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SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

FRIENDS OF MUIR WOODS PARK; WATERSHED ALLIANCE OF MARIN,

Petitioners/Plaintiffs,

V.

COUNTY OF MARIN, BOARD OF SUPERVISORS OF THE COUNTY OF MARIN and DOES I through X,

Respondents/Defendants.

DANIEL WEISSMAN, an individual, and , a California Corporation and DOES, XI through XX,

Real Parties in Interest.

Case No.: CIV2003248

UNLIMITED CIVIL CASE

REPLY BRIEF SUPPORTING PETITION FOR WRIT OF MANDATE

Petition Filed: November 04, 2020
Judge: Andrew E. Sweet
Department: E
Trial Date: December 17, 2021
Time: 1:30 PM

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I. INTRODUCTION

This is a case about Marin County's failure to follow its statutory duty to protect the environment. Specifically, Marin County failed to follow the requirements of California Environmental Quality Act (CEQA"), Cal. Pub. Res. Code § 21000 *et seq.* and the Subdivision Map Act, Cal. Gov't Code § 66410 *et seq.* ("SMA") when it approved Real Party In Interest, Daniel Weissman's ("RPI") proposal to develop a property along the Panoramic Highway. CEQA and SMA impose stringent standards of review (see Infra Section II) for proposals intended to protect fragile ecosystems like that of Mt. Tamalpais. The County failed to properly apply the law when the County approved RPI's proposal and ignored all of the signposts that mandated a more complete review of the proposal for large homes in Muir Woods' fragile watershed.

Petitioner's Opening Brief ("POB") sets forth the particular signposts in the record that mandated a full Environmental Impact Report: 1) there was conflicting expert opinion on rainfall and runoff perils (AR 64, 78, 111-113, 117, 131-133); 2) a key Geological Technical Report was altered to conceal the development's impacts on water quality and endangered Coho Salmon and Steelhead populations (AR 78, 111-113, 117, 133); 3) the County failed to analyze large scale project grading and surface drainage construction, which could potentially pollute Redwood Creek in Muir Woods National Monument (AR 242, 1271, 1294, 1716, 1811, 4366-4367, 4468-4470); 4) the County failed to analyze the true potential of the foreseeable ***fourfold*** expansion of the project, significantly jeopardizing area wildlife, including the endangered Northern spotted owl (*see, e.g.,* AR 254, 4071 4075-4077, 4366-4367); and 5) a key Countywide Plan density restriction was completely absent from the required CEQA and SMA consistency analysis and findings (see AR 24, 223, 822, 1601, 1711-1712, 1721, 4354-4355).

Instead of addressing these deficiencies, RPI tries to recast this case as an affordable housing dispute. This is not an affordable housing case; the RPI is no white knight, and Petitioners are not foes of affordable housing. RPI's reinvention of this case as an affordable housing dispute is one of many red herrings intended to distract the Court from conducting a close review of Marin County's woefully inadequate environmental review of RPI's proposal and the County's improper approval of the Project.

II. STANDARD OF REVIEW AND STATEMENT OF ISSUES.

A. The Lower Threshold Fair Argument Standard of Review Applies.

The law requires merely a "fair argument" for a mandatory Environmental Impact Report ("EIR") instead of the Initial Study/Negative Declaration ("IS") the County produced. *No Oil, Inc. v City of Los Angeles* (1974) 13 Cal. 3d 68, 75. In such cases, the Court conducts a more stringent, low threshold review of the agency's CEQA compliance. The Opp'n correctly states that the standard for judicial review for an IS in CEQA cases is whether Petitioners have made a "fair argument," based on evidence in the record,

that the project may have a significant impact on the environment. Opp'n 10:9-15. When there is such a fair argument by Petitioners, *an agency may not rely on an IS* and must prepare a full EIR.

Nonetheless, the Opp'n wrongly attempts to convince this Court that this case should be judged by the deferential "substantial evidence" test, based on one inapposite case and that Petitioners have an "obligation to discuss all the evidence in the record" that supports the County. (Opp'n 11:17,17:20, 28:7-8, 28:21.) The RPI's main case for this proposition is *Citizens for a Megaplex-Free Alameda v Alameda* (2007) 149 Cal.App.4th 91, 112-113 (hereinafter "*Megaplex*"), which *cites State Water Res. Control Bd. Cases* (2006) 136 Cal.App.4th 674, 749, and *Markley v. City Council* (1982) 131 Cal.App.3d 656.

The substantial-evidence test requires the court to be deferential to agencies and is applied to EIRs (and not initial studies) because where the local agency has chosen to prepare the more detailed, in-depth analysis in an EIR, the court must grant some deference to agency decisions. However, *State Water Res. Control Bd. Cases*, *supra,* 136 Cal.App.4th 749 and *Markley*, *supra*, 131 Cal.App.3d 673, are both EIR cases, not initial-study cases, and thus are not relevant to the case at hand.

The court did apply the substantial argument test to the IS in *Megaplex* but only because the *plaintiffs failed to challenge the IS* within the applicable statute of limitations period and instead challenged a subsequent approval. The court found that the group's challenge to the IS was untimely under Pub. Resources Code, § 21167, subd. (b). Thus, the court applied the substantial evidence standard for "subsequent" documents in Pub. Res. Code, § 21166 "because in-depth review has already occurred, the time for challenging the sufficiency of the original EIR [or negative declaration] has long since expired, and the question is whether circumstances have changed enough to justify repeating a substantial portion of the process." *Megaplex*, *supra*, 149 Cal.App.4th 91, 103.

Here such a scenario does not exist because: 1) Petitioners appealed the original decision; 2) Petitioners timely filed their lawsuit, and 2) there is no "subsequent" CEQA document that triggers Pub. Res. Code, § 21166. Therefore, the RPI's dependence on *Megaplex* in numerous sections of its Opp'n is simply wrong. Opp'n 11:17, 14:22-24, 29:8. Thus, there is no requirement under the fair-argument test to discuss all the evidence in the County's favor, and EIR case law cited by the RPI only serves to reinforce the low-threshold standard in this case.

