

**RESPONSE TO JULY 9, 2012, STOP 150 APARTMENTS GROUP, APPEAL OF THE PLANNING COMMISSION'S CERTIFICATION OF A FINAL ENVIRONMENTAL IMPACT REPORT AND APPROVAL OF A VESTING TENTATIVE SUBDIVISION MAP AND CONDITIONAL USE PERMIT FOR THE ORCHARD AT PENRYN PROJECT**

The Stop 150 Apartments Group submitted an appeal letter dated July 9, 2012 to the Placer County Community Development Resource Agency, which included a follow-up letter dated August 7, 2012 from Keith G. Wagner, Lippe Gaffney Wagner LLP that contains supplemental information in support of their appeal. This correspondence serves as a formal response to concerns raised by the Stop 150 Apartments Group.

**Comment 1:** “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.)”

**Response 1:** **The “Penryn Parkway” is a separate and distinct community plan designation. It was formally adopted as a land use designation and incorporated into the then current community plan, the Loomis Basin General Plan, by the Board of Supervisors in 1988. (Plan, p. 80) It continues to be a separate land use designation in the current Horseshoe Bar/Penryn Community Plan, which replaced the Loomis Basin General Plan in 1994 (See Plan, Table 5, p. 14). As the appellant notes the Community Plan also has separate land use designations for low/medium/high densities but these land use designations have no relevance for purposes of determining the permissible land uses within the Penryn Parkway designation. As noted in the Community Plan, the “Penryn Parkway is unique to this Plan area as a land use designation. It comprises 166 acres or 1% of the Plan area. The Parkway is meant to provide a mixed-use area, including multiple-family residential, professional office and commercial uses.” (Plan, p. 27) Therefore multi-family uses were contemplated as a permissible land use within the Penryn Parkway land use designation. (Plan, p. 81)**

**Appellant’s characterization of Penryn Parkway Development Policies d, e and i (Plan, p. 81) omits the full language of those policies that provides additional context and meaning to the policy; thus, the appellant’s conclusion that the proposed project is inconsistent with the same is misguided. Policy d provides guidance on the nature of the development design, specifically stating the following:**

“Development shall be of a relatively low density, low profile type, and the signing and lighting provided shall reflect such a policy; specifically, building height is to be restricted to a maximum of two-stories. The area’s historical nature (i.e., Japanese heritage, gold rush era, English settlement) should be reflected as much as possible in the design of new buildings to be constructed within the Penryn Parkway area.” [Emphasis added].

The term “relatively low density” in the above policy is not the same as the “low density” Plan land use designation. The above term seeks to implement the intent of the Parkway land plan development policy of the necessity of “[c]onscientious design review regarding the *location and appearance* of buildings, parking, signs and landscaping [to] be necessary to ensure the integration of commercial uses and compatibility with surrounding rural residential uses.” (Emphasis added, Plan, p. 80) Thus the reference to “relatively low density” in policy d is intended to refer to the placement and visual appearance of the buildings.

The buildings in the Orchard at Penryn project (the “Project”) are two stories in height, and designed in a “Gold Rush” era architectural style. Moreover, the buildings in the Project have been clustered to avoid much of the central drainage swale and the design has incorporated open and recreational space. The combination achieves the policy goal of providing a development that is not massive in size or visual appearance.

The appellant acknowledges that the Penryn Parkway designation allows “for multi-family housing” (Plan, Policy e., p. 81) but appears to believe that the inclusion of this use in policy e is inconsistent with the Plan. This assertion is untimely as the Penryn Parkway land use designation was adopted by the Board in 1988. This assertion is also incorrect. As previously discussed, the Penryn Parkway is a separate land use designation and allows certain uses, including “multiple-family residential uses.” (Plan, p. 81) Therefore the location of the Plan’s “High Density Residential” land use designation is irrelevant to a discussion of what uses are permitted to be located within the boundaries of the Penryn Parkway land use designation. Further, policy e establishes that the multiple-family residential use within the Penryn Parkway is considered a “relatively low impact” use. Two phrases within policy e support this conclusion. Policy e states the intention of the Penryn Parkway plan area is to serve as a “highway-service oriented retail area *which also* allows for multiple-family residential uses.” Policy e describes the “type of commercial activity that will meet the local residents’ needs....” to “include specialty retail.....senior independent living centers, multiple-family uses, *and* other relatively low impact uses.” (Emphasis added, Plan, p. 81) When the Penryn Parkway land use designation was first considered in 1988, the Penryn Area Advisory Council provided insight into what uses it would not consider to be “low impact” and these included (and were eliminated in 1988 from inclusion) “R.V. parks, campgrounds and mobile home park grounds”. (November 4, 1988 letter from Dick Freeberg, Chairman of the Penryn Area Advisory Council to the Board of Supervisors, which letter is incorporate by reference.) Thus the proposed multi-family residential project is consistent with policy e of the Plan.

