



PLACER COUNTY PLANNING SERVICES DIVISION

AUBURN OFFICE
 3091 County Center Dr, Auburn, CA 95603
 530-745-3000/FAX 530-745-3080
 Website : www.placer.ca.gov
 E-mail : planning@placer.ca.gov

TAHOE OFFICE
 775 North Lake Blvd., Tahoe City, CA 96146
 PO Box 1909, Tahoe City, CA 96146
 530-581-6280/FAX 530-581-6282

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JUL 09 2012

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PLANNING APPEALS

The specific regulations regarding appeal procedures may be found in the Placer County Code, Chapters 16 (Subdivision), 17 (Planning and Zoning), and 18 (Environmental Review Ordinance).

-----OFFICE USE ONLY-----

Last Day to Appeal _____ (5 pm)

Letter _____

Oral Testimony _____

Zoning C.U.-UP-DC

Maps: 7-full size and 1 reduced for Planning Commission items

Appeal Fee \$ 529

Date Appeal Filed 7-9-12

Receipt # 12-0082698

Received by S

Geographic Area HB/Penryn

-----TO BE COMPLETED BY THE APPLICANT-----

1. Project name ORCHARD at PENRYN

2. Appellant(s) Stop 150 Apartments Group 916-677-7825

Telephone Number _____ Fax Number _____

Address 2991 Taylor Road Loomis CA 95650

City _____ State _____ Zip Code _____

3. Assessor's Parcel Number(s): 043-060-052 and 043-060-053

4. Application being appealed (check all those that apply):

- Administrative Approval (AA-____)
- Use Permit (CUP/MUP-____)
- Parcel Map (P-____)
- General Plan Amendment (GPA-____)
- Specific Plan (SPA-____)
- Planning Director Interpretation _____ (date)
- Minor Boundary Line Adj. (MBR-____)
- Tentative Map (SUB- 20070521)
- Variance (VAA-____)
- Design Review (DSA-____)
- Rezoning (REA-____)
- Rafting Permit (RPA-____)
- Env. Review (EIAQ-____)
- Other: FEIR Certification

5. Whose decision is being appealed: Planning Commission
(see reverse)

6. Appeal to be heard by: Board of Supervisors
(see reverse)

7. Reason for appeal (attach additional sheet if necessary and be specific):
PLEASE SEE ATTACHED LETTER

(If you are appealing a project condition only, please state the condition number)

Note: Applicants may be required to submit additional project plans/maps.

Signature of Appellant(s)

[Signature] Marilyn Davis
[Signature] Carol Van Ness

July 04, 2012

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Bobby Uppal
Representative of the "Stop 150 Apartments" Group
2991 Taylor Road
Loomis CA 95650

Subject: Notice of Appeal of Planning Commission Decision concerning the Orchard at Penryn

Dear Mr. Johnson:

This letter shall serve as formal submittal of an appeal by the Residents of Loomis & Penryn regarding the Planning Commission's decision on June 28, 2012 approving the Orchard at Penryn Vesting Tentative Subdivision Map and Conditional Use Permit (PSUB 20070521). The appeal includes the decision of the Planning Commission in certification of the FEIR prepared for the project. This appeal is being submitted in compliance with Section 17.60.110 of the Placer County Code.

The Residents believe the Planning Commission acted in error and that Placer County failed in its public duty to satisfy the requirements of the California Environmental Quality Act ("CEQA") and land use and planning law with respect to the project and the associated FEIR.

The Residents will be preparing and submitting additional explanatory materials in support of this appeal within thirty (30) days of the date of filing the appeal as provided for in C(1) of 17.060.110 of the Placer County Code.

We have also attached the required completed appeal form and check in the amount of \$529.00. If you have any questions, don't hesitate to give me a call at 916-677-7825.

Sincerely,



Bobby Uppal
Representative of the "Stop 150 Apartments" Group

August 7, 2012

Via Hand Delivery

Hon. Jennifer Montgomery and Members of the
Placer County Board of Supervisors
175 Fulweiler Ave.
Auburn, CA 95603

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Re: Administrative Appeal Supplemental Information – Orchard at Penryn Project: Vesting
Tentative Subdivision Map/Conditional Use Permit (PSUB 20070521) and Final
Environmental Impact Report.

Dear Chair Montgomery and Members of the Board of Supervisors:

I write on behalf of my client, the Stop 150 Apartments Group, an unincorporated association of residents of the Penryn area, to provide supplemental information in support of their July 9, 2012 administrative appeal of the above Project approvals and EIR certification adopted by the Planning Commission on June 28, 2012. This letter incorporates by reference all objections previously raised and on file regarding the Project to date including, but not limited to, all prior objections raised by the Stop 150 Apartments Group’s members and the Town of Loomis.

I. VIOLATIONS OF STATE PLANNING AND ZONING LAW AND LOCAL ORDINANCE CODE.

The Project, as described in the EIR and approved by the Planning Commission, proposes to build 150 apartments on two parcels (one 5 acre and one 10 acre) in what the Horseshoe Bar/Penryn Community Plan (“Plan”) refers to as the Penryn Parkway. (Plan, pp. 79-81.) Penryn Parkway is intended to provide a commercial core for local residents and to also provide some highway services for travelers. (Plan, p. 80.) Penryn Parkway is given unique development policies in the Plan, which, while emphasizing commercial uses, does allow for multi-family housing. However the Plan specifies any such development “shall” be of “relatively low density” and “clustered together in such a way as to preserve the maximum amount of undeveloped open space on-site.” (Plan, p. 81, Development Policies d. and i.) The Plan precisely defines low/medium/high density and provides that high density is allowed only in one location at the far southwest portion of the Plan comprising 12 acres of land adjacent to Auburn-Folsom Rd. area, to recognize an older mobile home park predating the Plan. (Plan, p. 25.)

