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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

MARIN COMMUNITY ALLIANCE, an unincorporated association, and MEEHYUN KIM KURTZMAN, an individual Petitioners vs. COUNTY OF MARIN Respondent	Case No. 1304393 **PETITIONERS' REPLY BRIEF** Date: February 13, 2015 Time: 9:00 a.m. Courtroom E Honorable Paul M. Haakenson

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I. INTRODUCTION AND SUMMARY

The County's Opposition Brief raises two main arguments.

First, the County argues that Housing Element adopted in 2013 was a pro forma exercise, with only slight changes to the Land Use Element of the CWP, the 2012 HE project fell within the scope of the prior CWP EIR prepared in 2007 and so the County could tier to the CWP EIR's findings on significant and unavoidable cumualtive impacts as the basis for its certified Supplemental EIR.

Second, the County argues that this case is controlled by two decisions, *Black Property Owners Assn. v. City of Berkeley ("Black Property Owners")* (1994) 22 Cal.App.4th 974, and *Latinos Unidos de Napa v. City of Napa ("City of Napa"*) (2013) 221 Cal.App.4th 192, a case the County characterizes as "virtually indistinguishable" from this case. *See* County Brief, p. 13:3-5.

These arguments fail. The Housing Element is not a minor change to a different element of the CWP, it is a *new* Housing Element, with its own action plan and inventory of possible dense housing sites for which programmatic CEQA review has been completed in the form of an SEIR.

The housing inventory requirements set forth in Government Code § 65583(a)(3) were part of state law amendments passed in 2004, intended to tighten up state law requirements for the planning for affordable and adequate housing by local cities and counties. *See Fonseca v. City of Gilroy* (2007) 148 C al. App. 4th 1174, 1197-1199. The 2012 HE is the *first Housing Element in Marin County containing such an inventory* in response to the 2004 amendments.

Neither *City of Napa* or *Black Property Owners* address the CEQA review appropriate for the County's compliance with the state Housing Law's inventory requirement. Instead, as discussed in Sections II.A.3.d, B.1 & C, *infra,* each case involves minimal or – in the case of *Black Property Owners* – non-existent changes to general plan building densities contained in the land use elements of those cases' respective general plans. In contrast, the 2012 HE identifies potential developments calculated at specific building densities on 49 parcels totaling approximately 2,537 dwelling units, for which the 2012 HE has purportedly completed programmatic CEQA review.

These 2004 amendments adding the new housing inventory designation and analysis requirements was thought necessary to further "the ultimate goals of the Housing Element Law of promoting and increasing the available stock of affordable housing in this state." *Fonseca, supra,* 148

Cal. App. 4th at 1198-1199. This happens in several ways.

First, the inventory densities identified are not, as the County asserts, simply a restatement of the applicable General Plan zoning for the parcels. Instead, the densities specified in the inventories confer certain rights for developers, based on the restrictions set forth in the Government Code that *do not allow the County to downzone the inventory density* unless the County can identify other parcels can substitute in for the specified number of dwelling units. See Govt. Code § 65863(b)

The densities set forth in the Housing Element inventory are not the mimimum number of dwelling units that would inevitably occur for a given land use designation, but instead often equal or even exceed the maximum number of units that could be built under the applicable CWP and zoning. *See* Section II.B.2.e, *infra.* For many parcels, maximum densities may be inappropriate given environmental and other constraints that would ordinarily limit how many units might be built. Nonetheless, the number of units and densities designated for these parcels have now been amended into the Countywide Plan and may be relied on by future developers in developing the properties.

Finally as discussed in Petitioners' Opening Brief (pp. 46-48), the County has prepared an EIR for the Housing Element and accompanying inventory and designated housing densities on the 49 parcels, which purports to find that the cumulative impacts of these projects will not be significant, based on the flawed comparison to the maximum buildout densities of the CWP land use designations. The record shows that the County's purpose in conducting this flawed CEQA review process for the 49 parcels was to insulate Housing inventory parcels from further requirements to assess cumulative impacts down the road. *See e.g.,* AR 412 P11453:18-24 -11454:1-2; P11455:24-25 - 1456:1-23. This action is consistent with the Housing Law requirements that the County's Housing Element contain action items that include ways to eliminate government regulatory constraints on the construction of new housing, *See* Govt. Code § 65583(c)(3).

The record shows that the County went out of its way in this case to identify and complete CEQA review for many more units that were actually necessary for the County to meet its housing requirements. In doing so, the County produced a flawed EIR, which nonetheless now stands as a legal finding that the level of development envisioned in the 2012 HE inventory will not be cumulatively significant. Because the SEIR does not meet CEQA standards, it should be set aside.

II. ARGUMENT

A. THE 2012 HOUSING ELEMENT IS NOT SIMPLY A CHANGE TO THE CWP LAND USE ELEMENT BUT INSTEAD ESTABLISHES A SEPARATE PROGRAM FOR WHERE DENSE HOUSING WILL BE LOCATED IN THE COUNTY.

The 2012 HE implements for the first time the housing inventory requirements of Government Code § 65583(a)(3), requiring the County to plan for how and where to locate dense housing affordable to persons of all income levels by creating a specific inventory of potential housing locations, along with an analysis of suitability in terms of infrastructure and environmental constraints. Contrary to the County's assertions, the housing inventory *does* confer unique legal rights that further the future development of the designated lands at the identified building densities. *See* Govt. Code § 65863(b).[1/] In addition, the County's adoption of an SEIR purporting to assess the impacts of these developments means that future projects at the designated densities and locations will be not be required to conduct further programmatic CEQA review in relation to those densities.

1. Government Code § 65583 Requires the County to Adopt an Inventory of Planned Locations and Action Program for Meeting its Housing Obligations.

The County's Brief tries to characterize the 2012 HE inventory as simply a list of possible parcels for future housing, which has no legal effect one way or another.

> All that inventory does is list the sites that are currently available for housing development at certain densities as already listed in the General Plan and zoning ordinance. That list or inventory, including its development potential as "dense" affordable housing would remain the same even if the State Legislature repealed the Housing Element law tomorrow and Marin County rescinded its Housing Element altogether.

See County Brief, p. 3:8-17. The County thereupon defends its decision to tier to the CWP EIR's findings, given the de minimus changes made to the CWP.

The County misunderstands the important planning exercise required by the Government Code's inventory requirement and complementary 'action plan' to ensure adequate housing for citizens of all income levels. *See Fonseca v. City of Gilroy, supra,* 148 C al. App. 4th at 1197-1199.

The state Housing Law states that the "housing element shall identify adequate sites for housing....and shall make adequate provision for the existing and projected needs of all economic segments of the community," including an "assessment of housing needs and *an inventory of*

[1/] Petitioners' Opening Brief (p. 2:19-20) mistakenly cites to Government Code § 65583(a)(3) for the source of this restriction. Petitioners apologize for this error.

resources and constraints relevant to the meeting of these needs." Govt. Code § 65583(a) (emphasis added.) In particular, the Housing Element must contain:

> An inventory of land suitable for residential development, including vacant sites and sites having potential for redevelopment, and an *analysis of the relationship of zoning and public facilities and services to these sites*.

Govt. Code § 65583(a)(3) (emphasis added.) (hereinafter, the 'Inventory Requirement.")

The Housing Law's Inventory Requirement was adopted as a 2004 amendment to ensure that local agencies plans include specifically designated locations with predetermined densities for housing development. *See Fonseca, supra,* 148 C al. App. 4th at 1180. ("Since 2005, the Housing Element Law has required the detail and specificity, particularly regarding the land inventory and identification of adequate sites to meet the locality's housing needs.")[2/]

The Inventory Requirement is bolstered by other Housing Law provisions intended to ensure the development of the listed parcels in the housing inventory. In particular, Government Code § 65583(c) requires the Housing Element to contain:

> A program which sets forth a schedule of actions during the planning period, each with a timeline for implementation, which may recognize that certain programs are ongoing, such that there will be beneficial impacts of the programs within the planning period, that the local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element through the administration of land use and development controls, the provision of regulatory concessions and incentives, the utilization of appropriate federal and state financing and subsidy programs when available, and the utilization of moneys in a low- and moderate-income housing fund....

A key component of this implementation program is Government Code § 65583(c)(3)'s requirement that the program "[a]ddress and, where appropriate and legally possible, *remove governmental constraints* to the maintenance, improvement, and *development of housing*...." (emphasis added.)

