not considering the consistency of the Project with Policy LU2.1 and (TAP) Policy LU 2.3.
Numbers 1 and 2 are discussed above under SMA compliance and are incorporated by reference here. Regarding #3, the Tam Design Review Board (TRDB) reviewed the project and concluded that: “If this were design review, the building envelopes, as proposed, would have a very difficult, if not impossible time meeting the Development standards for both the Development Code and the Tam Plan because of the proximity to the ridgeline.” (Tamalpais Design Review Board Meeting Minutes, Regular Meeting: May 2nd, 2018.)

This TDRB conclusion – apparently ignored by the County -is supported by the MND, the CDFW and other parts of the record that demonstrate that the property contains unstable slopes, jurisdictional wetlands, endangered Norther Spotted Owl habitat, other nesting birds habitat, wildlife corridors and streams connecting to Redwood Creek’s Coho salmon habitat. Therefore, the TDRB’s Findings on the Project and interpretation of the CWP and TAP conflict with the County’s later determination that the Project is consistent with CWP and TAP. Due to this internal conflict, there is a fair argument that the County has not complied with requirements to disclose, assess and require consistency with the CWP and TAP.7

CONCLUSION

The County has not complied with the SMA, PZL or CEQA in approving the Project, including failing to prepare an EIR as required by CEQA. If the Project is approved by your Board, my clients will consider their legal options.

However, your Board does have the opportunity to direct the Community Development Department to increase efforts to engage the Appellants and the Developer in order to achieve a mutually acceptable result in which the Developer is able to secure a reasonably profitable development plan and the Appellants can be assured that this sensitive area is not developed inappropriately.

Sincerely,

Edward E. Yates

7 The County/MND also ignored CEQA’s requirements to assess other planning documents, including plans adopted by Mount Tam State Park, Muir Woods National Monument and Marin Municipal Water District.
Memorandum

From Laura Chariton
To Judy Schriebman, Chair Marin County Sierra Club
September 27, 2020

Dear Judy,

You have asked me to prepare an analysis of the Mitigated Negative Declaration (“MND”) for the Dipsea Ranch project on behalf of the Sierra Club Marin Group that assesses the letters from Lotic Environmental Consulting, the California Department of Fish and Wildlife and documents prepared by LSA regarding the proposed development project at 455 Panoramic Highway.

I have expertise in riparian wildlife and habitat, watersheds and creeks. In addition, I have lived across the street from the subject property for 28 years so am very knowledgeable regarding local conditions, including rainfall, wind, wildlife, stream flows, erosion, traffic and other considerations.

My expertise and qualifications include:

- M.A. Sonoma State’s Hutchins Institute in Riparian Policy and Restoration, Water Institute, Occidental and Permaculture Certification.
- Thirteen years assessing watersheds, riparian habitat, biology and policies.
- Riparian restoration and plant propagation, local ethno-botanical knowledge.
- Work with Salmon Protection & Watershed Network (SPAWN) creating an existing vegetation plan for the National Park Service.
- Conducted SCA policy information and input meetings with multiple watershed groups.
- Biological consultant supplying supporting studies of toxic runoff research data for Mt. Tam Task Force to inform the Memorandum of Understanding between Marin County, Golden Gate National Parks Conservancy and National Park Service for protection of riparian parking areas and mitigate stormwater runoff toxicity.
- Refer and confer with numerous government agencies throughout the area including: San Francisco Regional Water Quality Control Board, California Department of Fish and Wildlife, MCSTOPPP, US Fish and Wildlife, NOAA, National Marine Fisheries Service
- Instream surveys for plants, hydrology, geomorphology and biological assessment throughout Marin County in over 13 watersheds, including mentoring/training citizen scientists
- Conducted and provided watershed specific historic and study data to NOAA NMFS for salmonid (multispecies) recovery plan.
- Presentations on watershed restoration and biology to municipalities and community groups of San Rafael, Mill Valley and Sea Ranch CA.
- Expert consultant on watersheds, creeks and biology for Tamalpais Community Plan update group.
- Performed hundreds of on-site private watershed and habitat health consultations in Marin County for riparian restoration and permitting.
- Advisory to: Marin County Open Space, Tamalpais Community Plan update, Sierra Club Marin Group, Watershed Restoration and Community Groups, Mill Valley 2040 General Plan on Natural Environment.
- President and Co-Founder of the Watershed Alliance of Marin. 2013.

In general, the Dipsea Ranch MND does not provide scientific data, studies or other evidence to rebut the letters from Lotic Environmental and the CDFW regarding Dipsea Ranch project impacts to the environment. In my observations as trained scientist and nearby resident, there are many

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points in their report that LSA got factually wrong, ignored or did not investigate thoroughly enough to provide an accurate response to onsite conditions. As an example, LSA only visited the site limited amounts of times and not in seasons (e.g. winter rainy season) that are necessary to provide evidence on impacts to wildlife corridors, Northern spotted owl and bats. The CDFW Memo confirms this lack of adequate study.