From the time the Project was first presented as an information item at a 2007 Municipal Advisory Committee (MAC) meeting, the community has consistently objected to the Project as fundamentally inconsistent with the character of the surrounding community, and because the Project does not comply with the express and mandatory requirements of the Horseshoe Bar/Penryn Community Plan, or the County’s Zoning Ordinance. Despite these undeniable

facts, County staff appears to have assumed the Project must be rubberstamped at the proposed 150 units, simply because that is what the developer has proposed. Except for providing the developer with windfall profits at the expense of the local community, there is no need that drives such high densities. In sum, staff and the Planning Commission have impermissibly dismissed lower density alternatives because they don't meet the developer's objectives, despite the fact that those objectives, on their face, violate the plain language of the Plan.

The "consistency doctrine" is the "linchpin of California's land use and development laws; it is the principle which infuse[s] the concept of planned growth with the force of law." (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1336 ("FUTURE").) The consistency doctrine requires that any decision affecting land use and development must be consistent with the overlying general plan, area plan and zoning. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 772.) Any attempt to approve a project that is inconsistent with the overlying general plan, area plan and/or zoning, is a legislative nullity, or void *ab initio*. (*Leshar Communications Inc v City of Walnut Creek* (1990) 52 Cal.3d 531, 540-541; *Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 783.) The County's Zoning Ordinance confirms that "any land use or development approved according to the requirements of this chapter will also be consistent with the Placer County general plan and any applicable community plan." (Ordinance Code, § 17.02.020.)

While local agencies are ordinarily granted liberal discretion to apply their general plans, area plans and zoning to specific projects, agencies have no discretion to approve projects that violate the specific, mandatory requirements of such overlying land use laws, and the courts do not defer to decisions that violate such mandatory policies and ordinances. (*FUTURE, supra*, 62 Cal.App.4th at p. 1340.) For example, in *FUTURE*, the court invalidated the approval of a residential subdivision, where the project would violate a mandatory general plan policy disallowing low-density residential development in specified areas. The Court in *FUTURE* expressly rejected the County's argument that violation of only one general plan policy could not invalidate its approval of the project, precisely because the policy was stated in mandatory language. (*Id.* at pp. 1341-42.)

The consistency doctrine, however, also requires more than that a project must merely comply with "mandatory" goals and policies stated in a land use agency's general plan: *any* project approval – such as the Planning Commission's approval of the Orchard at Penryn project, in this case – violates the doctrine to the extent that the agency's record of proceedings demonstrates that implementation of the project would frustrate the goals and policies of a general or area plan:

[T]he consistency doctrine requires more than that [subsequent project approvals] recite goals and policies that are consistent with those set forth in the County's General Plan. . . . [C]ases such as *FUTURE v. Board of Supervisors*, do not require an outright conflict between provisions before they can be found to be inconsistent. The proper question is whether development of the Project Area under the [subsequent project approval] is compatible with and will not frustrate the General Plan's goals and policies. If the [subsequent project approval] will

frustrate the General Plan's goals and policies, it is inconsistent with the . . . General Plan unless it also includes definite affirmative commitments to mitigate the adverse effect or effects.

(*Napa Citizens, supra*, 91 Cal.App.4th at p. 379. "The County also points out, correctly, that the cases that have struck down a specific plan for inconsistency with a general plan, have concerned more than a failure to implement the general plan's goals and policies." *Id.*)

Of the two parcels that constitute the Project site, the 10 acre parcel touches Taylor Rd. and is zoned RM-DL10 PD10, while the 5 acre parcel fronts on Penryn Rd. and is zoned C1-UP-DC. Planning Staff has asserted the Plan "does not specify an allowable density or establish minimum or maximum lot sizes. Therefore density is generally determined by the zoning designation." (See e.g., page 8 of the Staff report to the Planning Commission.) Based on this assertion, staff has asserted the zoning for the 5 acre parcel would, therefore, allow 21 dwellings per acre.

The problem here is that the County's Zoning Ordinance states, "It is the intent of the Placer County board of supervisors that this chapter be adopted and maintained so as to be consistent with the Placer County general plan and applicable community plans, and that any land use or development approved according to the requirements of this chapter will also be consistent with the Placer County general plan and any applicable community plan." (Ordinance Code, § 17.02.020(B).) The County's Zoning Ordinance goes on to provide that when there is a conflict between a community plan and zoning, the community plan prevails: "When conflicts occur between the provisions of this chapter and standards adopted by ordinance in any applicable community plans, including those areas within the jurisdiction of the Tahoe Regional Planning Agency (TRPA), the provisions of the community plans shall apply." (Ordinance Code, § 17.02.050(D)(2).) The County Code further states: "No land shall be subdivided and developed pursuant to a vesting tentative map for any purpose which is inconsistent with the general plan and any applicable specific plan, or is not permitted by the zoning ordinance or other applicable provisions of the Placer County Code." (Ordinance Code, § 16.24.030.)