Here, the County has fulfilled these Housing Law requirements by identifying and purporting to analyze under CEQA the feasibility and cumulative impacts of housing development on 49 parcels totaling 2,537 dwelling units. By purporting to undertake programmatic CEQA review for these sites,

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[2/] "[W]ithout site specificity in the land inventory, the ultimate goals of the Housing Element Law of promoting and increasing the available stock of affordable housing in this state are more difficult to achieve. We also recognize as a practical matter that *meaningful enforcement o*f the Housing Element Law, in all its component parts, may have been undermined without...a requirement of *more specificity in the land inventory* mandated by section 65583, subdivision (a)(3). *The Legislature,* whose function it is to write the statutes*, has apparently recognized this fact too..." Fonseca v. City of Gilroy, supra,* 148 C al. App. 4th at 1199 (emphases added.)

the County has implemented Section 65583(c)(3)'s requirement to *remove governmental constraints* to future development by completing CEQA review for these developments.

These actions, taken as a whole, have the potential for cumulative physical impacts to the environment by guiding development to pre-destined locations, at housing densities that are by no means mandated by the 2007 CWP. As discussed below, the designated densities convey unique legal rights on the developers of inventory parcels, while the completed CEQA review helps to streamline future approvals of these projects.

2. The Designation and CEQA Review for Housing Inventory Locations Confers Legal Rights That Will Effect the Pattern of Future Development in the County.

The County argues that the 2012 HE housing inventory and accompanying CEQA review will have no effect on where future dense housing is located in Marin County. This is clearly wrong. Here, the designation and analysis of the housing inventory is specifically intended to ensure that adequate housing will be available in the next two decades. The establishment of the inventory and corresponding CEQA review produces several legal effects, each of which act to further development in these locations at the specified densities.

a. The Housing Law Strictly Limits the County's Ability to Lower the Designated Density of a Parcel Listed in the Housing Inventory.

Government Code § 65863(b) states that once a parcel is presented as accommodating high density development as part of a Housing Element inventory under Government Code § 65583(a)(3), a local agency *may not permit the reduction of such residential density* below that which was utilized by HCD in determining compliance with housing element law, unless the agency makes written findings supported by substantial evidence that (1) the reduction is consistent with the adopted general plan, including the housing element; and (2) the remaining sites identified in the housing element are adequate to accommodate the jurisdiction's share of the regional housing need.

Section 65863(b)'s restriction on the County's ability to reduce the future density of an inventory parcel is significant, particularly in the typical situation where the number of units assigned to a parcel is necessary to meet an agency's regional housing allotments under State law.[3/]

[3/] The County's arguments (p.17:17-20) that nothing in "the State Housing Element Law or the 2012 Housing Element -Including Its 'Implementing Programs'- Changes the Potential Environmental

(1) The County's Arguments Compare Apples to Oranges.

The County raises a series of confusing arguments about how Petitioners have misconstrued the applicable laws that govern the legal status of a parcel that has been designated and relied on as a housing element inventory required by Government Code § 65583(a)(3).[4/]

First, the County argues (p. 18:10-14) that the alternative - where the County lacks an adequate housing inventory compliant with the Inventory Requirement – would also lead to legal consequences with the potential for significant effects. Whether this is true or not, however, the County is still required to analyze and identify the actual environmental effects of the planning decision that *was* made, including the location and choice of density for each of the 49 parcels. Here, Section 65863(b)'s restriction on changing parcel density makes the designations legally meaningful.

Second, the County argues that other provisions of the Government code provide equal treatment for *any* residentially-zoned parcel, irrespective of whether that parcel is part of a Housing Element inventory. In support, the County compares (pp. 18-19) two government code sections that also place restrictions on how agencies can regulate housing developments: Section§ 65583(g)(2), which regulates the parameters of how an agency must enact zoning changes promised as part of a housing element; and Section 65589.5(j), which restricts an agency's ability to disapprove or lower the density of residential projects found to be consistent with "applicable, objective, general plan and zoning standards and criteria." The County argues that an agency must make "*identical* findings"for each statute. *See* County Brief, p. 18:24-25.

The problem with this argument is neither of these statutory sections addresses the situation in this case, where parcels *have* been designated in a housing element inventory, thereby gaining the benefit of Section 65863(b)'s restriction on reducing density. Once a site is listed in a housing inventory, the County cannot simply make one of the findings required by Government Code §§ 65583(g)(2) and 65589.5(j). Instead it can only act under Section 65863(b) if it already has other

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Impacts of Developing the 'Sites' Listed In the Inventory From Those Examined in the 2007 CWP Program EIR" do not address the legal efect of this restriction on reducing density.

[4/] *See* County Brief p. 3:4-8 ("[P]etitioner's mistakes stem ...from a fundamental misunderstanding of the scope and potential environmental impact of a Housing Element, especially the so-called "inventory" of available sites pursuant to Government Code section 66583(a)(3).")

adequate, approved housing inventory meeting state standards that can make up for the loss of dwelling units. This is a different, and potentially *far greater* restriction on the County's discretion than the public safety and infeasibility findings required by Sections 65583(g)(2) and 65589.5(j).

The County's arguments try to make hay of Petitioners' legal background section, which attempted to lay out the different Government Code provisions that play a role in restricting an agency's ability to regulate housing development in California, without intending to suggest that each applied specifically to the housing inventory units and densities that are the subject of this case. Here, the relevant legal effect of Section 65863(b) is not somehow overridden by other statutory sections discussed in Petitioners' legal background, where such sections apply different restrictions to different situations. This practically obvious point is emphasized by the statutory language. *See* Govt. Code § 65863(d) ("The requirements of this section shall be *in addition to* any other law that may restrict or limit the reduction of residential density.") (emphasis added.)

b. The Amendment of the CWP to Include the 2012 Housing Element Inventory Means that Development Designated at the Building Intensities in the Inventory Will be Considered Consistent with CWP Policies.

Another consequence of the adopted inventory of parcels at specific densities is that such densities would be considered consistent with General Plan policies given their status as a component of the CWP's Housing Element, a required element of the CWP**.** As discussed in Section II.B.2.e, *infra*, many of the housing densities and unit numbers identified in the Housing Element inventory would not automatically flow from the General Plan land use designations and accompanying zoning, which provide for a range of housing densities based on neighborhood compatibility and the potential for adverse effects on sensitive natural resources. Absent the Housing Element inventory density designations, the County would have been within their discretion to determine that certain parcels proposing an overly high building density would not be compatible with General Plan policies. Yet now such building densities have been set by the Housing Element inventory.[5/]

Further, in the absence of new Housing Element with its assigned parcel densities, many of the inventory parcels designated would have been in conflict with the Housing Overlay Designation

[5/] *See also* Govt. Code § 65589.5(d)(5) (local government is prohibited from making a finding regarding zoning and general plan inconsistency to disapprove a development if the jurisdiction identified the site in its housing element as appropriate for residential use at the density proposed.)

criteria policies set forth in the Community Development chapter (3.4) of the CWP, based on their location away from transit hubs, or in sensitive resource areas or floodzones. *See* AR 26 F2408-2409; Petitioners' Opening Brief, pp. 8, 11-12, 27-31, 36, 41, 43-45.

The irony is, in the absence of these CWP changes, many parcels would *not* be eligible for the restrictive policies of Government Code § 65589.5(j), which, as discussed above, places limits on an agency's ability to reduce density for projects that are compatible with "applicable, objective, general plan and zoning standards and criteria."[6/] The County argues that Section 65589.5(j) would be applicable to *all* the inventory parcels regardless of their inclusion in the Housing Element, but in fact, many of these parcels, proposed at these maximum densities, *would not be consistent* with general plan and zoning criteria that limit the level of development that is appropriate for a particular site.

This point is supported by *Honchariw v. County of Stanislaus* (2011) 200 Cal.App. 4th 1066, cited by the County, which addressed whether a development project was subject to the Section 65589.5(j) restrictions. In *Honchariw*, the County argued that the developer's project "did not comply with 'applicable, objective general plan and zoning standards and criteria, including design review standards...' because the project did not, in [the County's] view, comply with County Code section 20.52.21" an ordinance requiring that all lots of a subdivision be "connected to a public water system whenever available." *Id.* at 1079. In rejecting this argument, the court relied on the fact that the ordinance requirement did not come into play until the developer applied for a building permit:

> The water connection requirement of County Code section 20.52.210 is only applicable, i.e., relevant and operative, when a developer or owner attempts to build a home on the lots. The Planning Commission staff recognized this when they attached a condition to the recommended approval of the tentative map application that 'connection to the water system shall be made at the time of dwelling construction.'

