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7 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 IN AND FOR THE COUNTY OF MARIN

9 MARIN COMMUNITY ALLIANCE,)
an unincorporated association, and)
10 MEEHYUN KIM KURTZMAN, an individual)

11 Petitioners)

12 vs.)

13 COUNTY OF MARIN)

14 Respondent)
_____ /

Case No. 1304393

**PETITIONERS' RESPONSE TO THE
COUNTY'S MOTION TO SET
ASIDE AND VACATE JUDGMENT**

Date: July 29, 2015

Time: 8:30 a.m.

Courtroom B

Honorable Roy O. Chernus

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16 **I. INTRODUCTION AND SUMMARY**

17 The County's Motion to Vacate the Court's Judgment does not meet the Code of Civil
18 Procedure 663 standards of either 1) an "incorrect or erroneous legal basis for the decision; or 2) not
19 consistent with or not supported by the facts.

20 Instead the County's motion seeks to rehear the Judgment's exhaustion analysis, disagree
21 about the Court's use of the CEQA standard of significance to assess cumulative traffic impacts and
22 argue about the scope of the writ relief granted.^{1/} None of these rulings by the Court had an
23 "erroneous legal basis" or were "not supported by the facts." Code Civ. Proc. § 663. Instead, these
24 rulings were each well within the Court's discretion, given the undisputed facts as set forth in the
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27 ^{1/}The County also alleges that the Court erred in stating that Grady Ranch was designated as AH
28 zoning. This argument is irrelevant. Whether or not Grady Ranch was designated AH Zoning or not
does not make any difference as to the housing figures the 2012 HE was required to analyze, i.e., 240
units. Petitioners' point on this is that the 2007 EIR did not analyze that type of development at
Grady, and thus tiering was inappropriate. The Court's Judgment disagreed.

1 record. The Court should deny the County's motion.

2 In the event the Court were to revisit its Judgment as a result of the County's motion, and
3 given the County's emphasis on the traffic issue, the Court should *also consider* how the SEIR's
4 traffic study demonstrates the flaws in the County's plan to plan comparison as was done in the SEIR
5 generally. In Petitioners' view, a clarification by the Court on the issue of how the EIR's traffic study
6 conclusions can be read consistently with the SEIR's finding of no significant impacts from the HE
7 project would clearly aid the record on appeal, should either party wish to pursue that option in this
8 case. *See* Discussion, Section III.B, *infra*.

9 **II. STANDARDS FOR MOTIONS TO VACATE UNDER CCP SECTION 663.**

10 Code of Civil Procedure § 663 provides, in pertinent part:

11 A judgment or decree, when based upon a decision by the court, . . . may, upon motion of the
12 party aggrieved, be set aside and vacated by the same court, and another and different
13 judgment entered, for either of the following causes, materially affecting the substantial rights
14 of the party and entitling the party to a different judgment: [para.] 1. *Incorrect or erroneous*
legal basis for the decision, not consistent with or not supported by the facts; and in such case
when the judgment is set aside, the statement of decision shall be amended and corrected."

15 (emphasis added.) Thus the grounds for vacating a judgment are 1) incorrect or erroneous legal basis
16 for the decision; or 2) not consistent with or not supported by the facts:

17 [A] motion to vacate lies only where a "different judgment" is compelled by the facts found.
18 (§ 663.) A motion to vacate under section 663 may only be brought when "the trial judge
19 draws an incorrect legal conclusion or renders an erroneous judgment upon the facts found
by it to exist.' 'A motion to vacate under [Code of Civil Procedure] section 663 is a
remedy to be used when a trial court draws incorrect conclusions of law or renders an
erroneous judgment on the basis of uncontroverted evidence.' (citations omitted.)

20 *Payne v. Rader* (2008) 167 Cal. App. 4th 1569, 1574.

21 Procedurally, the "statute does not contemplate merely the setting aside of the judgment, as
22 does a motion for new trial or a motion for relief from default under C.C.P. 473. It expressly provides
23 for vacating the judgment and entering of another judgment. Hence, an order of vacation, without
24 directing entry of a new judgment, is void." (8 Witkin, Cal. Procedure (3d ed. 1985) Attack on
25 Judgment in Trial Court, § 141, p. 544, italics in original.)