There are many clear conflicts between the Project and the Plan. Yet, in each instance, staff impermissibly relies on zoning designations subservient to the Plan to assert the Project is consistent with the County's applicable land use laws.

Contrary to staff's assertions, the Plan does establish allowable densities in the Project area, stating at Penryn Parkway Development Policy d.: "Development shall be of a relatively low density, low profile type..." (Plan, p. 81.) In turn, low, medium and high residential densities are expressly defined in the Community Plan as follows:

- **Low Density Residential:** .4 to 2.3 acres per dwelling. Converting the smallest parcel size under this standard (.4 acres per dwelling) to the more commonly used metric in the Plan, dwellings per acre (DU/Ac), yields a maximum density of 2.5 dwellings per acre.
- **Medium Density Residential:** 2-4 DU/Ac.

- **High Density Residential:** 4-10 DU/Ac.

(Plan, pp. 21, Exhibit A, and 25.)

While “relatively low density” is not a precise term, the Plan’s definitions of low, medium, and high densities establish the outer limits of the reasonable interpretation of the “relatively low density” standard applicable to and allowable in the Penryn Parkway under the Plan. It certainly can’t be more than “medium” density, which is expressly defined as a maximum of 4 DU/Ac. Yet, the Project calls for the construction of 10 DU/Ac throughout both parcels, which is the absolute maximum residential density defined anywhere in the Plan, and which the Plan, on its own terms, expressly states applies only to 12 acres of land along Auburn-Folsom road, at the pre-existing trailer park, which is located approximately 2.5 miles away from the Project site. (Plan, pp. 21, 25.)

The Planning Commission’s approval must be overturned, because the density of this Project violates the plain and mandatory language of the Plan and the County’s Zoning Code and otherwise frustrates the implementation of the Plan by calling for development densities that are unauthorized anywhere in the Plan, except for the trailer park along Auburn-Folsom Road which is approximately 2.5 miles southeast of Penryn Parkway. (Ordinance Code, § 17.02.050(D)(2); Community Plan, pp. 21, 25, 81; *Napa Citizens, supra*, 91 Cal.App.4th at p. 379.)

The Project would also impermissibly frustrate the implementation of numerous other goals and policies stated in the Plan:

- A primary goal of the Plan is maintaining the unique, rural character of the area (See e.g., Plan, p. 75, first paragraph, which is repeated consistently throughout the Plan). The proposed, high density apartment complex is unprecedented anywhere within the Plan area, and is in no way consistent with the existing rural character of the Plan area.
- General Community Goal 19 states “Manage the development of the land so that it is treated as a limited resource rather than a product to be maximized for economic gain.” (Plan, p. 5.) In this case, the density of the Project is at the very outer limit of densities allowed anywhere within the Plan area simply to maximize the applicant’s gain at the expense of the surrounding, rural community.
- Land Use Policy 3t. states “Buildings shall be of a size and scale conducive to maintaining the rural atmosphere of the Plan area.” (Plan, p. 18.) Again, an unprecedented, 150 apartment complex crammed onto 15 acres of land in Penryn Parkway utterly frustrates implementation of this mandatory policy.
- Land Use Policy 3e., as restated at Design Element Policy 21, expressly requires that the intensity of permitted land uses be governed by “considerations of health and safety, impact on adjoining properties due to noise, traffic, night lighting or other potential

disturbing conditions.” (Plan, pp. 17, 78.) Both also require that “Visibility of structures, preservation of natural land forms and natural resources, topography, noise exposure, maintenance of rural quality, and compatibility with the surrounding properties shall be considered in preparing subdivision designs.” Both policies conclude that “Subdivision density, or number of lots will ultimately be determined by these factors. It is recognized that the maximum number of lots permitted by the land use or zoning designations may not be realized once these factors are considered.” Again, the Project, which calls for an unprecedented development of 150 apartments on 15 acres of land, violates practically every one of these considerations; especially to the extent the EIR declares numerous visual, transportation, and air quality impacts of this high density development proposal “significant and unavoidable.” (DEIR, p. 15-2.) As stated in the EIR’s discussion of Significant Irreversible Environmental Impacts: “The most notable significant irreversible impacts are a reduction in natural vegetation and wildlife communities, alteration of the visual character of the site, [and] increased generation of traffic and air pollutants.” (DEIR, p. 15-3.)

- Penryn Parkway Development Policy g. states “As the Penryn Parkway area develops, conditions that must be taken into consideration include visual impacts, buffering adjoining residential uses, air and noise pollution and added traffic; especially where Taylor Road intersects with English Colony, Rock Springs, and Penryn roads, which may require mitigation to insure public safety and control of traffic congestion.” (Plan, p. 81.) The EIR for the Project “considers” such impacts, but then fails to mitigate them, summarily brushing them off as “Significant and Unavoidable.” (DEIR pp. 15-2 to 15-3.) A project designed to comply with the Plan’s direction of preserving the area’s rural character and its “relatively low density” designation for Penryn Parkway in particular, on the other hand, would clearly mitigate, if not entirely eliminate, these acknowledged significant and unavoidable impacts.
- Design Element Policy 22 states, *inter alia*, that subdivisions shall not “create a feeling of overcrowding and/or an infringement on privacy,” or “create measureable negative environmental impacts without appropriate mitigation.” (Plan, p. 78.) The Project, which will result in numerous, acknowledged “significant and unavoidable” impacts to a range of environmental resources (DEIR, pp. 15-2 to 15-3) facially violates these express and mandatory prohibitions.
- Plan General Goal 6 and Land Use Goal i. both state: “Maintain the Penryn Parkway commercial area as highway service oriented retail area which also allows for residential uses. Development should carefully consider the impact on surrounding land uses and expand the range of commercial uses to better serve the local residents as well as the area’s visitors.” (Plan, pp. 4, 15.) However, the County has already allowed much of the Parkway area to be developed as single family residential uses. To now approve the construction of 150 apartments on two large parcels of the remaining undeveloped land in the Parkway will only further frustrate the ability to implement these goals.