B. Petitioners Have Repeatedly Demonstrated Prejudice.

The POB contains *dozens* of references to the record showing environmental harm, lack of required

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disclosure, inadequate impact assessment, and prejudice to the Petitioners.[1] The Opp'n, though, without even addressing those POB record references, makes baseless claims that virtually every allegation in the POB does not show prejudice. Opp'n *see, e.g.*, 10, 12, 15, 17, 18, 20. The Opp'n, though, never explains what the prejudicial-error standard actually is. Prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process. *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 440, 463. The POB repeatedly makes those allegations and the Opp'n never applies that standard to the POB to actually prove lack of prejudicial error.

C. The Countywide Plan and Tamalpais Community Plan Are Laws which the Court Can Apply and Petitioner Cited to Both in the Administrative Record.

The Countywide Plan (CWP) and Tamalpais Area Community Plan (TACP) are laws, not evidence, which any court can apply in the exercise of its judicial authority. *See, e.g., Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540 (general plans provide a "constitution" for land use decisions). It is not incumbent on parties to request judicial notice of law (as opposed to evidence); practically every case before any court would be flooded with superfluous requests for judicial notice to various laws applicable to the case. Respondents cite to no authority for the proposition that requests for judicial notice are required for law.

Moreover, Petitioners cited extensively to places in the Administrative Record ("AR") concerning the CWP and the TACP. *See, inter alia*, CWP: AR 1712, 4110-4112, 4354-4355, 4377; TACP: AR 24, 222-223, 822, 1601, 1615-1616, and 4335. It would have been unduly burdensome, and completely unnecessary, for Petitioners to include the entire 936-page Marin CWP in the AR *when the County itself certified and lodged the AR*. In addition, the only relevant provisions were those discussed in the POB with corresponding citations in each instance to the AR. Similarly, there was no reason to include the entire 186-page TACP in the AR when the relevant provisions were identified in the POB with corresponding citations to the AR. Both plans were enacted by the County Board of Supervisors and operate as law or ordinance for the County. The Court applies those laws in carrying out its judicial authority and the County itself certified and lodged the AR.

D. A Statement of Issues Under Pub. Res. Code § 21167.8(F) Is not Required Where, as Here, Respondents Were on Notice of Issues Petitioners Intended to Raise at Hearing.

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[1] For instance, the POB 16:10 states: "This issue is vital to Coho Salmon and Steelhead habitat in Redwood Creek because the Countywide Plan warns that '[s]ediment is a major concern countywide, as it can damage aquatic habitat . . . by filling in channels and floodplains. Sediment sources include construction [and] road building. . . .' Countywide Plan at WR 2.5-2. Sediment fills the interstices in spawning gravels, thereby destroying the large gravel and cobble structure required for successful spawning activity." (AR 616.)

Petitioners have given Respondents ample notice of Petitioners' allegations. *See Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211-212. The specific absence of a Statement of Issues under Pub. Resources Code § 21167.8(f) does not prejudice the RPI as he was served with the Petition on December 30, 2020. Significantly, Petitioners framed the issues in the lengthy detailed Petition, and are not advancing any issues that are outside their pleadings. Indeed, those issues were already raised in the RPI's Answer and Demurrer herein. The purpose of Pub. Res. Code § 21167.8(f) has thus been satisfied. See Kostka & Zischke, Practice Under the Cal. Env'tal Quality Act (CEB 2017) § 23:81, pp. 23-24 ("the obvious intent of this requirement is to provide a method of limiting the issues to be briefed and raised at the hearing").

Moreover, Statements of Issues are not indispensable as evidenced by the fact that courts permit parties to waive Statements of Issues. *See*, e.g., *Rocklin Residents for Responsible Growth v. City of Rocklin,* 2011 Super. LEXIS 1066, Case No. 34-2008-0000236-CU-WM-GDS (Sacramento Cnty Sup. Ct., July 20, 2011) (parties waived statement of issues). While there was no express waiver here, the course of conduct of *all parties* in pretrial scheduling and the lack of *any* statement of issues from *any of the parties* indicate that the parties waived any separate Statements of Issues. From the very beginning of the case in early 2021, the parties negotiated and prepared a mutually agreed upon schedule for preparation, filing and certification of the administrative record, responsive pleadings, and mandatory CEQA Settlement Conference on February 17, 2021, all without incorporating a Statement of Issues deadline for either Petitioner, Respondent or RPI. See Respondents' CMC Statement dated January 8, 2021.

III. THE RPI'S VERSION OF THE FACTS IS NOT SUPPORTED BY THE RECORD.

The POB contains hundreds of specific detailed record references. The Opp'n addresses very few of those references but instead misstates the record repeatedly. For instance, the Opp'n claims that: RPI simply made a mistake in doing large-scale fire-road reconstruction on his property without a permit, that he wanted to help the County, and that he volunteered to rectify the red-tagged construction. Opp'n 2:26, 20:26-28. Instead, the record shows that the RPI tried to blame his own contractor for the violations (AR 1668-1669), and there was no volunteering. The County Fire Marshall reported that "the owner inserted fill without permits and was caught." AR 4177. See also AR 54, 64, 483, 4335 (Photos of Violation: March 26, 2014: AR 493, AR 731, AR 1131). The Opp'n claims that the Developer cannot and will not use the fire road. Opp'n 21:3; AR 63-64, 1652. The record contradicts that claim and shows that the RPI testified to the Board of Supervisors that he did not want any limits on fire-road use because he wanted to be able

to use it in the future to access the lower part of the property.[2] AR 1738:1-3; 1777:12-14. The Opp'n also claims that the County requires access to occur from the existing driveway along Panoramic Highway. The page cited by the Opp'n, AR 63, states no such thing.[3]

The Opp'n states that the Developer stated it would be "insane" to think of developing more. Opp'n 14:8. Yet, the RPI said he wanted to hold future rights to develop and would not agree to any restrictions. AR 1611:18-20, 1777:12-14, 1778:1-3. Thus, the record shows the County is aware that the RPI or a subsequent resident can apply for additional units, regardless of the RPI's supposed plans. AR 1571, 1717.