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III. ARGUMENT

A. THE COURT SHOULD DENY THE COUNTY'S MOTION TO VACATE.

1. The County's Exhaustion Argument Does Not Warrant Vacating the Judgment.

The County's exhaustion argument should be rejected on several grounds.

First, the Court's ruling on exhaustion was not legally erroneous and was based on the facts in the record. *See* Judgment, p. 23:18-19 ("On this record, the court finds that Petitioners have exhausted their administrative remedies.") There is no grounds for revisiting this ruling in a Motion to Vacate, particularly given that the County had the opportunity to raise the issue it is arguing about in its motion when it filed its Opposition Brief, or at the hearing in this matter. As the Court will recall, the County never raised any specific issue with relation to exhaustion, making it difficult if not impossible for Petitioners or the Court to analyze exhaustion with respect to any particular issue. Now, the County raises a single particular exhaustion issue but *after* the Judgment has been entered and served. In Petitioner's view, such a rehearing on an issue already addressed by the Court is not within the grounds for which relief under Code of Civil Procedure § 663 is appropriate.

Second, the County's argument that although members of the public raised traffic as an impact that was not being addressed adequately by the SEIR, those objections were not specific to exhaust on traffic, should be rejected. Here, public commenters were Marin citizens, not lawyers or transportation experts. As such, the claim that the traffic study did not analyze the true impacts of the project should be found to have been adequately exhausted. *See Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal. App. 4th 1042, 1051-1052 (describing less rigorous exhaustion standard applicable to "parties unfamiliar with the technicalities of administrative proceedings and subsequent judicial proceedings.") *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 163 ("[I]n administrative proceedings, [parties] generally are not represented by counsel. To hold such parties to knowledge of the technical rules of evidence and to the penalty of waiver for failure to make a timely and specific objection would be unfair to them.")

This point is all the more true given that the traffic study in the SEIR fails to provide an adequate description of its input data and methodology to allow for a meaningful critique, except to

1 point out, as the commenters did, that simply comparing the traffic study numbers to the CWP EIR
2 numbers was improper. *See e.g.*, Petitioners' Opening Brief, pp. 38-39.

3 Finally, exhaustion is a problematic defense given that County officials informed citizens that
4 traffic impacts had already been found to be significant and that further analysis would occur:

5 MR. BERMAN: Again, you know, I don't -- there's no traffic engineers here. You know, this
6 is modeling work. Modeling work that's done by TAM, Transportation Agency of Marin,
7 modeling work that's done by ABAG, modeling work that's done my MTC and then it's all
8 put together in terms of what we call traffic assignment zones by the county, the Community
9 Development Agency GIS folks. And these are projections based upon the modeling, *The*
10 *results...of course, are as good as the information that goes into it.* But it is a -- somewhat of
11 a fluid situation where those assumptions are changing each time it's done, so yeah.....

12 COMMISSIONER HOLLAND: So, there's a general statement of overriding impact for
13 traffic, which doesn't specify exactly which sites were affected by that?

14 CHAIR LUBAMERSKY: Right. But what we're saying is that of these sites we evaluated and
15 the screening level date is provided *many of these same impacts that were in the countywide*
16 *plan would likely have render the same conclusion for these specific sites, significant*
17 *unavoidable impact.* So, we're being conservative calling it significant unavoidable.

18 COMMISSIONER HOLLAND: But we don't really --

19 CHAIR LUBAMERSKY: I know it's --

20 COMMISSIONER HOLLAND: -- call it out to site specific...

21 CHAIR LUBAMERSKY: No, because we -- again, *it just goes back to we don't have the*
22 *information for each particular site yet.* So, you can't say it until you actually have an
23 application in front of you that you're considering.

24 *See AR P11893, P11907 (emphasis added.).*

25 In this and other similar public hearing conversations, traffic impacts were routinely portrayed
26 by County decision-makers as significant and unavoidable based on mysterious input data used in
27 unexplained ways in the traffic analysis. In this context, it is inappropriate for Marin citizens to be
28 told they did not exhaust this issue sufficiently. *See e.g.*, Petitioners' Opening Brief, pp. 38-39.