- Footnote 2 to Table 6 of the Plan, titled “General Rules for Determining Zoning Consistency with the Horseshoe Bar/Penryn Community Plan” (page 20) states “Zone districts are consistent with the Community Plan where they are found on this chart and the density does not exceed that permitted by the Community Plan text or the land use diagram....” (Plan, p. 20.) The Land Use Diagram (Exhibit A), in turn nowhere indicates medium or high density in the Parkway. (Plan, p. 21.) As already explained above, the County’s Zoning Code provides that any designated zoning is subservient to the Plan’s requirements, where the two conflict (Ordinance Code, § 7.02.050(D)(2)), but zoning does compliment and further define Plan requirements. For example the C1-UP-Dc zoning designation of the five acre parcel would allow densities that are greater than those specified for Penryn Parkway in the Plan, so the Plan’s density prevails. However, the zoning helps carry out the intent of the Plan by requiring a Design Review (Dc) and a Conditional Use Permit (UP) to assure all the requirements of the Plan are implemented. Again, approving a Conditional Use Permit for this project that allows densities greater than those authorized by the text of the Plan violates the Planning and Zoning Law’s consistency doctrine and the County’s Zoning Code, which gives the Plan’s Penryn Parkway “relatively low density” development policy precedence over the subservient zoning designations for the parcel.

For each of the foregoing reasons, the Planning Commission’s approval of a conditional use permit and tentative map for the Project is void *ab initio*, and must be set aside by the Board of Supervisors. (Ordinance Code, §§17.02.020(B), 7.02.050(D)(2); *Leshner*, *supra*, 52 Cal.3d at pp. 540-541; *Napa Citizens*, *supra*, 91 Cal.App.4th at p. 379; *FUTURE*, *supra*, 62 Cal.App.4th at p. 1340; *Midway Orchards*, *supra*, 220 Cal.App.3d at p. 783.)

II. VIOLATIONS OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The Planning Commission’s approvals must also be set aside, because the EIR certified by the Planning Commission fails to comply with CEQA’s procedural information disclosure and environmental protection requirements.

A. CEQA’s Legal Framework.

CEQA has two purposes: environmental protection and informed self-government. (*Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 690-691.)

1. CEQA’s Environmental Protection Mandate.

CEQA “[e]nsure[s] that the long-term protection of the environment shall be the guiding criterion in public decisions.” (§ 21001(d); *No Oil, Inc. v. Los Angeles* (1974) 13 Cal.3d 68, 74.) CEQA requires agencies to “take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.” (§ 21001(a).) Agencies should not approve projects “if there are feasible alternatives or... mitigation measures available” which would substantially lessen the project’s significant environmental effects. (§ 21002.) “[T]he public agency bears the burden of

affirmatively demonstrating that, notwithstanding a project's impact on the environment, the agency's approval of the proposed project followed meaningful consideration of alternatives and mitigation measures." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112, 134.)

CEQA is "to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Id.* at p. 112; *Laurel Heights I, supra*, 47 Cal.3d at p. 390; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.) "[I]t is ... too late to argue for a grudging, miserly reading of CEQA." (*Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 274.)

2. CEQA's Informed Self-Government Requirements.

"Public participation is an essential part of the CEQA process." (Guidelines, § 15201 [emphasis added]. See also Guidelines, § 15002(j); *Concerned Citizens of Costa Mesa v. 32nd District Agricultural Assn.* (1986) 42 Cal.3d 929, 935-936.) "Public review provides the dual purpose of bolstering the public's confidence in the agency's decision and providing the agency with information from a variety of experts and sources." (*Schoen v. Cal. Dept. of Forestry and Fire Protection* (1997) 58 Cal.App.4th 556, 574.) In this way, "[t]he EIR process protects not only the environment but also informed self-government." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 ("*Laurel Heights I*") [emphasis added].)

"An environmental impact report is an informational document," the purpose of which "is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; ..." ([Pub. Resources Code,] § 21061.) The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided." ([Pub. Resources Code,] § 21002.1, subd. (a).)

(*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106 (*Amador Waterways*); See also Guidelines, §§ 15126.2, 15126.6, 15130 [same].)

Accordingly, "[a]n EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*Laurel Heights I, supra*, 47 Cal.3d at p. 405; Guidelines, § 15151.) The lead agency must "use its best efforts to find out and disclose all it reasonably can" in its Draft EIR.

(Guidelines, § 15144; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428.)