Id. at 1080. Implicit in the court's reasoning was that a lack of compliance by a project with general plan or zoning conditions and requirements *applicable to the earlier project approval stage* would preclude that project from being eligible for the heightened findings required by Section 65589.5(j).

The consequence of this change in the legal framework of the County's CWP is that, housing projects that conform to the new CWP-approved densities – due to the CWP amendments enacted

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[6/] As discussed, this is a *separate* restriction from Government Code § 65863(b)'s restriction on reducing density for Housing Element inventory.

as part of the Housing Element inventory – can now be argued to be consistent with specific General Plan policies, namely the Housing Element's inventory and assigned building densities. In the absence of the inventory designation, the County would *not* be obligated to make the Section 65589.5(j) findings for such projects, which would otherwise not be consistent with CWP policies.

c. The Certification of a Supplemental EIR Purporting to Find No Significant Cumulative Effects from High Density Development in 49 Locations in the County Confers Legal Rights.

The County's brief wholly ignores the fact, discussed in Petitioners' Opening Brief at pp. 46-48, that the SEIR prepared in conjunction with the 2012 HE confers legal rights on developers, in that they may claim, with legal justification, that the programmatic, cumulative impacts of the proposed development at the Housing Element inventory densities have already been analyzed under CEQA.

Here the Board instructed staff to have the SEIR evaluate the cumulative effects of not only the present but also future sites that could be used for inventory so that, as Planning Commission Chairman Holland explained, "the CEQA is done already when we look at those sites as the menu of potential options for the next round." AR 414 P11637:1-2. *See also id.* at P11637:4-5 (statement of the lead County Planner explaining that Chairman Holland's assessment was "exactly right.") The County's decision to conduct CEQA review on 49 different parcels was motivated by practical incentives, for the County to"have just sort of doubled up on doing the environmental review ....so that when we look at them in the future, the environmental review was all done." *Id.* at P11637:7-8.

The CEQA findings made in the SEIR, specifically that the 'project' (i.e., the development of the parcels at the assigned housing inventory densities) would not have any cumulatively significant effects, may easily be tiered to by future projects proposing similar housing densities. While the County might still require some site-specific review relating to design criteria, there would be no need to consider the cumulative impacts of locating such dense projects in areas already experiencing significant cumulative effects with respect to traffic, flooding, public services, school facilities etc. That level of programmatic review would already have been addressed in the SEIR. *See* AR 412 P11453:18-24 -11454:1-2 ("It seems to me that there is a real threat here that you could short-circuit the environmental review process by allowing someone say, "Oh well, you've already looked at…" you know, if they want 100 units in Strawberry, you've already looked [at] 243 units.")

In particular, the programmatic review conducted in the SEIR allows the County to find that individual projects fall 'within the scope' of the SEIR, which the County asserts is a programmatic document that is specifically designed to allow future project to utilize tiering to streamline any additional environmental review. As noted by the EIR Consultant who prepared the SEIR:

> I think in those situations you want to go back to kind of the same threshold that we looked here and that is - were the impacts, if you look at a project, analyzed in a previous document, in this case via the Housing Element EIR. Do the changes involve new or substantially more severe significant impacts? Any new circumstances involving new or substantially more severe impacts, or any new information of substantial importance, requiring new analysis..?

AR 412 P11455:24-25 - 1456:1-6. This, of course, is the same approach undertaken by the SEIR in tiering its entire analysis to the CWP EIR. Nothing in the consultant's response suggests that any further cumulative impact review will take place, given the certification of the SEIR purporting to address precisely these impacts. The likely result is a sequential tiering process, where the broad and relatively superficial analysis contained in the 2007 CWP EIR is continually trotted out as a substitute for the missing analysis of the actual, on-the-ground cumulative impacts as they are occurring with each successive development, yet which end up never being reviewed in a CEQA proceeding. *See* AR 412 P11456:17-23 ("But if it didn't cross that threshold, then that at least would be a strong argument that the environmental review has already been conducted, on that issue...? STAFF: Yep.")

The completion of the SEIR for the project was part of an overall planning effort by the County pursuant to Housing Element Policy 1.d, which implements Government Code § 65583(c)(3)'s requirement that the program "[a]ddress and, where appropriate and legally possible, *remove governmental constraints to the ...development of housing*." (emphasis added.) *See* AR 19 E1188.[7/] By removing these environmental review hurdles through the completion of the SEIR, the County implements Section 65583(c)(3)'s objective that the review of future housing projects consistent with the housing inventory numbers may be streamlined.[8/]

[7/] "Policy 1.d - Streamline the Review of Affordable Housing. Encourage the development of housing for low, very low and extremely low income households by making the review process more efficient and *clarifying permitted density*." (emphasis added.)

[8/] As discussed, the County has also exempted affordable housing projects from master plan and precise development plan requirements, which will also streamline future project approvals. *See* County Code § 22.44.035; AR 19 E01143 (amendment is intended to "shorten the costly pre-development process undertaken by affordable housing developers in order to secure approvals.")

Importantly, the certification of the SEIR for the County's approval of the 49 sites considered as part of the Housing Element inventory remains valid and in effect, regardless of whether or not a particular parcel remains as a current part of the inventory. In future years, as Housing Element inventories change over time, the SEIR's continued existence represents a future CEQA pass whether that parcel is plugged back into the inventory or not.

3. The 2012 HE is Not Simply a Change to the CWP's Land Use Element.

One of the County's primary arguments is that any evaluation of environmental impacts arising from the 2012 Housing Element must be limited to an examination of whether and to what extent changes have been made to the Land Use Element of the CWP. *See e.g.,* County Brief p. 1:21-25 - p. 2:1 (characterizing legal issue before the court as 'the scope of CEQA review" for a Housing Element where the "*changes* to the 'Land Use Element'...are fairly minor.")

In support, the County relies heavily on the *City of Napa* decision, which addressed the impacts of a Housing Element Update in the context of changes to the Land Use Element. As discussed in Sections II.A.3.d, B.1 & C, *infra,* however, the City of Napa case is distinguishable.

Here, the alleged impacts of the 2012 HE are not primarily due to the changes in building densities for the CWP Land Use Element,[9/] but instead the establishment and implementation measures intended to further the development of a Housing Element inventory at housing densities that are not described in any way in the CWP Land Use Element. Here, the Housing Element inventory is a separate regulatory vehicle from the Land Use Element, which instead describes a HOD that differs substantially from the inventory set forth in the 2012 HE. As discussed, the housing densities identified in the Housing Element inventory, along with accompanying CEQA review,

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[9/]As the County acknowledges, the County had already taken land use element related actions in amending its zoning code and CWP allowing for increased building intensities through qualification as affordable housing, all without CEQA review, prior to their adoption of the 2012 HE. *See* Petitioners' Opening Brief pp. 13-15. The County argues that CEQA review for these actions *was* done through the County's tiering in its final Resolutions to the CWP EIR and that Petitioners are mistaken in their assertions. *See* County Brief, p. 15:4-10. Petitioners disagree that such tiering constitutes CEQA review. Using tiering as a cover, these policy and zoning changes were not reviewed under CEQA, nor were they discussed as an part of the SEIR for the 2012 HE. *See* Petitioners' Opening Brief p. 14:19-22 ("The County *did not conduct CEQA review for any of these actions*, despite the potential for such land use designation and zoning changes to lead to greater development ...")

establish legal changes that derive not from the CWP Land Use Element, but instead, the 2012 HE.

The CEQA issues in this case derive from the effects of the Housing Element's housing inventory combined with a certified programmatic EIR purporting to assess the cumulative impacts of developing that inventory. These actions affect legal rights, as well as the County's ability to regulate future projects that conform to the new inventory standards. The impacts of these actions are not revealed by limiting the assessment to effects to the CWP's separate Land Use Element.

a. The Housing Element is Not Subordinate to the Land Use Element.

The County's arguments fail to acknowledge basic principles of the planning and zoning laws, which envision general plans composed of co-equal 'elements,' to be interpreted harmoniously:

> Section 65300.5 states in pertinent part: "the Legislature intends that the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." Section 65300.5 has been repeatedly construed as requiring " that the elements of the general plan comprise an integrated internally consistent and compatible statement of policies.' "

Friends of Aviara v. City of Carlsbad (2012) 210 Cal. App. 4th 1103, 1111 (citing *Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90, 96-97.)