29 **2. The Court Did Not Rely on an Erroneous Legal Basis to Find Cumulative
30 Significant Traffic Impacts.**

31 The County argues (p. 6:6-12) that the Court's use of the same significance criteria utilized
32 in the 2007 CWP EIR (citing to AR, p. A 3042, n. 12) to assess whether additional traffic impacts
33 would be cumulatively significant is flawed because such thresholds are not applicable to a
34 determination of whether a new EIR need be prepared under CEQA Guideline § 15162(a).

35 This argument is baseless and the County provide no authority for its position at all. Here,

1 where an additional cumulative impact is considered to be significant, that impact must be identified
2 in the EIR and either mitigated or addressed through a statement of overriding considerations. *See e.g.*
3 Pub. Res. Code §§ 21002, 21081. This occurs whether or not the agency is proceeding under CEQA
4 Guideline § 15162 or not. *See e.g.*, 14 Cal. Code Regs. § 15162(a) ('substantial changes' include "the
5 involvement of *new significant environmental effects.*") (emphasis added.)

6 The County argues (pp. 7-8) the change in cumulative traffic is not 'so substantial' as to
7 require it to be addressed in the SEIR. However, the County provides no criteria for how a court is
8 to determine whether a change was 'substantial' except to rely on the CEQA significance criteria to
9 identify in the first instance whether an additional incremental cumulative impact is in fact significant.

10 **3. The Court Should Not Revisit the Scope of the SEIR.**

11 The Court's decision on the scope of the remedy here is well within its discretion. Here, the
12 Court proceeded to exercise its discretion under Pub. Res. Code § 21168.9 and determined that
13 severance - i.e., setting aside part of the EIR, but not other parts – was not appropriate. This decision
14 need not be revisited in a motion to vacate.

15 The County argues that the Court erred in relying on *Land Value 77, LLC v. Board of Trustees*
16 (2011) 193 Cal. Appl. 4th 675, 681-682 due to that decision's reliance on an outside treatise.
17 However, the reasoning of *Land Value 77*, that the "statutes and CEQA Guidelines provide for the
18 certification of an EIR when it is complete, and the concept of completeness is not compatible with
19 partial certification" and "an EIR is either complete or it is not" is completely sound. Here, the
20 County's traffic analysis conclusions there will be no significant impacts from the Project relating to
21 traffic are flawed. Therefore the SEIR cannot be found to be a complete document.

22 Assuming for purpose of argument that the severance of an EIR may be appropriate in certain
23 circumstances when a court grants a writ under Public Resources Code § 21168.9, it is clearly not
24 outside a court's discretion *not to do so*, based on the related nature of the EIR's analysis. *See e.g.*
25 *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184, 1221
26 ("[N]o discrete or severable aspects of the projects are unaffected by the omitted analyses; the defects
27 relate to the shopping centers in their entirety, not just to one specific retailer.")

28 Indeed, even the case cited by the County, *Preserve Wild Santee v. City of Santee* (2012) 210

1 Cal. App 4th 260, makes this point clear:

2 Having concluded a trial court has the authority under section 21168.9 to issue a limited writ
3 in appropriate cases, the question remains whether the trial court abused its discretion in doing
4 so here. ‘An abuse of discretion occurs when, in light of applicable law and considering all
5 relevant circumstances, the *court's ruling exceeds the bounds of reason.*’...

6 *Id.* at 288-289 (emphases added.) Indeed, in *Wild Santee*, the court noted:

7 [D]uring our review of plaintiffs' biological resources claims, we observed a strong
8 interrelationship between the project's fire safety impacts and its biological resources impacts
9 because the preservation of some sensitive species...Consequently, whatever steps the City
10 takes to remedy the EIR's deficiencies in one of these areas could affect the steps the City
11 takes to remedy the EIR's deficiencies in the other. Thus, we question whether the issuance
12 of a limited writ was reasonable in this case. We need not decide the matter, however, because
13 the *trial court recently ordered the City to decertify the EIR* and set aside the project
14 approvals as part of subsequent trial court proceedings.