The Opp'n claims that "a vocal minority of neighbors aggressively objected to any residential development of the property, including affordable housing." Opp'n 3:6-11. First, 150 neighbors signed a petition objecting to the CEQA compliance. AR 855-882, 1505, 4381. Second, the record pages cited in the Opp'n, AR 817, 1561-1568 and the rest of the record, show no "aggressive" objections to the project. A search of the record also shows no neighbor/Petitioner opposition to either senior or affordable housing. The Opp'n further claim that the RPI abandoned affordable housing because of the opposition from the neighbors to affordable housing is baseless. Opp'n 20-22.

Rather, early on, the County determined that the RPI's supposed affordable housing plan in a draft proposal was a non-starter and not compliant with County requirements. The County urged the RPI to consider a compliant affordable housing plan. AR 3722. The RPI, though, rejected this suggestion and chose to pay an in-lieu fee of $100,000 to the County. AR 1571(i). The RPI's completed application was for single-family homes. AR 230, 3722, 4112. Thus, the only evidence shows that it was the RPI who did not want multifamily homes.

The Opp'n continues by falsely claiming ad nauseum that the neighbors and Petitioners objected to *"any"* development or subdivision at the site. Opp'n 1:21, 1:22, 1:28, 3:8, 6:22, 7:1, citing AR 568-583, 1617, 1628-1613 (*sic*). Petitioners did object to *"the"* subdivision and cited technical environmental and planning factors regarding the specific development and subdivision. AR 568, 573, 1617. A search of the record shows the only mention of "any development" by the Petitioners was by the National Marine Fisheries Service *2012 Central California Coho Recovery Plan,* which specifically calls out any development in this watershed as a "high risk" stressor for salmonids." AR 4373.

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[2] RPI's claims are further impeached by his rejection of any limitations on fire-road use, such as a limiting use to fire-truck access. AR 1777:12-14; 1778:1-3. The Opp'n also claims that such a restriction would prevent the landowners from removing fallen limbs. The condition, though, does not prohibit such activities. AR 223-224, 1574.

[3] The Opp'n claims that the GT Report found the site building pads stable. Opp'n 9:7-8. But the GT Report actually states: "Planned roadway grading and building pad development will extend into areas of weak fills, colluvium and slide deposits." AR 1826. Similarly false is the RPI's contention that there has been no land sliding since 1976. Opp'n 9:26. Instead, the GT Report states, "Zone 4 includes existing active or inactive landslides and areas subject to downslope creep." AR 1824, see Exhibit 1.

Regarding County staff, the RPI liberally uses the term "expert" and "third party," apparently to bolster staff credentials and make them appear independent. Oppo 5:3; 9:1. However, the record provides no support of expert credentials for the staff. Mr. Sicular's own stated mission—***before reviewing the public comments***—was to assist the RPI by rejecting **all** community arguments and rationalizing the use of an IS instead of an EIR. Mr. Sicular wrote: "As before, our intent in responding to comments is to counter any claim of a 'fair argument' based on substantial evidence, that the project may result in a significant impact on the environment, which, if it is determined during the administrative process or if the MND is challenged in court, could push the Project to an environmental impact report (EIR)." AR 4079.[4]

Conversely, even though Petitioners' expert Jason Pearson of Lotic Environmental ("Lotic"), identified himself as "Hydrologist/Fluvial Geomorphologist Owner, Lotic Environmental Services" (AR 4107), the RPI challenges Mr. Pearson's credentials (Opp'n 24:27). The RPI also claims Mr. Pearson never visited the site (Opp'n 8:5, citing AR 4101, 4105), claiming he only "generally" reviewed the Hydro report. Opp'n 8:6. The record belies both claims. Unlike the County's alleged "peer reviewer," Sutro Sciences, Mr. Pearson visited the site area, took photos, made calculations and site observations and cited technical data in his critique of the Ziegler Hydrological Report ("Hydro Report"). AR 4108-4109.

IV. LEGAL ARGUMENT—CEQA

A. <u>There Will be *No* CEQA Compliance Required for Future Foreseeable Development.</u>

At the Planning Commission and Board Hearings, in letters, and in the POB, Petitioners set out the clear rule that because future residential development on the parcels, e.g., ADUs, will be ministerial, no future CEQA environmental will occur. AR 707, 1722:11-12; POB 1:19, 8:26-9:21. Not only did staff deny this reality (AR 221-222) and mislead the Board of Supervisors, but the Opp'n again asserts the disproven claim that there will be such future discretionary review and CEQA review. Opp'n 14:15. However, neither the foreseeable ADUs nor the lot split will be subject to future CEQA review because: a) ADUs are ministerially approved (POB 9:4-14); and b) CEQA provides an exemption for "minor land divisions" such as lot splits (14 CCR § 15315). The RPI falsely alleges that Petitioners claim that a future lot split on the property is "by right." Opp'n 14:16-17. Petitioners do not claim that a lot split is ministerial but instead allege that the ADUs are ministerial and by right. POB 7:14-9:22.

B. <u>Future Residential Development Is Reasonably Foreseeable.</u>

The POB sets out the legal authority that CEQA documents must consider future related *reasonably foreseeable* development (POB 7-8) and argues that the *County* refused to consider later "by right"

[4] County staff was so concerned that LAFCO would not approve the Developer's sewer hookups or septic that Staff misled the LAFCO by saying that any development application would require the preparation of a master plan. AR 4505. The County never held the Developer to that promise made to the LAFCO.

development. POB 8-9. This requirement is not difficult because CEQA only requires that an agency use its best efforts to disclose all that it reasonably can. (14 CCR §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.

1. The County Ignored Reasonably Foreseeable "Like-to-Like" Residential Development.

The POB cites the seminal California Supreme Court case, *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 396 on the duty of agencies to assess reasonably foreseeable future projects. The RPI ignores that case and cites inapposite case law for the proposition that a CEQA document "need not cover every potential development scenario." Opp'n 13:11-12. No one alleges that. Petitioners agree that different ordinances or land uses may not be reasonably foreseeable. The POB cites the record to support its claim of *similar residential* development being reasonably foreseeable. POB 7-9.