B. Failure To Properly Consider and Apply Mandatory Community Plan Standards When Determining Significance of Impacts.

The DEIR acknowledges the project may have significant adverse impacts to a range of on-site biological resources caused by converting practically the entire 15-acre site from its current, undeveloped status into a complex of 150 apartments. (DEIR, pp. 5-15 to 5-20.) In each case, the DEIR asserts that such impacts will be mitigated to “less than significant levels” through a range of mitigation measures that all but exclusively call for the preservation or creation of similar habitats and biological resources at undisclosed, off-site locations. (*Id.*)

Appendix B to the DEIR considers whether the project’s impacts to open space and natural resources on the project site should be considered significant, in light of the Horseshoe Bar/Penryn Community Plan (DEIR, p. 5-19, Appendix B, pp. 25-50.) Notably absent anywhere in the DEIR or its Appendix B discussion of impacts is any disclosure or consideration of the express and mandatory Penryn Parkway Development Policies which, *inter alia*, 1) limit development in Penryn Parkway area to “relatively low density” (i.e., less than 4 DU/Ac., under the plan’s definitions of low, medium and high density); and 2) require that where multiple family residential is proposed in the Parkway, “structures shall be clustered together as to preserve the maximum amount possible of undeveloped open space on-site.” (Plan, pp. 21, Exhibit A, 25, 81, Development Policies d. and i. See discussion at Part I, *supra*.)

In the case of this multiple family residential proposal, the maximum number of allowable units under the plain language of the text of the Plan and its Land Use Diagram (which expressly supersedes any inconsistent zoning on the site) is a maximum of 60 DU for the entire 15 acres (4DU/ac. x 15 acres). (Plan, p. 20, Table 6 and fn. 2, 21 [Land Use Diagram], and 97-82 [Penryn Parkway Development Policies].)¹ The Project, as proposed, demonstrates the ability to cluster

¹ It is true that the zoning of the 10-acre parcel is RM-DL10-PD10. But Table 6 to the Plan and its footnote 2 make it clear that where any zoning in the Parkway is inconsistent with the Land Use Map (Exhibit A) and the text of the Plan’s Development Policies for the Parkway at p. 97, the Plan’s text and Land Use Map Control. Nothing in the Exhibit A Land Use Map or the Parkway Development Policies call for high density residential development in the Parkway. Accordingly, unless and until Table 6 of the Plan and the Parkway’s Development Policies are amended to allow anything greater than “relatively low” density residential development, allowable development of this parcel cannot lawfully be implemented at the 10 DU/Ac. conceptually allowed by the parcel’s subservient zoning. This point is further confirmed by the Plan’s text, which, in expressly defining “High Density” residential, states the only place where densities of up to 10 DU/Ac. are authorized under the Plan is at the pre-existing trailer park along Auburn-Folsom Road, while making no mention of any such density in Penryn Parkway. (Plan, at p. 25.) In sum, nothing in Table 6, the Land Use Diagram, the Plan’s definition of “High Density,” or the Plan’s Development Policies for Penryn Parkway authorize “High Density” residential development in Penryn Parkway, regardless of the 10-acre parcel’s inconsistent (and therefore superseded) DL10-PD10 zoning. Moreover, even if the Plan were to be misread to purportedly authorize high density development of up to 10DU/Ac. on the 10-acre parcel (where it does not), the fact remains that such density still would not apply to the 5-acre parcel, which

approximately 10 units per acre. Accordingly, under the Plan's text and Land Use Diagram, the Project should lead to the conversion of at most 6 acres to residential uses, (i.e., the allowable, maximum 60 dwelling units, clustered in a manner similar to that proposed in the Project, at 10DU/ac.) with the remaining 9 on-site acres being the "maximum amount possible of undeveloped open space on site." (Plan, p. 81, Development Policies d. and i.)

It is a violation of CEQA's information disclosure and environmental protection procedures to declare that a project's impacts have been mitigated to less than significant levels, where evidence in the record indicates the impact may still be significant. As explained by the Court of Appeal in *Protect the Historic Amador Waterways v. County of Amador* (2004) 116 Cal.App.4th 1099 ("*Amador Waterways*")

in preparing the EIR, the agency must determine whether any of the possible significant environmental impacts of the project will, in fact, be significant. In this determination, thresholds of significance can once again play a role. As noted above, however, the fact that a particular environmental effect meets a particular threshold cannot be used as an automatic determinant that the effect is or is not significant. To paraphrase our decision in [*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98], a threshold of significance cannot be applied in a way that would foreclose the consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant. (See 103 Cal.App.4th at p. 114....)

Thus, in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect.

(*Amador Waterways, supra*, 116 Cal.App.4th at p. 1109.)

In this case, regardless of the EIR's mitigation measures calling for off-site mitigation of impacts to biological resources, the Project should still be viewed as having a significant adverse impact to on-site biological resources, because 1) the Plan's specific and mandatory requirements nowhere authorize 150 units of multi-family residential buildings on the overall 15-acre site, and 2) the Project, as proposed, demonstrates that the allowable 60 units can feasibly be clustered at a density of approximately 10DU/acre. This, in turn, would leave as much as 9 acres of on-site biological resources intact and protected as mandated by the Plan's development policies for the Parkway. It should also be noted that a project proposed in a manner consistent with the Plan's mandatory development policies for Penryn Parkway (e.g., a maximum 60 unit apartment complex clustered on 6 acres of the 15 acre Project site) would have the added benefit of substantially reducing if not avoiding all other project impacts, including those to aesthetics, traffic and air quality that the EIR, on its own terms, declares "significant and unavoidable," and thus, the Plan also failed to consider a "reasonable range" of Alternatives in failing to consider

does not have DL10-PD10 zoning. Again, under even a patently unreasonable interpretation of the Plan, the 150-unit proposal on 15-acres is illegal.

any alternative actually consistent with the Plan's standards and requirements. (DEIR, p. 15-7 to 15-11, which nowhere contain an alternative consistent with the Plans standards to cluster allowable multi-family residential development, while preserving "the maximum amount possible of undeveloped, open space on-site." (Plan, p. 81, Development Policy i.)