A paramount principle of General Plan law is that "all elements of the general plan have equal legal status." *Sierra Club v. Board of Supervisors* (1981) 126 Cal. App. 3d 698, 708:

> [T]he land use element and the open-space element cannot contain different land use intensity standards rationalized by statements such as 'if in any instance there is a conflict between the land use element and open-space element, the land use element controls.' *Because the open-space element is not legally subordinate to the land use element, any conflicts between the two must be resolved within the general plan itself.*[10/]

In a more recent decision, *Friends of Aviara v. City of Carlsbad, supra,* the issue was whether the City's failure to implement zoning changes to its land use element to match the general plan's housing element inventory numbers created an inconsistency within the General Plan. In denying this claim, the court put to rest any doubts about the independent status of the Housing Element Law and statutory mandates vis a vis the land use element in a general plan:

As we interpret section 65583, subdivision (c)(7), it manifests a clear legislative preference

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[10/] *Id. Sierra Club* relied on this principle of "equal status" to find the county had improperly attempted to elevate its land use element above the open space element in the general plan. *See* 126 Cal. App. 3d at 704 (legislative intent "is frustrated if counties can simply subordinate the open space element to other elements of the general plan")

> that municipalities promptly adopt housing plans which meet their numerical housing obligations *even at the cost of creating temporary inconsistency in general plans.* The interpretation suggested by Aviara, by which other elements of a general plan must be made consistent with the housing element immediately, would no doubt delay the adoption of revised housing elements. *Such an interpretation is not consistent with the express language of the Housing Element Law*.

210 Cal. App. 4th at 1112 (emphases added.)

The County's arguments suggest that a change made to a housing element that does not directly change a general plan's land use element is *not meaningful,* i.e, is not an action that could have significant impacts on the environment. Here, however, the 2012 HE plays a unique role in the CWP by providing *the* program for how the state will meet its housing obligations under state law. Here, two components of the program are key: 1) designation of a housing inventory with specified building densities; and 2) completion of programmatic CEQA review as a means to streamline the future development process. Each of these actions is in response to a state Housing Element mandate that in itself does not affect the Land Element of the CWP. Yet as discussed above they each have the potential for long term cumulative impacts to the environment that have never been analyzed.

b. The County's Reliance on *Fonseca v. City of Gilroy* and the Least Cost Zoning Law on this Issue are Without Merit.

The County argues (p. 23:1-12) that the land use and housing elements must contain the same information, and that an "amendment to a Housing Element that does not significantly change the contents and standards of the Land Use Element" cannot be considered a "large change in the land use provisions of a County's land use regulatory framework." In support, the County cites *Fonseca v. City of Gilroy, supra,* 148 C al. App. 4th 1174 and the Least Cost Zoning Law, Govt. Code § 65913.

Fonseca, addressed the relationship between the Housing Element requirement of the General Plan and Least Cost Zoning Law as follows:

> [S]ection 65913.1 [Least Cost Zoning Law] governs land use designation and zoning while section 65583 governs the housing element of a general plan. The two statutes were intended to *work in concert.* (§ 65913, subd. (a).

Id. at 1186. (emphasis added.) The court evaluated the claim that the City had not complied with the Least Cost Zoning Law, eventually agreeing with the City's argument that the housing "element's plan for meeting its share of the regional housing need through rezoning and implementation of the Neighborhood Districts plan is all that was required to comply with section 65913.1." *Id.* at 1209.

The County's reliance on these authorities here does not help their cause. In *Fonseca,* the 'plan' for rezoning that the court found satisfied the Least Cost Zoning Law's requirements is the same action item set forth in Government Code § 65583(c)(1), which requires agencies to "identify actions that will be taken to make sites available during the planning period with appropriate zoning development standards." However, Section 65583(c)(1) is merely one requirement of many in the state Housing Element Law. Other provisions, such as Government Code § 65583(a)(3)'s requirement to analyze and approve a housing element inventory, or Government Code 65583(c)(3)'s requirement to streamline the future review of such projects, are not actions that directly affect the land use element. Yet, as discussed, these actions also have the potential for impacts.

Nothing in *Fonseca* or the Least Cost Zoning Law affects that conclusion. Instead, *Fonseca* merely shows that a court must interpret the requirements of the two elements "in concert" thereby allowing each to satisfy their statutory roles as components of the overall General Plan. *See* 148 C al. App. 4th 1174. As the decision in *Friends of Aviara v. City of Carlsbad, supra*, shows, this may at times involve allowing the housing element to actually take precedence over the land use element, at least for some period, in order to assure adequate housing. *See* 210 Cal. App. 4th at 1112. ("[I]n the case of housing, the Legislature has permitted some inconsistency so long as the means of resolving any inconsistency is also set out.")[11/]

c. The County Ignores the Potential Effects of Housing Element Policies that Are Not Addressed by the CWP's Land Use Element.

The County's arguments ignore how the Housing Element may cause environmental impacts even though it does not directly change the CWP Land Use Element. Here, this occurs in three ways.

First, the housing inventory sets densities and locations for dense development that are simply not addressed in the Land Use Element's HOD discussion. As discussed, the inventory building intensities are statutorily protected under the Government Code § 65583(b), even though they represent in most cases, maximum levels of development based on a variety of planning techniques

[11/]Arguably, the 2012 HE is inconsistent with the CWP's Land Use Element in that it establishes a wholly separate approach for meeting the County's housing needs – through inventory designations that dispense with the restrictive criteria utilized by the CWP EIR in selecting its Housing Overlay Designation sites. *See* Opening Brief, pp. 8, 11-12, 27-31, 36, 41, 43-45. Under *Friends of Aviara*, the County may try to reconcile these potential inconsistencies between the two elements.

to achieve the high dwelling unit numbers. *See* Discussion, Section II.B.2.e, *infra*.

Here, the high densities and dwelling unit numbers provided in the Housing Element inventory are clearly *not* mandated by the Land Use Element designations, which in most if not all cases provide for a range of building densities. *See e.g,* AR 26 F2429-2439 (CWP Land Use Designations and consistent zoning.)[12/] Instead, the source of these planning density standards emanate from the Housing Element Law and the requirements of Government Code §§ 65583(a)(3) and 65583.2.

Further, the housing inventory identifies the *specific locations* of where this dense development will occur, which do *not* correspond to the developments listed and mapped in the existing Land Use Element's HOD. The locations of cumulative projects such as in Lucas Valley or Tam Junction have the potential for significant cumulative impacts, caused by the Housing Element's specific location of these development sites, not from the general land use and zoning designations for *all* County lands as set forth in the CWP Land Use Element.

Second, as discussed, the adopted Housing Element is a general plan amendment, which results in designated numbers of units at specified inventory locations that are now consistent with General Plan policies, criteria and zoning. In contrast, in the absence of the 2012 HE, dense projects in flood zones, or in ridge areas, or in locations not listed or studied in the existing Land Use Element, would not be consistent and therefore not eligible for further statutory restrictions on an agency's ability to regulate their development. *See e.g.,* Govt. Code § 65589.5(j); Section II.A.2.b, *supra*.

Finally, the implementation measures taken by the County in streamlining the environmental review of future Housing inventory projects do not emanate from the Land Use Element, but instead from Section 65583(c)(3), a wholly different governmental mandate from Section 65583(c)(1), which addresses an agency's obligation to update the land use element designations and zoning to keep pace

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[12/]So, for example, at Grady Ranch the CWP land use designation PR (Planned Residential) allows for a range from .1 to 1 dwelling nuit per acre. *See* AR 26 F2431. Here, the 2012 HE inventory designates 240 dwelling units for this parcel, which can only be achieved using the highest density possible, seemingly without consideration to the environmental constraints of the property that in previous years led planners to believe the proper number of homes as approximately 40. *See* AR 411 P11321, lines 1-3, 15-17 ("[F]or market rate only the base zoning for Grady Ranch would apply and that would allow roughly 40 units.") This same scenario – the housing inventory achieving and committing to high numbers based on maximum possible densities — is played out for a number of locations. *See* Discussion, Section II.B.2.e & note 21 *infra.*

with housing element objectives. *See Fonseca v. City of Gilroy, supra,* 148 C al. App. 4th at 1209.

d. *City of Napa* Does Not Control on this Issue.