Aptos Council v. Cnty. of Santa Cruz (2017) 10 Cal.App.5th 266, and the other cases cited in the Opp'n are also irrelevant because those agency actions were not like-to-like development. *Aptos* was not a permit but an *ordinance* review that the court ruled did not have to address all other similar ordinances or speculative hotel-development scenarios *because there was no evidence in the record* about related future development. In contrast, in this case there is substantial evidence of expansion of the *exact same use*—residential development. POB 7-9.

The Opp'n mistakenly relies on *Rominger v. County. of Colusa* (2014) 229 Cal.App.4th 690. Opp'n 15:14-16:8. *Rominger* did not involve a specific development but instead was a rezoning. There, the plaintiffs demanded that all entirely new possible future industrial activities such as chemical plants be considered prior to rezoning. The plaintiffs in *Rominger,* though did not provide any evidence for their claim of foreseeability, as Petitioners did here. POB 7-9. Moreover, during review, Colusa County *did study and address the* project opponents' allegations and found that potential industrial chemical uses were not reasonably foreseeable. *Ibid.* at 698. Marin County failed to do that here. *Pala Band of Mission Indians v. Cnty. of San Diego* (1998) 68 Cal.App.4th 556, 575, is also distinguishable because, like *Aptos* and *Rominger*, later general plan amendments and CEQA compliance would be necessary.

In contrast, *Laurel Heights* involved a future possible academic medical facility that would expand that same academic medical use. *Laurel Heights*, *supra*, at 388-389. Also, in *City of Maywood v. Los Angeles Unified School District* (2012) 208 Cal.App.4th 362, 371 there would be a future possible

expansion of high school facilities to the *same* high school facilities.[5] In *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1328, the court ruled that an IS about residential infrastructure was deficient and required an EIR because the City did not address impacts of the infrastructure that could trigger residential development, much like the Dipsea subdivision will be a catalyst for ADUs here.

2. The Record Shows Future Development Is not "Speculative."

The Opp'n makes hyperbolic claims that future development is "purely" or "wildly" speculative and that "Petitioners fail to cite any evidence" regarding future development. Opp'n 13:1, 13:24. The POB, though, includes a section, "Eight Additional Future Homes are not Speculative, Unforeseeable or Difficult to Assess" (POB 9:23-24), which included 27 different citations why development is not speculative. POB 9:23- 25:22.

The Opp'n, citing no legal authority, tries to change the standard in *Laurel Heights* from "reasonably foreseeable future development" to "planned" development. Opp'n 14:6-9.[6] Instead, CEQA's legal standard relates to an ***agency's*** notice of future development, not the owner's supposed plans. POB 8:1, 9:23-10:1. Evidence of that notice includes a County memo concluding; "The lot in question is proposed Lot 3, a 5.18-acre lot that *has the potential to be further subdivided* under the RMP-0.5, zoning district." AR 222. Also, the County refused to enact a deed restriction limiting a lot split (AR 223-225) because the Developer stated that: "Is it possible that some day my wife and I may build a home on a different parcel and sell another one? Yes." See Opp'n 6:16; AR 1611:18-20. The County may accommodate the developer and reject such a deed restriction, but it must assess the future environmental impacts of its decision.

3. State Law Prevents County from Restricting any Landowners to Building Envelopes.

The POB describes how state law housing preempts local government agency actions to regulate multifamily housing, including ADUs. POB 8:14-8:28. *See, also*, Gov't Code §§ 65585(i)(1)(B); 65589.5(a)(2)(K); 65589.5(j)(2)(A). CEQA and the County Muni Code also provide for such ADUs by right. POB 9:1-7. The Opp'n, however, contends that the County can limit the developer by a map approval project condition limiting development on the parcels to the approved building envelopes. Opp'n 16:21-24. The Opp'n discussion, though, **does not even bother to cite those Gov't Code citations** or the POB discussion of state housing law, which restrict the County from limiting ADUs to the building

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[5] The Opp'n contends that *Laurel Heights* is irrelevant to the case at bar because *Laurel Heights* and City of *Maywood* "hold that CEQA analysis must not be piecemeal." Opp16:25-28. The POB is not cited and says no such thing. Both cited cases are in fact "reasonably foreseeable future project" cases and not "piecemeal" allegations.

[6] The Opp'n claims the RPI intends no further subdividing. Opp'n 6:16. The RPI, though, contradicted himself by admitting that he would possibly develop and sell another home on the parcel. AR 1611:18-20.

envelope condition. This is because state law does not allow the County to limit that footprint or impose any other geographical limitations not stated in Gov't Code §65852.2(a)(1)(D)(8).[7]

Thus, once a landowner applies for ADU or JADU permits, he can locate the ADUs where he wants as long as he meets ***state*** setback requirements, because local agencies *may not impose their own stream or other setbacks*. Gov. Code, §65852.2(c)(2)(C), (e)(1)(B-C). These stringent housing laws and powerful developers' rights have been strictly enforced in the first two cases (decided immediately before or after the POB was filed). In *California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 831, a city violated Code Civ. Proc. §1094.5(b) in denying approval of a housing project based on a local height guideline because Gov. Code, §65589.6 limited municipal authority in order to further the statewide interest in housing development.

The court in *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, 324, overturned the City of Berkeley's decision to deny the developer's request to apply the state housing law-mandated *ministerial review* requirement, reasoning that the state may infringe on the city's authority when it sufficiently articulates a statewide interest, as was done in state housing laws. These cases affirm that even if it wanted to, *the County cannot enforce the building envelope map condition.* AR 61.[8]

4. <u>The IS Also Failed to Assess Impacts from ADUs *Inside* the Building Envelopes.</u>

Even if the County could limit construction of the eight ADUs to the building envelope, the IS never considered the foreseeable impacts of those ADUs and their residents, including: additional vehicle traffic on the unstable fire road and impacts to soil stability and landslides (AR 130, 132, 133, 153); polluted runoff and stormwater flows from new-resident vehicles and runoff and downstream impacts on Coho Salmon in Redwood Creek (AR 249, 253, 1811, 2018, 3710);[9] additional septic tanks and potential pollution of groundwater (AR 247, 256, 257, 3710, 4510); additional movement, noise, night glare and their impacts to wildlife corridors and endangered species (AR 91, 251, 4075-4077, 4366-4367); and additional traffic and emergency fire escape scenarios. AR 263-267, 444.