In sum, regardless of the DEIR's off-site mitigation measures for biological resources, preserving anything less than 9 on-site acres undeveloped open space (and the biological resources such open space would support) conflicts with the Plans clear and mandatory standards, and therefore should have been acknowledged and treated as a significant, adverse environmental impact. (*Amador Waterways, supra*, 116 Cal.App.4th at p. 1109.)

C. Inadequate Investigation and Disclosure of the Existing Environment.

The DEIR also fails to meet CEQA's information disclosure and environmental protection procedures, because its description of existing resources that may be impacted by the Project is incomplete. For example, the DEIR's discussion of public utilities asserts that the Project's impact to local sewer capacity is less than significant, based on a V&A Consulting Engineers study, conducted "for two weeks from June 19, 2008 to June 26, 2008, and from July 24, 2008 through July 31, 2008 to establish existing sewer flow rates and capacity of the trunk line proposed for connection to the project and to determine impacts to capacity of the sewer line that would result from the proposed project." (DEIR, p. 12-10.) Relying on this study as its baseline, the DEIR asserts that the sewer line has an existing, total capacity of 210 (gallons per minute) gpm, and that the peak dry weather flow measured by V&A was 62.0 gpm. Based on this information, the DEIR informs the reader that 70% of the sewer line's capacity (or 148 gpm) is available to the Project. (DEIR, p. 12-11.) The DEIR then states that using an "average unit flow for future residential development of 190 gallons per day per equivalent dwelling unit (gpd/EDU)," the Project "would generate approximately 28,500 gallons per day of additional wastewater or an additional 20 gpm of average dry weather flow." (*Id.*)

CEQA requires that an EIR accurately and completely describe the impacted "environment." (Pub. Resources Code, § 21060.5; Guidelines, § 15125(a).) In *San Joaquin Raptor Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713 ("*San Joaquin Raptor I*"), the Court of Appeal invalidated an EIR that had "understate[d] the significance of the San Joaquin River located directly adjacent to the site." (*San Joaquin Raptor I, supra*, 27 Cal.App.4th at p. 725.) The court concluded that "[b]y avoiding discussion of the San Joaquin River and identification of [the preserve], the DEIR precluded serious inquiry into or consideration of wetland areas adjacent to the site or whether the site contained wetland areas." (*Ibid.*)

In this case, the DEIR disclosure regarding the existing condition and capacity of the sewer line is similarly flawed. The DEIR glosses over, or flat out misrepresents, several key facts revealed in the V&A study cited in the DEIR's text. (DEIR, Appendix J.) First, on its own terms, the V&A study states:

Dry weather flow is the flow that is caused by actual waste drainage from buildings in the area. Wet weather flow includes rain-dependent infiltration and

inflow which may increase the flow through the sewer pipes. The flows recorded during this study were dry weather flows only.

(DEIR, Appendix J, V&A Study, at p. 4.) In other words, because V&A's measurements were taken during dry weather in June and July, the existing conditions monitored by V&A and reported in the DEIR are not representative of the existing condition/capacity of the sewer line during wet weather conditions, when acknowledged "rain-dependent infiltration and inflow may increase the flow through the sewer pipes." (*Id.*) In addition, by taking measurements in June and July, V&A's monitoring missed including existing contributions to the sewer line from the Hope Lutheran Church and School, which opened in approximately 1990 and serves Kindergarten through 8th grade with a school year that appears to runs from August through May. (<http://www.hlcpenryn.org/>)

Another notable misrepresentation is the EIR's assertion that, even under measured conditions, the sewer line has 70% available capacity. (DEIR, p. 12-11.) In fact, what the V&A study actually states is that the 8-inch sewer line in question is filled with 1.5 inches of sediment, which substantially reduces the actual carrying capacity of the sewer line (again, under non-representative, dry weather conditions) from 70% to just 54% of capacity. (DEIR, Appendix J, V&A study, at p. 1.)

A third misrepresentation is the DEIR's calculation of the Project's contribution to the sewer based on a presumed, average flow of 190 gpd/EDU. The Eco:Logic cover memo to the V&A study states that, in the absence of wet weather flow modeling, "the on-site wastewater collection system must be sized using a 400gpd/EDU value, with a wet weather peaking factor of 2.3." (Compare DEIR, p. 12-11, with DEIR, Appendix J, Eco:Logic Cover Memorandum, p. A-1.)

The EIR is fundamentally inadequate to serve its basic information disclosure purposes. (*San Joaquin Raptor I, supra*, 27 Cal.App.4th at p. 725.) The EIR's calculations and information regarding the sewer line are based on 1) studies that do not disclose peak flows during periods of wet weather; 2) assertions of total sewer capacity that fail to acknowledge that 1.5 inches of the 8-inch sewer line is obstructed by sediment; and 3) calculations of Project demand that do not comply with the direction provided by the County's own consultants, who stated that absent wet weather flow modeling, the demand of the Project would have to be calculated using a 400gpd/EDU value, and a wet weather peaking factor of 2.3. Accordingly the DEIR's assertions that the project has no potential to cause significant adverse impacts to the sewer line it will connect to are useless, because they are not based on "substantial evidence." (Pub. Resources Code, § 21080, subd. (e)(2) ["[s]ubstantial evidence is not...evidence that is clearly inaccurate or erroneous."])

