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Via FedEx

Georgia McDaniel
Project Planner
County of Sonoma Permit & Resource
Management Department
2550 Ventura Avenue
Santa Rosa, CA 95403-2859

Re: 245 Paula Lane: Initial Study and Mitigated Negative Declaration
PRMD File No. MNS 12-0004

Dear Ms. McDaniel:

On behalf of the Paula Lane Action Network (“PLAN”), we have reviewed the Initial Study and Notice of Intent to Adopt a Mitigated Negative Declaration (“MND”) prepared in connection with the proposed subdivision located at 245 Paula Lane (“Project”) in Sonoma County. We submit this letter to express our legal opinion that: (1) the MND for the proposed Project fails to comply with the requirements of the California Environmental Quality Act (“CEQA”), Public Resources Code § 21000 *et seq.*, and the CEQA Guidelines, California Code of Regulations, title 14, § 15000 *et seq.* (“Guidelines”), and (2) the County must prepare an environmental impact report (“EIR”) before proceeding with the Project.

The MND fails to include the information and analysis necessary to evaluate the Project’s impacts, and it does not provide sufficient evidence or analysis to support its conclusions concerning many environmental impacts. Similarly, many of the mitigation measures proposed in the MND are inadequate and will not address the Project’s significant environmental impacts.

At the same time, what information the MND does provide makes clear that there is a fair argument that the Project—a subdivision to be located in the habitat area of the American Badger, a California species of special concern—will have significant impacts on the environment. Indeed, the MND admits that the Project area shows signs of

recent use by the American Badger, including as a wildlife corridor, and acknowledges that habitat loss and residential development can threaten the badger and its movement. MND at 13, 18-19. Further, the Project will add to cumulatively significant environmental impacts—in particular, the erosion of the conservation values that the neighboring Open Space Preserve at 431 Paula Lane (“the Preserve”) was established to protect—resulting from past, present, and future projects in the region.

The Project is also fundamentally inconsistent with the County General Plan, the City General Plan, and the West Petaluma Area Plan. Tellingly, the County General Plan calls for the “preservation of important biotic resource areas and scenic features” and the protection of special status species and areas of habitat connectivity. Goal LU-10; Goal OSRC-7; Objective OSRC-7.1. As a residential subdivision sited in a habitat for American Badger, the Project clearly conflicts with this mandate. It also runs afoul of numerous other provisions in the land use plans designed to protect the region’s unique aesthetic and recreational resources. Thus, approval of the Project and adoption of the MND would violate not only CEQA, but the State Planning and Zoning Law, Government Code section 65000 *et seq.*, as well. For all of these reasons, the County cannot approve the Project as currently proposed.

I. CEQA Legal Standard

It is well settled that CEQA establishes a “low threshold” for initial preparation of an environmental impact report (“EIR”), especially in the face of conflicting assertions concerning the possible effects of a proposed project. *Pocket Protectors v. City of Sacramento*, 124 Cal. App. 4th 903, 928 (2005).

CEQA provides that a lead agency may issue a negative declaration and avoid preparing an EIR only if “[t]here is *no* substantial evidence, in light of the whole record before the lead agency, that the Project may have a significant effect on the environment.” Pub. Res. Code § 21080(c)(1) (emphasis added). A lead agency may adopt a mitigated negative declaration only when all potentially significant impacts of a project will be avoided or reduced to insignificance. Pub. Res. Code § 21080(c)(2); Guidelines § 15070(b). A mitigated negative declaration will also be set aside if the proponent’s conclusions are not based on substantial evidence in the record. *Sundstrom v. County of Mendocino*, 202 Cal. App. 3d 296, 311 (1988).

An initial study must provide the factual basis, with analysis included, for making the determination that no significant impact will result from the project. Guidelines § 15063(d)(3). In making this determination, the agency must consider the

direct and indirect impacts of the project as a whole, Guidelines § 15064(d), as well as the project's cumulative impacts. *See City of Antioch v. City Council of Pittsburg*, 187 Cal. App. 3d 1325, 1333 (1986).

An agency must prepare an EIR whenever it is presented with a “fair argument” that a project may have a significant effect on the environment, even if there is also substantial evidence to indicate that the impact is not significant. *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 75 (1974); *Friends of B St. v. City of Hayward*, 106 Cal. App. 3d 988, 1002 (1980); Guidelines § 15064(f)(1). Where there are conflicting opinions regarding the significance of an impact, the agency must treat the impact as significant and prepare an EIR. *Stanislaus Audubon Soc’y v. County of Stanislaus*, 33 Cal. App. 4th 144, 150-51 (1995) (an EIR is required if a project will result in reasonably foreseeable indirect physical changes that may have a significant adverse effect on the environment); Guidelines § 15064(f)(1).

II. The MND’s Description of the Project is Inadequate.

The MND must adequately describe the Project. “An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR.” *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, 27 Cal. App. 4th 713, 727 (1994) (quoting *County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 193 (1977)). “The negative declaration is inappropriate where the agency has failed to provide an accurate project description or to gather information and undertake an adequate environmental analysis.” *City of Redlands v. County of San Bernardino*, 96 Cal. App. 4th 398, 406, 410 (2002). Courts have found that, even if an environmental review document is adequate in all other respects, the use of a “truncated project concept” violates CEQA and mandates the conclusion that the lead agency did not proceed in a manner required by law. *San Joaquin Raptor*, 27 Cal. App. 4th at 729-30. Furthermore, “[a]n accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity.” *Id.* at 730 (citation omitted). Thus, an inaccurate or incomplete project description renders the analysis of significant environmental impacts inherently unreliable.