C. <u>The IS Project Description Fails to Disclose the Placement Site of the Fill or Excess Fill.</u>

The POB explains why the "plans" for placement of fill on the site violate CEQA's requirements to provide a detailed project description. POB 11:23-13:10. The Opp'n essentially ignores this section with a short response that claims that an IS *baseline* setting can be less exacting than that for an EIR, citing

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[7] County staff appeared confused and gave conflicting answers to different Board members on whether state law and even its own code required ministerial review for ADUs. AR 1728-1729.

[8] The Opp'n claims that an ADU must be part of a living space or accessory building. Opp'n 16-19. This is a false rendition of the code; an ADU can be new. Muni Code § 22.32.120(A)(1)(c).

[9] The *NOAA NMFS 2012 California Coho Recovery Plan* states that any development in this watershed is a "high risk" stressor for salmonids" (AR 4128, 4157-4176), yet the County never cited or addressed this Plan. AR 92-111.

Lighthouse Field Beach Rescue v. City of Santa Cruz (2005) 131 Cal.App.4th 1170, 1192. Opp'n 18:6-23. *Lighthouse,* however, mainly concerns the baseline setting, not the project description, such as project fill. In its one reference to project description, the *Lighthouse* court held that: "Where an agency fails to provide an accurate project description…a negative declaration is inappropriate." *Ibid* at 1202.

The POB and the CEQA regulations require that the project description be accurate and include enough detail to assess the impacts. In *Taxpayers for Accountable School Bond Spending v. San Diego Un. School Dist.* (2013) 215 Cal.App.4th 1013, 1047, the court overturned an IS for lack of explanation of the project description. "Without a comparison of existing baseline physical conditions to the conditions expected to be produced by a project, an initial study or environmental impact report (EIR) will not inform decision makers and the public of the project's significant environmental impacts, as CEQA mandates."

The Opp'n claims that a nebulous promise that fill will be "stockpiled or hauled off site" is a sufficient project description. Opp'n 18:11. Yet the public and the decision makers still have no idea where the fill will be stockpiled. It could be stockpiled on the property's steep slopes, unstable fire road, or upstream from the wetland. *Additionally, the County failed to describe in any way the unidentified 140 cubic yards of fill, its fill location or impacts.* This despite the County's own biologist finding that fill could wash into the wetland and stream and cause potential significant downstream impacts to endangered Coho Salmon and Steelhead. *See, e.g.,* AR 64, 78, 111-113, 117, 131-133, 1737, 1738.

D. The IS Improperly Altered a Key Geotech Finding and Repeated it throughout the IS.

The POB makes a simple but detailed allegation: The IS's environmental-setting discussion and numerous IS impact significance findings were fatally flawed because County Staff altered a key technical finding in the Herzog Preliminary Geotechnical Investigation ("GT Report") regarding fire-road stability. POB 14; AR 132, 1826. That GT Report concludes that the illegally graded fire road is geologically unstable and such instability could result in downstream hydrological and biological impacts. AR 1826. This instability—***13 landslides***, many on or adjacent to the fire road—is graphically shown by The GT Report. See Exhibit 1, AR 2195. The IS completely reversed this finding, repeatedly forwarding a baseless contention that the fire road became *more* stable due to its illegal grading by the RPI. POB 14. Thus, the GT Report refutes the IS conclusions on downstream hydrological, water quality and biological impacts. POB 14:23-24, AR 78, 111-113, 117, 133.

The Opp'n attempts to rebut Petitioners' allegation by claiming that County staff "reassessed" the fire road conditions three years after the GT Report was submitted. Opp'n 22:22-23:8, citing AR 132. Rather, the record shows that there was: no "assessment"; no conclusion that the Geotech analysis was out of date; no field visit or analysis to reassess the GT Report; and no expertise to make any such reassessment. AR

132. Further there is no basis for the IS contention that a culvert would solve any geological and hydrological problems related to the unstable fire road. AR 132. Instead, County engineer Jason Wong opined that the culvert impacts should be assessed in the IS, which assessment was never done. AR 4269.

The Opp'n mistakenly contends that none of these concerns about lack of impact analysis matter because the County approvals contain conditions stated in the Hydrology Report. However, as stated in the POB, ***those are not County adopted conditions***, but instead are merely Report recommendations that "informed" the unapproved future stormwater system. AR 28, 826. *See* POB 21:26-28; AR 20-42. Further, while the Opp'n claims that the AR discussed fire-road issues concerning biological, geological, and hydrological resources (Opp'n 21:28, 22:2), the cited sections show that the IS based its conclusions on the same misrepresentation of the GT Report finding.

