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**Via Email and Regular Mail**

Marin County Board of Supervisors  
3501 Civic Center Drive, Room 308  
San Rafael, CA 94903-4157

**Re: Comments on Robertson Appeal of Planning Commission Resolution  
OPC07-004; Robertson Design Reviews 05-048 - 05-050 and Lot Line  
Adjustment 05-10 for Lots at 338, 350 & 360 Arroyo Road Lagunitas**

Members of the Board:

I am submitting these comments on behalf of Salmon Protection and Watershed Network and concerned citizens of Lagunitas on the Robertson Appeal of Planning Commission Resolution OPC07-004; Robertson Design Reviews 05-048 - 05-050 and Lot Line Adjustment 05-10 for Lots at 338, 350 & 360 Arroyo Road Lagunitas. As you are aware, the Planning Commission Resolution denied the proposed development of three residences on 12.3 acres that includes two stream courses protected by the Marin Countywide Plan.

**I. INTRODUCTION AND SUMMARY**

As set forth below, the Board should follow the recommendation of its staff and action of the Planning Commission in denying this project as presently proposed since the existing negative declaration fails as an adequate informational document under the California Environmental Quality Act ("CEQA"). Thus, at the least, considerable more analysis of environmental effects is required. Further, the evidence suggests that this project has the potential for significant cumulative impacts, and thus an Environmental Impact Report (EIR) is required. Included with these comments are the expert observations and analyses of Laurel Collins, a fluvial geomorphologist at Watershed Sciences, (Referred to herein as Collins 2007), which notes a number of technical inadequacies in the current documents before the Board. The project also appears to violate several Marin Countywide Plan policies, as set forth in Section V below.

Finally, because the Planning Commission exempted its review under CEQA based on its intent to deny the project and staff has thus prepared no CEQA findings for the Board to approve, the Board cannot approve this project, since the CEQA documentation is not completed.

## II. THE NEGATIVE DECLARATION IS PRESENTLY INADEQUATE AS AN INFORMATIONAL DOCUMENT

CEQA's fundamental policy is that all public agencies "shall regulate such activities so that major consideration is given to preventing environmental damage." *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 390; Pub. Res. Code § 21000(g).

CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. CEQA Guidelines § 15002(a)(1). The environmental review document must include a description of the physical conditions in the vicinity of the project at the time environmental analysis commences. CEQA Guidelines § 15125. This environmental setting will normally constitute the baseline physical conditions by which the lead agency determines whether an impact is significant. *Id.* The County's environmental review must compare impacts of the project to this baseline, determine whether impacts are significant, and if so identify mitigation measures and alternatives to the project which may reduce or avoid the project's significant adverse impacts, thus accomplishing CEQA's basic statutory goals. *See Laurel Heights*, 47 Cal.3d 376, 400-403; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; Pub. Res. Code §§ 21002.1, 21100. This analysis of feasible mitigation measures and a reasonable range of alternatives is crucial to CEQA's substantive mandate that significant environmental damage be substantially lessened or avoided where feasible. Pub. Res. Code §§ 21002, 21081, 21100; CEQA Guidelines § 15002(a)(2) and (3).

A fundamental purpose of the environmental review process is to inform the public and foster public participation, resulting in official accountability. *Laurel Heights, supra*, at 392, 404-405. "The EIR process protects not only the environment but also informed self-government.")

The negative declaration for this project does not satisfy this informational function for a number of reasons: 1) fails to accurately characterize environmental setting; 2) fails to accurately describe the project; 3) fails to accurately calculate impacts of this project on the environment; 4) fails to adequately consider cumulative impacts in accordance with CEQA; and 5) improperly defers mitigation measures.

### 1. Negative Declaration fails to accurately characterize environmental setting

CEQA requires a full description of the environmental setting in which the project will occur. 14 Cal. Code Reg. § 15125; *San Joaquin Raptor v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 722-723. In *San Joaquin Raptor*, the court held:

[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal. App.3d 818, 829.

The error is prejudicial "if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App.3d 692, 712.)

*Id.* at 721-722.

The Project proposes a number of activities that will change both the appearance and function of the site and its riparian habitat including considerable grading, construction of driveways, installation of impermeable surface areas, septic systems and domestic wells, tree removal, and realignment of two existing intermittent drainages. To make a proper assessment regarding the potential impacts of those activities on geological, hydrological, and biological resources, it is imperative to know exactly what geological, hydrological and biological resources exist on the Project site, and how they are currently functioning. However the current project documents fail to provide that information.

