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September 9, 2014

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

Re: Marin County Housing Element Update

Dear Chair 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. This letter is a follow up letter to my letter of August 20, 2014 and responds to comments made by County staff at the August 28 Planning Commission hearing and by Supervisor Katie Rice regarding their interpretation of state housing and planning and development law.

CVP is concerned about the Planning Commission and Board of Supervisors' unfortunate reliance on inaccurate interpretations and implementation of state housing, transportation and environmental law. Staff and other County officials have not complied with or have misinterpreted state law provisions regarding:

- Public participation in the housing element development process;
- County liability for not adopting a housing element by January 31, 2015;
- Waiver of County development review authority for housing element and bonus density units;
- Reduction of local input and public review of housing element and bonus density units.

CVP urges Marin County to not proceed in their current plan to rush housing element certification based on misinformed views of state laws as set out below.

1. The County continues to ignore Housing Element public participation requirements

Regarding municipal housing element adoption, Government Code Section 65583(c)(7) states that; "[t]he local government shall make a diligent effort to achieve public participation..." The County's noncompliance with this requirement was made further apparent by its introduction of an enormous buffer on August 28 and then approving the buffer only two weeks later – barely giving the public a week to respond to a vital decision that will cover eight years. Then, at the Planning Commission hearing on August 28, Commissioner Holland claimed that it is "too late" to amend housing element site designations or units numbers, and that doing so was engaging in a "numbers game." This was said, despite the fact that there are 6-9 months left in the process and Mr. Holland and other Commissioners

voted only 2weeks previously to drastically and unnecessarily increase housing element designations. If Mr. Holland believes that the public simply has no role at this point in the County deliberations on the Housing Element - six to nine months before adoption - then Mr. Holland and the Commission itself, in agreeing with this assessment, appear unconcerned with state law requirements for a "diligent effort to achieve public participation." Indeed, such a statement shows a lack of respect for the very concept of public participation.

Similarly, County Planner Leelee Thomas contended to the Planning Commission that tinkering with the site list/unit counts for the state density bonus law could raise "red flags" at HCD. (July 28, 2014 Planning Commission Hearing Video, Minute 3:38.) First, buffers of such a high number are not requested nor expected by staff at the Housing and Community Development Agency (HCD). The only red flag would be such a high buffer number being proposed in the first place, thus possibly causing HCD to question how credible the actual site designation list is.

The County should assert its own community needs and not those of HCD officials. The housing element is adopted by the County, not by HCD and is part of the Marin Countywide Plan. Government Code Section 65581(c). HCD has a role in certifying the housing element but it is up to the County to prepare a housing element that complies with state planning and zoning law and meets the needs of its residents. Thus, County staff should be assertively advocating on behalf of County residents. Negotiating is part of any Housing Element certification process and County staff is paid very well to conduct these negotiations.

In her recent newsletter, Supervisor Rice urged residents to be sanguine about the huge new buffers, claiming that the Board can make changes after HCD's review. This is a curious view of how the public can – or cannot – participate in formation of the housing element. Ms. Rice's body, the Board of Supervisors, established a time-constrained work schedule that makes any meaningful review by the public – or even the Board - after HCD certification impossible.

Supervisor Rice and Commissioner Holland's view that it is too late to "tinker" or more accurately, reduce the enormous buffer in response to public opposition, and "engage in a numbers game" reflects a staff view that the Housing and Community Development opinions are paramount to those of taxpaying citizens of Marin.

2. County liability for not adopting a housing element by January 31, 2015 has been repeatedly overstated

In her August 29 newsletter, Supervisor Rice claimed "January 31, 2015, is the first deadline for adoption of the 2014-2023 Housing Element. Meeting this deadline would allow the County to stay on an eight year cycle for Housing Element update, representing a considerable saving per the County's resource allocation, and ensuring access to regional transportation funding." As I showed almost a month ago in my letter to the Planning Commission, that date is an artificial deadline; Government Code Section 65588(e)(4) gives the County until May 31, 2015 to adopt its Housing Element before being forced to move to a four year cycle.

There is another faulty argument that the January 31 date creates liability for the County. That claim, like many other made to rationalize a truncated public role, is based on a partial truth. The claim is that

the County would lose the rebuttable presumption of validity for its housing element if the County did not adopt its housing element by the statutory due date of January 31, 2015. This is true. The second part of the claim, that someone or an organization could file an action against the County for failing to have a legally adequate housing element is a strawman. While this provision has some teeth, it is not in the context of a delay in housing element adoption. First, no judge would ding the County for being late when the statute gave the County a grace period. Such a case would almost certainly be dismissed.

Second, such a lawsuit would never be filed because there would be no requisite cause of action or damages until a developer's proposal was rejected. (Government Code § 65883.) Such a fear of a lawsuit assumes that between Jan 31 and May 31 that the County would disapprove a low income housing application regarding something in the housing element and the developer would appeal. It would be impossible for practical purposes for an application to be submitted, deemed complete and appeals addressed before May 15. The lawsuit would end up being moot.

3. The County continues to make erroneous interpretations regarding the *mandatory* nature of development approvals of Housing Element and density bonus units

During the hearing, Commissioners Holland and Dickerson asked some important questions of staff regarding the relationship of density bonus and housing element law. Their questions addressed the reality that the county is not considering the impact of the state density bonus in its housing element submittal. In order to dismiss these concerns, County staff and officials have misinterpreted the state density bonus law, failing to take into account that with the state density bonus will in some instances now exceed the densities allowed in the Countywide Plan.

Supervisor Rice made several comments in her newsletter of August 2014 regarding her view of housing element law and effect, which mirrored County Planner LeeLee Thomas's views. Unsurprisingly, neither Ms. Thomas nor Ms. Rice supported their claims with any citations to state housing element or density bonus law. But surprisingly, Ms. Thomas and Ms. Rice appeared to have an important lack of understanding of the very basis of housing element and density bonus law; both laws are designed to provide incentives by significantly reducing local control over development.

