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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

FRIENDS OF MUIR WOODS PARK; WATERSHED ALLIANCE OF MARIN, Plaintiffs/Petitioners, vs. 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.: CIV200324 **REAL PARTY'S IN INTEREST BRIEF IN OPPOSITION TO PETITON FOR WRIT OF MANDATE** Hearing Date: December 17, 2021 Time: 1:30 P.M. Department: E Judge: Hon. Andrew E. Sweet

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I. INTRODUCTION

CEQA cases typically involve challenges to large-scale endeavors such as sprawling residential projects, big-box shopping centers, and industrial manufacturing operations, to name a few. But this case does not fall into any such category. In this action, Petitioners "Friends of Muir Woods Park" and "Marin Watershed Alliance" challenge Respondent Marin County's ("County") approval of Real Party in Interest Daniel Weissman's ("Weissman") subdivision of the 8.29 acre developed lot upon which his family currently reside into three total parcels – allowing for the planned construction of two new single family residences along the Panoramic Highway near Mill Valley. Yes, the battle before the court hinges around a modest low-density residential project that creates two additional parcels.

Importantly, the approved project, which clusters development atop the property in mapped "building envelopes" and was subject to several years of environmental review, mitigation measures, and project modifications in order to address concerns of the County and the community, is a substantially reduced version of the Weissman Family's initial proposal to develop 13 lots, including some designated as affordable housing, on the site and to bring public sewer to the property.

But these substantial modifications and reductions, along with a voluminous record of environmental analysis leading to the preparation of a mitigated negative declaration, still left a remaining few local activists and project neighbors (several of whom, ironically, reside on much smaller lots than those approved here) decrying the idea of allowing any additional residences in the community. With calls to arms to thwart any construction on the Weissman property, they unsuccessfully urged both the Planning Commission and Board of Supervisors to deny the Project or, in the alternative, to require further environmental review in the form of an unaffordable, unnecessary, and unjustified environmental impact report. Petitioners make the same request to this court. But their war against the Project waged through the opening brief suffers recurring material flaws that warrant denial of the petition. While Petitioners launch a scatter-shot attack on the County's approval, perhaps hoping for something to stick they ultimately fail to heed the standards of review applicable to each of

their claims. Petitioners repeatedly fail to describe all relevant evidence in the record (leading to a forfeiture of claims), fail to satisfy the applicable standard of review (whether "fair argument", "substantial evidence", or otherwise) with citations to specific evidence in the record, and repeatedly fail to demonstrate any prejudice resulting from any alleged error. That the County could have evaluated or mitigated an impact differently than Petitioners' preferred approach does not mean that the County committed reversible error in choosing to act as it did. Nor does this result warrant the preparation of an EIR as Petitioners demand, for, "The purpose of CEQA is not generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. (Cal. Code Regs., tit. 14, ("CEQA guidelines") § 15003, subd. (g).)

In the final analysis, the County's decision to approve the three-lot subdivision and adopt the various mitigation measures is supported by substantial evidence in the record, and Petitioners fail to show that the County improperly determined the potential significance of any environmental impact, misapplied its own planning policies, or otherwise committed a prejudicial abuse of discretion in its approval of the Project. For these reasons, the Court should deny the petition in its entirety.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Historical Background of Project

The Weissman Family purchased their home at 455 Panoramic Highway near Mill Valley, in 2009 (the "Property"). (AR 1724, 4138) The Property consist of approximately 10.15 acres between two legal parcels, APN 046–161–11 totals ±8.29 acres, APN 046–221–07 totals ±1.86 acres. (AR 494) The Weismann Family's personal residence sits on the larger parcel. (AR 1590)

In 2014, prior to submitting any applications to subdivide the Property, Weissman graded a section of an existing fire road on his Property to increase access for vegetation management and firefighting crews (AR 479, 1655.) Because the road work allegedly exceeded the scope Weissman's permit to install a culvert and pave the driveway entrance, the County opened an enforcement case (AR 479; 3746; 4010.) After a thorough investigation the County determined that the grading did not have significant impacts to biological resource conditions, hydrology, or water quality. (AR 479–493.)

In February 2017, Weissman applied to the County to subdivide the Property into 13 lots (AR 817, 1792.) That initial application included a master plan for the Property that would have created both market rate and much needed affordable housing (AR 242, 1599). Weissman also received "will serve" confirmation from all necessary utilities, including the Homestead Valley Sanitary District (AR 4507).

At a 2017 meeting of the Tamalpais Design Review Board ("TDRB"), despite efforts to provide public and private benefits through affordable housing and ecologically beneficial sanitation waste management, a vocal minority of neighbors aggressively objected to any residential development at the Property, including the affordable housing. (AR 817; 1561–1568). Instead of welcoming sewer to the surrounding area, subsidized by Weissman, the minority neighborhood opposition preferred restrictive land use regulation based on septic limitations (AR 1561–1568.).

B. Project At Issue

In 2018, Weissman submitted a revised application to the County, this time excluding the ±1.86 acre parcel from the application and merely proposing a tentative map to divide the ±8.29 acre parcel (the "Project Site") into three separate parcels of ± 0.89-acres, ± 2.22-acres, and ± 5.18-acres, respectively (the "Project").[1] (AR 007, 1786–1803) This neutered 3-lot subdivision, in effect, only created two new developable lots since the third lot was already improved with Weissman's existing home, as was recognized by decisionmakers during the approval process. (AR 54, 233, 281–282, 1692) The County evaluated impacts of future development of the two residential parcels in the environmental studies as it is a reasonably foreseeable result of the subdivision. (AR 300)

The homes to the north and east of the Project Site were developed in the 1930s and generally sit on approximately 0.2 acre or smaller lots (i.e. ~6,000 - ~8,000 square feet). (AR 1802) The Project's proposed lot sizes varying from .89 acres to 5.18 acres would result in lower density than the neighboring subdivision parcel sizes. (AR 279).

[1] A copy of the tentative map contained in the administrative record is attached hereto as Exhibit A for the Court's reference.

The Project Site is zoned RMP-0.5 (Residential, Multiple Planned District), which allows for development of one dwelling unit per two acres. (AR 023, 55) The Project Site is also regulated by the policies, programs and goals identified in the Tamalpais Area Community Plan ("TACP"), which was adopted by the County Board of Supervisors in 1992. Although the Tam Plan designates the Project Site as a Land Use Category of SF-1 (one single-family unit per acre maximum density), the TACP identifies the Subject Parcel specifically as having a lower maximum density of five units based on septic regulations. (AR 024) Accessory Dwelling Units ("ADUs") and Junior Accessory Dwelling Units ("JADUs") do not apply toward calculation of the site's density. (AR 187)

Because the Project subdivides the Project Site into three single-family lots, it is consistent with both the Countywide Plan's RMP-0.5 designation and the Tam Plan's preferred maximum density of five units. (AR 024.) The Project does not include any specific development design; rather, the Project accommodates a framework for future residential development. (AR 1590–1591) Any future development is limited to the areas within the proposed building envelopes depicted on the tentative map (which limit total buildable area up to 7,000 sq. ft. per lot) and would be subject to future County permitting and design review. (AR 1701) The building envelopes are strategically clustered onto more level portions of the Project Site, which include areas that are accessed by the existing driveway and already substantially developed by existing development of Weissman's home. (AR 224–225, 1591, 1702.)

C. Tamalpais Design Review Board Meeting May 2, 2018

On May 2, 2018, the Project, as currently proposed, was discussed at the TDRB (AR 1570–1574.) The TDRB is an advisory board comprised of resident volunteers. At the meeting, the TDRB heard from multiple members of the public (AR 1569–1574.). The written and oral comments demonstrate a split opinion on the merits of the scaled down Project (AR1570–1574.). Despite some criticism of the Project, the TDRB voted to recommend approving the Project, subject to two conditions: (1) the fire road shall be used for fire access only; and (2) a deed restriction shall be placed on Parcel 3 (the ± 5.18 acre parcel), to assure it could not be further subdivided in the future. (AR 1574)

D. Initial Study/Mitigated Negative Declaration and Adopted Mitigation Measures

During the ensuing 18 months following the TDRB meeting, the County engaged Sicular Environmental Consulting & Natural Lands Management firm ("Sincular"), a third-party environmental consultant, to assist in processing the application in compliance with CEQA (AR 3774–3778.) This work included the preparation of an Initial Study as well as the preparation and processing of the MND. (AR 277)

On December 4, 2019, the County prepared and completed an Initial Study pursuant to CEQA Guidelines Section 15063 to evaluate any potentially significant environmental effects from the Project. (AR 053) On the basis of the Initial Study, which concluded that the Project will not have significant impacts on the environment with the implementation of specific mitigation measures, the County determined that a mitigated negative declaration ("MND") was appropriate (Collectively the Initial Study and MND are sometimes referred to as the "IS/MND"). (AR 219) The IS/MND evaluated all 21 environmental impact categories from Appendix G in the CEQA Guidelines Checklist. (AR 19) The County's 171-page IS/MND relied upon and referenced approximately 13 technical reports, information, and modeling results for the Project. (AR 1807–3682)