**Comment 2:** “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.”

**Response 2:** **Appellant’s comment is noted. Contrary to the commenter’s assertion, County staff has not “rubberstamped” the Project. The Project has been subjected to a five-year planning and environmental review process, which has culminated in substantive changes to the site plan and alterations to the design and orientation of the Project’s buildings in response to comments and objections from staff and the public. The Planning Commission found the proposed project to be consistent with the Penryn Parkway land use designation and the goals/policies for the same. The Planning Commission also independently considered the alternatives presented in the Project EIR and determined at a public hearing, based on all of the evidence in the record, including testimony provided during the hearing, that the Project as proposed was consistent with the General Plan and Community Plan goals and policies, and rejected the alternatives in the Project EIR based on the feasibility findings the Commission adopted.**

**Comment 3:** “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.4<sup>th</sup> 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.4<sup>th</sup> 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) 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.4<sup>th</sup> 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.4<sup>th</sup> 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 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.)”

**Response 3:** The appellant’s comments are noted. The majority of the above comment recites land use consistency case law, which requires no response. After conducting an extensive hearing on the proposed project, the Planning Commission approved the project based on findings of consistency with the applicable Placer County General Plan and the Horseshoe Bar/Penryn Community Plan goals and policies.

Appellants are correct that the Penryn Parkway land use designation does not expressly identify permitted zone districts. (See Table 6, “General Rules for Determining Zoning Consistency with the Horseshoe Bar/Penryn Community Plan”, Plan, p. 20.) Rather, the Penryn Parkway is subject to specific development policies which identify the type of land uses that are compatible in this community plan land use designation. (See Policies a, e, f and j, Plan, pp. 80-81.)

The subject property was actually rezoned in 1981 from AR-B-X-4.6 (Agricultural Residential, comb. Bldg. site size of 4.6 acre minimum) to R-3-DL-10-LUI-10 (High Density Multiple Residential, comb. Density Limitation of 10 units per acre, with a land use intensity of 10 units per acre) and Open space with LUI-10 and C-1-Dc (Neighborhood Commercial combining Design Control) (See Notice of Public Hearing October 1, 1981, incorporated herein by reference.) The present zoning designations are RM-DL10 PD=10 (Residential Multi-Family, Combining Density Limitation of 10, Planned Development = 10 dwelling units per acre) and C1-UP-DC (Neighborhood Commercial, Combining Use Permit Required, Combining Design Corridor). With the exception of the requirement for a use permit in the Commercial district, there have been no substantive changes to the zoning of these parcels since 1981.

When the Board approved the inclusion of the Penryn Parkway Area land use designation in 1988, the Board concurrently adopted a rezone ordinance. (See November 9, 1988, Memorandum from Planning Commission to Board of Supervisors, incorporated herein by reference.)

It should also be noted that the law does not require nor anticipate that any project should have 100 percent compliance with all policies in a community plan. As to consistency with the Community Plan, as the court found in *Sequoyah Hills Homeowners Ass’n v. City of Oakland*, 23 Cal.App.4<sup>th</sup> at 704, 719-720 (1993), a project need not be in perfect conformity with each and every general plan policy:

“Indeed, it is beyond cavil that no project could completely satisfy every policy stated in the [Oakland Comprehensive Plan], and that state law does not impose such a requirement (*Greenbuam v. City of Los Angeles*, 153 Cal. App. 3d at 406-09; 59 Ops. Cal. Atty. Gen. 129, 131 (1976)). A general plan must try to accommodate a wide range of competing interests – including those of developers, neighboring homeowners, prospective homebuyers, environmentalists, current and prospective business owners, jobseekers, taxpayers, and providers and recipients of all types of city-provided services – and to

present a clear and comprehensive set of principles to guide development decisions. Once a general plan is in place, it is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be “in harmony” with the policies stated in the plan. [Citation omitted.] It is, emphatically, not the role of the courts to micromanage these development decisions. Our function is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms to those policies, whether the city officials made appropriate findings on the issue, and whether those findings are supported by substantial evidence. (Code Civ. Proc. § 1094.5(c); *Youngblood v. Board of Supervisors*, 22 Cal. 3d 644, 651 (1978)).”

As discussed above, the Project is consistent with all applicable Penryn Parkway policies in the Community Plan that are specifically related to the Project.

The appellant’s reliance on the court holding in *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors*, 62 Cal. App. 4<sup>th</sup> 1322 (1998) (“*FUTURE*”), and application to the present proposed project is misplaced. In *FUTURE*, the General Plan land use designation approved by the El Dorado Board of Supervisors for that project directly conflicted with the General Plan policy that prohibited such a land use designation for properties that did not comply with the General Plan requirement for contiguity of low density residential parcels to properties designated “Community Regions” and “Rural Centers”. Thus, the specific land use designation assigned to the property violated a specific express prohibition in the General Plan. (*FUTURE*, 62 Cal. App. 4<sup>th</sup> at pp. 1340-1341).

Here, the Project has a Community Plan land use designation of Penryn Parkway, and the Project as proposed is consistent with the specific land use policies for development in the Penryn Parkway area. Thus in contrast to the facts in *FUTURE*, the multi-family land use for the Project is a permitted use within the Penryn Parkway Community Plan land use designation.

**Comment 4:** “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 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.4<sup>th</sup> at p. 379.)”

**Response 4:** The Planning Commission based its decision on the whole of the record, which indicates that the proposed Project is consistent with the Penryn Parkway land use designation. As discussed above, the property has been zoned for multi-family use since 1981 and multi-family is a land use permitted within the Penryn Parkway Community Plan designation. As also previously discussed, the Penryn Parkway is a separate land use designation, and appellant’s discussion of the other community plan land use designations and location of trailer parks in the plan area is irrelevant to a community plan/zoning consistency discussion for the proposed project.

**This is not the first multi-family residential project proposed (or approved) within the Penryn Parkway. South of the Project on the east side of the Penryn Parkway corridor, the Penryn Townhomes project was approved by the Board of Supervisors in 2008 at 7.2 units/acre. That property is also designated “Penryn Parkway” under the Community Plan and is zoned C1-UP-DC.**

**Comment 5:** 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.

**Response 5:** The Planning Commission found that the proposed Project is consistent with both the Penryn Parkway land use designation and other applicable goals and policies of the Community Plan. Again, the Penryn Parkway portion of the Community Plan allows for multi-family residential uses, so long as these are limited to two-stories in height, with low profile lighting and signage, with a design reflective as much as possible of the area's historical nature, including the Gold Rush era. The Project is two stories in height, with low profile lighting and signage, and designed with Gold Rush architecture.

In terms of consistency with general goals and policies of the Community Plan, the Project is consistent with a broad range of general Community Plan goals and policies outside of the Penryn Parkway corridor discussion, as analyzed in the EIR, including Appendix B to the DEIR. Examples of such goals and policies include:

**Community Design Element Goals**

**"9. PRESERVE THE NATURAL LAND FORMS, NATURAL VEGETATION, AND NATURAL RESOURCES OF THE AREA AS MUCH AS POSSIBLE. IT IS RECOGNIZED THAT DEVELOPMENT OF COMMERCIAL, INDUSTRIAL AND HIGHER DENSITY RESIDENTIAL USES CAN RESULT IN THE LOSS OF NATURALLY OCCURRING AMENITIES. WHERE THIS IS ALLOWED TO OCCUR, ADHERENCE TO A SET OF COMMUNITY DESIGN GUIDELINES SHOULD ASSIST IN MITIGATING SUCH IMPACT."**

The Project preserves numerous prominent rock outcroppings and nearly all of the uncontaminated sections of the wetland swale on the site.