The Opp'n claims the potential erosion, land movement, and sediment deposition that could result from the fire road's condition and use are simply an area of "geotechnical area of concern" (Opp'n 22:12), as if the GT Report did not really make a serious technical finding. The Opp'n also repeats that this misrepresentation was harmless. Opp'n 22:5. The POB, however, debunks this claim. *See, e.g.*, POB 1:20, 4:10-20, 12:9-10; AR 12:15-24, 14:15-17, 16:13-23, 24:9-13.[10]

E. <u>Geological and Hydrological Resources Conditions are Not Adequately Analyzed.</u>

The POB cites the Lotic Report, an expert study of the site and its weather, which Report concludes with disagreements of key conclusions in both the GT Report and the Hydrology Study, and as such CEQA regulations require the preparation of an EIR. POB 17:1-14. The Opp'n, though, inexplicably contends that despite this expert hydrologist disagreeing with the methodology of the Hydro Report measurement of rainfall, there is no disagreement among experts. Opp'n 24:1-8. The County, though, hired a third hydrology firm, Sutro, to refute the Lotic Report so disagreement is obvious. POB 16,fn. 6; AR 3680. The Lotic Report included cites to NOAA weather modeling, statistics from the National Hydrography Data Set, and site-specific calculations by Lotic. The supposedly expert Sutro Report did none of those. *Ibid.*

The Opp'n further claims that the Lotic Report's critique of the Hydro Report methodology is not important. Opp'n 25:7-8. Yet the Hydro Report's underlying methodology is the basis for the IS

[10] The Opp'n discusses allegations never made by Petitioners, contending that Petitioners "appear to take issue," "suggest," "appears to allege," and "appear to be upset." Opp'n 20:7, 21:1-22:8, 22:4. The RPI contends that the POB alleges that: (i) the IS must include the illegal road grading as part of the project description; (ii) the IS must assess all the impacts of the past illegal fire-road grading; and (iii) Petitioners are upset that the County did not treat the RPI with "antagonism." Opp'n 21:3, 21:8, 22:4. None of these claims were made and this Reply need not address them. The Opp'n also downplays the IS's key error of altering the finding in the GeoTech Report. Opp'n 20:24, 23:14-22. This claim is debunked, *supra*, in Section I and the AR 479 does not support this false claim.

conclusions on the amount of polluted runoff. Underestimating rainfall will clearly change all the conclusions on water quality, landslides and impacts to downstream Coho Salmon. POB 15:10-16:2.

F. <u>The Biological Resources Existing Conditions Section Is Rife with Errors.</u>

The POB cited and critiqued the biological reports in the AR, including the 2015 LSA Report, to demonstrate errors, lack of industry standard surveys, and conflicts with the IS. *See, e.g.*, POB 17:20, 18:13, 18:18, 18:22, 20:6, 20:10. Yet the Opp'n claims the POB never mentioned the 2015 LSA Report, cited at AR 1808-1819. Opp'n 25:22-23. This is obviously ***false.*** The Opp'n also makes the misleading claim that the POB only cites public comments of evidence that the onsite streams have been delineated as perennial blue-line streams. Opp'n 27:1-3. Yet the record shows that those public comments cited, referenced and attached County, U.S. Fish and Wildlife and U.S. Environmental Protection Agency maps show[ing] blue line streams. POB 24-27. The RPI never objected to this evidence placed in the AR.

The IS failed to assess the impacts of project mitigation measures, e.g., surface constructed drainage, as required by CEQA and suggested by a County engineer. 14 CCR 15126.4(a)(1)(D); AR 4269. The Opp'n, though, states that a 100-foot stream setback required for Stream Conservation Areas ("SCA") will prevent any possible impacts to riparian and wetland areas. Opp'n 27:7, 17:13-19. Yet mitigation cannot be certain to drop impacts below significance level if the impact level is not determined. POB 21:23-22:5. In *Salmon Protection & Watershed Network v County of Marin* (2004) 125 Cal.App.4th 1098, 1102, the appellate court found that Marin County erred in relying only on mitigation measures to grant a categorical exemption regarding habitat for Coho salmon because the County should have weighed the mitigation "against potential environmental impacts." *Ibid.* at 1108. Thus, the IS mitigation without impact assessment does not comply with CEQA decisions that hold such a shortcut cannot be made. POB 21:22-23:6. See, also, *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1233.[11]

The Opp'n baselessly asserts that Petitioners rely on unsupported assumptions and hypotheticals. Opp'n 27:6. The POB, however, made *54 AR citations regarding biological resources* conditions and impacts to technical parts of the record, including the LSA report, the Lotic Report, federal endangered species reports, and official County and state riparian and wetlands maps. POB 16:1-18:26; 19:24-23:14.[12]

G. <u>The IS Did Not Properly Assess the Project's Impacts.</u>

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[11] The Opp'n claims the POB used the term "no effects" instead of no significant effects. Opp'n 25:15. It must have been obvious to the RPI that this is a typo, because "significant" effects is CEQA standard. CEQA Guidelines, § 15070(b)(1), § 15064(f)(2) and the term significant effect(s) or impact(s) is used 26 times in the POB. POB 7-24.

[12] The Opp'n argues against the POB's cite (POB 21:28) to *Save the Agoura Cornell Knoll v City of Agoura Hills* (2020) 46 Cal. App. 5th 665, 690, but does not cite the POB and does not include a full citation, nor is it listed in the Opp'n TOA. Thus, the RPI's argument is difficult to determine that this case is not applicable.

The POB contains numerous arguments, citations and analyses regarding the IS's failure to assess environmental impacts. POB 19:21-23:21. Yet the RPI fails to respond to those arguments. Opp'n 28. *Thus, the RPI has mainly forfeited the CEQA allegations here.* The Opp'n makes only two claims here. First, that supposedly the POB recycles many of the arguments made in the Existing Conditions section. Opp'n 28:9-14. Yet that is how CEQA works; the POB references the Existing Conditions argument because if the methodology or baseline facts are wrong, the impact assessment is baseless.

The Opp'n also claims that County-adopted mitigation measures recommended by the Cal. Department of Fish and Wildlife ("CDFW") solve the lack of impact assessment. Opp'n 28:21-28. But adopting the CDFW recommendations does not allow the County to skip impact assessment and adopt the mitigation measures. POB 21:23; 22:5-8; Reply, *supra*, II(B)(3); II(F).

Even if adopting those recommendations was evidence of lowered biological significant impact, the County blatantly violated *three* of its own CEQA biological resources significance criteria, (a), (b) and (f), which require an assessment of conflicts with state, federal or regional conservation plans protecting riparian resources, fish and wildlife. AR 91-92. The IS did not even mention three of the most important relevant regional conservation plans and yet found no conflict with the CEQA criterion. AR 95, 99, 110, 118. Those missing and ignored plans are: 1) *2004 CDFW Recovery Strategy for California Coho Salmon*; 2) *NOAA NMFS 2012 California Coho Recovery Plan*; and 3) *Final Coastal Multispecies Recovery Plan for Steelhead, including those in Redwood Creek.* AR 633, 1757, 4128, 4136-4137, 4157-4176. All three have specific protections for Redwood Creek Coho Salmon and Steelhead and should have been assessed.