The Initial Study determined that the Project could result in potentially significant impacts in the categories of air quality, noise, and biological resources but concluded that these impacts *could be reduced to less-than-significant levels with the adoption and implementation of specific mitigation measures*. (AR 071, 083–90, 092–120, 179–185) These measures included reducing emissions from construction vehicles at the Project, wildlife surveys, tree surveys, the implementation of a vegetation management plan, cleaning equipment, and restrictions on construction times, among other mitigation measures. (AR 013–017) The IS/MND also analyzed the Project's potential to have impacts that are "individually limited, but cumulatively considerable" and concluded that the Project would not have any such impacts. (AR 0457)

The notice of comment period for the IS/MND was issued on December 12, 2019 and an extension was issued until January 28, 2020 to enable the sufficient time to enlist broad input on the Project. (AR 1153)

E. Public Hearings

1. Marin County Planning Commission Meeting July 27, 2020

On July 27, 2021, the Project came before the Planning Commission for a duly noticed public hearing lasting several hours. (AR 271, 1592) At the hearing, County Planning Staff presented their report on the Project, which included responses to all of the public comments made as clarifying comments on many of the technical studies prepared for the Project, including animal surveys, hydrology reports, among others. (AR 222–816) The Planning Commission considered the application materials, technical studies, and public comments before approving the Project and adopting the MND (AR 020–021) and a Mitigation Monitoring and Reporting Plan ("MMRP"). (AR 007–019) At the hearing, nearly 40 members of the public were present to give comment. (AR 1582–1695) Weissman, explained that the Project represented a reduced Project due to the comments regarding the previous 13-lot subdivision and affordable housing project. (AR 1607) With the Project now reduced from 13 lots to 3 lots, including his existing home, the Project better suited the surrounding community. (AR 1607–1608) In response to questions from the Planning Commission regarding further subdivision of the property, Weissman opined that he and his family have no intention of further subdividing any of the parcels and that now, as part of this Project, would be the logical time to do so but he had elected to not pursue further division of land. However, he could not predict if a future owner might apply to the County and go through another discretionary environmental review process to further divide the Property at some time in the future. (AR 1612–1613, see also, Board of Supervisor's meeting response at AR 1776–1777) Weissman even characterized the Project as the "peace plan." (AR 1611)

Petitioners generally objected to any subdivision of the Project Site—even at the proposed low density, and demanded that an Environmental Impact Report ("EIR") be prepared for the Project. (AR

568–583, 1617, 1628–1613)[2] None of the comments provided to the Planning Commission provided substantial evidence that the identified mitigation measures would be inadequate such that an EIR is not required. (AR 504)

Other members of the public commented over concerns regarding the fire road on the property. (AR 1634–1635) The comments focused on the fact that the fire road, which was constructed previously, altered the environment. (AR 1635–1637; AR 1639–1640) Other members of the public were concerned because the Project would be using septic systems and potentially releasing effluence into the creeks on property and accordingly the San Francisco Bay. (AR 1647)

The Planning Commission also received public comments in support of the Project as submitted. Both neighbors and members of the broader community shared with the Commission that the scaled back three-lot subdivision Project was reasonable and a positive response to California's current housing crisis. (AR 1622–1623, 1633–1634, 1642–1646)

At the close of the public hearing, a motion to adopt the MND and approve the tentative map passed unanimously, 7–0. (AR 1693) The County adopted seven mitigation measures in the MMRP related to air quality, noise, and biological resources (AR 013–17; 071; AR 083–90; AR 092–120; AR 179–185) The Planning Commission added a condition to the Project proposal—that the septic system, including the leach field for each parcel, would be contained wholly within that respective parcel. (AR 1689)

2. Marin County Board of Supervisors Meeting October 6, 2020

Petitioners and the Sierra Club "Marin Group" appealed the Planning Commission's approval of the Project to the Marin County Board of Supervisors ("Board"). (AR 4300) At the October 6, 2020 appeal hearing, the County staff and consultants presented a staff report, which incorporated responses to the public comment received since the Planning Commission hearing as well as the technical studies the staff relied upon to support the conclusion that the IS/MND was legally sufficient

[2] As noted, the very thorough ISMND was already 170 pages in length. Section 15041 of the CEQA Guidelines suggests that a draft EIR not exceed 150 pages. Thus, it is unclear what additional information would truly cause for an EIR.

and the appropriate environmental document pursuant to CEQA. (AR 817–1560) Approximately one week prior to the hearing, Laura Chariton—who resides across the Panoramic Highway from the Project site and who is also a founding member of both Petitioner groups —Watershed Alliance of Marin and Friends of Muir Woods Park—submitted a letter prepared by "Lotic Environmental Services" (the "Lotic Letter".) (AR 4097–4109.) The Lotic Letter admitted the author had not visited the Project site (AR 4101; 4105) and generally critiqued the 1,000 page hydrology report prepared by Ziegler Civil Engineering based on the methodology used to calculate average annual rain fall, as well as the classification of certain streams on the Project site. (AR 2207–3612; 4097–4109)

Prior to the appeal hearing, County engaged Sutro Science, LLC ("Sutro") to evaluate the comments in the Lotic Letter and to determine whether the letter raised substantial evidence of a "fair argument" of a potentially significant impact. Sutro prepared a 4-page analysis of the Lotic Letter. (AR 3679–3682) Sutro's analysis explains that the Lotic Letter "does not contain any substantial new evidence to support a fair argument of a significant impact, and the evidence in the record, including the previously published March, 2020 Response to Comments Document (RTC), supports the findings presented in the Initial Study." (AR 3679) Petitioners did not mention the Lotic Letter at the hearing.

At the hearing, County staff presented the history of the Project and its previous revisions. (AR 1699) Staff stated that the Project was the subdivision only; no new buildings were proposed as part of the Project but the County presumed each lot would be developed with a single-family residence. (AR 1701) Staff emphasized that pursuant to the proposed tentative map, any building on the Project Site would be limited to the building envelopes, thereby clustering any development toward the top portion of the Project Site. (AR 1701–1702) County staff also emphasized that any future development of the Project Site, including any Accessory Dwelling Units, would need to go through a building permit and design review process, before any improvements could be installed. (AR 1728) Staff further noted that the IS/MND was over 170 pages long and the responses to public comment prepared by the County's environmental consultant, Sicular, were over 230 pages long, which reveals the extensive investigation and due diligence for a project of this size and scale. (AR

1759) Finally, the County's expert planning staff explained that the opposition comments submitted did not constitute substantial evidence of a potentially significant environmental effect that would invalidate the Planning Commission's decision. (AR 1704)

County's environmental consultant also offered comment on the thoroughness and extent of the technical studies prepared for the Project. (AR 1707–1710) He shared that his office peer reviewed many of the studies prepared for the Project, including the geotechnical report and the borings on the Property. (AR 1707) His firm determined that the portion of the property where the building envelopes are located was stable and suitable for development as there had been no identifiable landslides on that portion of the property. (AR 1711) Moreover, the storm water management plan for the Project was also peer reviewed and it was determined that it was consistent with low-impact development standards and would not result in a net increase to storm water runoff. (AR 1708) Finally, he reviewed the proposal for the septic systems, including a cumulative analysis of all other septic systems in the area. (AR 1709) He determined that the proposed septic system design was adequate to prevent seepage or other pollution of surface waters. (AR 1709)

The Sierra Club Marin Group gave public comment at the Board of Supervisors hearing. (AR 1715–1719) The representative alleged that the MND was inadequate because it did not take into consideration the addition of prospective ADUs or JADUs which might be developed on the Project site in the future. (AR 1717) Counsel for Petitioners also spoke, largely repeating the sentiments expressed by his clients at the prior Planning Commission hearing. (AR 1719–1723) Mr. Weissman, reiterated that he had started with a much higher density that was consistent with density bonus policies and provided necessary affordable housing and sewer infrastructure, but due to neighborhood concerns, he had substantially reduced the project to its current three lot configuration. (AR 1724–1726) He also again confirmed that he had no plans to further subdivide the Project. (AR 1723–1727)

After additional public comment largely echoing the same statements at the Planning Commission, and deliberations by the members of the Board, the Board of Supervisors voted to deny the appeal and approve the Project on a super majority vote 4–1. (AR 1779–1780) The Board adopted two comprehensive resolutions denying the appeal (AR 023–38) and adopting the MND. (AR

039–041) The Board found that the Project was consistent with planning and zoning density policies, and that the IS/MND for the Project was legally adequate because all environmental impacts were reduced to less than-significant levels. (AR 023–27)

F. Notice of Determination and This Action

The County filed its Notice of Determination on October 13, 2020. (AR 001) Petitioners filed this litigation on November 4, 2020, and effected service of the action on February 25,2021.[3]

III. STANDARD OF REVIEW

When reviewing a CEQA action, a trial court must determine whether there was a prejudicial abuse of discretion, which occurs whenever (1) an agency fails to proceed in the manner required by law, or (2) if substantial evidence does not support an agency's factual conclusions. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131; Pub. Resources Code, § 21168.) Moreover, "[T]here is no presumption that an error is prejudicial." (§ 21005, subd. (b), see also, *Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.* (2013) 57 Cal.4th 439, 463 [agency's error in using a future conditions baseline, rather than current conditions, was not prejudicial.]).