Here, the Initial Study barely describes the Project at all. Indeed, it only provides one paragraph of text, and even this limited discussion is cursory and vague. Any reasonably complete description of the Project would give the public and decision-makers a sense of what this subdivision would look like, how it would work, and how it would fit into the West Petaluma community. The purported project description does none of this; it merely describes the acreage of the three lots to be created out of the

current parcel. This failure echoes throughout the document: because the Project is incompletely described, none of its impacts can be fully analyzed.

The closest that the Initial Study comes to providing a sense of the Project is its references to the proposed lot sizes, to an American Badger habitat area on the west side of the property, and to designated building envelopes. Merely describing building envelopes is not sufficient, however; the document should provide information about what the subdivision will look like. For example, what are the development standards and guidelines? What plan can the public and decision makers consult in order to verify that the subdivision will be well-planned and that the homes would be compatible with other development in the area? Where are the photo simulations showing how this subdivision would appear from Bodega Avenue, Paula Lane, and the Preserve bordering the property? At this point, the County should be providing focused direction to the applicant regarding her vision for the Project, taking into account the nature and ambience of West Petaluma. Yet, because the County released this Initial Study without pressing for critical Project details, it appears the County may be attempting to satisfy the needs of the applicant at the expense of the community.

The flaws in the Initial Study's project description extend beyond its failure to contain a more developed land use plan; the document lacks sufficient plans for how the development will function. For example, how will residents of the two new proposed lots access their property? Where will the driveways, if any, be located? They are not shown on the map provided. MND at 6. The map as a whole is so small as to compromise its legibility. A member of the public lacking a magnifying glass would be excluded from reviewing the proposed subdivision.

As a final example of the problems with the insufficient project description, the anticipated drainage features are inadequately described. The MND requires that the Project applicant submit grading and drainage plans to the Permit and Resource Management Department ("PRMD") for review, and it references best practices for storm water management that can be incorporated. MND 35-36. But the eventual plan for the site remains a mystery (will it be terraced or maintain the natural slope? Where will the referenced drainage and landscaping features be located?).¹ Unless and until the applicant

¹ Drainage is a particular concern regarding the Project design. Previous grading and vegetation removal on the Project site has lead to increased stormwater runoff downhill from the property. The proposed Project threatens to make an existing problem even worse.

prepares a more detailed land use plan for the Project, and one which grapples with these basic planning and design considerations, the Initial Study will remain incapable of addressing and analyzing the Project's important environmental effects.

III. The MND's Description of the Project Setting Is Inadequate.

CEQA provides that one of the required components of an initial study is a description of the environmental setting of a project. Guidelines § 15063(d)(2). “[W]ithout such a description, analysis of impacts, mitigation measures and project alternatives becomes impossible.” *County of Amador v. El Dorado County Water Agency*, 76 Cal. App. 4th 931, 953 (1999). Decision-makers must be able to weigh the project's effects against “real conditions on the ground.” *City of Carmel-by-the-Sea v. Board of Supervisors*, 183 Cal. App. 3d 229, 246 (1986). One initial study's “environmental setting” section that was held to be adequate set forth the existing site conditions, facilities, and recreational uses, and contained a description of the existing physical conditions, including the topography and types of habitats and vegetation. *Lighthouse Field Rescue v. City of Santa Cruz*, 131 Cal. App. 4th 1170, 915-17 (2005). According to the court, the initial study's several-pages-long environmental setting discussion “met the minimum requirements of the Guidelines.” *Id.* at 917.

In contrast to this type of thorough description of the environmental context in which a project is proposed, the environmental setting discussion in the proposed MND omits essential information and thus fails to meet CEQA's requirements. In order for the public and decision-makers to be able to fully understand the environmental impacts of this Project, more information about the Project setting is needed. Such information includes, but is not limited to, a detailed description of the following:

- The visual character and appearance of the community and the proposed Project site, including existing development and open space in the Project vicinity. This would necessarily include photographs of the Project site and its surroundings.
- The site's proximity to Bodega Avenue, a road designated as a “scenic route” by the West Petaluma Area Plan. West Petaluma Area Plan at 31.
- The ridgeline near the Project site (textual and photographic).
- The existing hydrological and hydraulic conditions of drainages in the vicinity of the Project.

- Cumulative projects, including major construction projects, that will be carried out in the area during the period when the Project will be under construction.
- Sonoma County's General Plan, the City of Petaluma's General Plan, and the West Petaluma Area Plan, including the goals and policies relevant to the Project site (going beyond maximum densities, the only information currently included about the surrounding land uses).
- Noise levels existing at and around the Project site.
- Existing transportation infrastructure around the Project site, including the existing accident rates on roadways, availability of public transportation, and line-of-sight information for proposed subdivision access points (when these access points are ultimately included).
- The environmentally sensitive and significant nature of the Project's surroundings, which include an open space preserve. The Project area includes habitat for sensitive species that is contiguous with habitat in the open space preserve.
- Any other relevant regional and local setting information necessary to evaluate project and cumulative impacts.

