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August 19, 2014

Marin County Planning Commission
3501 Civic Center Drive, Suite 308
San Rafael, CA 94903

Re: Planning Commission Hearing: Marin County Housing Element Update Hearing #2
Dated August 25, 2014

Dear Chairman Holland and Members of the Planning Commission;

I represent Community Venture Partners, Inc., (CVP), and am also writing on behalf of Joan Bennett, Rick Harris, and Justin Kai in regard to the 2015-2023 Marin County General Plan Housing Element amendment. CVP is a non-profit public benefit organization dedicated to facilitating and assisting community-based projects, programs and initiatives that demonstrate the highest principles of economic, social and environmental equity and sustainability. CVP is concerned that the current planning process for the Housing Element does not comply with Government Code and Housing and Community Development requirements.

CVP, along with other Marin community organizations, has previously sent a letter objecting to the County's approach to preparing the Housing Element. This letter provides support for those communications. In brief, CVP objects to the large number of sites identified for housing in the current Housing Element draft and too many other proposed policies which cede local planning authority and participation by Marin County residents regarding decisions that affect their communities, for the following reasons.

1. **The County's rapid schedule in preparing and submitting the Draft Housing Element precludes public participation and is not consistent with state law and guidelines.**

In preparing a housing element, the Government Code 65583(c)(7) states that; "The local government shall make a diligent effort to achieve public participation of all economic segments of the community in the development of the housing element, and the program shall describe this effort." The Housing and Community Development Department has provided guidelines interpreting this statutory requirement. This Guidance states that municipalities must

> "Conduct effective meetings and establish rapport early. Build consensus among stakeholders, the public, professionals, and local decision-makers."

> "Bring directly affected stakeholders into the process as soon as possible. This facilitates the creation of teamwork earlier in the process and communicates the process is inclusive."
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> "Be willing to listen. Being patient and listening to all viewpoints, especially when the process breaks down, is valuable to restart the process and gain credibility with the participants."
> http://www.hcd.ca.gov/hpd/housing_element2/GS_publicparticipation.php

However, neither the statute nor the HCD guidance has been complied with by the County. The County's accelerated schedule has left no time for meaningful public participation and thus, the County has not made a "diligent effort to achieve public participation" as required by state law. Evidence of that lack of compliance is shown in the fact that the County process has not resulted in the HCD required effective meetings, rapport, consensus, teamwork or credibility. This is made clear by the fact that the County has not made any effort to "build consensus among stakeholders, the public, professionals, and local decision-makers" as set out in the HCD Guidelines. As evidenced by the public objections to the Draft Housing Element and the raucous nature of the public meetings, the current planning process has not complied with HCD guidance and the County should follow the HCD Guidelines directing that, "when the process breaks down, [it]is valuable *to restart the process* and gain credibility with the participants."

There is no legal reason to rush the Draft Housing Element process.

The relevant Housing Element Plan Period begins on January 31, 2015. (See Gov't Code § 65588.) However, this date has no legal consequences to the County as the Government Code also provides flexibility to municipalities regarding that date; SB 375 provides that the only sanction regarding adoption of the Housing Element is where a municipality approves the Housing Element more than 120 days after the January 31 deadline.) Gov't Code § 65588(e)(4).) (That sanction would be to require the Count to move from an 8 year to a 4 year planning cycle.) Therefore, the County still has until May 31, 2015 to adopt its Housing Element before being forced to move to a four year cycle.

The County also intends to provide its Housing Element to HCD 60 days before it is approved as provided in Gov't Code Section 65585(b). And the County wishes to consider the findings made by HCD before approving the Housing Element. While neither of these steps is mandatory, [1] the County can easily approve its Housing Element by May 31 (and probably by January 31) if it restarts its public process.

In answer to my question regarding other possible sanctions if the Housing Element is not adopted by January 31, 2015, County staff has provided me with one reference to one document, Metropolitan Transportation Commission Resolution No. 4035 (May 17, 2012.) This resolution approves a policy prepared by MTC staff: for the OBAG cycle subsequent to FY 2015 - 16, jurisdictions must adopt housing elements by January 31, 2015. (Attachment A, p. 13.)

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[1] Courts have supported aberration from HCD Housing Element guidance where the general plan was otherwise consistent with the Government Code. *Bownds v. City of Glendale* (1980) 113 CA 3rd 875; city Housing Element valid whether it comported with guidelines of the Dept. promulgated pursuant to state planning and zoning law.