The County relies on *City of Napa* for the proposition that changes to the Housing Element should be evaluated only insofar as how they change the land use designations and zoning set forth in the Land Use Element. *See e.g.,* County Brief, p. 2:19-23. However, *City of Napa* cannot be read as overriding the case law precedent and practical requirements of the state Housing Law discussed above, which ensure that the Housing Element has its own force and effect in order to meet state housing objectives that local agencies plan for an adequate housing supply. As discussed, the obligations on the part of the County implemented as part of the 2012 HE approval have their own potential for impacts separate from the generic land use designations in the CWP Land Use Element.

In *City of Napa*, the court's focus was narrow, based on its perception of plaintiff's claims:

> All of the alleged changes resulting from the Project *that plaintiff complains will result in significant impacts*--primarily the changes in density--*are changes that the Project makes to the Land Use Element*, not the Housing Element.

221 Cal. App. 4th at 203-204 (emphasis added.) There, the issues as argued by plaintiff were 1) a change in minimum densities on seven different parcels *from 10 to 40* residential units per acre *to 20 to 40* residential units per acre; and (2) changes to increase the permitted density for eight multifamily sites by a *total of 88 units*. 221 Cal.App.4th at 198 (emphases added.) Accordingly, the court limited its analysis to these essentially *minor* changes in the land use element.

City of Napa did not consider the potential impacts of designating a housing element inventory, including how the specific densities and locations for such an inventory, complete with CEQA programmatic review, might present environmental impact issues separate and distinct from changes in the land use element. As discussed more fully in Section II.B,1 and C, *infra*, *City of Napa* is distinguishable on these and other grounds.

B. THE 2012 HOUSING ELEMENT IS NOT A PROJECT OR PROJECT COMPONENT THAT FALLS WITHIN THE SCOPE OF THE CWP EIR.

As described in Petitioners' Opening Brief, pp. 23-31, the legal issue in this case is whether the 2012 HE and its required CEQA analysis fell within the scope of the program EIR prepared for the 2007 CWP, a point agreed upon by the County. *See* County Brief, p. 11:14-17.

The County's only arguments on this issue are 1) the Court owes deference to the County's

findings,[13/] based on a substantial evidence review standard; and 2) the entire 2012 HE project consists of limited amendments to the CWP and relatively minor amendments to the County's zoning ordinances and therefore fall within the scope of the CWP EIR. *See* County Brief, pp. 11-12, 23-24.

As discussed below, these arguments do not excuse the County's CEQA violations.

1. Standard of Review.

The County relies on the *City of Napa case* to argue that the question of whether the 2012 HE falls within the scope of the CWP EIR is a question solely limited to whether substantial evidence supports the County's decision. *See e..g,* County Brief, p. 12:3-10.

In fact, the issue of what should be the proper standard of review for an agency's determination regarding the proper scope of CEQA review is currently undecided in the appellate courts, with decisions such as *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, 1297 and *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, coming down on opposite sides. *See City of Napa, supra,* 221 Cal.App.4th at 201-202. Indeed, the issue has now been squarely presented in a case currently pending before the California Supreme Court, *Friends of the College of San Mateo Gardens v. San Mateo County Community College District,* Supreme Court case No: S214061. This case is on review from a 1st District Court of Appeal Decision that sided with *Save Our Neighborhood v. Lishman* in finding that questions about the scope of CEQA's application must be reviewed as questions of law, not substantial evidence.[14/]

As to the *City of Napa* case in particular, it is not clear at the outset that the court did not make its own *legal* determination that the project analyzed fell within the scope of the General Plan EIR:

[13/] *See* AR 11 C056 (County's CEQA findings state "the 2012 Housing Element adopted by the Board and the minor policy revisions to the 2007 CWP fall within the scope of the SEIR analysis.")

[14/] The docket and information for this case can be found on the Supreme Court's website at http://appellatecases.courtinfo.ca.gov/-search/case/mainCaseScreen.cfm?dist=0&doc_id=2059337&doc_no=S214061. The information provided on the website states: "This case presents the following issue: When a lead agency performs a subsequent environmental review and prepares a subsequent environmental impact report, a subsequent negative declaration, or an addendum, is the agency's decision reviewed under a substantial evidence standard of review *(Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385), or is the agency's decision subject to a threshold determination whether the modification of the project constitutes a 'new project altogether,; as a matter of law (*Save our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288)?"

> There is *no dispute* that the 2020 General Plan as adopted in 1998 included a fully revised and updated Land Use Element, and *there thus can be no dispute* that this aspect of the Project clearly is a modification to the 2020 General Plan that was analyzed in the 1998 Program EIR and therefore is properly analyzed under Guidelines section 15162.

221 Cal.App.4th at 204 (emphases added.) Given the lack of any factual dispute on this issue, the court's language about substantial evidence being the review standard is arguably dicta.

Further, in *City of Napa* there was no indication that the agency had failed to proceed according to law in making its determination that the housing element update was within the scope of the EIR for the prior general plan. Instead, the court noted that the general plan EIR *had* assessed the impacts of the pre-existing housing element, and that the complained-of-changes to the land use element densities had already been adequately analyzed. 221 Cal.App.4th at 203-204.

However the court wishes to treat the precedential value of *City of Napa* on the standard of review issue, if the County *did not follow proper CEQA procedures* in making its determination that the 2012 HE was 'within the scope' of the 2007 CWP as analyzed in the CWP EIR, those errors should be reviewed as procedural errors and an abuse of discretion. As noted by the Supreme Court in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412:

> In evaluating an EIR for CEQA compliance...a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. For example, where an agency failed to require an applicant to provide certain information mandated by CEQA and to include that information in its environmental analysis, we held the agency "failed to proceed in the manner prescribed by CEQA.' [] ...In contrast, in a factual dispute over "whether adverse effects have been mitigated or could be better mitigated" [], the agency's conclusion would be reviewed only for substantial evidence. Thus, in Laurel Heights I, we rejected as a matter of law the agency's contention that the EIR did not need to evaluate the impacts of the project's foreseeable future uses because there had not yet been a formal decision on those uses [] but upheld as supported by substantial evidence the agency's finding that the project impacts described in the EIR were adequately mitigated [ ] (citations omitted.)

Id. at 435. The message of *Vineyard Citizens* is that an agency's actions should be reviewed on both procedural and evidentiary grounds,[15/] and that a court should be attentive to the "nature of the alleged defect," whether the error is "one of improper procedure or a dispute over the facts." *Id.*

Here, the County has prepared a new program EIR that purports to evaluate the cumulative

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[15/] *See id*. at 427 ("We therefore resolve the substantive CEQA issues on which we granted review by independently determining whether the administrative record demonstrates any legal error by the County *and* whether it contains substantial evidence to support the County's factual determinations.") (emphasis added.)

project effects of 49 housing sites in the County, an EIR for which Petitioner alleges three procedural errors in how the County calculated impacts.

First, as discussed in Petitioners' Opening Brief,[16/] SEIR errs in its complete reliance on the cumulative assessment conducted by the CWP EIR, despite the robust case law prohibiting, as a *legal* matter, just such an approach. *See Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal. App.3d 350, 357-358. The County argues (p. 22:7-11) that comparisons to theoretical buildout numbers are only prohibited under CEQA when amendments "approve specific development criteria for a specific area." However, that is precisely what the Housing Element inventory accomplishes. Here, the inventory makes changes to the CWP that must be addressed.[17/]

Second, another procedural defect raised (*see* Opening Brief, pp. 38-39) is the SEIR's failure to consider how incremental impacts caused by further development may be themselves cumulatively significant. On the traffic impact analysis, for example, the SEIR counted a 16% increase in congestion at an intersection already operating at an unacceptable level of service as an insignificant cumulative impact, despite considerable CEQA case law prohibiting that result as a matter of law. *See e.g, Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal. App. 4th 1019, 1025.

Finally, a fundamental defect that permeates the SEIR is a lack of analysis generally, ironically including the only analysis actually attempted by the SEIR, the traffic study.[18/] It is well settled that

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[16/]As discussed in Petitioners' Opening Brief, pp. 32-35, the SEIR improperly compared the potential impacts of the Housing Element inventory to the theoretical impacts that would occur from General Plan buildout, precisely the type of "plan to plan" comparison not permitted under CEQA.