With a challenge to a negative declaration, courts apply this standard of review via the "fair argument test." If there is substantial evidence in the whole record supporting a fair argument that a project may have a significant non-mitigable effect on the environment, the lead agency shall prepare an EIR, even though it may also be presented with other substantial evidence that the project will not have a significant effect. (Public Res. Code § 21151, subd. (a))

It is the Petitioners' "burden to demonstrate by citation to the record the existence of substantial evidence supporting a fair argument of significant environmental impact." (*Leonoff v. Monterey Cnty. Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1348) Courts employ "a hybrid,

[3] On or about March 23, 2021, County and Weissman moved to dismiss the Petition on the basis that service had not been effected within the statutory period allowed by Government Code section 66499.37 and therefore the action is barred from further prosecution. The Court granted the motion to dismiss, but, over County and Weissman's objections, thereafter granted Petitioners' motion for relief from dismissal pursuant to Code of Civil Procedure section 473. County and Weissman reincorporate herein their objections to granting relief from dismissal for the reasons previously stated.

quasi-independent standard of review" in which their "function is to determine whether substantial evidence supported the agency's conclusion as to whether the prescribed 'fair argument' could be made." (*Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602–03) However, a fair argument is not any argument; instead it must be supported by substantial evidence, i.e. evidence that is of "ponderable legal significance ... reasonable in nature, credible, and of solid value." (*Jensen v. City of Santa Rosa, (2018) 23 Cal.App.5th 887, 896*)

In the CEQA context, substantial evidence "means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (CEQA Guidelines § 15384, subd. (a).) Substantial evidence includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts" (CEQA Guidelines § 15064, subd. (f)(5).) It does not include, "[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment (CEQA Guidelines § 15384, subd. (a)) Similarly, "[m]ere uncorroborated opinion or rumor does not constitute substantial evidence (*Leonoff, supra*, 222 Cal.App.3d at p. 1348.)

Here, Petitioners have the obligation to discuss all the evidence in the record that supports the County's decision to adopt the MND and to explain why that evidence is lacking. (*Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 112–113, citing *State Water Res. Control Bd. Cases* (2006) 136 Cal.App.4th 674, 749.) "To do so, [a petitioner] must set forth in its brief all the material evidence on the point, not merely its own evidence." (*Ibid.*) "A failure to do so is deemed a concession that the evidence supports the findings." (*Citizens for a Megaplex-Free Alameda v. City of Alameda*, *supra*, at pp. 112–113, citing *Markley v. City Council* (1982) 131 Cal.App.3d 656, 673.) Where Petitioners fail to present the reviewing court "with all the relevant evidence, then the [Petitioners] cannot carry their burden of showing the evidence was insufficient to support the agency's decision because support for that decision may lie in the evidence the [Petitioners] ignore." (.) This failure to present all relevant evidence on the point "is fatal." (*Ibid.* [holding petitioner's failure to set forth all material evidence, not just their evidence, was a concession

that the record supported city's action to approve project.] See also, *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266 [holding that an appellant challenging an environmental document for insufficient evidence must lay out all evidence favorable to the other side and show why it is lacking; failure to do so is fatal.] "A reviewing court will not independently review the record to make up for petitioners' failure to carry his burden." (*Ibid.*)

Here, Petitioners have failed to meet their burden in three material ways, thereby necessitating denial of their Petition. First, they fail to meet their burden to demonstrate, through citations to the record, that the County ignored a fair argument that the Project may cause significant environmental impacts. Second, while Petitioners make repeated claims that the County's environment review of the Project was inadequate, they do not make any effort to nor do they succeed in meeting their burden to show any such alleged errors constitute a *prejudicial* abuse of discretion. Finally, they repeatedly fail to discuss all material evidence related to each argument, instead focusing only on evidence that supports their argument, resulting in a waiver of such arguments.

IV. LEGAL ARGUMENT

A. Petitioners fail to demonstrate that the County committed a prejudicial abuse of discretion under CEQA in adopting the MND for the Project.

1. The County did not err in its consideration of reasonably foreseeable future development from the Project.

Petitioners' first CEQA argument asserts that the County erred in failing to consider the impacts from the "reasonably foreseeable future development" of the Project, namely, twelve homes – rather than the two additional homes proposed to be developed – on the subdivided Project Site. (Pet. Op. Br. at 7: 8–13) Petitioners' claim is not supported by the record.

Petitioners' argument seems to be that each of the three lots resulting from the Project is likely to be developed with a main house, plus an ADU and a JADU, and that Lot 3 could be subsequently subdivided to allow the same on an additional parcel – and that this level of speculative buildout must be assumed and studied by the County in its environmental analysis because it is "reasonably

foreseeable". (Pet. Op. Br. at. 7:8–13) But this proposed development scenario is purely speculative on the part of the Petitioners, is unsupported by the record, and the County was under no legal obligation to apply Petitioner's preferred narrative of foreseeable development.

For purposes of CEQA, a "project" is defined as compromising the whole of an action that has the potential to result in a direct or reasonably foreseeable indirect physical change to the environment (CEQA Guidelines § 15378, subd. (a).) Thus, the term "project" refers to the activity for which the approval is sought, not to each separate governmental approval that may be required for the activity to occur (CEQA Guidelines § 15378, subd. (c).)

Although an initial study should examine the impacts of contemplated development, the analysis should only consider developments that are reasonably foreseeable consequences of the approval and **need not cover every potential development scenario.** (*Aptos Council v. Cnty. of Santa Cruz* (2017) 10 Cal.App.5th 266, 293 [holding the negative declaration evaluating changes in ordinances governing hotel development did not require evaluation of potential development of larger hotels, as such development was speculative and not reasonably foreseeable.] See also, *Rominger v. Cnty. of Colusa* (2014) 229 Cal.App.4th 690 [holding that negative declaration evaluating subdivision of land used for agriculture-related industry not required to evaluate particular uses such as truck terminals or plastics processing in absence of any evidence that such development would be foreseeable consequence of subdivision approval.] See also *Pala Band of Mission Indians v. Cnty. of San Diego* (1998) 68 Cal.App.4th 556, 575 [holding negative declaration for county solid waste siting plan was proper because possible landfill site in the plan was only tentatively reserved and would not be reserved for landfill use without future general plan amendment and environmental review.])

Petitioner's correctly note that CEQA requires the lead agency to consider reasonably foreseeable impacts from proposed development (Pet. Op. Br. at 8:1–10) but then entirely disregard this standard of reasonableness in favor of wild speculation, suggesting that the development of ADUs and JADUs and further division of Lot Three is an anticipated future phase of the Project. Plain and simple, the Project has been reduced to the subdivision of an ± 8.29 acre parcel into three separate parcels—the first totaling ± 2.22 acres, the second totaling ± 0.89 acres, and the last, totaling ± 5.19 acres. (AR 007) The tentative map approval also includes, "site improvements to accommodate the

new lots, including: the installation of two new on-site sewage disposal systems to serve Lots Two and Three; the installation of a storm water management system, inclusive of storm drains, cisterns, and bioswales to address run off; and the improvement of the existing driveway to extend to Lots Two and Three". (AR 007) Petitioners fail to cite any evidence showing that any additional development is planned – or even speculatively envisioned – for the Project Site. Nor can they. Indeed, no evidence indicates that Weissman has future plans to further subdivide the ±5.19 acre parcel. Weissman testified to this point on record, stating, "If we had an intention of developing this parcel further, we would be insane not to have included it as part of the Project. The amount of work and money and time that went into this, adding another parcel or two, that was the time to do it." (AR 1612)

That Petitioners unsuccessfully requested the County add a deed restriction prohibiting any future division of the Project Site (AR 1570–1574), does not mean that a hypothetical subdivision of Parcel 3 at some point in the future is reasonably foreseeable. Again, the record is devoid of any evidence suggesting that such an application is reasonably foreseeable. Moreover even if Weissman or a future owner did ultimately decide to pursue further subdivision of the Property at some point in the future, such action would require discretionary approval by the County and further CEQA review. (AR 1613; 1701) The Subdivision Map Act does not allow the subdivision of property "by right" as Petitioners suggest. (Pet. Op. Br. at 2:17–19; 28:21–24) Accordingly, further subdivision of the Project Site is neither a known, nor even a reasonably foreseeable future phase of the Project that County was required to evaluate. Thus, CEQA does not require the speculative analysis demanded by Petitioners and there was no abuse of discretion by the County in not assessing a hypothetical future split of Parcel 3.

The Project conditions, as well as County ordinances, further restrict development—a material point Petitioners fail to mention. For example, per the approved tentative map, any development on the parcels must be within the designated building envelopes. (AR 1728–1730) These building envelopes are limited in size (Lot 1: 20,228 square feet; Lot 2: 10,397 square feet; and Lot 3: 33,826 square feet). (AR 3788–3789) They also restrict the maximum allowable building floor area (Lot 1: 7,000 square feet; Lot 2: 4,250 square feet; and Lot 3: 7,000 square feet). (AR 3788–3789)

This condition limits all the development at the Project site to the flattest, most-developed, least sensitive area of the Project Site, next to the already existing Weissman home. (AR 1724) The Planning Commission found that this "clustering" of development is also consistent with TACP policy LU 14.1a-1d, which calls for clustering in order to retain as much open space lands as possible. (AR 0253; 0256; 1600; 1653; 1678) The Planning Commission further limited any impacts from the Project by requiring the septic for each lot to be contained within the lot lines. (AR 1702) As initially proposed, the septic for Lot 1 would have partially been on Lot 3, but in order to make each parcel fully self-contained, this was revised by the Planning Commission. (AR 1658–1659; 1662; 1666–1667; 1689; 1692) Petitioners fail to explain why these actions by the County do not adequately resolve any potentially significant impacts or otherwise amount to an abuse of discretion, let alone prejudice. By failing to discuss the evidence supporting County's decision, Petitioners have forfeited their challenge on this point. (*Defend the Bay v. City of Irvine*, *supra*, 119 Cal.App.4th 1261 [holding that failure to cite to all the relevant evidence in the record is fatal.])