First, negative declaration and project documents do not adequately characterize the landslide potential on the property. As discussed in the comments submitted by fluvial geomorphologist Laurel Collins. ("Collins 2007"). The evidence shows that the property is likely to have a perched water table at a depth of 21 feet, which is indicative of a past landslide. However the project document do not characterize or analyze this condition since they are only measuring slide potential to 5 feet. *See Collins 2007.*

Second, the negative declaration and project documents do not accurately characterize landslide potential from adjacent properties that could affect the hydrology and sediment delivery on in the project area. *See Collins 2007.*

Third, the negative declaration and project documents do not accurately characterize the condition of the perennial and intermittent stream channels on the project site and below the property to the point where both drain into a culvert discharging into Arroyo Creek. The condition of both channels on the property and immediately downstream is degraded in places and thereby susceptible to erosion and sediment deposit. *See Collins 2007.* However, the documents do not describe this condition. Further, the negative declaration and project documents do not characterize the capacity of these channels at the point of discharge either on the property or below down to the culverted discharge point above Arroyo Creek. The project documents states that the discharge will only be 1% of the 100 year flow, but the record suggests that the 100 year flow is being calculated well downstream of the more fragile channels into which this project will discharge stormwater runoff and sediment.

Fourth, the the negative declaration and project documents do not characterize the condition of downstream culverts and how the estimated 1 Cfs increase in flow will effect culvert operation and downstream channel stability. Thus, the potential that increased flow and sediment may lead to the potential for culvert failure or overflow is not analyzed.

Finally, the negative declaration and project documents do not adequately characterize the biological setting, which includes documented coho salmon in the upper reaches of the Lagunitas watershed. The recent Coho Recovery Strategy identifies a number of habitat parameters for the coho, which include native stream vegetation, large woody debris, instream sediment and substrate composition, hydrological regime, water temperature, dissolved oxygen, and extent (buffer width and % cover) of riparian forest. However such relevant downstream information is not provided in the project documents.

Each of these informational inadequacies render the negative declaration's resulting environmental analysis to be incomplete, as discussed below.

## **2. Negative Declaration fails to accurately describe the project**

CEQA requires that the environmental review document contain a full and accurate description of the proposed project. *See e.g. Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal. App.3d 357, 366; *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal. App.3d 818, 829-831; *County of Inyo v. UCB of Los Angeles* (1977) 71 Cal. App. 3d 185; 14 Cal. Code Reg. § 15124. As the *County of Inyo* court noted:

Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e. the "no project" alternative) and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.

71 Cal. App. 3d at 192.

Here the negative declaration and project documents do not adequately describe the project in a number of respects.

First, the negative declaration and project documents do not describe how it is measuring impacts to the perennial creek on the property and downstream to the culvert. As discussed above, the project documents do not explain the percentage additional flow that will be deposited into each of the two stream channels on the property.

Second, the negative declaration and project documents do not appear to provide information as to the amount of increase of surface water runoff due to impermeable surfaces and changed hydrology on the property due to the project. For example, the negative declaration does not clarify that surface water runoff from rooftops, drains, patios, gutters, ditches, etc. have been considered. Further the project documents provide no information as to how drainage patterns may change due to the proposed road repair and retaining wall. As set forth in *Collins 2007*, the retaining wall

structure will trap groundwater flow and turn it to surface water flow, thereby increasing the loading in storm events. However, no information is provided regarding this potentially significant impact.

Third, by deferring mitigation measures, as discussed below, the project documents avoids describing key components of the project, including mitigation measures that are necessary to reduce sedimentation, loss of riparian canopy, pollutant discharge etc.

### **3. Negative Declaration fails to accurately calculate impacts of this project on the environment**

The environmental review process under CEQA is “the primary means of achieving the Legislature's considered declaration that it is the policy of this state to "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." *Laurel Heights, supra*, 47 Cal.3d at 392, The environmental review process is an "environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Id.*; *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal. App.3d 818, 822. The process is intended "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." *Id.*

To fulfill these purposes, the environmental review document under CEQA must conduct an accurate and informed assessment of project impacts. However, here the negative declaration fails to conduct such an analysis, based in part on the informational inadequacies discussed above.