As noted above, the Project site is immediately adjacent to an open space preserve. And the broader Project area has been the subject of longstanding efforts to protect and preserve the rural character of this part of the County. The Project's goal of subdividing land to make way for two additional houses threatens to completely and permanently change the rural and open space nature of this area. Given the inadequacies of the Project setting and description, however, a member of the public would not be made aware of this looming threat to important environmental, aesthetic, and community values.

IV. The County Must Prepare an EIR That Analyzes the Potentially Significant Effects of the Proposed Project.

An agency must prepare an EIR for a proposed project whenever substantial evidence in the administrative record supports a "fair argument" that the project may have significant impacts on the environment. Guidelines §§ 15064(a)(1),

(f)(1). A fair argument can be made that the Project, which will replace open space with a subdivision, will have potentially significant impacts on biological resources, aesthetics, and land use. Furthermore, the Project will add to cumulatively significant environmental impacts resulting from a number of past, present, and future projects in the region. For all of these reasons, as discussed below, the County is required to prepare an EIR.

A. The Project Will Result in Significant Adverse Impacts to Biological Resources.

1. The Project Will Have Significant Adverse Impacts on the American Badger, a California Species of Special Concern.

The MND incorrectly concludes that the Project would result in less than significant impacts to the American Badger with mitigation measures incorporated. MND at 13. On the contrary, the Project will result in significant adverse impacts to this special status species that will not be addressed by the mitigation measures described in the MND.

a. Substantial Evidence in the Record Undermines the MND's "Less Than Significant Impact" Conclusion.

The MND rests on faulty assumptions and inaccurate observations concerning the presence of American Badgers on the Project site. Relying on a 2014 biological assessment by Dana Riggs, the MND asserts that "no evidence of badger use" was found beyond the northwestern portion of the Project area. MND at 13. As a result, the MND's conclusions regarding the Project's effects on the badger population and its proposed mitigation measures—including especially the American Badger Habitat Area (see MND at 14)—are based on the assumption that the badger habitat is confined to the northwestern corner of the property.

There is substantial evidence in the record that the Riggs Report and the MND significantly underestimate the extent of the American Badger's presence on the Project site. Biologist Kim Fitts completed her own assessment of the badger population at 245 Paula Lane and 431 Paula Lane, the property adjacent to the Project site, in 2004 (the 431 property forms a continuous open space and habitat with the 245 Paula Lane property, including the Project site). Kim Fitts, American Badger Habitat Survey (2004), attached as Exhibit A. Fitts counted 25 badger dens and observed that "badger use extends onto adjacent properties." *Id.* Fitts returned to the site in 2012. She observed

three to four recently created burrows on the Project site (245 Paula Lane) and several older burrows that she had mapped on her previous visits. Letter from Kim Fitts to Misti Harris, July 24, 2013, attached as Exhibit B. Most recently, Fitts drafted a letter in October of 2018 confirming that the grassland habitat covering the Project site and the adjacent open space preserve is a movement corridor for badgers and hosts badger trails and burrows. The undersigned have reviewed the October 2018 Fitts letter and hereby incorporate it by reference into this document. The letter will be sent under separate cover.

The California Department of Fish and Wildlife (then Fish and Game) also observed numerous burrows on the project site in 2012. The Department sent a letter to PRMD Planner Misti Harris on December 27, 2012, recounting its observation of “approximately five badger burrows . . . on the neighboring Project site at 245 Paula Lane.” Letter from Department of Fish and Game to Misti Harris, December 27, 2012, attached as Exhibit C.

Finally, the Applicant’s own biological consultant contradicted the conclusions relied upon by the MND in a letter to the Applicant in 2013. In that letter, Riggs informed the Applicant that “three old badger digs were observed” on the southern portion of the site, where there had been unauthorized grading activity. Letter from Dana Riggs to Kim Gardner, July 5, 2013, attached as Exhibit D. “*Evidence of recent digs overlapping older digs in the same general area on the site* suggests current site activities have not deterred badger use at the site.” *Id.* (emphasis added). This letter acknowledges what the MND denies—that American Badgers have been active recently on areas of the site extending beyond the northwestern corner. This evidence undermines the MND’s conclusions concerning the Project’s impacts on the American Badger and the adequacy of the proposed mitigation measures.

The MND also incorrectly asserts that feral cats in the adjacent Preserve are “the primary threats” to badger habitat. The MND goes as far as to claim that the presence of a watering bucket—and not the construction of two residential buildings, with all of the associated impacts (noise, dust, night-time lighting, loss of open space, etc.)—is “the activity that may have a substantial adverse effect” on the American Badger.