H. The Opposition Cedes Petitioners' Allegations on Violation of Cumulative Impacts.

The IS never combined the impacts of a prior project, the illegal road grading, with the proposed project's extensive grading and fill for two (or foreseeably more) homes to ***predict future impacts*** to streams, safety and habitat. See POB 13:19-15:3; AR 1635. Moreover, the POB alleges that the IS dismissed potential impacts of the other residential projects in the area out of hand. POB 24:14-19. These failures to do any rudimentary cumulative assessment are obvious transgressions of CEQA. *The Opp'n cedes this argument* by relying only on a non-sequitur, that this POB allegation is "generic." Opp'n 29:6.

I. The County Failed to Determine Lack of Consistency under CEQA.

The POB provides the authority and record citations regarding why the County violated the CEQA requirement that it consider whether the project would conflict with any land-use plan. POB 24:21-27, citing CEQA Guidelines § 15125(d). POB 30:18-34:5. Yet the Opp'n fails to counter Petitioners' argument that the County never complied with CEQA's requirement to determine if the Project conflicts with local plans. Opp'n 29:13-30:4. The Opp'n claims that Petitioners "*seem to argue* that the County

erred in not adopting the conditions requested by the TDRB." Opp'n 29:16. The POB never makes such an argument. The Opp'n never addresses Petitioners' actual argument about the County's lack of basis for the IS CEQA consistency findings. POB 30:18-34:5. Thus, the RPI ceded this section as well.

V. LEGAL ARGUMENT—SUBDIVISION MAP ACT ("SMA")

A. The County Violated the SMA by Refusing to Consider a Key Policy.

The POB alleges that the County violated the SMA by improperly failing to "consider" a key General Plan Policy, CWP CD5.e. POB 25:19-25:2. The Opp'n asserts that Petitioners "claim" CD5.e is a "mandate" (without citing it). The POB never claims this.

The Opp'n cites case law for the precept that a County has discretion on how to interpret its general plan, yet mainly lists case law addressing the Planning and Zoning Code, Gov't Code § 65000 et seq. But the POB relies on the SMA, Gov't Code §§ 66473.5 and 66474, which have stricter consistency requirements regarding consistency with general and specific plans. Gov't Code § 66473.5 provides that no agency **shall** approve a subdivision unless it is consistent with a general plan or a specific plan and the proposed subdivision or land use is compatible with the objectives, policies, general land uses, and programs specified in such an agency adopted plan.

The County never made such a determination of "consistency" or "compatibility"; in fact, it refused to consider CWP CD5.e because supposedly another policy prevailed. POB 26:11-24. The County's contention that a supposedly more specific policy trumps a general policy is directly contradicted by state law. *Sierra Club v. Bd. of Supervisors of Kern County* (1981) 126 Cal.App.3d 698, struck down just such a "precedence" clause in the Kern County General Plan because Gov't Code section 65300.5 provides that an agency *must resolve potential conflicts* among general plan elements. *Ibid.*, *see* POB 26:11-24.

The Opp'n also repeatedly states that local agencies have discretion in interpreting their own plans. Opp'n 30:20-31:20. Petitioners acknowledged this. POB 25:26-28. But that discretion does not allow agencies *to refuse to interpret certain policies based on a precedence.* POB 26:11-24.

Naraghi Lakes Neighborhood Preservation Assn. v. City of Modesto (2016) 1 Cal.App.5th 9, 18-19, interpreted Gov. Code § 65860, not the SMA. However, even if applied to this case, *Naraghi Lakes* is favorable to Petitioners and is instructive regarding what consideration of general plan policies entails. That case held that because policies in a general plan reflect competing interests, the governmental agency must be allowed to *weigh and balance* the plan's policies when applying them. But unlike the City of Modesto in *Naraghi Lakes*, Marin County did not weigh and balance CWP CD5.e. Evidence of the County's failure to consider and resolve includes the fact that the Planning Director was concerned that the IS lacked a discussion of CD5.e (AR 3683), and that County Staff expressed uncertainty and

prevarications regarding the need to consider CD5.e. AR 1601:12-25, 1603, 1606:12-18, 1627:7-24, 1657:12-22, 1712. We will never know if the subdivision in this case was compatible with CWP CD 5.e.

The Opp'n then wrongly contends that CWP CD 5.e is neither any kind of policy nor a density policy. Yet the CWP Community Development Element introduction states: "This section includes *policies* about urban form that are intended to shape development in the unincorporated county..." CWP 3.4-1 (emphasis added). Further, CD5.e is termed an "implementation program," indicating that it is in fact more specific than a broader policy and is a specific directive. Its wording shows a requirement to "calculate ***density*** at the lowest end of the County Wide Plan ***density*** range for new development." CWP 3.4-23. The TACP policy is not a density policy but is a *technical septic tank calculation criteria. POB* 30:14.

The Opp'n claims that the County did "consider" CWP CD 5.e. Yet the Opp'n relies on County Staff's alleged rationale for *not considering* CWP CD5.e: that the TACP was more specific. The RPI then attempts to argue that because other sections of the CWP (RMP-0.5) and the TACP (LU31.1) were considered, CWP CD5.e was also considered. Opp'n 33:19-27. There is no evidence in the record for this contention but instead the evidence is clear: the County did not engage in consideration and instead refused to consider CWP 5.e. POB 26:9-24.

B. The Opposition Does Not Refute Allegations Regarding the County's Failure to Adequately Determine Consistency with *Other* General Plan Policies.