The negative declaration and project documents do not provide a quantitative assessment of the Project's potential short-term or long-term, onsite or offsite, direct and cumulative adverse impacts on geology/soils (hillslope stability, erosion), hydrology, stream channel stability, water quality, or aquatic habitat, or impacts on listed salmonid species occurring downstream.<sup>1</sup> The negative declaration and project documents present no information regarding the current quality of the watersheds containing coho with respect to relevant habitat parameters outlined in the Coho

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<sup>1</sup>For example, the DEIR for the Marin Countywide Plan Update describes the coho salmon and steelhead trout in the County as follows:

Coho Salmon and Steelhead Trout – Coho salmon and steelhead trout are both listed as threatened under the federal ESA within the Central California Coast Evolutionarily Significant Unit. These species are anadromous, spawning in coastal streams and rivers, then migrating to, and maturing in the ocean. Both of these species are known to occur in streams within Marin County. Exhibit 4.6-2 indicates streams with established or historic records of these species. Where a record of salmon or steelhead has been reported from a stream, generally the entire drainage has been indicated as supporting the species, although habitat conditions have not always been confirmed in the field.

Recovery Strategy such as instream flows necessary to support salmonids along developed reaches (low flow as well as excessive winter flows associated with runoff), streambed alteration, disturbance of natural vegetation (existing stands and recruitment patterns to sustain native forests into the future), disrupted hydrological processes and reduced stream complexity, degradation of soil function, impaired water quality, barriers to passage of both adult and juvenile salmonids, and degraded biological diversity and habitat suitability.

As noted in exhibits submitted to the County, the impacts of residential construction on salmonids can be significant. For example, the Coho Recovery Strategy notes:

Land-use practices such as urbanization, agricultural activities, and timber harvest can alter natural hydrologic cycles and impact stream flows, peak flows, flow timing, and flood frequencies. Alteration of the natural hydrological cycle can in turn create significant impacts to coho salmon and their habitat. Impacts to coho salmon can include increasing juvenile and adult mortality by delaying migration because of insufficient flows, stranding fish during rapid flow fluctuations; decreased food supply because of reduced invertebrate drift, and increasing mortality due to higher water temperatures (California Advisory Committee on Salmon and Steelhead Trout [CACSSST] 1988; CDFG 1991; Berggren and Filardo 1993; Reynolds et al. 1993; Chapman et al. 1994; Cramer et al. 1995; NMFS 1996). In addition to these factors, alteration of the natural hydrograph can increase deposition of fine sediments in spawning gravels, decrease recruitment of LWD and spawning gravels; it may also lead to encroachment of riparian and non-endemic vegetation into spawning and rearing areas (e.g., on the Trinity River) (CACSSST 1988; Forest Ecosystem Management Assessment Team 1993; Botkin et al. 1995; NMFS 1996).

See Exhibit A, p. 3.12. The Coho Recovery Strategy, p. 3-19, also finds that:

Urbanization can cause severe and permanent alteration of the natural vegetation by its removal or conversion to lawns and ornamental plants. In upland areas this can contribute to erosion and altered drainage, often reducing infiltration and increasing surface runoff. However, impacts are particularly severe in riparian corridors where vegetation is commonly removed to increase the visibility of and access to streams and to allow the installation of landscaping and structures very near the tops of stream banks. Loss of riparian vegetation reduces inputs of nutrients, recruitment of LWD, and stream-bank stability (Booth 1991; Spence et al. 1996). It also leads to an increase in stream temperature by removing much of the overhead canopy (Booth 1991).

Further, the Coho Recovery Strategy, p. 3.19 - 3.20, notes that:

Construction and landscaping near streams is often followed by the installation of retaining walls and other hard structures intended to protect or enlarge developed areas. This results in severely constricted streams with disabled or altered hydrological and riparian processes. Furthermore, in developed areas, much of the surface soil is covered by impervious surfaces

(buildings, parking lots, roads) which increase peak flows and change channel characteristics. These changes produce measurable effects in the hydrologic response of a drainage basin, particularly an increase in maximum discharge associated with floods and an increase in frequency of flooding (Klein 1979; Booth 1991)... Not only do impervious areas increase peak flow, they also block infiltration into the soil (Klein 1979; Booth 1991), thus decreasing the ability of the basin to store precipitation and reducing summer base flows (Spence et al. 1996). These changes occur primarily because of increases in the impervious surface area and the replacement of complex, natural drainage channels with a network of storm pipes and drainage ditches (Lucchetti and Fuerstenberg 1993, as cited in Spence et al. 1996). Clearing of vegetation, compaction of soil, installation of roads and other impervious surfaces, grading of depressions, and direct interception of subsurface flows by drains can lead to irreversible effects to drainage basin hydrology.