**Policies**

**"3. Roads should follow natural topography wherever possible to minimize cutting and grading."**

The main road through the Project as well as loop roads respect the natural land forms and avoid them.

**"8. Landscaping shall be used to reduce the visual impact of all structures, including solid fences. Natural vegetation should dominate where possible. Where existing vegetation is inadequate, the use of native plant materials is encouraged. Landscaping materials should provide an informal character and smooth transition between buildings, parking lots adjoining roadways and open areas."**

The Project provides enhanced landscaping around the perimeter of the site, along loop roads and the main road through the Project, and around buildings in the Project. (See also Policy C.15, Community Plan, p. 77).

**"15. To the maximum extent possible, all structures, including residences, should complement and blend in with the natural**

setting of the planning area, and to this end the following principles shall be incorporated into the project design:

- a. The visual impact of the structure shall be mitigated either through reduction of building bulk, increased setbacks, or introduced hillside structures shall be designed to step down the natural hillside in order to achieve a low building profile and minimize grading.”

The buildings in the Project are a blend of 3-plexes and 6-plexes, adding variety and breaking up the massing in the Project. The Project’s variety in building mixes and the limitation to 6 units per structure are found in the Placer County Design Guidelines.

“20. Encourage the clustering of dwellings and other structures to help save larger areas of open space and preserve the natural terrain.”

The Project is divided into four quadrants with a mix of 3-plexes and 6-plexes, each with a loop road and distinctive color and landscape pallet, with buildings clustered so that each quadrant has its own passive recreation space, with numerous rock outcroppings and much of the central wetland swale preserved.

**Natural Resource Management Element**  
**Hydrology and Water Quality Policies**

“b.(11) Improve water quality by eliminating existing water pollution sources and by discouraging activities which include the use of hazardous materials around wetland and groundwater recharge areas.”

The Project will remove all contaminated soil from the site, including all such soil around wetland areas on site.

**Comment 6 :** General Community Goal 19 “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.

**Response 6:** As noted above, the Project does not maximize the density that could be allowed under the two parcels’ zoning, i.e., 212 units, but is approximately 30 percent less than the maximum allowed density on the Project site, preserving much of the central swale, and providing on-site recreation areas.

**Comment 7:** 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, the unprecedented, 150 apartment complex crammed onto 15 acre of land in Penryn Parkway utterly frustrates implementation of this mandatory policy.

**Response 7:** The Penryn Parkway corridor policies of the Community Plan govern development in the Penryn Parkway area, and the Planning Commission found the proposed Project to be consistent with those policies. Moreover, this policy is general and therefore subject to the County's discretion to interpret and apply, balancing it against sometimes-competing policies elsewhere in the Plan. (*Sequoyah Hills Homeowners Ass'n v. City of Oakland* (1993) 23 Cal.App.4<sup>th</sup> at 704, 719-720.) The County maintains that the Project is not inconsistent with this policy because it is less than the maximum allowed density, and it incorporates other design elements, such as its two-story height and preservation of natural features and open space on the site, that are in keeping with the Plan's intent for a reduced size and scale of development in the existing rural atmosphere.

**Comment 8:** 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.)

**Response 8:** The Planning Commission found that the proposed Project has been designed consistent with the Penryn Parkway policies in the Community Plan, i.e., two stories, low profile signage and lighting, Gold Rush era architecture, clustering of buildings, preservation of the central swale. Health and safety impacts, impacts on adjoining spaces due to noise, traffic, night lighting, etc. were considered in the Project design and analyzed in the EIR. Again, the Project does not maximize the number of units that could be developed on site under the Project site's zoning.

**Comment 9:** Penryn Parkway Development Policy g. states "As the Penryn Parkway area develops, conditions that must be taken into considerations include visual impacts, buffering adjoining residential uses, air and nose 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.