Petitioners also claim that the County erred in failing to assume that each parcel would be developed to the maximum allowable density and with the maximum number of dwelling units allowed under state law. (POB p. 8:9–13) This argument is also without merit. *Rominger v. Cnty. of Colusa*, *supra*, 229 Cal.App.4th 690, is on point. There, Colusa County adopted a mitigated negative declaration and approved the subdivision of four agricultural lots into sixteen separate parcels. Romingers challenged the approval, in part, alleging that the county failed to consider various "reasonably foreseeable activities that could occur as a result of the development of the subdivided property." *Id.* at p. 712 (disapproved of on other grounds by *Union of Med. Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171) The court of appeal disagreed, explaining, "The mitigated negative declaration analyzed the reasonable scenario that agriculturally-related industrial development will occur on the subdivided property. To the extent the Romingers complain that certain specific 'permitted uses'—including 'food or plastic processing plants or truck terminals' —'could develop on the newly subdivided land without any environmental review' and thus the county's failure to analyze those particular uses amounted to a prejudicial abuse of discretion, we find no merit in that complaint." (*Ibid.*) The court explained further:

> The question is whether the unanalyzed uses are a 'reasonably foreseeable consequence' of the Adams subdivision and whether 'the future ... action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.' But the Romingers do not point to any evidence in the record that these particular uses area reasonably foreseeable consequence of the subdivision, nor do they show how the impacts of these uses would vary significantly from the general agriculturally-related industrial development the mitigated negative declaration analyzed. Under these circumstances, no impermissible piecemealing of the project has been shown.

(*Ibid.*) Akin to the challengers in *Rominger*, Petitioners fail to demonstrate that the development scenario considered by the County (existing Weissman residence plus development one additional residence on each of the two new parcels with limits on development square footage) is unreasonable.

No evidence suggests the likelihood that any of the three parcels would result in construction of a primary residence, an ADU, and a JADU. Indeed, as noted above, the Project Site is already developed with the Weissman Family residence (AR 0012; 1724), but it has not been developed with any additional dwelling units during in that time. Nor does any evidence support Petitioners' supposition that an earlier version of the Project proposing 13-lots indicates a future intent to add more lots. (AR 3788–3789) And each of the three lots is subject to size and locational criteria, and has been engineered to accommodate 5-bedroom septic capacity. (AR 134) Further, Petitioners continue to mischaracterize both an ADU and a JADU. An ADU is smaller than a typical home (California Department of Housing and Community Development Accessory Dwelling Unit Handbook 2021.) Per the Marin County Code an ADU is 150 - 800 sq. ft. and must either be part of already constructed unusable living space or in an accessory building (Marin County Municipal Code § 22.32.120–22.32.125.) A JADU is no greater than 500 sq. ft. and must be maintained entirely within a single family residential structure. Any permitted ADU or JADU must fit within these constraints and within the proposed building envelopes for the Project, including the septic limitations. (AR 1729; 3788–3789) If an ADU or JADU falls outside those envelopes, then it would not be permitted during the ministerial approval process.

The cases cited by Petitioners do not hold otherwise. They simply hold that CEQA analysis must not be "piecemeal" (Pet. Op. Br. at 8:4–9, citing *Laurel Heights Improvement Ass'n v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 396; *City of Maywood v. Los Angeles Unified Sch. Dist.* (2012) 208 Cal.App.4th 362, 295.) While true, this is irrelevant to the case at bar. Rather, the

environmental review for the impact of developing two additional residential parcels was studied—up to 4,250 sq. ft. habitable space on the ±0.89 acre lot, and up to 7,000 sq. ft. on the ±5.19 acre lot. Accordingly, Petitioners' fail to show any abuse of discretion by the County in this regard.

Moreover, even if Petitioners could demonstrate that the County did err in evaluating impacts from the reasonably foreseeable anticipated scope of development, they fail to show any such error is prejudicial. Prejudice is not presumed, rather, the Petitioners bear the burden to prove that the County committed a prejudicial abuse of discretion by citation of the record, which they fail to do (*South Orange Cnty. Waste Water Auth. v. City of Dana Point* (2011) 196 Cal.App.4th 1604, 1612–1613 [holding that appellant bears the burden of proof by citation to the administrative record, the existence of substantial evidence supporting a fair argument of a significant environmental impact.]; See also *Parker Shattuck Residents v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 778 [holding that unless the administrative record contains evidence, and Plaintiffs cite to it, no fair argument that an EIR is necessary can be made.]) The Project approval included conditions on future development, including restricting future development to the size and locations identified in the building envelopes, making the septic systems self-contained within each proposed parcel, mitigation measures to ensure that streams, flora, or fauna are impacted from the Project (including protections during construction of the reasonably foreseeable two future homes on the Project site as well as any by-right dwelling units allowed for the homes).(AR 0010–0012; 053–221; 222–276; 468–700) This is sufficient under CEQA.

2. The Project Description is supported by substantial evidence and Petitioners cannot show a prejudicial abuse of discretion.

An initial study must contain a brief description of the proposed project, including its location, and a brief identification of the environmental setting of the Project (14 Cal. Code Regs. § 15063(d).) An initial study is a "preliminary analysis" of a project—the requirements of an initial study are not as demanding as those imposed on an EIR (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1192, citing CEQA Guidelines § 15365.) In fact, the requirements for a project description and a physical description in an Initial Study are so much less stringent, they do not use

the term "baseline" or set specific rules regarding the baseline for analysis in the study (Cal. Environmental Quality Act., Vol. 1 (Cont. Ed. Bar 2nd ed. 2021) § 6.16A.) Nevertheless, the project description proposal for the IS/MND is comprehensive.

i. Excess Fill at the Project Site.

Petitioners claim that the Initial Study's project description is inadequate because it fails to state, in detail, where any excess soil generated from the Project would be placed (Pet. Op. Br. at 12:11–14.) This claim is impeached by the record. The IS/MND does, in fact, state the plan for the residual soil left from grading the Project, "The Grading plan estimates earthwork to be a total of 1,709 cubic yards of cut and 1,565 cubic yard of fill (Ziegler Civil Engineering, 2018). The difference (about 140 cubic yards) would be stockpiled on-site or hauled off-site and disposed". (AR 064)

Petitioners' argument on this point relies on a misrepresentation of the record. First, Petitioners focus on only gross amount of cut (1,709 cu. yd.), not the resulting net amount of cut soil (140 cu. yd.). (AR 064) Additionally, the Initial Study does in fact, describe a plan for the remaining soil—either stock piled on site or removed. (AR 064) This information satisfies the "preliminary analysis" required from a Project description in an initial study. Petitioners fail to establish any harm (potentially significant impact) from either scenario.

Instead, Petitioners repeatedly point to the heightened standard required in an EIR in an attempt to confuse the court as to what level of detail and analysis is actually required for an initial study. (Pet. Op. Br. at 13:2–10) Each of the cases they cite deal with EIRs, not an initial study (*Kings Cnty. Farm Bureau Fed'n v. City of Hanford* (1990) 221 Cal.App.3d 692, 736; see also *Sierra Club v. Cnty. of Fresno* (2018) 6 Cal.5th 502, 519) But this is standard is not apt and Petitioners fail to demonstrate that the County's treatment of anticipated grading amounts to prejudicial error.

ii. Fire Road on Project Site.

Next, Petitioners assert that the 2014 fire road grading done by Weissman at the Project site had a significant impact on the environment. (Pet. Op. Br. at 12:15–24) But contrary to theses assertions, the County appropriately considered prior and future use of the fire road and determined the Project would not have a significant impact. The IS/MND states:

> CEQA analysis typically uses current conditions—that is, the existing physical environment as it existed at the time the environmental analysis is initiated—as the baseline against which to measure a project's impacts. Changes that occurred before environmental review commenced, even if they were not permitted, are generally not considered a part of the baseline. For this Initial Study, however, the County has chosen to consider the impacts of the Fire Road grading…The consideration of Fire Road grading includes both impacts during construction, and ongoing impacts.