The Coho Recovery Strategy, p. 3.21, finds that the many different potential adverse effects of streamside development, unregulated agriculture, and other activities constitute a significant cumulative threat to coho:

The structure of the biological community and abundance and diversity of aquatic organisms are greatly altered by urban impacts on channel characteristics and water quality. Wang et al. (1997) found that high urban land use was strongly associated with poor biotic integrity and was associated with poor habitat quality. Fish populations are also adversely affected by urbanization. Limburg and Schmidt (1990, as cited in Spence et al. 1996) found a measurable decrease in spawning success of anadromous species in Hudson River tributaries that had 15% or more of the watershed in urban development. Wang et al. (2003) found a strong negative relation between urban land cover in the watershed and the quality of fish assemblages in coldwater streams in Wisconsin and Minnesota. In a study of urbanized Puget Sound streams, Lucchetti and Fuerstenberg (1993, as cited in Spence et al. 1996) found that coho salmon appeared to be more sensitive than cutthroat trout (*O. clarki*) to habitat alteration, increased nutrient loading, and degradation of the intergravel environment. They found that as impervious surfaces increased, coho salmon abundance declined, and concluded that coho salmon are of particular concern in urbanized areas because of their specific habitat needs (smaller streams, relatively low velocity microhabitats, and large pools). Other recent studies have documented that pollution associated with urban areas is causing impacts to juvenile Chinook salmon, including suppressed immune response due to bioaccumulation of PCBs and PAHs, increased mortality associated with disease, and suppressed growth (Spence et al. 1996).

Further, the Marin Countywide Plan Update DEIR states that:

The unprotected natural areas that remain, primarily in the City-Centered and Inland Rural Corridors, are subject to continued development pressures, contributing to declining water quality, habitat conversion and fragmentation. Protecting and enhancing habitat connectivity and functional movement corridors between the remaining natural areas is essential to

sustaining populations and allowing for the continued dispersal of native plant and animal species. Natural linkages include the undeveloped baylands and shorelines, riparian corridors and drainages, undeveloped ridgelines, and corridors across valley floors where impermeable barriers such as dense urban development, exclusionary fencing, and heavily traveled roadways have not yet eliminated options for wildlife movement and plant dispersal. While narrow corridors may be the only option in some locations due to the extent of existing development, habitat linkages are most effective through maintenance of a permeable landscape (i.e., one that allows for uninhibited movement of species across large areas).

Relatively few studies or maps of opportunities to maintain and enhance biodiversity and habitat connectivity have been prepared that address resources in Marin County or the state as a whole..... the Missing Linkages conference report identified nine habitat linkages for the North Coast and Bay Area Ecoregions encompassing the Marin County vicinity.... However, they do not address fragmentation on the local level, nor do they address the need to protect habitat connectivity and provide for movement corridors between core areas and important natural communities in the county.

CWP Update DEIR, p. 4.6-19, 4.6-21. These conclusions are substantiated by other documents submitted into the record.

Further, as discussed in the sections above, the negative declaration does not adequately describe the environmental setting and project, which leads to a lack of accurate analysis on specific points with the potential to impact downstream salmonids as well as contribute to existing violations of water quality standards for the watershed relating to sediment, pathogens and nutrients.

First, the negative declaration and project documents do not describe the effect of the road cut on slope stability and surface water runoff. As note in Collins 2007, the project documents' analysis of the road repair does not account for the possibility of landslides occurring below 5 feet underground, and the analysis of the installation of a retaining wall does not account for increased surface flows due to changed hydrological patterns.

Second, the negative declaration and project documents do not explain how they are measuring impacts to the creeks on the property. The project documents state that flow will be increased by only 1% but the documents suggest that this percentage is taken from a total flow downstream of the property, at the point where flow is discharged into Arroyo Creek. This calculation does not address the effect of the increased flow at the *actual point of discharge* on the stream. See Collins 2007. Since the channels of both onsite streams are fragile and susceptible to erosion, the project documents thus fail to calculate this potential impact.