**Response 9:** The EIR did take into consideration the impacts in the Penryn Parkway Development Policy g., and did propose mitigation, e.g., Mitigation Measures 7.1a, 7.2a in the Transportation Section of the EIR, Mitigation Measures 8.1a, 8.1b, 8.1c, 8.1d, 8.1e, 8.1f in the Air Quality Section of the EIR, etc., but, in some cases, impacts were still not mitigated to a less than significant level. For those impacts that could not be mitigated to a less than significant level, the Planning Commission adopted a Statement of Overriding Considerations pursuant to and in compliance with CEQA Guidelines sections 15043 and 15093. As previously discussed the Penryn Parkway is not designated as a “low density” land use category. Since the Loomis Basin General Plan’s adoption in 1988, and thereafter with the 1994 adoption of the Horseshoe Bar/Penryn Community Plan, multi-family residential uses have been an anticipated land use within the Parkway. Therefore, the appellant’s characterization of what types of uses are allowed in the “relatively low density “designation for Penryn Parkway” is incorrect.

**Comment 10:** 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.

**Response 10:** Mitigation has been proposed, and adopted by the Planning Commission, for impacts to transportation, biological resources, visual resources, air quality, etc., with the Project designed to meet the Penryn Parkway policies of the Community Plan. See also prior response.

**Comment 11:** 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.

**Response 11:** Please see prior discussions on land use consistency of the proposed project with the Penryn Parkway designation.

**Comment 12:** 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.

**Response 12:** Appellant misreads Table 6 of the Plan. Table 6 indicates that all zone districts within the Penryn Parkway are subject to the development policies found on pages 80-82 of the Community Plan. Neither Table 6 or the development policies establish the underlying zoning for the Penryn Parkway designation. The underlying zones for the real property in the Penryn Parkway land use designation were rezoned in 1981 and 1988 respectively. These zoning designations dictate the intensity and type of uses that are permitted in that zone but the development policies for the Penryn Parkway would discourage those uses that are inconsistent with the Community Plan policies. For example, the Residential-Multi Family zone district allows mobile home parks with a conditional use permit (County Code, Chapter 17, Article 17.48, Section 17.48.010). But development policy f discourages "mobile home parks" (Plan, p. 81). Therefore although the property's one zone designation of RM-DL10 PD=10 would permit those land uses found in Section 17.48.010 of the zoning code, the community plan development policies for the Penryn Parkway would discourage incompatible land uses. On the other hand the RM-DL10 PD=10 zone district permits multi-family dwellings and development policy e. articulates the intent of the Penryn Parkway designation which is to allow "for multi-family residential uses".

The appellant is correct that the Community Plan designation and in this case the accompanying Penryn Parkway Development Policies take precedence over the underlying zoning. But in this case and as discussed in the staff report and as stated in the Planning Commission's findings, there is no inherent conflict between the proposed project's land use, its zoning, density or design and the Penryn Parkway land use category or the Parkway Development Policies. As discussed above, properties in the Penryn Parkway area have been assigned the Penryn Parkway land use designation. Zoning is the implementing mechanism to determine allowed land uses and densities in the Penryn Parkway area, and the Project is consistent with both its zoning designations and applicable Penryn Parkway policies in the Community Plan.

**Comment 13:** 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.)

In the case of this multiple family residential proposal, the maximum number of allowable units under the plan 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].)[fn.1] The Project, as proposed, demonstrates the ability to cluster 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.)

(footnote 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 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.

**Response 13:** As explained at length above, in the County’s staff reports, and the EIR, the proposed Project is, in fact, consistent with the Horseshoe Bar/Penryn Community Plan. (See DEIR, pp. 4-12 to 4-16, and Appendix B to the DEIR.) The County disagrees with the appellant’s position that the project is inconsistent with applicable land use plans for the several reasons stated in the above responses.

**Comment 14:** 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 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 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 Plan's 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 Plan's 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.)

**Response 14:** The County disagrees with the appellant's position that the Project is inconsistent with the Horseshoe Bar/Penryn Community Plan Penryn Parkway Development Policy i. calling for clustering of multi-family residential uses to preserve the maximum amount possible of undeveloped open space on-site. In fact, the proposed Project is clustered to the maximum amount feasible in order to balance the competing goals of providing the number of units that renders the project economically feasible, maintaining a scale and size consistent with the Community Plan's development policies (two-story limit), and respecting the existing legal and physical constraints on the developable area of the project site (e.g., easements, setback requirements). The County believes, based on all of the available evidence contained in the EIR, its staff reports, consultant reports and economic feasibility information provided by the applicant, that the proposed Project does, in fact, preserve the maximum amount possible of undeveloped open space on-site. The development layout shown on Figure 3-3 of the DEIR illustrates the proposed clustering of the buildings and the preservation of substantial portions of open space, riparian habitat and oak woodland habitat in the center of the site and on the northern edges of the site. The landscaped area is approximately 260,000 square feet, with another 37,900 square feet of open space area, for a total undeveloped area of 297,900 square feet, or 6.84 acres out of the 15-acre site.