[17/]In *Environmental Planning & Information Council, supra,* the comparison made was between the "Greenstone" and "Camino-Fruitridge" area plans as amendments to the county's 1969 general plan, and the inflated buildout numbers of the general plan itself. *See* 131 Cal. App.3d at 353

[18/]The traffic analysis is a good example how all three procedural failures operate together to undermine CEQA's primary objective, to conduct "a meaningful evaluation" of the potential impacts of a project or, as in this case, an important planning decision. *See* Petitioners' Opening Brief, pp. 18, 34-35, 38. Here, the traffic analysis assumes one may compare future projected increases in traffic due to the projected – and highly inflated – numbers from the 2007 CWP and on that basis find that further impacts would be insignificant. In so doing, the SEIR fails to explain why further increases in traffic up to 16% do not present cumulatively significant impacts, which they would under basic CEQA procedure mandating that incremental contributions to existing significant conditions should be considered cumulatively significant. *See Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 718. Here, the traffic analysis fails to meet CEQA's standards for procedure and

a lack of adequate analysis and information to ensure a meaningful evaluation of project impacts constitutes a procedural error under CEQA. Here, due to the County's flawed belief that it could simply tier the SEIR's cumulative impact findings to the significant and unavoidable impact findings made in the 2007 CWP, the SEIR neither presented nor analyzed whether the 2012 HE could cause cumulative impacts to affected communities. *See e.g.,* AR 16 D326 ("[I]t was not necessary to revise the cumulative analysis or the alternatives discussion of the 2007 Countywide Plan EIR.")[19/]

Without this procedural and informational compliance, the court need not even reach the question of whether there is substantial evidence to support its decision. A flawed analytical methodology, a failure to provide adequate information for an effective review to take place, these types of CEQA errors preclude whatever evidence may exist from being considered in a meaningful context. For example, the County argues that the Court must review the County's decision that the 2012 HE Project fell "within the scope" of the 2007 CWP based on substantial evidence. Here, however, the manner in which the County found that the 2012 HE was "within the scope" of the 2007 CWP EIR is contrary to CEQA's requirement that plans for development must compare impacts to conditions on the ground, and not on inflated numbers used to estimate the impacts of General Plan buildout decades in the future. Any "substantial evidence" in relation to this assessment would not be 'substantial' in that it would not be responsive to the relevant issue of the plan's impacts on the communities in which inventory has been designated. It would not be responsive, for example, to the question of why an incremental 16% increase to an already congested traffic intersection would not be considered significant under CEQA. Because these types of errors are inherently procedural, the substantial evidence standard cannot apply.

If the Court wishes nonetheless to address these errors under a substantial evidence standard

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informational adequacy, thereby precluding informed decision making and public accountability. *See Communities For a Better Environment v. California Resources Agency* (2002) 103 Cal. App. 4th 98, 124 *(*agency may not adopt a statement of overriding considerations for a prior, more general EIR, and then avoid future political accountability by approving later, more specific projects with significant unavoidable impacts pursuant to the prior EIR and statement of overriding considerations.")

[19/]Many issues in this case may turn on legal interpretations with respect to the meaning of statutes and regulations, including the meaning and significance of the referenced Government Code provisions and CEQA statutes and guidelines. Such interpretations are matters of law made by the court.

framework, the same arguments apply. Here, there is no evidence in the record that the 2007 CWP ever analyzed the potential cumulative effects of the Housing Element inventory and completed CEQA analysis for 49 designated sites totaling over 2,500 new units in various Marin communities. The CWP 2007 never addressed how the County would meet its Housing Element Inventory Requirement and the HOD approach reviewed by the CWP EIR differs substantially from the 2012 HE both in number and location of units and in the criteria utilized to determine appropriate locations.

2. However the Court Reviews the County's Decision, the Issues raised by the 2012 HE and SEIR Do Not Fall Within the Scope of the CWP EIR.

a. The 2012 HE Is the First County Housing Element to Have Ever Presented a Housing Inventory Pursuant to Government Code § § 65583(a)(3) and Thus is Not Within the Scope of the CWP EIR.

As discussed above, the 2012 HE is the first County Housing Element containing a Housing Element inventory, including a programmatic CEQA review of 49 parcels on over 2,500 units. The inventory was created and analyzed by the County in response to the requirements of the 2004 Housing Element Law amendments, set forth at Government Code §§ 65583(a)(3) and 65583(c). In contrast, the 2007 CWP contained no Housing Element inventory, and the CWP EIR goes out of its way to point out that it did not analyze the prior 2003 Housing Element as part of its CEQA review. *See* AR 49 A-2824, note 2; Petitioners' Opening Brief, pp. 7:20-23; 22:2-7; 26:11-23.

As discussed above, the adoption of a housing element and adequate housing inventory with specific locations and planned densities for housing is an important planning decision with potentially far reaching consequences on how Marin County develops in the next decades. The issues raised by the 2012 HE and its accompanying inventory were simply not addressed by the 2007 CWP EIR.

b. From a Tiering Standpoint, the County's Approach Violates CEQA.

The County does not respond to Petitioners' Opening Brief's explanation of how CEQA tiering works, except to agree that the issue is whether the 2012 HE falls 'within the scope' of the 2007 CWP. In particular, the County ignores the Opening Brief's discussion of how tiering allows for decision makers to address environmental issues at the appropriate scale, when such issues are '*ripe for decision." Koster v. County of San Joaquin* (1996) 47 Cal. App. 4th 29, 38.

The question of what level of review is appropriate at each planning stage is critical to the determination of whether the County could properly tier to the CWP EIR's findings for cumulative

and unavoidable significant impacts from general plan buildout at maximum densities. If, for example, there were no requirement that the SEIR assess the programmatic effects of the locations and densities assigned in the Housing Element inventory beyond the level of detail provided in the CWP EIR for *all* residentially zoned parcels in the County, the County's approach of tiering might be considered lawful. This is what occurred in the *City of Napa* case, where the court chose to focus on the slight changes to the minimum building densities in the land use element to find the project to be within the scope of the prior general plan EIR.

Here, however, the level of detail required for a CEQA review of the 2012 HE and its housing inventory must be greater than what would be appropriate for a base assessment of all County land use designations. This distinction can ironically be observed in the CWP and CWP EIR, which, while providing general information and analysis about land use designations throughout the County and the possible impacts were these areas all developed at maximum density, also present a closer examination for particular housing locations where dense housing is anticipated to be located, particularly within the CWP's Housing Overlay Designation. *See* AR 26 F2409-2411; 49 A-03012-3013, 3590-3591 (maps of Housing Overlay Designation & consistency with CWP Update Criteria.")

This is the level of detail found necessary by the 2007 CWP EIR to qualify as programmatic review for these HOD projects. The CWP EIR does not come anywhere close to this level of detail for the development envisioned in the 2012 HE inventory list. Here, there is no prior programmatic level of review for the locations and numbers proposed in the inventory to which the SEIR may tier.

(1) CEQA Guidelines § 15152 Shows How the Flawed Tiering as Done in this Case Allows the County to Avoid Accountability.

One important consequence of the County's tiering its SEIR fully to the CWP EIR is how it allows the County to avoid accountability in making determinations about where housing should be located. CEQA requires that this decision be made in accordance with the statutory mandate to avoid or substantially reduce significant impacts where it is feasible to do so. *See* Pub. Res. Code § 21002.

Under CEQA, accountability is achieved in the tiering process where the environmental effects at issue in a project have already been "adequately addressed in the prior EIR." *See* CEQA Guidelines § 15152(f) (hereinafter, 14 Cal. Code Regs. § 15152(f)). Significant environmental effects have been "adequately addressed" if the lead agency determines that they have been avoided by the

prior EIR, or that they have been examined at a "sufficient level of detail in the prior EIR" to enable those effects to be mitigated or avoided in later projects. *See* 14 Cal. Code Regs. § 15152(f)(3).

Here, neither of these conditions are true. The potentially significant cumulative effects of the 2012 HE – the development of over 2,500 units in specific locations at specific densities – were not mitigated or avoided by CWP EIR. Further, these impacts have not been addressed at a level of detail that would inform the decision makers and the public about the possibility for mitigation measures or alternatives that could avoid or substantially lessen the worst effects. This analysis was not done, due to the SEIR's wholesale reliance on the CWP EIR's CEQA findings.