Third, the negative declaration and project documents do not describe how impacts to downstream creeks are being measured. The documents do not appear to include any discussion of the condition of downstream culverts and how 1 Cfs will effect culvert operation and downstream channel stability. See Collins 2007.

Fourth, as discussed, the negative declaration and project documents do not accurately characterize amount of increased runoff and thus the assumption that the project will only generate 1 Cfs in additional maximum flow is flawed. Increased flow due to runoff from a range of impermeable surfaces, ditches, gutters and drains has not been analyzed in the project documents, yet has the potential to significantly increase overall discharge to the onsite streams. *See Collins 2007.*

Fifth, the negative declaration and project documents do not address the potential that increasing flow to the creeks on the project will lead to significant sedimentation due to poor condition of existing channels. *See Collins 2007.*

Sixth, the negative declaration does not address how these impacts will affect salmonids nesting and rearing immediately downstream of the project site since it does not describe the habitat parameters that ensure the continued health and survival of this species. *See also CWP Policy EQ-2.88.*

#### **4. Negative Declaration fails to adequately consider cumulative impacts in accordance with CEQA**

As set forth in the CEQA guidelines the cumulative impact from several projects is "the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects." 14 Cal Code Reg. § 15355(b.)

Here, the Negative Declaration assumes that adverse effects such as increase sedimentation, pathogens and nutrients will occur, but finds that these impacts will be "minimized" by best management practices and thus not significant under CEQA. This approach violates CEQA because it fails to assess the cumulative impacts of this project in conjunction with 1) the existing environmental setting representing the cumulative impacts of past projects and activities; and 2) other present and future projects within the watershed.

##### **a. Negative Declaration Does Not Acknowledge that Incremental Impacts to Existing Significant Impacts Must be Characterized as Significant Under CEQA**

Where impacts due to loss of habitat are already significant, even seemingly *de minimus* incremental impacts are "significant." The court in *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App.3d 692, 720-721, succinctly summarized the problem:

. . . We find the analysis used in the EIR and urged by GWF avoids analyzing the severity of the problem and allows the approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling. Under GWF's 'ratio' theory, the greater the overall problem, the less significance a project

has in cumulative impacts analysis. We conclude the standard for a cumulative impacts analysis is defined by the use of the term 'collectively significant' in Guidelines section 15355 and the analysis must assess the collective or combined effect of energy development. The EIR improperly focused upon the individual project's relative effects and omitted facts relevant to an analysis of the collective effect this and other sources will have upon air quality.

In *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal. App. 4th 98, the Court of Appeals rejected proposed regulations allowing for “de minimus” cumulative impacts to be ignored by the regulatory agency:

[T]hese two Guidelines ...contravene the very concept of cumulative impacts. Their application would turn cumulative impact analysis on its head by diminishing the need to do a cumulative impact analysis as the cumulative impact problem worsens. The reason for this incongruity is that the de minimus approach ...compares the incremental effect of the proposed project against the collective cumulative impact of all relevant projects. This comparative approach is contrary to CEQA section 21083 and to the Guidelines section 15355 definition of cumulative impacts, set forth above; this approach also contravenes CEQA case law.

*Id.* at 117-118.

Here, the project will have increase existing significant impacts by causing the discharge of additional sediment, pathogens and nutrients, each of which are water quality impairing pollutants within the watershed for which TMDLs are currently being prepared. However, the negative declaration finds these impacts will not be significant due to best management practices that will “minimize” such impacts. This is approach violates CEQA because it ignores the existing significant impact and does not acknowledge that the only way to eliminate existing water quality impairment in the future may be to strictly prohibit new development from discharging such pollutants. *See e.g. Communities for a Better Environment v. California Resources Agency, supra; Kings County Farm Bureau v. City of Hanford.*<sup>2</sup>

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<sup>2</sup>*See also Los Angeles Unified School District v. City of Los Angeles* (1997) 58 Cal. App. 4th 1019, 1025-1026 (“[T]he relevant issue to be addressed in the EIR on the plan is not the relative amount of traffic noise resulting from the project when compared to existing traffic noise, but whether any additional amount of traffic noise should be considered significant in light of the serious nature of the traffic noise problem already existing around the schools. We do not know the answer to this question but, more important, neither does the City; and because the City does not know the answer, the information and analysis in the EIR regarding noise levels around the schools is inadequate.”)