The assertion about the feral cats and water bucket is as ridiculous as it is inaccurate. These claims were first made in the Riggs biological report. In 2014, Susan Kirks, a member of the PLAN Board of Directors, discussed this report with Adam

McKannay of the California Department of Fish and Wildlife. E-mail Exchange between Susan Kirks and Adam McKannay, September 17-18, 2014, attached as Exhibit E. Kirks explained that there are domestic—not feral—cats living near the property, and that these cats do not compete with badgers for habitat. *Id.* Instead, she wrote, “What is negatively impacting the American Badger in the area are the barking dogs on-site at 245 Paula, the intensive and extensive illegal grading, obstructive fencing, and structures the owners placed in the habitat[.]” *Id.* McKannay concurred with Kirks’s “observations of barking dogs and feral/house cats in the vicinity of the Preserve.” *Id.* The unpermitted grading and fencing was the subject of numerous complaints from neighbors and is acknowledged in the MND. E-mail from Kim Fitts to Misti Harris, January 28, 2014, attached as Exhibit F; Letter from Kim Fitts, Exhibit B; Letter from Amy Bricker to T. Wick and M. Grosch, May 17, 2016, attached as Exhibit G; MND at 2. This evidence shows that the proposed development and the concomitant structures and human activity, and not a watering bucket on the adjacent Preserve, is the primary threat to the badger habitat.

The evidence above reveals that the MND significantly underestimates the presence of American Badger on the Project site and misunderstands the nature of the threats to their habitat. As a result, the MND’s conclusions concerning the impact of the Project and the adequacy of the proposed mitigation measures are suspect. The evidence creates a fair argument that the Project will result in significant impacts to the American Badger that will not be mitigated by the proposed measures.

b. The Project Will Destroy and Compromise Badger Habitat and Wildlife Movement Corridors.

Habitat loss and fragmentation “are the greatest threats to badgers” in the state. 2012 Department of Fish and Game Letter, Exhibit C. American Badgers require significant home ranges and travel widely within them due to their efficiency as hunters. They must travel from place to place to allow prey populations to recover from their presence. Their need to travel means that badgers are vulnerable when their habitats are fragmented by development. 2004 Fitts Report, Exhibit A. Badgers are unlikely to remain in areas where agricultural land has given way to urbanization. 2012 Department of Fish and Game Letter, Exhibit C.

The Project site is partially composed of open annual grassland. This grassland provides “excellent habitat” for both the small mammals that form the major part of the American Badger’s diet and for the badger itself. 2004 Fitts Report, Exhibit A. Further, the Project site is contiguous with a larger wildlife movement corridor that

includes the open space preserve to the north of the property and other open space lands. 2013 Fitts Letter, Exhibit B. PLAN has identified and documented this important wildlife corridor in which both the Project site and the open space preserve exist.

The Project will destroy badger habitat or make further occupation of the area by badgers untenable. Noise and vibrations from construction would disrupt the badgers while they are in their burrows underground. 2004 Fitts Report, Exhibit A (“The development of this property would create significant diurnal noise and vibration, highly likely to cause the badger to move from the site.”). Further, bright night lighting “may . . . disrupt breeding on or adjacent to the Project Area.” Dana Riggs, WRA, Biological Resources Assessment Report, attached as Exhibit H. Finally, the conversion of open space to residential development will result in habitat fragmentation and the disruption of the wildlife movement corridor of which the Project site forms a part.

c. The Mitigation Measures are Inadequate.

As explained above, the mitigation measures—which are based on the incorrect assumption that the American Badger’s range is limited to the northwestern portion of the property—are inadequate to address the significant adverse impacts that the Project will have on the American Badger. For example, mitigation measures BIO-1, BIO-2, BIO-3, and BIO-4 concern land uses and activities that may be conducted on or adjacent to the designated American Badger Habitat Area. MND at 14-15. But since the Badger’s actual habitat extends beyond that small corner of the site, these mitigation measures are inherently inadequate to protect the badger. Similar defects affect mitigation measures BIO-5, BIO-6, and BIO-12. MND at 15-16, 19. Since the badger habitat extends across larger portions of the Project site, even downcast lighting will affect the badgers. And pass-thru fencing around the designated badger habitat is also inadequate: the badgers’ range extends well beyond those areas, and pass-thru fencing cannot mitigate the replacement of open space with residential development and the habitat disruption that comes with it.

With respect to mitigation measure BIO-5, the MND states that “existing topography will prevent lighting impacts from affecting wildlife use in the Open Space Preserve to the north.” MND at 15. The property is sloped from the north to the south, with the Preserve at a higher elevation than the Project site. The two new proposed residences are slated to occupy the northern portion of the site, adjacent to the Preserve. Light from the residences will affect the Preserve despite existing topography. Mitigation measure BIO-5’s explanation makes no sense: light is not discouraged by an uphill slope.

To address these inadequate mitigation measures, the County could consider requiring the creation of a conservation easement on the subject property. A conservation easement that protected the environmental and open space values of the badger habitat area would more meaningfully address the Project's negative impacts.

2. There is a Fair Argument that the Project Will Have A Significant Impact on Other Species of Special Concern.

The MND contains four mitigation measures concerning the burrowing owl, another California Species of Special Concern (BIO-7, BIO-8, BIO-9, and BIO-10). MND at 16-17. These mitigation measures require pre-construction surveys to locate burrowing owl and subsequent measures to avoid disturbing any owls that are so located. *Id.* None of the measures, however, affirmatively address the habitat loss likely to be caused by the Project.

