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

Re: 2015 to 2023 DRAFT Marin County Housing Element, CWP CAPs, and the State Density Bonus Law

Dear Marin County Planning Commission,

We have the following comments and recommendations regarding the 2015 to 2023 DRAFT Marin County Housing Element:

I. THE EFFECT OF THE STATE DENSITY BONUS LAW ON THE 2007 MARIN COUNTYWIDE PLAN CAPS AND HOUSING ELEMENT SITES & PROGRAMS

The State Density Bonus law in relationship to the Marin Countywide Plan's CAPs and Housing Element Sites and Programs has strong implications for the following sites, which have CAPs and are also included in the Housing Element Site Inventory and/or are impacted by Program 1.q – "Clarify Applicability of State Density Bonus":

- St. Vincent's/ Silveira (CAP)
- Marinwood Plaza – 100 Marinwood Ave. (Housing Overlay Designation CAP)
- California Park – Woodland Ave. at Auburn St. (HOD CAP)
- Oak Manor – 2400 Sir Francis Drake Blvd. (HOD CAP)

The following information will demonstrate:

- A. How powerful the State Density Bonus Law is in superseding County laws and in significantly increasing housing density;
- B. How easy it is for a developer to qualify for a State Density Bonus;
- C. The importance of the Marin Countywide Plan CAPs;
- D. The Marin Countywide Plan CAPs are inconsistent with the State Density Bonus Law; and
- E. The best solutions for maintaining the integrity of the Marin Countywide Plan CAPs.

A. How Powerful the State Density Bonus Law is in Superseding County laws and in Significantly Increasing Housing Density:

According to Attorney Rachael Koss; "California's density bonus law allows developers whose housing development proposals meet certain thresholds of affordability to receive density bonuses, incentives and development waivers from the local agency... The density bonus law provides that requests for a density bonus and incentives must be granted 'when an applicant for a housing development seeks and agrees to construct a housing development' that meets one or more of the statute's thresholds. Although an

agency may eventually deny a request for an incentive if certain limited findings are made, **the law does not identify any findings that would allow an agency to deny a density bonus request.**

The density bonus law states that a density bonus of 35 percent may be awarded to affordable housing developers. Courts have allowed density bonuses above 35 percent. In *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, the **court allowed a 40 percent density bonus**. The plaintiffs objected to the density bonus, stating that the density bonus law provided a cap on density bonuses of 35 percent. The court disagreed. The court found that the 35 percent density increase was meant to ensure that local governments provided *at least* that amount when a developer chose to provide a certain number of affordable housing units. The court also found that the statute clearly did not place any caps on the allowable density bonus. The court held that the 35 percent density increase reflected 'the maximum density increase that would be statutorily imposed upon municipalities,' not the maximum permissible.

Here, it is unquestionable that affordable housing developers would seek density bonuses from the County when density bonuses are mandated upon request (if certain thresholds are met)."¹

B. How Easy It Is For A Developer To Qualify For A Density Bonus:

According to the law firm Hanson Bridgett, in the recent case of *Latinos Unidos del Valle de Napa y Solano v. County of Napa*, 217 Cal. App. 4th 1160 (2013), the Court of Appeals overturned a portion of Napa's local density bonus ordinance. The ruling held that cities and counties must count "Inclusionary Housing Units" towards satisfying density bonus standards set forth in State law.² County Planner Leelee Thomas described this lawsuit at the August 25th Planning Commission public hearing.

*"Inclusionary Housing Units", under state law, are a percentage of units in market rate rentals or condos that are required to be "affordable," as defined by cities and counties.

Marin County's Inclusionary Regulation requires 20% of the total number of dwelling units to be developed as affordable housing. As illustrated by Table 3-5a (below), counting Inclusionary Units towards Density Bonus standards makes it very simple for a development proposal to qualify for a Density Bonus.

¹ Koss, Rachael. (February 2013). *Comment Letter re: the 2007 to 2014 DRAFT Marin County Housing Element's DRAFT Supplemental EIR*.

² Gladston, Brett. (September 11, 2013). *Recent Court of Appeals Case May Give San Francisco Developers More Apartment Units Per Lot If Otherwise A Development is Not Feasible*. Retrieved September 19, 2014, from <http://www.hansonbridgett.com/Publications/articles/2013-09-land-use-more-envelope-per-lot.aspx>

**TABLE 3-5a
DENSITY BONUS CALCULATION**

Income Category	% Affordable Units*	Bonus Granted	Additional Bonus for Each 1% Increase in Affordable Units*	% Affordable Units Required for Maximum 35% Bonus*
Very low income	5%	20%	2.5%	11%
Low income	10%	20%	1.5%	20%
Moderate income (for-sale common interest development only)	10%	5%	1%	40%
Senior citizen housing development	--	20%	--	--

C. The Importance of the 2007 Marin Countywide Plan CAPs:

A very important control in the 2007 Marin Countywide Plan (CWP) on buildout, and corresponding adverse environmental impacts, is dwelling unit CAPs in particular areas. According to the CWP, these CAPs are inclusive of any applicable density bonus units.