**b. The Project will combine with other future projects to have significant impacts on the environment**

As discussed above, the Negative Declaration assumes that the minimization of adverse impacts to stream quality, bank stability, riparian canopy and other environmental criteria on a *project by project* basis will ensure that Significant impacts do not occur. This approach is also contrary to CEQA. See 14 Cal Code Reg. § 15355(b) (“cumulative impacts can result from "individually minor but collectively significant projects taking place over a period of time." )

As has previously been disclosed there are numerous undeveloped private lots within the Lagunitas watershed, whose cumulative effects from development have never been adequately addressed as part of a meaningful effort by the County to establish a programmatic guidance document to direct how projects may proceed in the future without having cumulative effects on the watershed.<sup>3</sup> As set forth in *EPIC v. Johnson* (1985) 170 Cal. App.3d 604:

To address the cumulative effect issue the Department has taken the tact [sic] that if the adverse effects are minimized to the maximum on each individual operation, then the total effect in the surrounding area will also be minimized to an acceptable level...This statement is at odds with the concept of cumulative effect, which assesses cumulative damage as a whole greater than the sum of its parts. The Guidelines define "cumulative effect" as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." (Guidelines, § 15355) Such impacts may be of past, present or future existence.

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<sup>3</sup>The CWP Updated DEIR provides some information about the existing setting regarding development potential in the County. The DEIR states:

[A] total of 5,391 housing units would occur in the unincorporated area as a result of buildout of the Draft 2005 CWP Update land use plan. Specific occurrences of special-status plant and animal species (i.e., as monitored by CNDDDB) extend over portions or all of the parcels where 12.8 percent of the housing (approximately 690 units) would be located. .... Of the projected 1,236,781 square feet of nonresidential floor area that would occur in unincorporated Marin County, 5.1 percent (approximately 62,800 square feet) would occur on parcels where specific occurrences of special-status species (i.e., as monitored by the CNDDDB) extend over portions or all of the parcel.....In general, further site assessment would be necessary to determine whether an undeveloped parcel supports a population or essential habitat for special-status species, and to evaluate the significance of potential impacts accurately.

DEIR, p. 4.6-31. Based on this analysis, the County has information regarding the development potential within the Lagunitas Watershed that could be assessed, but has not been in this project review.

*Id.* at 624-625.

At this time, the County lacks any identified habitat thresholds based on existing data that would serve to guide the County's assessment of whether the development envisioned under the CWP Update would be significant. The County has no information about the potential habitat quality that would remain were full buildout of undeveloped parcels allowed to occur. This lack of quantitative cumulative analysis raises concerns due to the incremental adverse effects of streamside development on coho habitat. The County's parcel by parcel approach on this critical issue does not meet CEQA standards. *EPIC v. Johnson* (1985) 170 Cal. App.3d at 624-625.

#### **5. Negative Declaration improperly defers mitigation measures.**

The negative declaration defers the preparation of several critical mitigation measures including the development of an Erosion Control Plan, a Stormwater Pollution Prevention Plan and a Runoff Management Plan. As set forth in Collins 2007, this project has the potential to cause significant effects due to the increased discharge of pollutants. How such pollutants will be controlled is critical, yet the project proposes to defer preparation of these plans until *after* project approval.

In *Sundstrom v. County of Mendocino* (1988) 202 Cal. App.3d 296, 307, the court rejected the use of future studies as a mitigation measure for project impacts. Subsequent decisions have found such deferral appropriate when an EIR is prepared, but only in certain circumstances provided that 1) the EIR identifies extensive, alternative mitigation measures, 2) measurable performance standards are established in the EIR that will ensure the avoidance of significant impacts, and 3) the information presented in the EIR reasonably supports a conclusion that some combination of the range of proposed mitigation measures in the EIR will meet the performance standards. *See also Sacramento Old City Association v. City Council of Sacramento* (1991) 229 Cal. App.3d 1011, 1018; *Gentry v. City of Murrieta* (1995) 36 Cal. App.4th 1359, 1394-1396.

Here, the project is proposing to defer mitigation through the adoption not of an EIR but a negative declaration. Further, here there is no indication that the "plans" discussed above can avoid additional pollutant discharge, including sediment, into the sensitive streams on the property and into the watershed as a whole. The mitigation establishes no performance standards that would be monitored to ensure the avoidance of future significant impacts once the project is built. Further, the negative declaration fails to explain why the development of such measures is currently impracticable, and fails to provide information to ensure that some combination of the mitigation measures proposed will meet the performance standards.