There is substantial evidence in the record that the mitigation measures described above are inadequate to address the significant impacts to the burrowing owl likely to result from habitat disruption. According to a letter from the Department of Fish and Game in 2012, burrowing owl have been highly correlated with American Badger burrows in Sonoma County. 2012 Department of Fish and Game Letter, Exhibit C. The Department goes on to express concern that burrowing owl populations, like populations of American Badger, have taken a drastic hit as a result of habitat fragmentation. *Id.* Finally, the letter recommends that, if the Project will impact burrowing owls or their habitat, "adequate mitigation to protect and restore existing habitat that can support badger and burrowing owls should be required." *Id.*

None of the mitigation measures focused on the burrowing owl will protect or restore existing habitat. Instead, the measures would only prevent the accidental take of a burrowing owl as a result of active construction activities. While this is a step in the right direction, it is insufficient. The Project would result in the permanent conversion of burrowing owl habitat to residential development. The mitigation measures do not prevent this habitat loss, nor do they make any provision for the restoration of lost habitat. The mitigation measures are thus insufficient to address the significant impacts to burrowing owls.

Finally, the MND inadequately addresses the potential significant impacts of the Project on special-status bird species. The MND states, quoting the 2014 Riggs Report: "Golden eagle, white-tailed kite, Nuttall's woodpecker, loggerhead shrike, and

grasshopper sparrow are special-status bird species with potential to occur and nest in the Project Area or immediate surrounds. Although many of the mature trees will be retained, Project activities have the potential to result in indirect nest abandonment, which would be considered take under the Migratory Bird Treaty Act.” MND at 19. To address this, the MND proposes mitigation measure BIO-13, requiring preconstruction surveys during certain times of year. MND at 19-20. The MND and the mitigation measure significantly understate the potential for significant harm to these bird species and others. The conservation easement affecting the Preserve adjacent to the Project site states that Allen’s and Rufous Hummingbirds, Sharp-shinned Hawk, White-tailed Kite, Cooper’s Hawk, Nuttall’s Woodpecker, Oak Titmouse, Red-breasted Sapsucker, Snowy Egret, Great Egret, Great Blue Heron, Black-crowned Night Heron and Long-billed Curlew all use the Preserve. Deed and Agreement By and Between the City of Petaluma and the Sonoma County Agricultural Preservation and Open Space District Conveying a Conservation Easement and Assigning Development Rights, Recorded May 14, 2012, as Doc. 2012046059, Official Records of Sonoma County, § 2.1, attached as Exhibit I. Several of these special-status species are not even discussed by the MND or addressed by the mitigation measures. Impacts to these species could include, among other things, loss of adequate food sources caused by the decreased availability of prey species due to the destruction of open space. But the MND does not address these impacts. There is a fair argument that the Project will have a significant impact on these species that will not be addressed by the proposed mitigation measures.

3. There is a Fair Argument that the Project Will Have a Significant Impact on Protected Trees.

The MND states that the Project site “contains several protected oak trees, which will remain,” and proposes a mitigation measure (BIO-14) requiring compliance with the Sonoma County Tree Protection and Replacement Ordinance. MND at 20-21. There is, however, substantial evidence in the record that significant impacts to protected trees have *already* been sustained as a result of unpermitted construction and grading activities. In 2016, this firm submitted a report by certified arborist Sherby Sanborn to PRMD. The report stated that grading activities associated with roadway construction had “already impacted the root systems” of protected trees including “a Valley Oak, Coast Live Oaks, and a Monterey Cypress.” Letter from Sherby Sanborn to PLAN, May 17, 2016, attached as Exhibit J.

Mitigation measure BIO-14 states that trees damaged during construction activities “must be replaced in accordance with the Tree Protection ordinance.” MND at

20. To our knowledge, however, restoration activities related to the roadway construction in 2016 have never been completed. There is thus a fair argument that the mitigation measures are only words on paper and insufficient to address the Project's already significant adverse impacts on protected trees, not to mention potential significant impacts in the future.

B. There is a Fair Argument that the Project Will Have Significant Aesthetic Impacts.

Under CEQA, it is the state's policy to "[t]ake all action necessary to provide the people of this state with . . . enjoyment of aesthetic, natural, scenic, and historic environmental qualities." Pub. Res. Code § 21001(b) (emphasis added). Thus, courts have recognized that aesthetic issues "are properly studied in an EIR to assess the impacts of a project." *The Pocket Protectors*, 124 Cal. App. 4th at 937 (overturning a mitigated negative declaration and requiring an EIR where proposed project potentially affected street-level aesthetics). "Any substantial negative effect of a project on view and other features of beauty could constitute a significant environmental impact under CEQA." *Ocean View Estates Homeowners Assn., Inc. v. Montecito Water District*, 116 Cal. App. 4th 396, 401 (2004). As explained by the court in *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas*, 29 Cal. App. 4th 1597, 1606 (1994), it is "self-evident" that replacing open space with a subdivision will have an adverse effect upon "views and the beauty of the setting." Projects that are aesthetically incompatible with surrounding uses have also been required to prepare EIRs. *Protect Niles v. City of Fremont*, 25 Cal. App. 5th 1129, 1145-49 (2018) (holding that neighbors' objections to a project's aesthetic incompatibility with its surroundings constituted substantial evidence of a fair argument that the project would have a significant impact on the environment).