The Countywide Plan CAP in the Tamalpais Area Community Plan area demonstrates how important the CWP CAPs are. Due to multiple environmental constraints and hazards in the area (E.g. Traffic Congestion – LOS “F”; frequent flooding (100 year floodplain); sea level rise; high seismic activity; high liquefaction, subsidence & mud displacement; unsafe toxic air contaminants, etc.), the CWP restricts the development of dwelling units in Commercial/Mixed Use Land Use Designations of the Tamalpais Area Community Plan area to no more than 100 additional dwelling units over the number of dwelling units existing in 2007. Without this CAP, the number of dwelling units in these Commercial/Mixed Use Designations could rise up to approximately 1200 more units. The reduction of the potential buildout by approximately 1100 less dwelling units significantly lowered the risk of adverse impacts resulting from development.

The St. Vincent’s / Silveira Site has a CAP of no more than 221 units, including Density Bonus Units. In addition, all the parcels included in the Housing Overlay Designation (HOD) have an overall CAP of 658 units, including Density Bonus Units. Moreover, clusters of sites within the same Traffic Impact Area of the HOD have individual CAPs (see Figure 3-3 on page 4), each including Density Bonus Units. (Although the NEW 2015 to 2023 Housing Element Program 1.q –“Clarify Applicability of State Density Bonus” would change this.)

D. The Marin Countywide Plan CAPs are Inconsistent with the State Density Bonus Law:

Brian Crawford has mentioned a number of times that the Marin Countywide Plan CAPs are not consistent with the State Density Bonus law and that, if a developer sued the County for State Density Bonus units that exceed a CAP, then the developer would probably prevail. Moreover, at the August 25th Planning Commission hearing, Brian

stated that HCD expects State Density Bonus units to be allowed over and above the number of units designated to a site in the Housing Element Site Inventory.

E. Best Solutions For Maintaining the Integrity of the Marin Countywide Plan CAPs:

Figure 3-3 HOD Unit Allocations by Traffic Impact Areas

Traffic Impact Areas as Determined by Screenlines and HOD Site Criteria (See Map 3-2c)	HOD Unit Potential for Traffic Impact Areas (Including Density Bonus Units)	Suggested Qualifying Sites Within Traffic Impact Areas
Screenline 7:	Up to 110	<ul style="list-style-type: none"> ◆ Marinwood Shopping Center (50 to 100 units) ◆ Idylberry School (up to 10 units) ◆ Other qualifying sites
Screenline 8:	Up to 25	<ul style="list-style-type: none"> ◆ Gallinas Elementary School ◆ Other qualifying sites
Screenline 23:	Up to 88	<ul style="list-style-type: none"> ◆ College of Marin (up to 25 units – limited to student or workforce employees of the College) ◆ Marin General Hospital (up to 50 total units if associated with reconstruction or reuse, of which up to 25 units must be designated senior housing and up to 25 units designated for affordable, workforce employees, or special needs housing) ◆ Toussin (up to 13 units) ◆ Other qualifying sites
Screenline 22:	Up to 10	<ul style="list-style-type: none"> ◆ Oak Manor ◆ Other qualifying sites
Screenline 13:	Up to 50	<ul style="list-style-type: none"> ◆ California Park (San Rafael) ◆ Other qualifying sites
Screenline 17:	Up to 100	<ul style="list-style-type: none"> ◆ Strawberry Shopping Center ◆ Other qualifying sites
Screenline 19:	Up to 50	<ul style="list-style-type: none"> ◆ Fireside Motel
Screenline 21:	Up to 150	<ul style="list-style-type: none"> ◆ Marin City Shopping Center ◆ Other qualifying sites
	Up to 583	Units on named HOD sites
	Total: Up to 658	Total Potential HOD Units including Density Bonus Units

1. NEW Housing Element Program 1.q - Clarify Applicability of State Density Bonus:

“Evaluate policies in the Countywide Plan and Development code for housing opportunity sites to ensure consistency with Government Code 65915-65918 (the State Density Bonus law).”

According to the Staff Report prepared for the July 28th Planning Commission hearing, during the review of the 2007-2014 Marin County Housing Element, the State Department of Housing and Community Development (HCD) Staff questioned whether Countywide Plan (CWP) and Development Code Policies related to State Density Bonus Law and housing opportunity sites are consistent with Government Code 65915-65918.

Housing Element Program 1.q was added to the 2007 to 2014 Housing Element to address this concern and is scheduled for implementation with the adoption of the 2015 to 2023 Housing Element.