**Comment 15:** 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 to 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 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 run from August through May. (<http://www.hlcpennryn.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 modeling, the “on-site wastewater collection system must be sized using a 400 gpd 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 400 gpd/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 EIR 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 the 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.)

**Response 15:** The County summarizes the questions raised in the above comment regarding the EIR's sewer analysis and responds as follows.

1. Why was monitoring done in summer? It doesn't appear to account for inflow and infiltration during wet weather.

**As clarified in the EIR Errata, SPMUD applies a wet weather peaking factor to the monitoring data to evaluate wet weather conditions. SPMUD has confirmed adequate capacity during all seasons.**

2. V&A report indicates sediment in the line that should be cleaned.

**The line has already been cleaned since the V&A report was prepared, thus restoring full capacity in the line. SPMUD has a regular program for maintenance. Removal of sediment buildup is part of routine maintenance.**

3. Why was the 190 gpd rate used instead of the 400 gpd rate?

**190 gpd is the actual sewer flow and that rate is used to calculate the total volume of sewage generated. 400 gpd is the design flow, meaning the system is sized to accommodate periodic peaks (such as occurs during wet weather). SPMUD considers both the actual flow rate and the design flow rate when evaluating system capacity and design and has concluded that their facilities have sufficient capacity to accommodate the project during wet and dry seasons. Clarification has been provided in the EIR Errata. The ECO:LOGC memo also recommended using the 400 gpd rate for sizing the on-site wastewater collection system.**

4. Monitoring doesn't reflect operation of the Hope Lutheran Church and School.

**The church and school are downstream of the project site, so flows from that property do not pass through the sewer lines within the Orchard at Penryn project site. Per the Hope Lutheran Church and School website, their enrollment in 2012 is only 26 students. This is not a major sewage flow generator. SPMUD has reviewed their files for this part of the system, and even with the church and school and the proposed project, there would still be around 80,000 gallons of available capacity in the 8-inch line that would receive flows from the site. The 8-inch line transitions to a 10-inch line not far south of the church, and into a 15-inch trunk line, providing additional capacity downstream of the site.**

**The above information was provided to the EIR consultant in telephone conversations with Sam Rose, SPMUD Technical Services Manager.**

**Comment 16:** 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.)

Commenters 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 street"]), 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.”])

**Response 16:** Please see EIR Errata, pp. 14-1 through 14-8 and pp. 14-10 through 14-16 for clarifications made to the Cumulative Impacts chapter that respond to these concerns. The Clover Valley project was not included in the cumulative development scenario because it is too far away to influence the project’s impacts. The Clover Valley site is more than two miles distant from the Orchard at Penryn project site and is not adjacent to the Horseshoe Bar/Penryn Community Plan area. Further, the Clover Valley Site is located west of Clover Valley Creek, Antelope Canal, and the Southern Pacific Railroad. These features combined with the natural ridgeline near Antelope Canal and the railroad form a physical barrier that disrupts the continuity of biological resources and restricts wildlife movement to the east. Additionally, drainage from the Clover Valley site and drainage from the Orchard at Penryn site flow into separate drainage sub-basins (the Clover Valley sub-watershed and the Secret Ravine sub-watershed). Both of the sub-watersheds are part of the Dry Creek Watershed. However, their flows combine with each other more than six miles from the Orchard at Penryn project site. Based on the physical separation between the two sites, impacts at the Clover Valley site would not influence impacts of the proposed project under existing or cumulative conditions.

Comment 17: 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 the 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.) 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.