The proposed project is located in close proximity to Bodega Avenue, a corridor designated by the West Petaluma Area Plan as a scenic route. The MND recites the aesthetic policies of the Area Plan (e.g., "Policy 2.3.1: Protect visually vulnerable landscapes, such as ridgelines, unique scenic areas, and areas essential for defining the form of development in Petaluma") and attempts to address them. MND at 7. For example, the MND's mitigation measure AES-1 requires that building occur within building envelopes to reduce the impact on the view from Bodega Avenue. MND at 7-8. The building envelopes are situated behind the existing house and barn if viewed from certain places on Bodega Avenue.

As an initial matter, the MND's analysis is inadequate. It does not contain a full view-shed analysis or any pictures showing the views from Bodega Avenue. The

public is unable to analyze the Project's potential impacts on the view, and one is left to wonder about the completeness of PRMD's own review.

Additionally, the proposed mitigation measure is insufficient to protect the view from Bodega Avenue: it says nothing about the appearance of the homes that may eventually be built on the lot and, critically, does not limit their height. It is all well and good to place a new home behind an existing barn—but the view will not be spared if the home towers over the existing structure. This issue is compounded by the fact that the ground underneath the building envelopes is approximately 20 feet higher than the ground beneath the barn and the existing house. Finally, considering the lack of a height limitation, the topography of the site, the lack of photographs from Bodega Avenue, and the presence of a ridgeline just up-slope from the proposed building envelopes, the MND does not adequately explain how the view of the ridgeline will remain uninterrupted from Bodega Avenue. *See* West Petaluma Area Plan Policy 2.3.1 (“Protect visually vulnerable landscapes, such as ridgelines . . .”).

The MND also entirely fails to consider the aesthetic impact of the development with respect to the view from the neighboring Open Space Preserve. The conservation easement over the adjacent Preserve states that the property “will continue to be a public preserve in perpetuity.” Conservation Easement, § 5.6, Exhibit I. It further acknowledges that the property’s “primarily undeveloped character is an important open space resource, contributing to the county’s rural character.” *Id.*, § 2.2. Opportunities for “recreational enjoyment” of the site’s “natural features” is enshrined as one of the conservation values of the easement. *Id.*, § 2.3

The Project will have a significant adverse impact on the aesthetics of the area, as viewed and appreciated by the public from the Preserve. The Project will replace scenic open space on the southern boundary of the Preserve with two new houses and, presumably, parking areas, vehicles, and other features of residential development. This will negatively impact the Preserve’s ambience and scenic open space qualities and decrease the opportunities for recreational enjoyment of the site’s natural features. The MND has not explained, as it must, how the Project’s impact on the view from the Preserve is less than significant. *See Ocean View Estates Homeowners Ass’n, Inc.*, 116 Cal. App. 4th at 402 (requiring an agency to prepare an EIR because the petitioner presented “evidence from which a fair argument can be made that the [project] will be visible from public trails.”); *Protect Niles*, 25 Cal. App. 5th at 1145-49. The open space preserve represents a substantial investment—including one million dollars in public funds (*see* October 2018 letter by Kim Fitts, submitted under separate cover)—in protecting the rural character and aesthetics of this area. The addition of two homes in

close proximity to the Preserve would forever change the rural nature of the site.

Further, the MND does not even attempt to mitigate the Project's aesthetic impact on the Preserve. The Preserve is located up-slope of the Project site, so the topography will make Project features fully visible. And the building envelopes, which PRMD positioned to reduce the visual impact on Bodega Avenue, are situated so that both houses will be visible from the Preserve. Not even trees will obstruct the view. Mitigation measures that could reduce the impact—e.g., context-specific limits on building heights; required plantings, including trees, etc.—are absent.

C. There is a Fair Argument that the Project Will Have Significant Recreational Impacts.

The City of Petaluma General Plan 2025 (which applies to the Project site because it lies within the Urban Growth Boundary) calls for the City to “[r]etain and expand city-wide park and recreation assets,” including by encouraging and supporting collaboration with “non-profit organizations and private parties in the use of public lands for outdoor education opportunities such as . . . wildlife study/protection areas.” Goal 6-G-1; Policy 6-P-1(G).

The MND incorrectly concludes that the Project will not have significant recreational impacts because it would not lead to the degradation of parks or recreational facilities. In reaching this conclusion, the MND completely ignores the presence of a recreational facility adjacent to the Project site. One of the conservation values that the Preserve is intended to protect includes opportunities for “recreational enjoyment” of the site's natural features. In keeping with the General Plan policies above, the Preserve currently provides opportunities for non-profit organizations to use public lands for outdoor education activities and wildlife study. By disrupting American Badger habitat and the habitat of other special-status species and making the adjacent Preserve less attractive to these animals and birds, the Project will significantly diminish the opportunities available for wildlife study and education in the Preserve. As such, the Project conflicts with the recreational policies and goals of the City's General Plan, and there is a fair argument that the Project will have significant recreational impacts.

D. There is a Fair Argument that the Project Will Have Significant Land Use Impacts.

Evidence that a project is inconsistent with land use standards adopted to mitigate environmental impacts supports a fair argument that a project will have a

significant adverse effect. *Pocket Protectors*, 124 Cal. App. 4th 903 (2004); *Lighthouse Field Beach Rescue*, 131 Cal. App. 4th 1170 (2005). Since the Project is inconsistent with the General Plan as shown below, a fair argument exists that the Project would cause significant land use impacts. Thus, PRMD cannot rely on the MND and must prepare an EIR.