In addition, the negative declaration's reliance on future consultation and/or permits to be acquired from other state and federal agencies who insure that potentially significant impacts will be avoided does not change this result because by that time, the Project may have already been approved by the County without having had that information before it. Deferring the preparation of surveys and/or the analysis and development of mitigation measures to minimize or avoid impacts to rare, threatened or endangered species may cause an opportunity to positively change the project to avoid

such impacts to be missed prior to project approval, making it much more difficult to make substantial project changes or substantial project re-designs that may be required. CEQA requires environmental review and analysis at the earliest feasible opportunity to avoid just such problems.

Further, the County has a separate and distinct independent duty under CEQA to assess and address potential impacts to endangered species, a duty that is apart from any placed upon the United States Fish and Wildlife Service (to enforce the federal Endangered Species Act), or the Regional Board, United States Army Corps of Engineers and the Federal Environmental Protection Agency (to enforce the Clean Water Act). Accordingly, it is inappropriate for the County to completely pass off the responsibility of assessing and addressing impacts related to biology (rare, threatened or endangered species), or water quality to such agencies because its duties are different than the Town's under CEQA. While those agencies may have jurisdiction over species or project impacts because of the federal laws they have been entrusted to enforce, that does not allow the City to ignore its specific duties under CEQA, which work in conjunction with and in addition to other federal laws to address project impacts. *See Citizens for Quality Growth v. City of Mount Shasta* (1988) 198 Cal. App.3d 433, 443, n 8 (agencies cannot refuse to consider mitigation measures simply because another agency with subsequent permitting responsibility may have the power to address certain significant impacts.”)

Another point is that while mitigation measures are intended to minimize potential impacts, sometimes they can actually lead to additional impacts that may also need to be minimized or avoided. Such a situation appears to be true with regard to the construction of the retaining wall, which may affect hydrological patterns in ways that are currently unanalyzed in the project documents. Indeed, mitigation measures to alleviate landslides and unstable soils, many of which, such as removal of soil or deep drilling, are likely to create their own potentially significant impacts. While each of these measures have been proposed to address potential project impacts, due to their ability to cause possible unintended environmentally damaging side effects, the County cannot ignore them and must conduct analysis of any potential unintended damaging side effect of a required mitigation measure or alternative.

Finally, a mitigation measure must be designed to minimize, reduce or avoid an identified environmental impact or to rectify or compensate for that impact. CEQA Guidelines § 15370. Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments. *Id.* at § 15126.4(a)(2). An agency may not rely on mitigation measures of uncertain efficacy or feasibility. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App.3d 692, 727-28 (finding groundwater purchase agreement to be an inadequate mitigation measure because of no record evidence that replacement water was available).

### **III. County Must Prepare an EIR for this Project Due to the Potential for Significant Impacts**

The “primary means” by which the legislative goals of CEQA are achieved is the preparation of an EIR. *Laurel Heights, supra*, 47 Cal.3d at 392; Pub. Res. Code §§ 21080(d), 21100, 21151; 14

Cal. Code Reg. § 15080. The EIR has been described as “an environmental ‘alarm bell’ whose purpose is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.” *County of Inyo v. Yorty* (1973) 32 Cal. App.3d 795, 810. An EIR is intended to serve as “an environmental full disclosure statement.” *Rural Land Owners Assn. v. City Council of Lodi* (1983) 143 Cal. App.3d 1013, 1020.

Under CEQA, 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.” *See e.g., Pocket Protectors v. City of Sacramento* (2004) 124 Cal. App. 4th 903, 927. “May” means a reasonable possibility. *Id.* Here, there is substantial evidence in the record that this project could have significant impacts for several reasons. (*See Collins 2007*)

First, as discussed above, the increased amount of impervious surface areas and drainage mechanisms will increase flow, and also erosion and sedimentation into the perennial stream channel on the property, thereby causing further damage to the channel and increased erosion downstream. The evidence further shows that downstream, increase Cfs flows and sediment loading may lead to further erosion and sedimentation due to existing culverts and stream channels that are in poor condition and subject to erosion.

Second, there is a reasonable possibility that the hydrologic changes being proposed for this project may cause landslides, which have occurred in the past, and which would discharge increased amounts of sediment into the stream channel.