Finally, the RPI fails to respond at all to the specific contentions in IV.B.3 (POB 28:3-30:2) that the approvals were inconsistent with *other* policies of the CWP. As acknowledged above, the County has discretion in which to consider its plans. However, the POB provides evidence that again, the County avoided determining consistency with those other sections by dismissing each policy with a boilerplate sentence or two. The RPI has ceded this argument by not responding to it.

VI. CONCLUSION

By reason of the foregoing, Respondents have violated CEQA, the SMA and Code of Civ. Proc. §§ 1094.5 by approving Dipsea Ranch Land Division and the related Mitigated Negative Declaration, due to fatal defects described above. Petitioners request that this Court issue a Writ of Mandate setting aside and voiding the County's approval of the Subdivision and accompanying IS and MND.

DATED: November 29, 2021

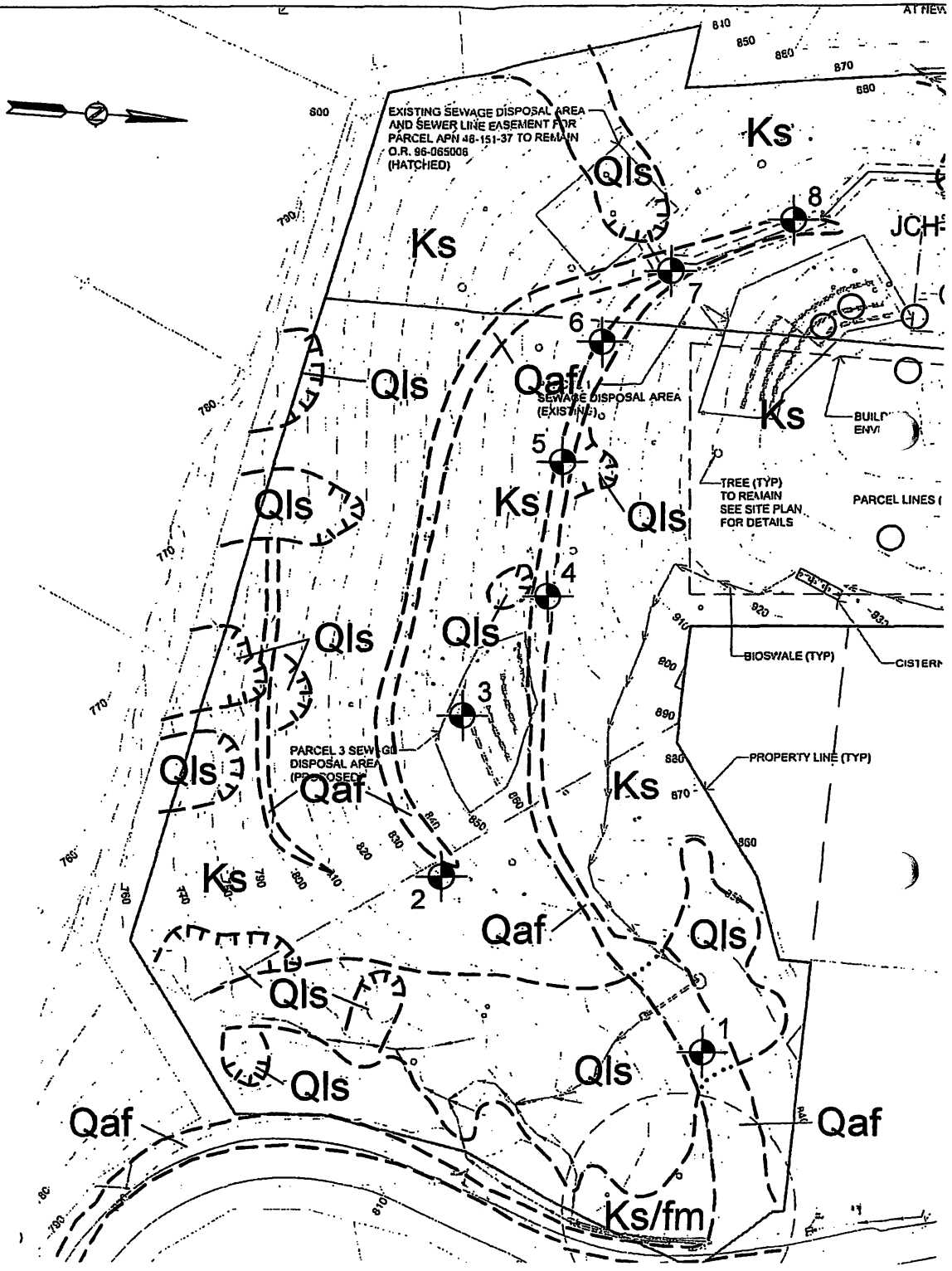
LAW OFFICE OF EDWARD E. YATES

By: _____
EDWARD E. YATES (SBN 135138)
Attorney for Petitioners

EXHIBIT 1

LEGEND

1	Recent Herzog Geotechnical Boring (2015)
HG-1	Previous Herzog Geotechnical Boring (2007)
JCH-1	John C. Hom & Associates Boring (2015)
O	Salem Howes Associates Boring (2003)
Ks	Cretaceous Sedimentary Bedrock; primarily sandstone and shale
fm	Franciscan Melange; typically consists of heterogeneous mixture of sandstone, shale, metavolcanic rock, serpentinite and chert
Qls	Landslide Deposits
Qaf	Artificial Fill



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SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

FRIENDS OF MUIR WOODS PARK; WATERSHED ALLIANCE OF MARIN,

Petitioners/Plaintiffs,

V.

COUNTY OF MARIN, BOARD OF SUPERVISORS OF THE COUNTY OF MARIN and DOES I through X,

Respondents/Defendants.

DANIEL WEISSMAN, an individual, and , a California Corporation and DOES, XI through XX,

Real Parties in Interest.

Case No.: CIV2003248

UNLIMITED CIVIL CASE

BRIEFING BINDER: PAGES AND INDEX FROM ADMINISTRATIVE RECORD CITED IN PETITIONERS' REPLY BRIEF

Petition Filed: November 04, 2020
Judge: Andrew E. Sweet
Department: E
Trial Date: December 17, 2021
Time: 1:30 PM