(AR 64)

In reviewing the Project's impacts to Biological Resources, the County did consider the impacts of the 2014 grading of the fire road. (AR 91–120) The IS/MND notes that the wetland around the fire road appears to be functionally intact and the grading appears not to have had a lasting impact on the environment. (AR 117) Petitioners claim that the sedimentation of Redwood Creek and its ephemeral tributaries was never quantified, let alone analyzed. Even with no requirement to examine the fire road, the County, yet again, went above and beyond the demands of CEQA to analyze the impacts caused from grading the fire road in 2014. (AR 053–221) Despite Petitioners' claims, the record clearly states, "The Project includes several features intended to protect these sensitive resources [coho salmon, steelhead trout, and sensitive aquatic habitat], including setbacks from streambanks and edge of riparian vegetation, the protection of most of the native trees growing on the Project site, and aforementioned storm water management plan". (AR 067) The portions of the record that Petitioners' cite to support their contention that the County did not sufficiently study erosion caused by the fire road, do not support their conclusion. (AR 64, 131, 1824) Rather, each citation supports the County's finding that there were not significant impacts from fire grading as the wetland that was disturbed from the grading was now in tact. (AR 64, 117) Moreover, the geotechnical report supports the conclusion that there was no land sliding at the Project site since regional mapping completed in 1976—forty-five years prior to the current Project. (AR 1824) The geotechnical report

noted topography indicative of old slide deposits on the eastern-most portion of the site, which will not be developed as that lies outside the designated building envelope. (AR 1824, 3789) Accordingly, the County appropriately considered the fire road and Petitioners do not show any prejudicial abuse of discretion.

3. The Initial Study Adequately Describes the Existing Environment.

Next, Petitioners appear to take issue with the County's description of the environmental setting baseline used in the IS/MND, citing several cases that apply to the environmental setting section of an EIR. (Pet. Op. Br. at 13:12–18.) The California Supreme Court explains that existing physical conditions typically form the environmental setting baseline. (*Cmtys. for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310.) And that is the very standard applied by the County for the Project that Petitioners challenge - with extra consideration given to effects of the existing fire road.

"[A]n initial study is neither intended nor required to include the level of detail included in an EIR." (CEQA Guidelines section 15063(a)(3)) Yet, that level of detail is precisely what Petitioners seek from the IS/MND. Accordingly, County did not abuse its discretion in describing the environmental setting.

i. Description of Geology and Soils

Petitioners assert that the Project description regarding geology and soils is inadequate because the IS/MND erred in not sufficiently describing the 2014 fire road improvements, and this therefore creates a prejudicial abuse of discretion triggering an EIR. But the record believes tis claim. In 2014, Weissman improved a section of the fire road that existed near the lower gate of the property in order to increase access for vegetation management and firefighting crews. (AR 479) The fire road, existed prior to the grading and provides access to the lower-portion of the Project site via a gated entrance from the Panoramic Highway, which also existed prior to 2014. (AR 479) Weissman improved the fire road in 2014 in excess of his permits and subsequently worked with the County to remediate that work (addressed in the 2015 GeoTech report cited by Petitioners) to ensure there would

not be any resulting impacts from that work. (AR 481) The IS/MND concluded that the Project posed a less than significant impact to the environment notwithstanding this work. (AR 127–128; 481–487)

But the fire road is not part of the Project as Petitioners suggest. In fact, the approval expressly requires access to the building envelopes to occur from the existing driveway along Panoramic Highway – and to not use the fire road. (AR 063) While Petitioners rely heavily on cherry-picked negative statements from the pre-Project GeoTech report, they fail to connect the dots to show that the County did not consider the existing fire road in the Initial Study's environmental baseline. The gravamen of Petitioners' complaint appears to be that the County treated the previously improved fire road as an existing condition on the Property, rather than fully evaluating the effects of that prior activity in considering the Project's impact to soil stability. As noted previously in Section V-A-2-ii, *supra*, this is factually incorrect. (AR 64)

But even if Petitioners' claims were true, they would not show reversible error. Several cases hold that an agency may treat prior unpermitted modifications of a project site as the existing conditions baseline in a CEQA analysis. In *Riverwatch v. Cnty. of San Diego* (1999) 76 Cal.App.4th 1428, 1451, the court held that the proper baseline is the existing conditions of the site, even if that condition may be the result of prior illegal activity. Project opponents argued that an EIR should not have included prior unpermitted disturbances of a mining site in the environmental setting and instead should have evaluated the project against a hypothetical baseline in which no disturbance had occurred. But the court reject this claim noting that CEQA is not the appropriate vehicle to determine the nature and consequences of the prior conduct of a project applicant. (*Id.* at p. 1452.) Similarly, *Eureka Citizens for Responsible Gov't v. City of Eureka* (2007) 147 Cal.App. 4, th 357, 371, *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1233, and *Fat v. Cnty. of Sacramento* (2002) 97 Cal.App.4th 1270, 1277 each reached the same conclusion. Thus, Petitioners fail to show that the County abused its discretion in not taking a more antagonistic approach to Weissman's grading of the fire road several years prior to the County's preparation of the IS/MND.

More to the point, the IS/MND does not ignore the prior unpermitted grading work on the fire road and explains that the impacts from the 2014 fire road were addressed in each of the topical sections required in the IS/MND. (AR 053–222) Fire road improvements were also discussed ad

nauseam, particularly in reviewing the impacts to biological resources, geology and soils, and hydrology and water quality. (AR 091–120; 127–137; 149–164) Thus, the Initial Study does not mislead the reader or otherwise deprive the public of meaningful information about Project. Rather, Petitioners simply appear to be upset that the County did not treat Weissman with their desired level of antagonism in evaluating the impacts of the Project. And to this end, Petitioners once again fail to establish any prejudice on the part of the County in using a modified existing physical conditions baseline for the Project.

Petitioners also try to pit the IS/MND against the 2015 GeoTech report prepared by Herzog Engineering in regards to the fire road. (Pet. Op. Br. at 14: 4–27) Herzog reviewed the grading and the soil condition at the property and determined that the Property may not be able to handle geotechnical work due to potential yielding and instability. (AR 1820–1839) However, yielding and instability were identified as "geotechnical areas of concern" (AR 1826), rather than areas that could not be fixed. Herzog also presented potential solutions to the site grading/site stability that include, but are not limited to: geogrid reinforcement, rip-rap buttresses, retaining walls, removal or reconstruction of fill as properly compacted and subdrained, laying back excavations in conformance with OSHA standards, shoring alternatives, such as cantilevered or tiedback soldier piers, tiedback shotcrete walls, soil nail walls, or internally braced walls. (AR 1826–1827) Petitioners failed to acknowledge that Herzog put forward any alternatives to remedy the road. Moreover, Herzog noted that these conditions apply to all the roads on the property (i.e., the fire road and the driveway) and to potential future slab foundations at the property. (AR 1826; 1833–1834) Herzog's conclusion was not limited to the road—it addressed and concerned all the soils on the Project site (AR 1820–1839.)

Importantly, Petitioner's attempts to show conflict between the GeoTech report and the Initial Study is a calculated attempt to compare apples to oranges. The GeoTech report was prepared to evaluate the effects not only of the fire road, but all grading work for the more extensive proposed 13-lot subdivision and ways to address those impacts. (AR 1820–1867) The Initial Study, on the other hand, evaluates the impacts of the Project against those existing conditions. That the GeoTech report found the fire road would be unstable for regular traffic to serve development does not conflict with

the Initial Study's assessment several years later that the existing graded bed had settled into "a stable terrace on the slope" and that the prior grading did not amount to a significant environmental effect. (AR 132)

Simply put, IS/MND does not mischaracterize Herzog's findings regarding the soil condition on the Project site. Rather, the IS/MND determined, "The unpermitted grading of the Fire Road did not cause new or exacerbate existing soil erosion and loss of topsoil because the grading project stabilized a slope composed of landslide debris by creating a benched slope break with stabilized fill material". (AR 132) "The culvert installed beneath the road serves to direct storm water flow under the road and into a channel downslope, thereby reducing the risk of long-term gully and rill erosion". (AR 132) Moreover, at the public hearings on the Project, Weissman again pointed out that the road already existed before he attempted to revise and fix the road in 2014. (AR 1655; 1671) He also importantly noted that the road was in fact there for fire safety and access due to the increasing number of wildfires in the California environment. (AR 1655; 1671)

Petitioners unsuccessfully requested a condition limiting any vehicle travel on the fire road to fire trucks (thereby, for example, limiting Weissman or others from driving vehicles on that part of the property for any litany of lawful activities such as thinning brush to promote fire safety or removing fallen limbs). That the County elected to not add this condition is not an abuse of discretion. The County articulated its belief that such a condition could violate the Constitutional limitations on taking of private property without just compensation. (AR 223–224) Nor does the record contain substantial evidence showing such a condition was necessary to address any potentially significant impacts from the Project – particularly as the County required vehicular access to the three parcels to be taken from the existing Wiessman driveway on Panoramic Highway. (AR 7, 63)

ii. Description of Hydrology and Landslides

Petitioners further claim that the Initial Study relies on inadequate analysis of rainfall at the Project site. Petitioners claim that an EIR is required because the Lotic Letter challenges the County's methodology in evaluating impacts to hydrology and landslides. (POB p. 15:10–17) But the Lotic Letter itself does not require the preparation of an EIR. Petitioners rely on the faulty premise that

disputing experts must result in an EIR. But the rule is more exacting than Petitioners suggest. Rather "in marginal cases where it is not clear whether there is substantial evidence a project may have a significant impact on the environment," fact-based disagreement among experts "over the significance of an effect on the environment" can trigger the need for an EIR. (CEQA Guidelines section 15063(g)) but an "expert" opinion that raises "generalized concerns" or "which says nothing more than 'it is reasonable to assume' that something 'potentially may occur…' does not constitute substantial evidence.]) These are precisely the types of insufficient statements made in the Lotic Letter.[4]

The Lotic Letter claims that the IS/MND is inadequate because it uses modeling for precipitation totals that underestimate precipitation by up to 25%. (AR 4097–4098) The Lotic Letter further claims County should have used the PRISM 30-year normal annual rainfall value instead of data consistent with both the MarinMap and NOAA. (AR 3679) But as the County's expert Sutro explains, "Lotic acknowledges that spatial distribution of rainfall from the coast to the top of Mount Tamalpais varies considerably due to the orographic effect on rainfall." (AR 3680) Moreover, Sutro points out additional relevant information:

> Given the acknowledged significant orograph effect and considerable rainfall variation, Lotic does not present evidence to support the application of a linear interpretation of elevation change and rainfall variation. Further, Lotic does not describe **how** the 30-year normal annual rainfall of 40.2 inches presented is relevant to the analysis of the impacts presented in the Initial Study. As described in detail in Master response 11, revising the setting information based on the information present and would not alter the impact analyses or conclusions presented in the environmental document.