The MND concludes that the Project does not conflict with any land use plan or policy. MND at 38. In reaching this conclusion, the MND discusses the zoning designation applicable to the Project site and the zoning density of the Project. It further concludes that the designated American Badger Habitat Area “does not preclude the Urban Separator Path identified in the Petaluma General Plan 2025 that runs along the rear of the property line.” *Id.*

The MND neglects a series of applicable goals and policies from relevant land use plans with which the Project conflicts.

Sonoma County’s General Plan 2020 Land Use Element and its Open Space and Resource Conservation Element contain goals and policies in conflict with this Project. For example, Goal LU-10 provides that the “uses and intensities of any land development shall be consistent with the preservation of important biotic resource areas and scenic features.” To achieve this goal, the General Plan encourages incentivizing voluntary easements on lands with important biological resources (Policy LU-10b), and developing programs “for preservation and enhancement of important biotic resource areas,” (Policy LU-10c). Goal OSRC-7 sounds a similar note, calling for the County to “[p]rotect and enhance the County’s natural habitats and diverse plant and animal communities.” This goal is supported by the following objectives: “[i]dentify and protect native vegetation and wildlife, particularly occurrences of special status species . . . and areas of essential habitat connectivity,” (Objective OSRC-7.1), and “[m]aintain connectivity between natural habitat areas” (Objective OSRC-7.5). But, as explained above, this Project will disrupt the habitat of the American Badger, a special-status species, and interrupt a wildlife movement corridor. This habitat disruption is not consistent with “the preservation of important biotic resource areas” or the protection and maintenance of wildlife and habitat connectivity called for in the General Plan.

The Project is also inconsistent with Goal LU-5 of the County General Plan. This goal calls for the identification of “important open space areas between and around the county’s cities and communities” and the maintenance of these areas “in a largely open or natural character with low intensities of development.” The Project is an open space area outside of the City of Petaluma but on the edge of its Urban Growth

Boundary. As such, it falls within the scope of Goal LU-5. The Project, however, would replace open space with development, which would not maintain this area “in a largely open or natural character” as called for by the Plan.²

Moving from the County General Plan to the City of Petaluma General Plan 2025 (which applies to the Project site because of its location within the Urban Growth Boundary), the Project conflicts with policies pertaining to the Urban Separator. General Plan Figure 3-3-1 shows that the property is adjacent to the Urban Separator Path. *See also* Letter from Heather Hines to Misti Harris, January 24, 2013, attached as Exhibit K (“the Urban Separator Path as identified in the Petaluma General Plan 2025 runs along the rear property line and should be incorporated into any future development of the property.”). The City’s General Plan calls for the maintenance of “a permanent open space around the city” through the use of “an Urban Separator Pathway.” Policy 1-P-18. While the MND states that the badger habitat area does not preclude the Urban Separator Path, the habitat area does not extend into the remainder parcel. To be consistent with the General Plan, the MND should extend open space restrictions consistent with the maintenance of an Urban Separator Pathway to the remainder lot.

In addition to its conflicts with the City and County General Plans, the Project conflicts with the West Petaluma Area Plan’s Open Space Plan. This plan “proposes the preservation of open space” for the purpose of preserving “natural resources such as areas required for the preservation of plant and animal life.” West Petaluma Area Plan at 30. The Project here runs completely against this policy in that it converts open space to residential development. Further, as discussed above in the biological resources section, this particular open space is required for the preservation of species such as the American Badger. Since the MND does not contain adequate mitigation to protect the badger and other species, the Project conflicts with the letter and the purpose of the West Petaluma Area Plan’s Open Space Plan.

This letter has already discussed the Project’s potential conflict with Policy 2.3.1 of the West Petaluma Area Plan and its goal of protecting scenic ridgelines (see section concerning aesthetic impacts, above). It has also discussed the Project’s conflict with City of Petaluma General Plan Goal 6-G-1 and Policy 6-P-1, concerning parks and recreation (see section concerning recreational impacts, above).

² In contrast, the creation of conservation easements in this area, including on the Project site, would be in keeping with Goal LU-5.

Finally, it appears that the Project may conflict with density standards for Rural Residential areas. The two subdivided lots are 1.53 acres each, smaller than the two-acre minimum lot size for these areas. Section 25-43 of the Sonoma County Code suggests that clustered development may be permitted when “common usable open space” is set aside. The proposed subdivision adds two lots between a large home constructed on the property in 2012 and the property line shared with the protected open space preserve, with a small area in the northwest corner of the property designated as “badger habitat.” It appears the total acreage for the two lots and the “badger habitat” is 3.06 acres (i.e., 1.53 acres multiplied by two). The remainder parcel is 3 acres. Given this arrangement, it is not clear whether “common usable open space” has been set aside, as the area set aside for habitat appears to be part of the subdivided lots.

Since the Project conflicts with applicable land use plans, there is a fair argument that it would cause significant land use impacts, and PRMD must prepare an EIR. Furthermore, these conflicts demonstrate that Project approval would also violate the State Planning and Zoning Law.