Ms. Thomas said during the August 28th hearing that the County is not too concerned with density bonus because there are exceptions to this law that provide municipalities with the ability to regulate such density bonus projects. Ms. Rice claims in her newsletter that "proposals for development of any parcel (whether or not included in the Housing Element), are required to conform to local code, community plans, general plan policy, design guidelines, etc. and must go through the planning, design, environmental review, and permitting and public review processes required by the County." Both statements are misleading, because – as shown below - reducing local control is the only real incentive and thus, the main tool of housing element and density bonus law.

<u>Housing Element Law provides "builders' remedies" that prohibit County regulation of development.</u> For instance, Government Code Section 65863(b) restricts municipalities ability to downzone parcels that have been included in an HCD certified Housing Element. Government Code Section 65583 – adopted in SB 375 - provides another builder's remedy whereby a County that does not comply with rezoning is subject to liability and attorney's fees.

Density Bonus Law's requirements to waive local control are mandatory. The operative word in density bonus law is the municipality shall" provide the density bonus. The term "shall" is used sixty three times in the main government code section regarding density bonus. Government Code § 65915. (Only a very few "shall"s relate to the developers responsibilities.) This ability to *force* the locality to modify or even *waive* its normal development standards is the very reason these laws were passed and are the most compelling reason for the developer to structure a project to qualify for the density bonus. Indeed, developer's attorneys advertise that the density bonus statute can be used to achieve reductions in development standards or the granting of concessions or incentives from jurisdictions that otherwise would not be inclined to grant those items.
http://www.kmtg.com/sites/default/files/publications/density_bonus_law_2012.pdf

For instance, Government Code Section 65915(e) states that *"[i]n no case* may a city, county, or city and county apply any development standard that will have the effect of precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted by this section." (Emphasis added.) Thus, a developer who meets the either law's requirements for affordable or senior units is arguably entitled to the density bonus and other assistance as of right, regardless of what the locality wants subject to limited health and safety exceptions. (Ibid.) What this means is that proposals are ***not*** required to conform to all local municipal codes or general plan guidelines.

Also, Ms. Thomas's contention that no one uses density bonus law is as strange as it is inaccurate. Ms. Thomas provides no statistically meaningful support for this claim despite thousands of such units being developed in California. Of course it is possible that Ms. Thomas is basing her opinion on her experience during the last 7 years – during California's worst housing recession in history.

Density bonus Law set asides apply to both affordable housing and senior housing. Ms. Rice and another County supervisor have recently expressed surprise that density bonus can be applied to senior housing at all income levels. This view goes to the heart of the many County officials' lack of understanding of how housing element and density bonus law operates. In fact, it is exactly the opposite of how the Supervisors believe it works. Density bonus is in fact, triggered by low income or senior housing proposals by developers. (Gov't Code Section 65915(b)(1)(a-c).) Thus, the 502 buffer units that the County is proposing could trigger an additional 176 density bonus units. Both the 502 and the 176 are arguably exempt from almost any local regulatory control or public comment and participation. Adding 502 extra units is not "tinkering" with the County's housing element allocation, it is needlessly ballooning it to 678 units.

4. **Housing Element and density bonus law eliminate much of the public's right to review projects**

Supervisor Rice contends in her newsletter that "identification of vacant or underdeveloped parcels with zoning in place that could accommodate additional new housing does not trigger development. It is up to the property owner to decide whether or not to develop their property." This is a strange argument – no one is contending that property owners must develop their own land, which is hardly ever the case for high density housing development. But more importantly Ms. Rice seems to characterize the housing element process as just a bureaucratic number counting exercise. This view is simply wrong and

ignores that housing element rights provided to developers are purposely designed incentives – incentives that provide monetary value partly *because they reduce local control and citizen input* as shown above.

Further, CEQA contains several infill exceptions and recently the state legislature has streamlined CEQA requirements for traffic and parking impacts in certain areas (located in high quality transit corridors – i.e. within one half mile of Highway 101). Developers have successfully used these exemptions to provide for complete exemptions for large projects with density bonus. *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329 held that modifications required by the density bonus law – which increased the project impacts - did not disqualify the project from claiming the exemption.

Recently, several jurisdictions, such as the Cities of Larkspur and Corte Madera have attempted to use CEQA exemption procedures to reduce their need to review infill or transportation adjacent projects contemplated in a general plan amendment. For instance, the City of Corte Madera, in approving the infamous Wincup development, relied on CEQA's "tiering" provisions (e.g. Pub. Res. Code §21083.3) to avoid public involvement at the project stage, resulting in a project that infuriated most of Marin County.[1]

Conclusion

Finally Supervisor Rice claims that "Marin is a county that respects community values, community character and thoughtful planning that supports our many unique and varied communities." If this is true, why does Ms. Rice advocate unnecessarily ceding County values, character and thoughtful planning?

Again, CVP urges the County to direct staff to "restart" the public participation process as set out in HCD guidelines, reduce the amount of buffer units to a reasonable number that does not unnecessarily cede County authority, and to consider the social, economic environmental costs of its proposal for such large scale development.

Sincerely,

Edward Yates

Cc: Supervisor Katie Rice, Brian Crawford

[1] Also, SB1537 (which reduces the default density in parts of Marin County) does not apply to sites within one half mile from transportation corridors, which is where most of the Housing Element sites are. Thus, the default density will be 30 units per acre and these developments are potentially exempt from certain CEQA public participation requirements. (E.g. Pub. Res. Code §§ Sections 21155, 21155.2, 21155.3.)