This policy on its face has no authority in federal or state law[2] that I am aware of and instead is MTC's effort to tie federal transportation funding to increased density to benefit larger, urban jurisdictions in the Bay Area in an attempt to compete for federal taxpayer funds. MTC in fact, is not the state agency charged with addressing transit oriented development and affordable housing; that agency is HCD.[3]

This MTC policy, in its effect, conflicts with Government Code 65583(c)(7) requiring extensive public participation. Because the ABAG allocations were made so late and the County has taken so much time to develop its Housing Element, this MTC policy requires the County to illegally not comply with Section 65583(c)(7). Since Resolution 4035 has no support in federal and state law and since it conflicts with the Government Code, it is invalid. Instead of violating 65583(c)(7), the County should legally challenge any attempts to implement it by MTC. Community Venture Partners and affiliated residents would potentially support and join such a legal challenge by the County against MTC.

2. **The County's justification for designating an enormous buffer above ABAG's allocation is not consistent with County and state law or policy.**

County Staff originally recommended that the County designate a total of 286 units (including 101 units in excess of the County's RHNA quota requirement). However, after direction from your Planning Commission, Staff currently is recommending that the County designate a total of 502 total units - approximately 317 more units than the 185 required by the County's RHNA allocation from ABAG.[4] CVP believes this number is unnecessarily high and reductions could be made in certain areas such as Marin wood, Strawberry and St. Vincent's Silviers. CVP does understand the decision to provide a modest buffer if certain sites fall though after certification; however, a number halfway between the RHNA allocation and staff's original proposal of July 28, 2014 in its Staff Report (i.e., 36 units), or even less, would be more appropriate.

The Planning Commission, unfortunately, has rejected County Staff's recommendations and even more clearly, the opinion of Marin stakeholders and residents, many of whom attended the July hearing and voiced their objections. The Planning Commission has proposed that County's 2015-2023 inventory include a total of 502 units. Remarkably, this designation provides for increased density allowing for almost 317 *more* units than is required by the County's 2015-2023 allocation.

Other policies also cause concern to CVP including:

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[2] Resolution No. 4035 assumes in its recitals that an MPO has complete discretion to distribute Federal transportation funding. This is not true because Federal agencies have guidelines for such grant distribution and such guidelines do not include MPOs, like MTC restricting funds to municipalities that do not implement state policies on affordable housing or density unrelated to federal transportation law. (See e.g. 23 U.S.C. § 134; 23 CFR Parts 450 and 500.) In fact, MTC itself may be in violation of federal regulations which require MPOs to have public participation plans and consultation with all interested parties for TIP spending. (23 CFR 450.316.)

[3] Cal. Health and Safety Code § 53560 et seq.

[4] The Staff Reports' tables use confusing and at times, inaccurate nomenclature. The number of homes identified by ABAG is the County's RHNA "allocation." The sites designated for inclusion by the County in its Housing Element submittal to HCD are "identified." Gov't Code Section 65583

- Requiring minimum densities in some places that are already zoned for multifamily,
- Recommending the study of Ministerial Review for Affordable Housing

Importantly, once the County submits these policies and designations to HCD, the County and the community will lose much of the local control over its own development approval process.   This is because the Government Code Section 65863(b) restricts municipalities ability to downzone parcels that have been included in an HCD certified Housing Element.   Thus, the Planning Commission– *for eight years* – is essentially ceding its ability to opine on and shape much of the planning for all of these development projects in Marin County. Further, the Planning Commission is not just stripping itself of the autonomy to review hundreds of individual development proposals,[5] it is also stripping the Board of Supervisors of such power and most importantly, is disenfranchising the residents of Marin County of their ability to participate in decisions affecting their communities.

In addition, the Staff's and the Planning Commission's current recommendations could have serious legal repercussions. I previously served as Deputy County Counsel in Santa Barbara County where I was lead attorney for housing element issues. I would have counseled my clients that your Planning Commission's approach could greatly increase county legal liability because such an approach potentially exposes the County to litigation (even where it makes the required findings accompanying any up zoning).   To be legally secure, the County therefore, needs to obtain recertification by HCD for land use changes for identified sites, even if due to unforeseeable circumstances such as earthquakes, sea level rise or findings of soil toxicity.

Once the County cedes that much authority to the state and locks itself into such a high number of RHNA sites (and creates more inflexibility by increasing the number of ministerial permits) the legal liability potential for the County rises greatly. Thus the Planning Commission is – probably unintentionally - providing enormous legal leverage to those that might wish to sue the County. There is a good reason that few jurisdictions in the state of California provide such enormous buffers to their RHNA allocations.