In contrast, applying the standards and guidance that do appear at Appendix J leads to startling results: the Project's own sewer demand should have been calculated as $150 \text{ du} \times 400 \text{ gpd/EDU} = 60,000 \text{ gpd}$, or 41.66 gpm. In light of this fact, dry conditions peak flow with the Project should have been disclosed in the DEIR as 62.0 gpm (existing) + 41.66 gpm (Project) = 103.66 gpm. In turn, applying the 2.3x wet weather factor directed by the County's consultants indicates that the DEIR should have disclosed that at periods of maximum demand during wet weather episodes,

the total demand on the sewer based on existing + Project (*i.e.*, not even including cumulative impacts of other projects) should have been stated as 238.42 gpm, where the pipeline's maximum capacity (even ignoring the 1.5 inches of sediment in the bottom of the pipe that reduces that capacity) is only 210 gpm. The result: potential overflows and related significant adverse environmental impacts nowhere disclosed or addressed in the EIR.

The ultimate point here is not whether the foregoing re-calculations are or are not correct. The point is that the information that was presented in the text of the publicly-circulated DEIR was so fundamentally and basically inadequate that meaningful public review and comment were precluded, thus requiring recirculation of a revised DEIR to present revised and accurate disclosure of the Project's actual sewer demand and potentially significant, adverse effects. (Guidelines, § 15088.5(a)(4); *Laurel Heights I*, *supra*, 47 Cal.3d at pp. 404-405; *Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1052.)

As stated by the Court of Appeal in a slightly different context that, nevertheless applies equally here:

the relevant issue to be addressed in the EIR...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 [cumulative] noise levels around the schools is inadequate. (*Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1025-26.)

D. Inadequate Cumulative Impacts Disclosure or Analysis.

1. Failure to Provide / Analyze Accurate and Complete List of "Other" Projects.

The Draft EIR acknowledges that the CEQA Guidelines detail two methods by which cumulative impacts may be evaluated. (DEIR, p. 14-1, citing Guidelines, § 15130(b)(1).) One method is to summarize growth projections in an adopted plan or EIR for such a plan. (Guidelines, § 15130(b)(1)(B).) The other is to describe a list of past, present, and reasonably foreseeable future projects that may work in combination with the proposed project to result in cumulative effects. (Guidelines, § 15130(b)(1)(A).)

Of these two methods, the County's publicly circulated DEIR states that it "considers the proposed project and other known approved, active, or reasonably foreseeable projects in the vicinity of the project area. These projects are briefly summarized below." (DEIR, p. 14-1.) The DEIR then specifically lists the following other projects: Bickford Ranch, Brennan's Point, Village at Horseshoe Bar, Village at Loomis, and Loomis Marketplace. (DEIR, pp. 14-1 to 14-2.)

Commentors on the DEIR noted, however, that there are other past, present, and reasonably foreseeable future projects that should have been, but were not disclosed in the DEIR's list, including, but not limited to the Penryn Townhomes development project. (See, e.g., FEIR, p. 2-80.) Additional examples of such "other" projects include, but are not limited to: the 622-acre Clover Valley development project located just to the south of the Bickford Ranch project (*Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 207 [which, as approved by the City of Rocklin, "will create 558 homes, a 5.3-acre neighborhood park, a 5.0-acre commercial site, a 1.0-acre site for a future fire station, and related infrastructure and streets"]), and the uncompleted Orchard project on Boyington Road and the Penryn Outlets project.

In response the FEIR makes the conclusory assertion that "[t]he cumulative scenario includes the Penryn Townhome development and other development consistent with the land use and zoning designations in the project area, in addition to the specific development projects described on pages 14-1 and 14-2 of the Draft EIR." (FEIR, p. 2-86.) The FEIR's assertion, however, is backed up by no citation of evidence to demonstrate that the Penryn Townhomes development was actually included in all aspects of the DEIR's cumulative impacts disclosure or analysis, and provides no information as to what supposed "other development consistent with the land use and zoning designations in the project area" are referenced in the FEIR's response.

This response violates CEQA in several ways. First, by asserting that the Penryn Townhome project and "other" undescribed and undisclosed development projects were included in the DEIR's cumulative impacts analysis, the FEIR concedes that the DEIR did not comply with CEQA Guidelines section 15130(b)(1)(A), by failing to identify, or describe the nature or scope of any such unmentioned projects. Absent such a description, it is impossible for the public or the County's decisionmakers to understand or assess whether the EIR's cumulative impacts disclosure and analysis is actually complete and accurate. Second, by simply asserting with no citation to evidence that the Penryn Townhome project and "other" projects were purportedly included in the EIR's cumulative impacts analysis, the FEIR fails to support its assertion with any "substantial evidence." (Pub. Resources Code, § 21080, subd. (e)(2) ["substantial evidence" is not "unsupported narrative."] Third, in making the conclusory assertion that the Penryn Townhomes project and "other" projects were included in the DEIR's cumulative impacts analysis, where there is no evidence to support that assertion, the FEIR failed to provide a "good faith, reasoned response," in further violation of CEQA's procedures. (Guidelines, § 15088, subd. (c) ["Conclusory statements unsupported by factual information will not suffice."])