(AR 3680, emphasis added)

As Sutro stated in their report, Lotic fails to describe *how* changing the amount of rainfall from 34 inches to 40.2 inches is relevant to the analysis of the impacts presented in the Initial Study. Rather, Petitioners merely present a more stringent way of analyzing the data, but do not explain how their analysis creates a fair argument that this is a potentially significant impact to the environment.

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[4] It appears that the Lotic Letter itself - which is unsupported by any credentials - is not even sufficient to be deemed "expert" analysis. (See, *Newton Preservation Society v. Co. of El Dorado* (2021) 65 Cal. App. 5th 771, 787 [retired firefighter's opinion on wildfire evacuation is not substantial evidence because it contains no credentials supporting scope of expertise.])

Instead, when the Initial Study reviewed all the potential environmental impacts, it was determined that all the impacts to Geology and Soils were less than significant. (AR 127–128) Sutro further bolsters the report prepared by Ziegler Environmental by stating that the use of design-storms is an industry accepted methodology required by various agencies, including the Regional Water Quality Control Board. (AR 3680) Moreover, the design storm promoted by the Lotic Letter represents an extreme weather event (i.e., a 100-year storm)—and Lotic basing its analysis on the extreme weather is "compounding an extreme version of an extreme event". (AR 3680) Neither the Lotic Letter nor Petitioners' brief demonstrates that applying another methodology would result in a significant effect. Petitioners, yet again, fail to show a prejudicial abuse of discretion committed by the County.

iii. Impacts to Biological Resource Conditions

Petitioners next claim that the Biological Resources section of the Initial Study fails to discuss existing conditions of the Project site because it mischaracterizes conditions, lacks scientific surveys, and fails to reach valid impact conclusions. (Pet. Op. Br. at 16:4–8) Petitioners also claim that the County violated CEQA because it "did not ensure that there were no effects to fish or wildlife species and thus an MND could not issue". (Pet. Op. Br. at 16: 7–8) None of the materials referenced by Petitioner actually stand for the position that the County must ensure that there are no impacts to fish or wildlife species.

Here, Petitioners suggest that the environmental baseline regarding riparian habitat and endangered species is inadequate because County did not provide any standard surveys or a detailed description of the watercourse on the property or the property's riparian habitat and hydrological connection as a tributary to Redwood Creek. (Pet. Op. Br. at 16:11–13) However, Petitioner's Opening Brief fails to mention the Reconnaissance-Level Biological Assessment prepared for an earlier version of the Project in 2015 by LSA Associates, Inc. ("LSA's Report") (AR 1808–1819.) LSA walked the Project site during different days in 2009 and 2015, and assessed areas of biological interest and sensitive plant communities/habitats, evidence of special habitat species, and/or habitats that could support such species. (AR 1809) LSA's Report did conduct surveys of the property, including special status wildlife, such as the Coho Salmon and Steelhead. LSA's Report states:

> Coho salmon and steelhead spawn in Redwood Creek, downstream of the project site. The on-site drainage is not accessible to these species due to the presence of downstream barriers and the absence of suitable aquatic habitat. 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.

(AR 1811)

The Initial Study itself discusses the sensitivity of downstream resources, including Redwood Creek, and the species that spawn within them. (AR 105) The Initial Study states,

> ...[T]he Project site is located in the Redwood Creek watershed. The watershed is known to support sensitive aquatic resources. Redwood Creek is documented habitat for federally listed as threatened steelhead, federal and state listed as endangered coho salmon, and special-status pond turtles;...Suitable habitat for these sensitive aquatic species is not present with the Project site. The Project would protect downstream aquatic resources through the establishment of SCA (per CWP, Policy BIO-4.1) along both of the drainages within the Project site;...The SCAs would allow for the protection of aquatic species by providing a 100-foot buffer from the creek and any development would ensure no sedimentation and contamination from the Project site though implementation of standard construction Best Management Practices (BMPs). The Project would not result in impacts on aquatic species or sedimentation of the Project site drainages or any downstream waterway or otherwise affect water quality.

(AR 105–106)

Thus, contrary to Petitioners' suggestion, the County did rely on appropriate biological baseline assessments in reaching its conclusions. Petitioners also claim that the Initial Study mischaracterized a stream on the Project site as an ephemeral stream when it should have been designated on maps as a perennial stream. (Pet. Op. Br. at 16:24–26) However, Petitioners fail to demonstrate or point to evidence in the record that characterizing the stream as an ephemeral stream results in significant environmental impacts. Instead, they criticize the Initial Study for characterizing a stream differently than the Lotic Letter did. Petitioners offer no evidence that the stream at issue has habitat for any endangered species. Merely, they say that because the Lotic Letter differs in characterization, this is substantial evidence of a fair argument of a potentially significant environmental impact, but do not explain how this characterization is potentially significant. (Pet. Op. Br. at 16:24–17:11) The Initial Study delineated between the construction site by using BMPs for construction as well as a 100-ft. buffer zone around drainages in the project site. (AR 105–106)

Moreover, the sources cited by Petitioners in their opening brief are no more than public comment letters, and not expert opinion to back-up their argument that the streams on the property are misclassified. (AR 242, 248) Thus, any alleged misclassification is non-prejudicial.

Petitioners make the same argument that the IS/MND allegedly failed to accurately describe and delineate the location of a wetland on the Project site. This assertion is neither accurate nor material. The County identifies the two wetlands on the Project site requiring 100-ft. from building envelopes, on-site septic, and drainage systems setbacks from the wetlands. (AR 111)

Further, Petitioners also do not cite to authority that requires that the wetland be described in the detail they demand in the Initial Study. *Save the Agoura Cornell Knoll*, cited by Petitioners, does not even involve wetlands. And, the portion of the Clean Water Act that they cite does not demand a different conclusion. (33 U.S.C. § 1344). This portion of the Clean Water Act deals with the discharge of dredged or fill material into navigable waters at specific disposal sites, and the permits required for such discharge. (§ 1344(a).) In fact, no sub-section of the Clean Water Act cited by Petitioners supports the notion that there is a requirement that there be a thorough survey of the wetland (§ 1344(a)–(t).) Stated again, the record does not contain a fair argument that the 100-ft. distance between the wetlands and the proposed building envelopes or associated septic systems is inadequate. (AR 111)

Finally, Petitioners attempt to make the same argument, this time in regard to bird nesting and wildlife corridors, and plants that *may be* present on the Project site. However, the Initial Study did consider the impacts to these species and offered mitigation measures to protect the species of flora and fauna on the Project site. (AR 091–120) The mitigation measures include, without limitation: conducting a worker awareness training for all field staff, restricting work to the Project areas, restricting foot and vehicle traffic, completing bat surveys, observing trees for active bat roosting sites, minimizing tree removal and pruning, developing a tree replacement plan, removing invasive tree species, and purchasing nursery stock for the prevention of the spread of sudden oak death, among other measures. (AR 014–017) Like many of their arguments raised previously, Petitioners rely on unsupported assumptions, speculation, and hypotheticals. They again fail to cite to all the evidence in the record—including the substantial evidence relied upon by the County to reach its

conclusion that there would be no impacts to flora and fauna due to project features and mitigation measures. (AR 091–120) And Petitioners fail to offer any evidence showing these mitigation measures are inadequate.

In sum, Petitioners appear dissatisfied with the IS/MND because it fails to meet aspirational goals that they have benchmarked in their mind, far beyond the requirements of CEQA. And this does not rise to the level of a prejudicial abuse of discretion by the County.

4. Substantial Evidence Supports the County's Conclusions Regarding Impacts to Geological, Hydrological, and Biological Resources and Human Safety.

Next, Petitioners recycle many of the arguments they made regarding the Project description and the environmental baseline in arguing that the County failed to conduct a "thorough investigation" of potential impacts to "geological, biological resources, and human safety. (Pet. Op. Br. at 19:1–23:22) But akin to Petitioners' previous claims, these arguments suffer similar material defects—mischaracterization of both law and fact.

Relying on *Brentwood Ass'n for No Drilling v. Cnty. of Los Angeles* (1982) 134 Cal.App.3d 491, 505, Petitioners reassert the Initial Study fails to adequate describe the conclusions of the 2015 GeoTech Report regarding the existing fire road and that this even creates a dispute between experts regarding an EIR. But again, this is factually incorrect as explained in Sections V.A.2.i. and V.A.3.i., *supra*. The Initial Study describes the existing conditions of the Fire Road and Petitioners fail to show any material dispute between the GeoTech Report and the ISMND regarding the significance of impacts from the Project.