Perhaps most striking is that this is not a necessary or legally required step at all. The County currently has the authority – right now – to consider proposals from developers on all those sites analyzed in the County's previous, approved Housing Element, without their inclusion in this Housing Element.

3. The County has not properly considered the impacts of the State Density Bonus Law in calculating the number of housing units developed.

The California State Density Bonus Law (California Government Code Sections 65915 – 65918) allows developers to obtain an increased unit density bonus in exchange for offering to build affordable or senior units. The Density Bonus Law provides up to a 35 percent increase in project densities, depending on the amount of affordable housing provided. If all of the proposed units designated in the Housing Element were to qualify for the State Density Bonus provisions the total potential units proposed would

[5] For instance, Government Code Section 65863(d) can be interpreted to require the County to require a developer to increase density from that applied for. Such a requirement would be extremely onerous to the County and the developer.

increase from 502 units to 678 units. CVP feels that this possibility must be considered and adds further credence to the argument that the so-called "buffer" of designated sites, above the RHNA legal requirement, should be kept at a minimum. Given the existing zoned capacity for additional housing (4,476 additional housing units)[6] and density bonuses in unincorporated Marin County, there is no good argument for such an outsized buffer.

4. The County must prepare a Supplemental EIR or a Negative Declaration to comply with CEQA.

My understanding is that the County intends to use the 2013 General Plan Update EIR to comply with the California Environmental Quality Act. However, the County must ensure that it complies with CEQA by providing substantial evidence that there is no increase in the severity of the environmental impacts identified in the 2013 EIR.

Public Resources Code § 21166, and its implementing Guidelines § 15162, mandate that once a public agency has prepared an EIR for a project, no further EIR is required unless either (1) substantial changes are proposed in the project that will require major revisions of the EIR, or (2) substantial changes occur with respect to the circumstances under which the project will be undertaken that will require major revisions in the EIR, or (3) new information, which was not known and could not have been known when the EIR was certified, becomes available.

There are many new developments since the text for the 2013 EIR was prepared in 2012, including new National Park Service proposal for parking on Highway One that will increase congestion, the January 2014 declaration of drought by Governor of California, and recent studies regarding newly discovered high levels of benzene at the proposed Marin wood site. A project change that may require more extensive CEQA analysis is the proposal to essentially adopt ministerial approval for over 500 units.[7] SB 610 requires that agencies prepare Water Supply Assessments for residential projects larger than 500 units and include them in the project draft environmental impact report. (Water Code § 10910 et seq.)

Both the Water Code provisions on WSAs and Section 15155 refer to "project" as within the CEQA definition of a project found in Section 21080 of the Public Resources Code. Section 21080 has been broadly interpreted by the courts to include program and policy level decisions that commit an agency to action or substantially forward an agency's decision process. *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116. This includes program-level analysis of water supply for development addressed in area and specific plans. *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 199, 206. There is nothing in Section 15155 that limits this definition to projects where

[6] The Draft Marin County Housing Element, PC Attachment 1, Section III: Constraints and Opportunities, page III-5: states that the County already plans for "4,476 additional housing units calculated as future buildout for unincorporated Marin" up to the year 2030, based on the existing zoning in place. This adds further argument that the enormous number of "buffer" sites recommended in the Housing Element Staff Report are excessive and unnecessary. The State Density Bonus laws will also be available for many of these existing zoned sites, increasing that number significantly.

[7] Also, 216 of the units noted in the Draft Housing Element are for very low, low and moderate income families, those developments will very likely use the state density bonus provision, which would add yet another 76 units. That brings the total of new units added by the Draft Housing Element to 578.

specific entitlements are approved. In fact, a program EIR is precisely the type of CEQA project and document for which a WSA would assist the decision makers and the public in examining scarce water resource. (See supra *Stanislaus Natural Heritage Project at 206.)* Given the declared drought in California and Marin's even more drastic water supply issues, a WSA would clearly fall into CEQA's requirements.

In order to demonstrate that there are no such changes, circumstances or new information, the County will, <u>at the least</u>, be required to prepare and circulate a Negative Declaration. (See *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192.)

In conclusion, CVP urges the Planning Commission to direct staff to "restart" the public participation process, reduce the amount of buffer units to a reasonable number that does not increase County liability or unnecessarily cede County authority, and to consider the social, economic environmental costs of its proposal for such large scale development with little community participation.

Sincerely,

Edward Yates