2. Failure to Define or Explain Criteria for Geographic Area Covered by Cumulative Impacts Analysis.

A related violation of CEQA's procedures is the EIR's failure to actually define the geographic area covered by the EIR's cumulative impacts analysis. Procedurally, an adequate cumulative impacts analysis must "define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used" and summarize "the expected environmental effects to be produced by [other] projects with specific reference to

additional information stating where that information is available.” (Guidelines, § 15130(b)(3) and (b)(4).) For example, in *Bakersfield Citizens v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, the court struck down two EIRs that did “state what has been determined to be the appropriate geographic area for each category of potential impacts, but no explanation was offered as to the criterion upon which this determination was made.” (*Bakersfield, supra*, 124 Cal.App.4th at p. 1216.) *A fortiori*, the EIR in this case must also be struck down, where its cumulative effects discussion defines no geographic area at all. (*Id.* See also *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 404-405 (“Laurel Heights I”) [“[Whatever] is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report”])

As just one example from the EIR: all of the information related to impacts to the 8-inch sewer line that will serve the project is based on a study of existing flows taken only at the Project site. (DEIR, pp. 12-10 to 12-11, and Appendix J. See discussion at Part II.C, *supra*.) But, no information is presented about where that 8” sewer line runs after it leaves the Project site, and what other cumulative existing flows (past projects) and anticipated future flows (current and future projects) demand the remainder of that sewer line’s capacity. In other words, the EIR presents no information from which the public or the County’s decisionmakers can know or assess whether adding the Project’s sewer flows to the 8” sewer line may cause significant, adverse cumulative impacts “downstream,” as other past, present and future projects each makes their cumulative contribution to overall flows.

3. Failure to Actually Present Any Cumulative Data or Information From Listed “Other” Projects.

Another failure in the EIR is that after it elects to proceed using a list of other projects under Guidelines section 15130(b)(1)(A), and then specifies the list of those other projects (DEIR, at pp. 14-1 to 14-2), the EIR’s cumulative impacts analysis nowhere again mentions those projects, let alone identifies or quantifies the scope of each project’s impacts or how they might combine with the Project to result in potentially cumulatively considerable, adverse effects. Having elected to proceed based on a list of projects, and then listing them, the EIR was procedurally required to include some discussion of those other projects and their related impacts.

E. Failure To Support Conclusions That Adopted Mitigations Will Reduce Impacts To Less Than Significant Levels With Substantial Evidence.

The EIR is also inadequate, because its conclusions that acknowledged, potentially significant, adverse impacts will be mitigated by proposed mitigation measures are unsupported by any evidence (substantial or otherwise) to support such conclusions. For example, the Project calls for the construction of numerous, multistory apartment buildings with only a 15-foot setback from neighboring, residential properties.

The EIR acknowledges that the Project may cause a substantial temporary increase in ambient noise levels associated with construction activities: “Activities involved in construction would

generate maximum noise levels ranging from 85 to 90 dB at a distance of 50 feet.” (DEIR, at p. 9-10 and Table 9.7.) The DEIR’s measured continuous daytime ambient noise levels in and around the property average 56 to 57 dB. (DEIR, p. 9-4.)

The mitigation measures for these construction related impacts 1) limit construction activities to daytime hours on non-holidays; 2) require construction equipment to be fitted with factory installed muffling devices and to be maintained in good order; and 3) require that construction contracts and plans shall require truck and equipment traffic to access the site from Penryn Road via I-80. The DEIR asserts that by employing these measures, the Project’s construction-related noise levels will be less than significant (under the DEIR’s standards, meaning they will not expose people to noise levels in excess of General Plan and Community Plan Standards, or cause a substantial permanent or temporary increase in ambient noise levels). (DEIR at p. 9-7 to 9-8, and 9-10 to 9-11.)

The problem, here, is that the DEIR states at Table 9.7 that the construction equipment in question (presumably in good order and with factory muffling installed when measured for sound emissions) actually generates noise levels of anywhere from 85 to 88 dB at 50 feet. (DEIR at p. 9-10, Table 9.7.) Yet, the Project only establishes a 15-foot setback from adjacent residential properties. In sum, on the EIR’s own terms, it is clear that such equipment, especially pneumatic tools, will be used right up to the property line with adjacent residences thus resulting in ambient noise levels significantly greater than the DEIR’s adopted thresholds. Accordingly, the DEIR’s conclusory assertion that implementation of these measures will somehow reduce the Project’s significant, adverse construction-related noise impacts to less than significant levels is unsupported by substantial evidence. (Pub. Resources Code, § 21080, subd, (e)(2) [“substantial evidence is not argument, speculation, [or] unsubstantiated opinion or narrative...”].)

III. CONCLUSION.

For the foregoing reasons the Stop 150 Apartments Group requests that the Board of Supervisors grant their administrative appeal by reversing the Planning Commission’s EIR certification and Project approvals for the Orchard at Penryn Project with directions that the Project must be denied until 1) the proposal is brought into conformance with the Horseshoe Bar/Penryn Community Plan and the County’s Zoning Code; and 2) a revised DEIR addressing that revised proposal is prepared and recirculated for public comment and review to cure the DEIR’s violations of CEQA’s information disclosure and environmental protection procedures.

Sincerely,


Keith G. Wagner

cc: Stop 150 Apartments Group.