The County's approach violates CEQA's mandate that an agency avoid or substantially lessen significant impacts whenever feasible. Pub. Res. Code § 21002. The Guidelines are clear that an agency should assess environmental effects in a second tier CEQA document whenever such effects "[a]re susceptible to substantial reduction or avoidance by the choice of specific revisions in the project, by the imposition of conditions, or other means." 14 Cal. Code Regs. § 15152(d)(2). This obligation exists at each step in the CEQA process for general plan enactments and implementation.

In this case, the SEIR does not consider project alternatives or cumulative effects for the 2012 HE. By simply tiering to the CWP EIR, the SEIR is also not bothered to make any assessment of whether the impacts caused by the development as proposed in the 2012 HE inventory could be substantially reduced or avoided by policy or planning measures that would function as mitigation. Ironically, this is what occurred in 2007, when the CWP EIR required the adoption of Mitigation Measure 4.1.5, which requires that individual HOD parcels that do not meet the HOD criteria "be removed from further consideration." AR 12 C0122; 49 A-3011. Here, the SEIR makes no assessment of possible measures that might reduce or avoid incrementally significant cumulative effects caused by the project, particularly in some of the communities where effects could be greatest.

As discussed in Petitioners' Opening Brief (pp. 45-46), without this analysis, the County cannot meet the CEQA requirement for accountability, since it cannot justify a finding that the avoidance of such impacts was "infeasible" as required by Public Resources Code § 21002.

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(2) The *Christward Ministry* Decision Provides a Good Example of How Tiering Should Have Occurred in this Case.

In *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 186,[20/] the City of San Marcos had an existing General Plan and zoning that allowed for waste disposal facilities on any lands zoned non-residential. State law required local jurisdictions to also designate potential locations for such facilities, including ensuring that surrounding land uses were compatible. *See* 184 Cal. App. 3d at 189. In amending its general plan to meet state requirements, the City argued that "at the time the amendment was adopted, the City's general plan and zoning ordinances permitted these uses by a use permit in all nonresidential areas of the City and the effect of applying the solid waste management facilities designation to the San Marcos landfill *was merely a ratification of an existing use* which had an adequate EIR completed and adopted in 1977." *Id.* at 190 (emphasis added).

The court rejected this argument based on the following reasoning:

> When assessing whether an EIR is required for a general plan amendment changing a land use designation, *the local agency is required to compare the newly authorized land use with the actually existing conditions*; *comparison of potential impacts under the amendment with potential impacts under the existing general plan is insufficient*.... [I]n the instant case, the City's argument that the amendment had no significant environmental impact because under the existing general plan such facilities could have been located at the San Marcos Landfill site by a special use permit, must fail. At the time of the amendment, the hypothetically permitted facilities did not in fact exist at the landfill. As in *Environmental Planning & Information Council v. County of El Dorado, supra*, 131 Cal.App.3d 350, an environmental analysis based on *a comparison between what was possible under the existing general plan and what was permitted under the amendment was "illusory*."

Id. at 190-191 (emphasis added). The court went on to note:

> [A]s represented by the City, under the existing general plan *such facilities were not tied to any particular location, but rather were permitted, upon obtaining the necessary permit, in all but residential areas.* In contrast, *the effect of the amendment was to pinpoint a particular location for these facilities and apparently, to concentrate them*. Thus, even if a mere comparison between the existing general plan and the amendment were sufficient, in the instant case, it was like *comparing apples and oranges*.

Id. at 191 (emphases added).

The *Christward Ministry* fact pattern is more on point with the facts of this case than either of the County's authorities, *Black Property Owners* or *City of Napa.* Here, similar to the city in *Christward Ministry,* the County argues that since the residential development identified in the 2012

[20/] *Christward Ministry* was distinguished by the County's authority *Black Property Owners*, based on the determination that "the rent control ordinance ratified and acknowledged in the update here was exempt from CEQA review because it was enacted by initiative." 22 Cal.App.4th at 986.

HE is generally allowed under the current Countywide Plan, no further CEQA review is required, i.e., the SEIR in this case may tier directly and without further analysis to the findings of the CWP EIR. However, also similar to *Christward Ministry,* the County is required by state law to identify as part of its Housing Element the *location of potential sites* which will satisfy the County's housing allocation – *see* Govt. Code § 65583(a)(3) – which it did in this case by designating and completing CEQA review for 49 different parcels totaling 2,537 dwelling units.

Christward Ministry considered similar state law requirements for the siting of solid waste facilities, requiring local governments "to develop a solid waste management plan," which must "[identify] and reserve sites for the establishment or expansion of solid waste facilities" and "[ensure] that land uses adjacent to or near those sites are compatible with the solid waste facilities." *Id.* at 191 (citing Gov. Code, §§ 66780 (a)-(b).) The court concluded that this level of planning required a more refined CEQA analysis than the general review undertaken in the General Plan EIR. *Id.*

Here, the state housing laws require the County to identify an inventory of sites where denser, more affordable housing can be feasibly implemented, including an "analysis of the relationship of zoning and public facilities and services to these sites." Govt. Code § 65583(a)(3). This more refined level of analysis requires CEQA review beyond simply a comparison to the general buildout numbers contained in General Plan EIR.

c. The 2012 HE Inventory Substantially Expands the Area Where the County Will Plan for Dense Housing Than Was Studied in the CWP EIR.

As discussed in Petitioner's Opening Brief (pp. 28-30), the 2012 HE and its associated housing locations designate dense development up to and beyond 30 units per acre at 49 different locations *with 2,537 dwelling units* in the unincorporated part of the County. *See* AR 17 D723-733, 736-739. This is a substantial expansion from the level and location of dense housing analyzed in the CWP EIR, which instead assumed *658 units* of HOD housing in a smaller range of locations. Only *six of the 49* housing locations reviewed in the SEIR were even part of the CWP HOD sites reviewed in the CWP EIR. *See* AR 17 D740.

The County argues that this is irrelevant, since the 2012 HE numbers are still less than the inflated buildout numbers presented in the CWP EIR. As discussed above, however, this is yet another apples to oranges comparison. The CWP and EIR, in assessing the HOD at a more specific

scale, demonstrate that the proper CEQA comparison for tiering purposes is between the 2012 HE inventory numbers and the units envisioned in the HOD.

d. The 2012 Housing Element Alters the Prior County Policy on Locating Dense Housing that was Analyzed in the CWP EIR.

The 2012 HE implements new policies to encourage the siting of dense housing that are potentially at odds with the strict criteria set forth in the CWP for the HOD. *See* AR 26 F2408-F2409; Opening Brief pp. 30-31, 43-45. The CWP EIR assumed these criteria would restrict the location of future dense affordable, HOD housing, and on that basis determined that significant land use and planning impact could be avoided. *See* AR 12 C0121; 49 A-2828, 3610. *See also id.* at A-3010 ("Residential development of 25 units per acre on parcels that contain a Stream Conservation Area, wetlands, an average slope of over 20 percent or are within the County's Ridge and Upland Greenbelt would result in significant impacts, including hydrologic, biotic, geologic, and or visual impacts.")

The County does not address this issue at all in their opposition brief. Yet here, this is both an informational failure – no explanation for why the CWP EIR impact findings made back in 2007 would no longer apply in 2013 – and a lack of any substantial evidence.

e. The 2012 HE Sets the Maximum Densities Possible on Many of the Designated Inventory Parcels.

A basic theme of the County's Opposition is that the CWP Land Use Element has not been substantially affected by any changes in permissible building densities on 2012 HE inventory sites. The County emphasizes that the number of units and densities chosen for the housing inventory are densities that are permitted under the CWP land use designations or zoning code, and thus there can be no impacts that have not already been addressed by the CWP EIR's analysis of buildout. *See* County Brief, p. 21:8-15 (the "inventory of sites is not, as petitioner's assert, '...specific plans where the densest housing in Marin will occur over the next 15 years,' any more than their land use designation and zoning would have allowed in 2007.")

The problem with this theory is that, once one moves beyond the base level of a buildout analysis, it quickly becomes clear that building densities and unit numbers assigned in the 2012 HE are in most instances the *maximum possible*, in some cases appearing even to exceed the maximum density that could be permitted. But this would certainly not be an inevitable result, in the absence

of the Housing Element inventory and implementation programs. Under the CWP, designated land use categories are defined as "generalized groupings of land uses that define a predominant land use type." AR 26 F2427. The CWP acknowledges that such land uses come with a range of densities:

> Residential development is designated at a full range of densities, with an emphasis on providing more affordable housing including incentives for low and very low income units, while also recognizing that physical hazards, fire risk, development constraints, protection of natural resources, and the availability of public services and facilities can limit housing development in some areas.