Discussed at length above, the record does acknowledge that there is substantial evidence to support each of its conclusions regarding impacts to salmon species (see V-B-3-ii, *supra*) and impacts to wetlands (see V.A.3-iii, *supra*). Petitioners' argument relies on a quote from the California Department of Fish and Wildlife taken out of context; the department recommended certain mitigation measures be added to the Project to protect the special status flora and fauna (beyond salmon) present at the Project site. (AR 013–18; 542–551) The County did incorporate all of the mitigation measures recommended by the California Department of Fish and Wildlife into the final conditions of approval. (AR548–551) *In toto*, the record reflects that the CEQA process worked correctly—the County

received comments from neighbors and other agencies, and those supported by substantial evidence were then incorporated into the Project. Those that were not supported by substantial evidence were responded to sufficiently by the County in the record. (AR 0468–0700)

5. County's analysis of the Project, including by-right development, and other cumulative impacts was adequate.

Petitioners make a generic "cumulative impacts" argument without any meaningful discussion of evidence or law and therefore, forfeit that claim under the fair recitation of the evidence rule. (see V.A.1, *supra*, citing *Citizens for a Megaplex-Free Alameda v. City of Alameda*, *supra*, 149 Cal.App.4th at pp. 112–113) Further, all claims that Petitioners make that the County committed a prejudicial abuse of discretion have been fully addressed in earlier sections. (see V.A.1.4., *supra*)

6. The Project is Consistent with Local Plans and County Wide Policies.

In their final CEQA salvo, Petitioners assert that the Project is inconsistent with the Marin County Wide Plan ("CWP") and Tamalpais Area Community Plan ("TACP") "policies" LU 2.1 and LU 14.1.d., but Petitioners fail to show any error by the County in its review of the Project against its own planning documents. Petitioners seem to argue that the County erred in not adopting the conditions requested by the TDRB (Pet. Op. Br. at 25:2–3), Yet, the County did acknowledge TDRB's recommendations, but for reasons clearly stated, opted not to adopt the recommendations. (AR 517)

Petitioners do not point to substantial evidence in the record, nor can they, explaining to how the record does not support the County's conclusions. Rather, they ignore the evidence present in the record, including findings by the County concluding that the Project was in fact consistent with the CWP and the applicable Community Plan. The County found:

> The proposed subdivision is consistent with the policies as they pertain to the impacts of design and improvements on the environment, community character, and the density established by the governing Tamalpais Area Community Plan as previously discussed in Sections 3 and 4 respectively.
>
> The subdivision has been designed with building envelopes and septic systems that are located outside of any Stream Conservation Areas, Wetland Conservation Aras, and would preserve the majority of the undeveloped wooded areas of the site. Further, the Project has been mitigated with measures that would support the preservation of existing natural systems and enhance and protect sensitive habitats and tree resources as previously discussed.

(AR 007–011)

The County undertook significant efforts to address the concerns that the Project might not be consistent with the general plan, including, responding to comments. (AR 495–499) Petitioners' shortcoming in this area is address in further detail in Section V.B.2, below.

7. Petitioners have forfeited all CEQA challenges set forth in the first cause of action by failing to file a statement of issues as required by Pub. Res. C. § 21167.8.

Section 21167.8(f) of the Public Resources Code provides no later than 30 days after the administrative record notice of certification is filed, "the petitioner... shall file and serve... a statement of issues which the petitioner or plaintiff intends to raise in any brief or at any hearing or trial." While the notice of lodging and certification of the administrative record was filed on August 4, 2021 – obligating Petitioners to file their statement of issues no later than September 3, 2021, they failed to satisfy this mandatory duty – either timely or at all prior to filing the opening brief. This amounts to a forfeiture of Petitioner's CEQA claims for, "Shall' is mandatory and 'may' is permissive" as used in the Public Resources Code. (Pub. Resources Code, § 15) Because Petitioners failed to satisfy this mandatory prerequisite prior to raising the issues now argued in their opening brief, those arguments are improper and should be deemed forfeited and rejected by the Court.

B. Petitioners Fail to Demonstrate that the Project Approval Violated the Subdivision Map Act.

Petitioners' arguments in support of their second cause of action assert that the County could not approve the subdivision because the Project is inconsistent with general plan and community plan policies. But they fail to acknowledge, or for that matter surmount, the steep burden a they must overcome to show the County erred in finding the Project consistent with its own general plan. The rule of general plan consistency is that a project must at least be compatible with the objectives and policies of the general plan. (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704; *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 817) But this is not a rigid standard. "[S]tate law does not require precise conformity of a proposed project with the land use designation for a site, or an exact match between the project and the applicable general

plan. [Citations.] Instead, a finding of consistency requires only that the proposed project be 'compatible with the objectives, policies, general land uses, and programs specified in' the applicable plan. [Citation.] The courts have interpreted this provision as requiring that a project be ' "in agreement or harmony with" ' the terms of the applicable plan, not in rigid conformity with every detail thereof." (*San Franciscans Upholding the Downtown Plan v. City & Cnty. of San Francisco* (2002) 102 Cal.App.4th 656, 678)

Judicial review of consistency findings is highly deferential to the local agency. (*Friends of Lagoon Valley v. City of Vacaville*, *supra*, 154 Cal.App.4th at p. 816.) "A reviewing court's role 'is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies.'" (*San Franciscans Upholding the Downtown Plan v. City & Cnty. of San Francisco*, *supra*, 102 Cal.App.4th at pp. 677–678.) In applying the substantial evidence standard, courts resolve reasonable doubts in favor of the City's finding and decision. (*Napa Citizens for Honest Gov't v. Napa Cnty. Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 357.) The essential inquiry is whether the County's finding of consistency with the General Plan was "reasonable based on the evidence in the record." (*California Native Plant Soc'y v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 637, 91 Cal.Rptr.3d 571.) "Generally speaking, the determination that a project is consistent with a city's general plan will be reversed only if the evidence was such that *no reasonable person could have reached the same conclusion*." (*Naraghi Lakes Neighborhood Pres. Assn. v. City of Modesto*, (2016), 1 Cal.App.5th 9, 19. [italics added])

In *Naraghi Lakes, supra*, Modesto approved a shopping center and neighbors sued, asserting that the project was inconsistent with the general plan because it substantially exceeded the size and intensity of development set forth in one general plan policy. In upholding the city's determination of General Plan consistency, the court explained:

> As has been accurately observed by one court: "[I]t is beyond cavil that no project could completely satisfy every policy stated in [a city's general plan], and that state law does not impose such a requirement. [Citation.] ...Where, as here, a governing body has determined that a particular project is consistent with the relevant general plan, that conclusion carries a strong presumption of regularity that can be overcome only by a showing of abuse of discretion.

(*Naraghi Lakes Neighborhood Pres. Assn. v. City of Modesto*, *supra*, 1 Cal.App.5th at p. 19.)

Here, Petitioners fail to meet the steep burden necessary to show that the County committed reversible error in approving the project in light of CWP "Policy CD 5.e." and Community Plan policy 3.4–3.

1. Petitioners fail to cite to the General Plan or Community Plan in the Record and therefore forfeit their challenge on the second cause of action.

Although they must demonstrate that substantial evidence does not support the County's decision that the Project is consistent with the Countywide Plan or the Tamalpias Community Plan, Petitioners fail to cite to either document in the record. Nor can they, because although they prepared the record, they did not include these policy documents or seek to introduce them into the proceedings during the administrative process. Nor did the Petitioners request the court take judicial notice of certified copies of these documents in support of their opening brief. Because the documents are not before the court, Petitioners cannot meet their burden to show that the County's conclusions that the Project is consistent with these planning documents is not supported by substantial evidence. Accordingly, Petitioners' second cause of action should be denied in its entirety.

2. Petitioners fail to show that the County Board of Supervisors abused its discretion in determining the Project is consistent with the CWP and TACP.

Even if the absence of the actual CWP and TACP documents from the record were not fatal to Petitioner's claims, and the court believes it its appropriate to look to these documents outside of the evidentiary record, Petitioners argument fails to meet their burden to establish that the County's approval of the Project violated these policy documents. Petitioners assert the Project is inconsistent with the CWP because "Policy CD-5.3…limits development in the project area to one unit per 10 acres, which may have limited the number of lots the County could approve" and the County "refused to consider" this "policy." The premise of this argument is materially flawed in several ways.

First, the "policy" cited by Petitioners is not a policy at all, but rather an "implementation" measure intended to guide the County in implementing CWP Policies 5.1 and 5.2 – neither of which includes any specific density limitation (CWP p. 3.4–22). The "Policy" paraphrased by Petitioners is neither an actual policy nor does it plainly establish a one-unit-per-10 acre density mandate as Petitioners claim. Instead, the implementation measure states:

> Limit Density for Areas Without Water or Sewer Connections. Calculate the density at the lowest end of the County Wide Plan density range for new development proposed in areas without public water or sewer service. This requirement shall not apply to development of housing exclusively affordable to very low or low income residents. (Id. at p. 3.4–23).