Third, there is a reasonable possibility that the septic systems proposed for the residences in this project will contribute to increased pathogens and nutrients in the watershed due to the foreseeable seepage into the streams on the property.

Each of these impacts will contribute to the existing water quality impairments for the watershed for sediment, pathogens and nutrients. Thus, each must be considered a potentially significant impact, thereby requiring the preparation of an EIR. Further, each of these impacts have the potential for adverse effects on downstream salmonid habitat, thereby potentially restricting the range of a listed species, which requires a mandatory finding of significant impact under the CEQA Guidelines, 14 Cal. Code Reg. § 15065(a)(1). Here, the County lacks any approved habitat conservation plan that might allow for such adverse effects to occur without the preparation of an EIR. *See* 14 Cal. Code Reg. § 15065(b)(2).

Further, as discussed below, the project has the potential to conflict with several general plan policies, which also requires the preparation of an EIR. *See e.g., Pocket Protectors v. City of Sacramento* (2004) 124 Cal. App. 4th 903, 930 (“[I]f substantial evidence supports a fair argument that the proposed project conflicts with the policies of the [general plan] this constitutes grounds for requiring an EIR.”)

#### IV. THE PROJECT IS INCONSISTENT WITH THE COUNTYWIDE PLAN

The project as proposed is not consistent with several General Plan requirements. The City's approval of a project inconsistent with the General Plan would be *ultra vires* and contrary to law. *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal. App.4th 342, 379; *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal. App. 4th 1332, 1340-1342.; *Orinda Assn. v. Board of Supervisors* (1986) 182 Cal. App.3d 1145, 1162, fn. 10.

Here, the Project as proposed does not allow the County to make the required findings to support consistency with the General Plan. *See Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 (findings required by agency's discretionary decision.)

First, the Negative Declaration and project documents correctly find that each stream on the property is subject to the 100 foot buffer zone protections of the Stream Conservation Areas (SCA) set forth in the CWP, Policy EQ-2.3. However, in considering whether "development" occurs within the SCA, the project documents do not fully acknowledge that the construction of a road is a prohibited use in the SCA. *See* CWP Policy EQ-2.5. Thus, the documents do not go on to make the required findings that might allow a road to be built, ie that it can be conclusively demonstrated that such development "on any other part of the parcel would have more adverse effect on water quality or other environmental impacts."

Second, the project documents propose that new septic systems are an "allowable use" within the SCA. However, CWP Policy EQ-2.4 does not list septic systems as an allowable use. Further, there is no evidence in the record that the location of septic systems within the SCA meets the standards of CWP Policy EQ-2.6.

Third, the project documents do not support a finding that the removal of vegetation has been "minimized or avoided whenever possible." CWP Policy EQ-2.8 - 2.9.

Fourth, the project documents do not support a finding that surface runoff rates in excess of pre-development levels have not been allowed because a new problem will be created or because the runoff will exacerbate an existing problem. CWP Policy EQ-2.19. As discussed above, each of these factors exist.

Fifth, the project documents do not support a finding that "on site facilities for the retention of sediments or contribution toward regional sediment control measures" have been provided or are even being proposed. CWP Policy EQ-2.20.

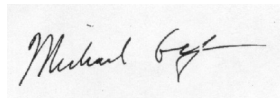
Finally, the project documents do not support a finding that the approval of this project, as part of the County's current parcel by parcel assessment of development impacts, will "ensure the continued health and survival" of coho salmon in the Lagunitas watershed. CWP Policy EQ-2.88.

As discussed above, the County lacks a habitat conservation plan or any other programmatic document that would provide such assurance. Thus this required finding would be unsupported as well.

**V. THE PLANNING COMMISSION DID NOT ADOPT THE NEGATIVE DECLARATION AND THUS THERE ARE NO PROPOSED CEQA FINDINGS AT THIS TIME**

The Planning Commission exempted its review under CEQA based on its intent to deny the project. As a result, staff has prepared no CEQA findings for the Board to approve. Thus, as a procedural matter, the Board cannot approve this project, since the CEQA documentation is not completed. *See e.g., Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 (agency required to make findings to support its decision at the time of approval.)

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael Graf", is centered on a light-colored rectangular background.

Michael W. Graf

(On Behalf of Salmon Protection and concerned citizens of Lagunitas )