**Response 17:** The DEIR does, in fact, note the geographic area for each cumulative impact discussed as relevant to the proposed Project. The DEIR states that "[c]umulative land use impacts would occur throughout Placer County and the Horseshoe Bar/Penryn area." (DEIR, p. 14-2.) Because the land use impact analysis focuses on the proposed Project's consistency with the applicable portions of the County General Plan and Horseshoe Bar/Penryn Plan, the geographic scope of "Placer County and the Horseshoe Bar/Penryn Community Plan area" is the logical geographic scope for this potential cumulative impact.

For biological resources, the DEIR states that "the project site is located in an area of transition between the Sacramento Valley and Sierra Nevada foothills regions. Significant cumulative impacts in both regions include loss of habitat types, such as oak woodlands, riparian areas, and federally-protected wetlands, and loss of special-status species." (DEIR, p. 14-3.) Because the EIR's analysis of potential biological resources impacts centers on the types of habitats on the project site that could be affected by development, the scope is appropriately defined as all of these types of habitats that similarly occupy this transition zone between the Sacramento Valley and Sierra Nevada foothills.

With respect to visual resources, the DEIR states, "[t]he geographic scope for cumulative impacts to visual resources is the *Horseshoe Bar/Penryn Community Plan* area. (DEIR, p. 14-3.) Because some of the Community Plan's policies regarding visual resources are applicable to the proposed Project and the Community Plan's residents would be the population most likely to experience any adverse impact to visual resources as a result of the Project, this scope is the logical and appropriate extent of the cumulative impact evaluation.

For transportation impacts, the DEIR states that, "[b]ased on the project's size and associated trip generation, the project is expected to influence traffic and circulation patterns in the local area. Traffic generated by the proposed project would not make a noticeable contribution to regional traffic patterns. Thus, the geographic scope of this analysis includes the intersections and roadway segments in the project vicinity." (DEIR, p. 14-4.)

The geographic scope of the cumulative noise impact was explained as the "immediate project vicinity" (DEIR, p. 14-12), which is logical given that noise is experienced as a problem primarily by receptors closest to the source, and because the focus of the analysis is on the magnitude of any contribution the proposed project would make to an existing significant cumulative impact, the "immediate project vicinity" is a logical and appropriate scope.

The DEIR expressly states that the geographic scope for consideration of cumulative impacts to geology and soils is the Sacramento Valley, because individual project impacts for this resource are focused on loss of soil resources, increased soil erosion, and alteration of natural topography, which are larger, regional concerns. (DEIR, p. 14-12.)

The geographic scope of cumulative impacts to hydrology and flooding is the Dry Creek Watershed and the Sacramento Valley groundwater basin, because those are the significant surface and groundwater features that the proposed project, in conjunction with nearby projects, could affect. (DEIR, p. 14-13.)

Therefore, as demonstrated above, the geographic scope was explained for each resource topic, and moreover, the appellant offers no substantial evidence demonstrating that the EIR should have defined the respective scopes differently. See also EIR Errata, pp. 14-1 through 14-8 and pp. 14-10 through 14-16 regarding further clarifications to the geographic scopes for the respective cumulative analyses of each impact topic.

**Comment 18:** 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.

**Response 18:** Please see EIR Errata, pp. 14-1 through 14-8 and pp. 14-10 through 14-16 for clarifications made to the Cumulative Impacts chapter that respond to these concerns. Furthermore, the commenter is incorrect in stating that an adequate cumulative impacts analysis requires precise quantification of the impacts from each of the projects included in the cumulative setting. The cumulative impacts analysis notes the influence or contribution of projects included under the cumulative scenario in specific topical discussions where relevant.

**Comment 19:** 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...."].)

**Response 19:** The comment assumes that the sound levels of the construction equipment presented in Table 9.7 in the DEIR represents the "as-mitigated" condition of that equipment and therefore that the use of such equipment, even as mitigated, would exceed County noise standards. In fact, there is no support in the DEIR for such an assumption. The referenced table presents a generic estimate of construction equipment noise levels, not the as-mitigated levels. Moreover, construction noise is exempt from the County's noise ordinance as long as construction activities are limited to the designated hours. None of the measures applied to this impact seek to reduce noise levels from the levels shown in Table 9.7. Rather they control the times at which noises can be generated, ensure that construction noise (equipment) is not excessive, identify performance standards applicable to any blasting activities, and prohibit construction traffic on Taylor Road. See EIR Errata pp. 9-7 and 9-10 for more information.