Thus, nothing in the implementation program expressly limits density at the Project site. Second, contrary to Petitioner's assertion, the County did consider this language in making its determination that the Project is consistent with the CWP. Indeed, the Resolution approving the Project (included in the staff report to the Board of Supervisors) includes a lengthy analysis of Petitioners' claims explaining that since 1975 the Project site had been zoned "RMP-0.5" - which allows a development density of one single-family dwelling per two acres. (AR 00821) "The [maximum] allowable density [per zoning] is four units" on the 8.29 acre Project Site, and because the project would only create three single family residential lots, the project is "consistent with density and use," the County further explained. (AR 00821). The response also notes that the TACP has an allowable density of up to 8 units for the Project site (1 unit per acre). (*Ibid.*) Acknowledging Petitioners' argument that the implementation measure could be interpreted to generally limit density in any undeveloped areas un-served by sewer to 1 unit per 10 acres, the County found such a standard was not apt to the Project site because "allowable residential density is specifically governed by the [TACP] because the community plan provides a more specific provision addressing density on the subject property." (AR 00822)

The County's response further explains that the CWP mandates, "Where there are differences in the level of specificity between a policy in the [TACP] and a policy in the [CWP], the document with the *more specific previsions shall prevail*" (AR 000822 [emphasis added]) and, in this case, TACP Policy LU31.1 expressly identifies the Project Site and explains, "given septic tank regulations a maximum of five units is possible." Thus, the County found "The project site is located on the property specifically identified by the TACP Policy LU31.1 and entails a subdivision of the existing property into three single-family lots that would be service by septic systems. Therefore, the Project is consistent with the density established by the TACP." (AR 000822)

The resolution further walks through the Project's consistency with the goals and policies of the CWP and the TACP (AR 00825–828). Thus, Petitioners have not and cannot show that the

County's decision is not supported by substantial evidence in the record or that "no reasonable person could have reached the same conclusion" as the Board of Supervisors did in finding the Project consistent with the applicable general plan and community plan policies. The same applies to Petitioners' other more generic consistency challenge as well. (Pet. Op. Br. at pp. 28-29) Accordingly, Petitioner's second cause of action should be denied.

V. CONCLUSION

For the reasons stated herein, the petition for writ of mandate should be denied in its entirety.

McKinley, Conger, Jolley & Galarneau, LLP

Respectfully submitted,

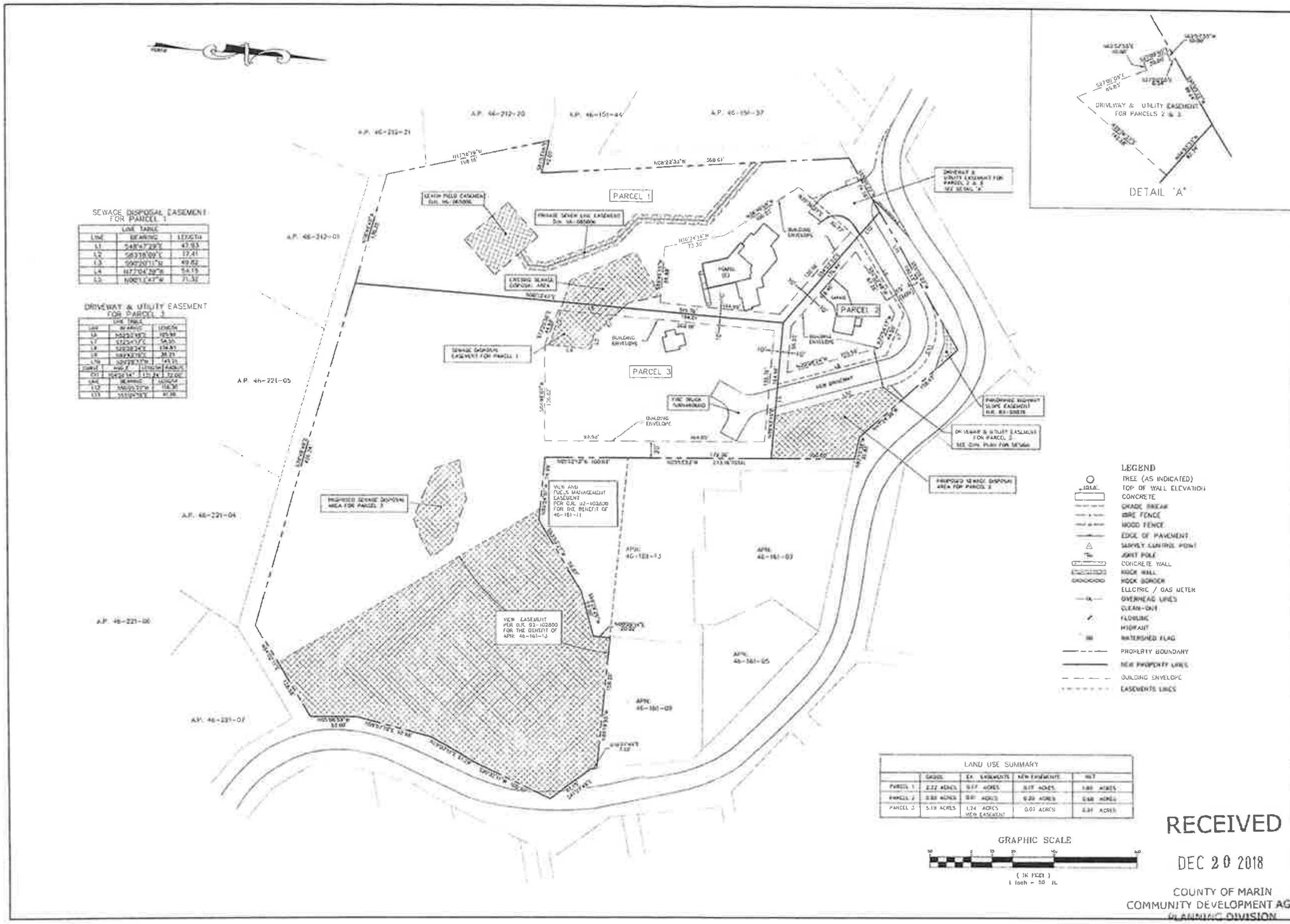
Dated: November 5, 2021

By: /s/ Brett S. Jolley

BRETT S. JOLLEY

Attorney for Real Party in Interest
Daniel Weissman

EXHIBIT A



SEWAGE DISPOSAL EASEMENT FOR PARCEL 1

LINE TABLE		
LINE	BEARING	LENGTH
L1	S48°47'22"E	47.93
L2	S83°38'09"E	17.41
L3	S00°20'11"W	49.82
L4	N77°04'39"W	54.15
L5	N08°11'47"W	71.32

DRIVEWAY & UTILITY EASEMENT FOR PARCEL 3

LINE TABLE		
LINE	BEARING	LENGTH
L6	[illegible]	[illegible]
L7	[illegible]	[illegible]
L8	[illegible]	[illegible]
L9	[illegible]	[illegible]
L10	[illegible]	[illegible]
CURVE	ANGLE	LENGTH / RADIUS
C1	[illegible]	[illegible]
LINE	BEARING	LENGTH
L12	[illegible]	[illegible]
L13	[illegible]	[illegible]

LAND USE SUMMARY

	GROSS	EX. EASEMENTS	NEW EASEMENTS	NET
PARCEL 1	2.22 ACRES	[illegible] ACRES	[illegible] ACRES	[illegible] ACRES
PARCEL 2	[illegible] ACRES	[illegible] ACRES	[illegible] ACRES	[illegible] ACRES
PARCEL 3	5.18 ACRES	1.74 ACRES VIEW EASEMENT	0.07 ACRES	[illegible] ACRES

REV.	DATE	DESCRIPTION

DIPSEA RANCH DIVISION
TENTATIVE MAP
455 PANORAMIC HIGHWAY, MILL VALLEY, CA
A.P. 046-161-11

PREPARED UNDER THE DIRECTION OF
LAWRENCE DOYLE
LAND SURVEYOR
CIVIL ENGINEER
100 HELENS LANE
MILL VALLEY, CA 94941

SHEET
C-3

SCALE 1"=50'

PROOF OF SERVICE

I, the undersigned, am over the age of eighteen years and am a resident of San Joaquin County, California; I am not a party to this action; my business address is c/o McKINLEY, CONGER, JOLLEY & GALARNEAU, LLP, 3031 West March Lane, Suite 230, Stockton, CA 95219.

On November 5, 2021, I served the following document(s):

REAL PARTY'S IN INTEREST BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDATE

REAL PARTY'S IN INTEREST BRIEFING BINDER AND INDEX FROM ADMINISTRATIVE RECORD CITED IN OPPOSITION BRIEF

addressed to:

SEE ATTACHED SERVICE LIST

_____(**BY MAIL**) **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid.

X (**BY MAIL**) **placing** the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with the business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

_____(**BY OVERNIGHT MAIL SERVICE**) by placing the envelope for collection following our ordinary business practices for collection and processing correspondence for mailing by express or overnight mail.

_____(**BY FACSIMILE**) In addition to service by mail as set forth above, the person(s) by whose name an asterisk is affixed, were also forwarded a copy of said documents by facsimile.

X (**BY E-MAIL TRANSMISSION**) Based on a court order or agreement of the parties to accept service by e-amil or electronic transmission, I caused the above document(s) to be sent to the person(s) at the e-mail address(es) as listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Executed on November 5, 2021, at Stockton, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

JAIME MARLOWE

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