15 *Id.*

16 In sum, the Court properly exercised its discretion is setting aside the EIR until the County
17 can complete an accurate and complete EIR document for certification.

18 **B. WERE THE COURT TO VACATE ITS JUDGMENT, IT SHOULD CONSIDER
19 THAT THE TRAFFIC STUDY CONTRADICTS THE ASSUMPTION THAT THE
20 2012 HE ‘PROJECT’ WILL HAVE INSIGNIFICANT IMPACTS.**

21 Given that the County has asked the Court to reexamine its Judgment at this time, the Court
22 should also consider how the traffic issue highlights the flaw in the County’s assumption that it may
23 simply tier to the findings of significant and unavoidable cumulative effects made in the 2007 EIR.

24 Here, the traffic analysis *demonstrates two points* that raise substantial concerns about the
25 County’s ability to tier to the 2007 CWP EIR for its impact analysis.

26 First, the traffic analysis shows that the 2007 CWP EIR did *not* correspond to existing – or
27 *even future* – traffic levels. Instead, the ‘buildout numbers’ estimated for 2030 were *substantially*
28 *higher* than the updated estimates contained in the SEIR for the year 2035.^{2/}

29 The Judgment (p. 39:13-14) refers to this fact without comment, stating only “[t]he SEIR also
30 relied on an estimate for a smaller 2030 population than projected in the CWP.” But this is not a
31 throwaway point. In Petitioner’s view, the fact that the population figures were *overestimated* in the

32 ^{2/}See AR 17 D955, Row 15. The traffic data shown for this segment demonstrates that predictions
33 for 2030 traffic levels made in 2005 (1,035 vehicles per hour (VPH) for the am peak) were well above
34 the updated estimates of 773 VPH for the year 2035 Cumulative Baseline. This overestimation of
35 future impacts is consistent for all road segments. See AR 17 D955-958 (Exhibits 3.0-35 and 3.0-36.)

1 2007 CWP EIR does *not* support the idea of tiering but in fact highlights the problem with comparing
2 artificial buildout numbers to realistic figures that are based more specifically on the designation and
3 locations for the Housing Element inventory. Here, instead of an actual comparison between the
4 Project and no-project scenarios, the County simply starts out with huge inflated and in retrospect
5 *inaccurate* numbers dating back to 2005, leading to 42 significant and cumulative effects that cannot
6 be mitigated, and, according to the approach taken by the County and condoned by the Court's
7 Judgment, *need not be addressed again* on a programmatic basis in a CEQA proceeding. In
8 Petitioners view, the traffic analysis shines a glaring light on this legal error. *See e.g., Environmental*
9 *Planning & Information Council v. County of El Dorado* (1982) 131 Cal. App.3d 350, 357-358. *See*
10 *also Communities For a Better Environment v. California Resources Agency* (2002) 103 Cal. App.
11 4th 98, 124. These arguments have been raised already and will not be repeated here.

12 Second, the traffic study demonstrates that there is *difference* between the 'project' levels of
13 development, versus what development would occur if there were *no 'project.'*" *See e.g., AR 955-959*
14 (tables showing that the 'Project' will increase traffic in comparison to 2030 baseline conditions.)

15 This fact is important as it shows 1) the irrelevance of the 2007 CWP numbers in estimating
16 the actual impacts of the project; and 2) that in some areas such as Lucas Valley, but also in Kentfield
17 and Tam Valley, the 'project' – ie the designation of the 2012 Housing Inventory sites – *will cause*
18 *development that would otherwise be unexpected to occur within the 2030 time frame.*^{3/}

19 The result of the SEIR's approach is the public is provided no real information about the level
20 of cumulative impacts that may occur in the future based on how the County chooses to meet the