Specifically, LSA did not conduct protocol field surveys on wetlands, endangered species, bird nesting or wildlife corridors, which are industry standard. I have observed this area of Marin County on Panoramic Highway for over 20 years and have witnessed use of the project area by numerous species, including endangered or threatened species, such as Northern spotted owl and other nesting bird species and wildlife, including raccoons, gray foxes, gray and red squirrels, dusky-footed wood rats, bobcats, ringtail cat, coyotes, black-tailed deer and mountain lion sightings are reported.

For instance, LSA did not even do any minimal surveys, such as protocol level surveys at night and for Northern Spotted Owls when wildlife is present, nor did it place cameras to record wildlife activity in riparian corridors. Some of the visits were in the driest part of the year and in drought years, resulting in inaccurate stream designations.

With a property of this size and complexity simply a few site visits are inadequate. I would have immediately installed wildlife cameras to monitor activity.

Multiple determinations in the Biological Resources of the Initial Study/MND lack evidence, are incorrect, or are insufficient in providing a comprehensive analysis. Issues that remain unresolved and in dispute after Master responses include:

- Wildlife Corridors
- Federal and State Recovery plans for endangered species
- Hydrology
- Biology
- Traffic
- Wildfire
- Muir Woods MOU

Determinations were made that lacked supporting evidence and are plainly false and dangerous for the community. Where there are deficiencies an environmental impact report would shed light on most of these issues.

Sincerely,

Laura Chariton, MA Riparian Policy and Environmental Restoration
October 5, 2020

Board of Supervisors
County of Marin
Marin County Civic Center
Address: 3501 Civic Center Dr # 330, San Rafael, CA 94903

Addendum to My October 1, 2020 Letter RE: Appeal of the County’s Dipsea Ranch (Weissman) Land Division (Tentative Map) and Mitigated Negative Declaration 455 Panoramic Highway, Mill Valley Assessor Parcel 046-161-11

Dear Board Members:

Additional authority mandates that the County ensure general plan consistency with tentative maps and proposed developments and that the County prepare specific findings regarding this issue. Spring Valley Lake Assn. v. City of Victorville (2016) 248 Cal. App. 4th 91 The County has not done so.

The County improperly did not make all of the findings enumerated in Government Code sections 66473.5 and 66474 before approving the Project's parcel map.

Government Code section 66473.5 provides: "No local agency shall approve ... a parcel map ... unless the legislative body finds that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan ... or any specific plan.... [¶] A proposed subdivision shall be consistent with a general plan or a specific plan only if the local agency has officially adopted such a plan and the proposed subdivision or land use is compatible with the objectives, policies, general land uses, and programs specified in such a plan."

Government Code section 66474 provides: "A legislative body of a city or county shall deny approval of a tentative map, or a parcel map for which a tentative map was not required, if it makes any of the following findings:

(a) That the proposed map is not consistent with applicable general and specific plans as specified in Section 65451.(b) That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans.(c) That the site is not physically suitable for the type of development.(d) That the site is not physically suitable for the proposed density of development.(e) That the design of the subdivision or the proposed improvements are likely to
cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat. (f) That the design of the subdivision or type of improvements is likely to cause serious public health problems. (g) That the design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of, property within the proposed subdivision.

Per the facts set out in my letter of October 1, 2020, the County has not complied with either Section 66473.5 or 66474 because it did not make all the required findings under both Government Code sections. Selinger v. City Council (1989) 216 Cal.App.3d 259, 269-270; 58 Ops.Cal.Atty.Gen. 21, 28 (1975) [both code sections "require affirmative findings by the local governing body before approval is granted to a proposed subdivision map. Should the local governing body fail to make the required affirmative finding on any matter covered by either statute or by both, it must deny approval of the map." Spring Valley supra 248 Cal. App. 4th at 104-106.

As demonstrated in my October 1 letter and by my clients’ comments, the County did not make the required findings that: (d) the site is not physically suitable for the proposed density of development; (e) that the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat; (f) that the design of the subdivision or type of improvements is likely to cause serious public health problems.

The County did not and cannot make these findings because among other reasons: the Project property’s steep slopes, and geological and hydrology restraints, the Projects’ sediment and polluted runoff into Redwood Creek, existing conditions of the property as potential habitat for wildlife species, including listed endangered species and the slope stability and extreme fire hazard risks to human health.

The Staff Report for your October 5, 2020 hearing (and Resolutions approving the Tentative Map and Mitigated Negative Declaration) are substantially the same as the previous Planning Commission Staff Report and Resolutions. None of these resolutions: includes any project specific, non-boilerplate discussion; makes any findings that contain any technical or qualitative detail or discussion that would provide any substantive support to the findings; and/or makes any substantive findings that actually address the specific objectives or goals of the CWP and TAP policies.

Thank you for your attention to this matter.

Sincerely,

Edward E. Yates