Id. at F2428. *See also* AR 26 F2429-2439 (charts showing range of densities.)

Here, the County is making an important initial call with respect to the balancing that must occur in deciding the appropriate scale of development, without ever having completed the most basic level of analysis to support the numbers and densities approved as part of the 2012 HE.

Designation in the inventory has legal significance due to the restrictions set forth in Government Code § 65863(b) and the formal amendment of these numbers into the CWP as a component of the Housing Element. The action raises particular concerns in areas such as Grady Ranch, where the unit numbers rise from 40 units to 240 in a single Planning Commission hearing. While 40 and 240 units may each be "consistent" and 'within the scope' of the generalized CWP land use designations, their respective impacts may differ substantially to affected communities. The same is true for numerous parcels, where the County has cobbled together an array of zoning options to achieve housing numbers that appear to exceed allowable densities. *See* AR 19 E01167-E01176.[21/]

C. THE *CITY OF NAPA* AND *BLACK PROPERTY OWNERS* DECISIONS ARE NOT ON POINT WITH THE FACTS OF THIS CASE.

The County's Brief argues that Petitioners' Opening Brief failed to cite two cases: *Black Property Owners Assn., supra,* 22 Cal.App.4th 974; and *City of Napa, supra,* 221 Cal.App.4th 192. Neither of these cases, however, addressed a factual situation remotely similar to this case.

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[21/]Site Nos. 13 (Oak Hill), 14 (Armstrong), 16 (Grady), 21 (Strawberry), 25 (Tiburon Redwood), 28 (Kentfield Westbound), 30 (Ross Valley Storage), 32 (Sunnyside Fairfax), 35 (Los Ranchitos), 36 (Big Rock Store), 37 (Rotary Field), 43 (Atherton) and 46 (Feed Lot), all raise substantial questions as to how the County managed to maximize dwelling unit numbers up to such high amounts given the zoning categories listed in the charts. *See* AR 17 D724-725, 737-739. None of these are 'Housing Overlay" sites (*see id.* at 740), yet most achieve the same densities of 30 units per acre.

1. *Black Property Owners* Is Not on Point with the Facts of this Case.

In *Black Property Owners,*[22/] the CEQA issue concerned the potential environmental impacts of a Housing Element update adopted by the City of Berkeley, in which Petitioners focused their argument on a single issue, the update's failure "to analyze adequately the effect of its rent control law on the maintenance, improvement, and development of housing in the City." 22 Cal.App.4th at 978. The court rejected this argument based on a determination that the City need not consider the environmental effects of an existing law that would not be changed as part of its CEQA process:

> Respondents have cited no authority which supports their theory that the City was obligated to evaluate the environmental effects of an ordinance exempt from CEQA when enacted, and which the City took no action to expand, amend, or change in any way....Our conclusion that *the City's acknowledgment of its existing housing-related ordinances in its update was not an aspect of the project necessitating environmental review* is consistent with the public policies underlying CEQA. The Supreme Court has observed that a fundamental purpose of an EIR is to inform the public and responsible officials of the environmental consequences of their decisions before those decisions are made. [Citations omitted] *To require an EIR on the policies embodied in the rent control ordinance, which was not subject to CEQA when it was enacted 13 years ago by the voters of the City, and which the City has taken no action to change*, would not further that statutory purpose.

Id at 986. (emphasis added.)

In contrast to *Black Property Owners,* here the issue is not the effects of the existing zoning codes on Countywide growth, but rather the environmental impacts that may follow from the 2012 Housing HE, including 1) its designation and CEQA review conducted for 49 high density sites; and 2) its determination not to comply with the restrictive HOD siting criteria utilized by the 2007 CWP. As discussed, these impacts could be significant but were never addressed in the CWP EIR.

2. *City of Napa* is Also Distinguishable.

This brief distinguishes *City of Napa* in specific contexts at Section II.A.3.d (land use element issue) and Section II.B.1 (standard of review). In addition, Petitioners offer the following.

The *City of Napa* decision involved a minor Housing Element update, which the court determined made non-significant changes to the City's Land Use Element, in particular 1) changes to increase the *minimum residential densities* in seven areas *from 10 to 40* residential units per acre *to 20 to 40* residential units per acre; and (2) changes to increase the permitted density for eight

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[22/] In fact, Petitioners did cite to *Black Property Owners* (p. 6) for the proposition that the adoption and amendment of a Housing Element are "projects" requiring CEQA compliance. Beyond that point, the case offers little guidance with respect to the facts of this litigation.

multifamily sites by a *total of 88 units*. 221 Cal.App.4th at 198 (emphases added.) Under these circumstances, the court determined there was "no dispute" that these slight changes were 'within the scope' of the prior general plan EIR. *City of Napa*, *supra*, 221 Cal.App.4th at 204.

As discussed above, the *City of Napa* decision differs in several important respects from the facts of this case, which substantially limit its applicability to this proceeding.

First, *City of Napa* did not consider the impacts of the city's housing element update separately from the changes to the minimum density standards of the general plan's land use element. As discussed in Section II.A.3, *supra*, such an approach is inappropriate in this case given the important planning decisions made in the 2012 HE that are separate from the Land Use Element.

Second, in *City of Napa*, the court emphasized the prior general plan EIR *had* analyzed the impacts of the prior Housing Element, which the court found was not substantially changed by the update. *See* 221 Cal.App.4th at 203-204 ("[T]he 1998 Program EIR analyzed the effects of the then existing Housing Element.") In contrast, here, for the first time, the County is purporting to assess the impacts of designating and analyzing the state law inventory of potential housing sites, required by the recent amendments to the Housing Law. *City of Napa* does not address this.

Finally, *City of Napa* never considered the potential impacts that should be analyzed as part of a Housing Element inventory which plans and completes CEQA review for over 2,500 units on 49 locations in the County. Instead, as discussed, *City of Napa* assesses the potential that a change in minimum density from 10 to 20 units per acre to 20 to 40 units per acre, potentially adding up to 81 new units, will be substantial. *City of Napa* also did not assess the potential that the County's change in policy regarding the siting of new dense development in sensitive areas could have the potential for cumulative environmental effects that had been found previously in the CWP EIR.

D. THE ISSUES RAISED IN THE PETITION WERE ADEQUATELY EXHAUSTED IN THE ADMINISTRATIVE PROCEEDINGS.

The County argues that Petitioners have not adequately pleaded exhaustion of issues in these proceedings. Out of an abundance of caution, Petitioners have filed a stipulated amendment to their petition adding in the pleading language (at ¶ 11) the County claims was missing, which the Court signed on January 12, 2015. Beyond that, the County has not referred the Court to any particular issue that it believes were not adequately exhausted in the administrative proceedings.

In this case, comments and testimony came mostly from citizens, making their points in practical, on the ground terms, without exhaustive reference to CEQA terms or standards, raising concerns about potential impacts from traffic, flooding, aesthetics etc., lack of adequate analysis etc. These include comments that touch on all the issues raised in this proceeding. *See* e.g., AR 290 L09853 (school impacts); L09854 - L09855 (aesthetics) L09857 (lack of alternatives analysis or cumulative impact analysis) L09854 (over-allocation of sites); AR 263 L8876-8877 (streamlining); L8879 (improper tiering); L8879-8890 (flooding, traffic and lack of utilities); *See also* AR 276 L9006-9008; 291 L9860-9871 (Grassetti comments including unlawful plan to plan comparison, alternatives, cumulative impacts); 269 L8909-8980 (comments on a range of issues); 292 L9893-9896 (comments on effect of designating housing inventory under Government Code.)

This is not an exhaustive list. If the Court is concerned about a particular item of exhaustion, Petitioners would be willing to brief that issue with more specific citations and record references.

E. THE COUNTY DOES NOT BOTHER WITH PETITIONERS' REMAINING POINTS.

The County's Opposition mostly does not address the specific issues raised in Petitioners' Opening Brief. The County does argue that the Housing Element complies with the state Housing Law. But that issue is not before the Court. The County's compliance with the Housing Element Law does not mean it has proceeded lawfully in evaluating the effects of that action under CEQA.

III. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of mandate to (1) set aside the 2012 HE and SEIR; and (2) direct the County to conduct further environmental review and analysis as required by CEQA.

DATED: January 16, 2015

By: _____
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