E. There is a Fair Argument that the Project Will Have Significant Cumulative Impacts.

CEQA requires a discussion of the environmental impacts, both direct and indirect, of the proposed project in combination with all “closely related past, present and reasonably foreseeable probable future projects.” Guidelines § 15355(b); *see also* Pub. Res. Code § 21083(b); Guidelines §§ 15021(a)(2), 15130(a), 15358. The discussion of cumulative impacts must “reflect the severity of the impacts and the likelihood of their occurrence” (Guidelines § 15130(b)), and must document its analysis with references to specific scientific and empirical evidence. *Mountain Lion Coalition v. California Fish & Game Comm’n*, 214 Cal. App. 3d 1043, 1047, 1052 (1989). A lead agency must prepare an EIR if a project’s possible impacts, though “individually limited,” may be “cumulatively considerable.” Pub. Res. Code § 15064(i).

Extensive case authority highlights the importance of a thorough cumulative impacts analysis. In *San Bernardino Valley Audubon Society v. Metropolitan Water District*, 71 Cal. App. 4th 382, 399 (1999), for example, the court invalidated a negative declaration and required preparation of an EIR for the adoption of a habitat conservation plan and natural community conservation plan. The court specifically held that the negative declaration’s “summary discussion of cumulative impacts is inadequate,” and that “it is at least potentially possible that there will be incremental impacts . . . that will have a cumulative effect.” *Id.*

The MND fails to analyze the Project's cumulative impacts in light of related past, present, and reasonably foreseeable probable future projects. First, the MND fails to address the cumulative effects of the unpermitted grading and construction work that has recently occurred on the Project site. The MND acknowledges that illegal grading occurred in the project description, but its impacts are not addressed in the cumulative impacts section. The illegal grading and construction had negative impacts on protected trees on the parcel, Sanborn Letter, Exhibit J, and disrupted wildlife habitat, Letter from Lindsay Mickles to Misti Harris, February 20, 2014, attached as Exhibit L ("The owners have graded away wildlife habitat up to my property line . . . and have installed unpassable fencing . . . in the . . . area of the property that was always habitat for wildlife and through which wildlife frequently moved"). The MND does not address how these existing and closely related impacts to wildlife and protected species will interact with projected Project activities.

Additionally, the MND fails to consider the impact of past and future development around the Project site. In particular, this is a special concern because of the danger that the Open Space Preserve will be walled in by development. The impacts from such development—including the development proposed in the current Project—are identified in the October 2018 Fitts letter (sent under separate cover). These impacts will negate the conservation easement over the open space property and undermine the more than \$1,000,000 in public funds that have been invested in the Open Space Preserve and its conservation values. If residential development steadily increases around the Preserve, this special property will gradually lose its value as a wildlife habitat and a place for wildlife study, education, and passive public enjoyment of open space.

Because the MND does not analyze the potential for cumulative impacts in light of these past actions and future projects, it cannot possibly conclude that there will be no significant cumulative impacts. Accordingly, the County must prepare an EIR to evaluate whether the Project's impacts will be cumulatively significant.

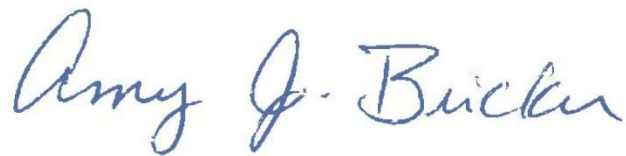
V. Conclusion

For all of the reasons explained above, there is fair argument that the Project will have significant impacts on the environment. The Project also conflicts with numerous policies in the County and City General Plans and the West Petaluma Area Plan. Approval of the Project would contravene good public policy and violate CEQA

and State Planning and Zoning Law. We therefore urge PRMD to revise the Project and prepare an EIR.

Respectfully,

SHUTE, MIHALY & WEINBERGER LLP



Amy J. Bricker
Aaron M. Stanton

Exhibits:

- A - Kim Fitts, BioConsultant LLC, American Badger Habitat Survey (2004).
- B - Letter from Kim Fitts, BioConsultant LLC, to Misti Harris, PRMD, July 24, 2013.
- C - Letter from Scott Wilson, Department of Fish and Game, to Misti Harris, December 27, 2012.
- D - Letter from Dana Riggs, WRA, Inc., to Kim Gardner, July 5, 2013.
- E - E-mail Exchange between Susan Kirks and Adam McKannay, September 17-18, 2014.
- F - E-mail from Kim Fitts to Misti Harris, January 28, 2014.
- G - Letter from Amy Bricker, Shute, Mihaly & Weinberger LLP, to T. Wick and M. Grosch, May 17, 2016.
- H - Dana Riggs, WRA, Biological Resources Assessment report: 245 Paula Lane, Sonoma County California (August 2014).
- I - Deed and Agreement By and Between the City of Petaluma and the Sonoma County Agricultural Preservation and Open Space District Conveying a Conservation Easement and Assigning Development Rights, Recorded May 14, 2012, as Doc. 2012046059 in the Official Records of Sonoma County.
- J - Letter from Sherby Sanborn to Paula Lane Action Network (PLAN), May 17, 2016.
- K - Letter from Heather Hines, Petaluma Community Development Department, to Misti Harris, January 24, 2013.
- L - Letter from Lindsay Mickles, Mickles Enterprises, to Misti Harris, February 20, 2014.