Background

As originally written in 2007, the Marin Countywide Plan restricts the total number of units allowed on all the Housing Overlay Designation (HOD) sites via a total CAP of 658 units and restricts the number of units allowed in each Traffic Impact Area within the HOD designation with other smaller CAPs. Both the total HOD CAP and each of the Traffic Impact Area CAPs are inclusive of any Density Bonus units. (Please see Figure 3-3 on page 4.)

New Program

The NEW Housing Element Program 1.q – “Clarify Applicability of State Density Bonus” changes this so that the number of dwelling units in specific Traffic Impact Areas could exceed the CAP with Density Bonus units, provided the total HOD CAP of 658 units is not exceeded. The program specifically states; “Specific sites could allow more units than the number of units recommended in the Countywide Plan if a density bonus is applied. However, once the cap of 658 units is reached the HOD would no longer be applicable.”

Consequences of Program 1.q

This new program allows greater density at most of the HOD sites. Beside other potential adverse environmental impacts, this would potentially increase traffic congestion in the Traffic Impact Areas that receive the excess Density Bonus Units. No Environmental Impact Report has evaluated the potential additional environmental impacts that could occur due to implementation of this program.

RECOMMENDATION:

In order to maintain the integrity of the Housing Overlay Designation (HOD) CAPs and still allow application of the State Density Bonus, the number of units allowed at each of the sites with HOD CAPs should be lowered so that, even with the addition of State Density Bonus units, the original CAPs would not be exceeded. In so doing, Program 1.q would be unnecessary and should be eliminated.

2. St Vincent’s / Silveira

During the Countywide Plan public hearings the environmental community was very concerned about development at St. Vincent’s / Silveira and advocated to limit development at the site. This stance is reflected in the “Community Marin 2013” Report, written by Marin County’s major environmental organizations.

The “Community Marin 2013” Report consists of policy recommendations from Marin Audubon Society, Marin Baylands Advocates, Marin Conservation League, Sierra Club-Marin Group, Salmon Protection and Watershed Network, and San Geronimo Valley Planning Group. The purpose of the report is to provide an environmentally responsible foundation for land use planning.

Excerpt from the Community Marin 2013 Report: St. Vincent's / Silveira

"Protection and preservation of the 1,110-acre St. Vincent's/Silveira site has been and continues to be a high priority for the environmental community. The 2007 Countywide Plan included the area in the Baylands Corridor, as recommended by Community Marin. The purpose of this designation is to protect the scenic, historical, agricultural, and natural resource values and to minimize public safety problems such as flooding, seismic hazards, and traffic generation."... "The desired outcome for St. Vincent's / Silveira continues to be acquisition for resource protection, restoration of Miller Creek, protection of wildlife habitat, agricultural preservation, and protection of public health and safety, rather than development."³

Per the Community Marin 2013 Report, development is not the preferred use of the St. Vincent's/Silveira site. However, if housing is permitted at the site, then it should not exceed the CWP's 221 unit CAP.

Unfortunately, it is likely that a State Density Bonus would be applied to the St. Vincent's /Silveira site and the CWP's CAP of 221 units would be exceeded. If a 35% Density Bonus were granted, then the number of allowable dwelling units at the site could rise up to 298 units. This is unacceptable.

RECOMMENDATIONS:

1. Preferred Recommendation: In order to avoid the restrictions placed on the St. Vincent's/Silveira Site by being identified in the Housing Element's Site Inventory, which includes locking in the density at 221 units plus applicable density bonus units (a potential of 298 units), we recommend eliminating the St. Vincent's/Silveira Site from the Housing Element's Inventory. Due to an excess of sites identified in the Housing Element's Site Inventory, the County would still accommodate its Regional Housing Needs Allocation of 185 units with a suitable buffer. In addition, the County would still have authority to consider project proposals at the site, yet, beneficially, would have more flexibility in planning decisions regarding those proposed projects; OR
2. Per Commissioner Dickenson's and Commissioner Biehle's suggestion, in order to maintain the integrity of the St. Vincent's/Silveira CAP and still allow application of the State Density Bonus, the CAP should be lowered so that, even with the addition of State Density Bonus units, the original CAP would not be exceeded. For example, if the St. Vincent's / Silveira CAP were lowered to 164 units, then, even with a 35% Density Bonus (57 dwelling units), the total allowable units at the site would not exceed 221 dwelling units (equal to the original CAP).

Sincerely,
/s/ Michele Barni

Michele Barni
Chair, Sierra Club Marin Group

cc: Marin County Board of Supervisors

³ Marin Audubon Society, Marin Baylands Advocates, Marin Conservation League, Marin Group-Sierra Club, Salmon Protection & Watershed Network, & Environmental Action Committee. (2013). *Community Marin 2013*. 39.