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22 ^{3/}As discussed in Petitioners' briefing, the traffic analysis does not provide any explanation for what
23 data was used to create the models, how the numbers were derived, or how the 'project' was defined
24 or analyzed in the traffic analysis. *See POB, pp. 39-40* ("The traffic analysis suffers from other
25 problems. It fails to provide any information on existing levels of traffic, without explanation on why
26 the absence of such readily available information does not hinder the informational adequacy of the
27 review process. It provides no data or input numbers on how the future 2035 cumulative baseline was
28 established, nor how the County's new P09 Model works. There are no background reports, for
example, to explain the inputs that formed the model's comparisons between the "With" and "Without
Project" cumulative baselines set for 2035, or why such a comparison is superior than one comparing
the project to existing conditions on the ground....at every level, the SEIR traffic analysis fails to meet
CEQA's requirement of proper procedure and adequate information to ensure a 'meaningful evalua-
tion' of project impacts.")

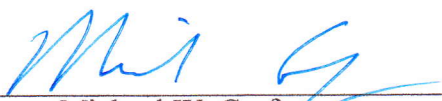
1 Housing Element state law requirements. Instead, the SEIR provides only comparisons, which fail
2 to ensure meaningful evaluation of the effects of the project proposed, including explaining why
3 further increases in traffic up to 16% do not present cumulatively significant impacts, which they
4 would under basic CEQA procedure mandating that incremental contributions to existing significant
5 conditions should be considered cumulatively significant. *See Kings County Farm Bureau v. City of*
6 *Hanford* (1990) 221 Cal. App. 3d 692, 718.

7 These points were all raised in Petitioners briefing but rejected by the Court. However, were
8 the Court to consider issuing a new Judgment in response to the County's motion, it should consider
9 providing more explanation for why the two points discussed above do not render the SEIR's tiering
10 process to be contrary to CEQA, *i.e.*, why cases such as *Environmental Planning & Information*
11 *Council v. County of El Dorado, supra*, and *Communities For a Better Environment v. California*
12 *Resources Agency, supra*, are not on point and controlling in this matter. Such an explanation could
13 aid future legal proceedings should either party choose to pursue an appeal of the Court's decision.

14 **IV. CONCLUSION**

15 The County's motion does not meet the standards for vacating a Judgment as required by
16 Code of Civil Procedure § 663 and should be therefore denied. However, if the Court were inclined
17 to consider issuing a new Judgment in response to the County's motion, it should consider providing
18 more explanation for how, given the facts revealed by the traffic analysis as discussed above, the
19 SEIR's tiering can be found to be consistent with CEQA law.

20 DATED: July 15, 2015

21 By: 
22 Michael W. Graf
Attorney for Petitioners

23 P011 - REsponse on Motion to Vacate.wpd

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PROOF OF SERVICE

1 I am employed in the County of Contra Costa, State of California. I am over the age of
2 18 and not a party to the within action; my business address is 227 Behrens Street, El Cerrito
3 California, 94530. I caused the attached:

4 **PETITIONERS' RESPONSE TO THE COUNTY'S MOTION TO SET ASIDE AND**
5 **VACATE JUDGMENT**

6 to be served as follows:

7 x **By Email** On July 15, 2015, I transmitted a PDF copy of the above written document via email
8 to the following address:

9 David Zaltsman
10 Deputy County Counsel
11 dzaltsman@marincounty.org

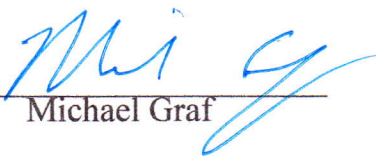
12 **PETITIONERS' RESPONSE TO THE COUNTY'S MOTION TO SET ASIDE AND**
13 **VACATE JUDGMENT**

14 to be served as follows:

15 x **By Regular Mail** On the date written below, at El Cerrito, California, I placed a true
16 copy of the above written document in a sealed envelope(s) and placed it for collection
17 and mailing, addressed as follows:

18 David Zaltsman
19 Deputy County Counsel
20 3501 Civic Center Dr., Suite 303
21 San Rafael, CA 94903

22 I declare under penalty of perjury under the laws of the State of California that the
23 foregoing is true and correct, and that this declaration is executed this July 15, 2015, in Marin
24 County, California.

25 
26 Michael Graf

27 Proof on Response to Motion to Vacate.wpd
28