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December 18, 2008

Via Facsimile (805-781-1350)

Honorable Jim Patterson, Chairperson
San Luis Obispo County Board of Supervisors
County Government Center
San Luis Obispo, CA 93408

RE: Applicant's Proposed Findings for Santa Margarita Ranch Project

Dear Chairperson Patterson and Members of the Board of Supervisors:

On behalf of North County Watch, we are providing the following comments on the applicant's proposed changes to the Staff Report, findings, and conditions of approval regarding the Santa Margarita Ranch project (the "project"). These comments supplement previous letters filed by and on behalf of North County Watch. We again incorporate those previous letters herein in their entirety.

At the outset, we share the concerns expressed by Chairperson Patterson and Supervisor Gibson at the December 16, 2008 meeting regarding the lack of adequate time for either the Board of Supervisors or the public to review and evaluate the materials before the Board concerning this project, including the applicant's numerous proposed changes. Furthermore, the public cannot know which, if any, of the applicant's suggested findings and changes might be adopted by the Board, nor can the public adduce what the Board's ultimate findings might contain. For these reasons, our comments below are not meant to be exhaustive, but are intended merely to highlight examples of findings and suggestions that are legally unsupported and/or contradicted by evidence in the record. North County Watch expressly reserves the right to challenge any and all findings and conditions of approval that the Board might ultimately adopt.

That said, the Board cannot simply approve this project in reliance on the applicant's suggestions. It appears that the applicant has deleted, weakened, or otherwise modified any findings, mitigation measures, and conditions of approval proposed in the EIR and recommended by Staff that it finds inconvenient or burdensome. The applicant has not even attempted to justify many of these changes, and where it has, those justifications are either irrelevant or

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contrary to the evidence. The applicant thus invites this Board to commit grave legal error by approving the project in reliance on these modified findings and conditions—findings and conditions that the Board has had inadequate time to review and understand. The Board should reject this ill-conceived invitation.

I. The Applicant's Proposed CEQA Findings Regarding Project Impacts Are Legally Inadequate and Factually Unsupported.

A. Class II Impacts

The Board must find that measures or changes incorporated into the project render each Class II impact less than significant. Pub. Res. Code § 21081(a)(1); Guidelines § 15091(a)(1). As described in our December 15, 2008 letter, Staff's proposed findings were inadequate to meet this standard. The applicant's proposed changes to Staff's findings only exacerbate this failing.

Impacts B-4 and B-7

The applicant proposes to reduce buffer zones along Trout and Tostada Creeks, as well as other wetlands and waters of the United States, to half (or less than half) of the distance recommended in the final EIR and Staff's proposed findings. (Ex. B, pp. 12, 17.¹) The applicant contends that the Department of Fish & Game (DFG) "typically recommends" 100-foot setbacks from perennial drainages and 50-foot setbacks from ephemeral drainages. (*Id.* at pp. 14, 18-19.) This contention, however, ignores DFG's *specific* recommendation of "a minimum 200-foot buffer" from Tostada Creek for *this* project, which DFG identified as necessary to protect listed species. (RDEIR Comment Letter R-12 at p. 7; see also FEIR at pp. CR-1114, CR-1125.) The applicant's suggested changes are unsupported by the evidence. Because these changes would eviscerate mitigation measures proposed by DFG, moreover, they could also necessitate further analysis and mitigation by DFG, as a responsible agency under CEQA, in its evaluation of streambed alteration agreements and incidental take permits. (See RDEIR Comment Letter R-12 at p. 3.)

Impact B-6

The applicant proposes to reduce the buffer zone protecting habitat occupied by vernal pool fairy shrimp from 300 feet, as recommended in the FEIR (FEIR at p. 4.3-65), to 100 feet. (Ex. B, p. 17.) The applicant has provided no explanation or justification for this change, which is unsupported by the evidence.

Impact B-8

The applicant proposes to reduce the FEIR's recommended survey area and buffer zone protections for the California red-legged frog. (Ex. B, pp. 19-21.) Once again, the applicant

¹ Citations in this form refer to exhibits to the "Letter of Transmittal" from Kirk Consulting to the Board of Supervisors, dated December 10, 2008, regarding the "Tract 2586 Staff Report" for the December 16, 2008 meeting.

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ignores DFG's specific recommendations. (See FEIR at pp. CR-1114, CR-1125.) These changes are unsupported by the evidence.

Impact B-9

The applicant proposes to reduce the FEIR's recommended survey area and buffer zone protections for the southwestern pond turtle by a factor of ten (from 1,000 feet to 100 feet). (Ex. B, p. 22.) The applicant has provided no explanation or justification for this change, which is unsupported by the evidence.

Impact G-2

The applicant proposes to weaken mitigation measures associated with grading near watercourses, exempting grading associated with road construction and requiring buffer zones only "where feasible." (Ex. B, p. 31.) The applicant's justification for this change has nothing to do with grading. (See Ex. B, p. 32.) These changes are unsupported by the evidence.

Impact N-1

The applicant proposes to delete a portion of the recommended mitigation for noise impacts to neighboring residential receptors. (Ex. B, p. 34.) The applicant provides no explanation or justification for this change, which is unsupported by the evidence.

Impact PS-3

The applicant apparently proposes allowing grazing as a fuel reduction measure within the 30-foot buffer zone around structures. (Ex. B, p. 37.) This is incompatible with other project elements designed to separate grazing from residential uses. (See Ex. C, p. 6 [requiring that all building envelopes be "cattle fenced"].)

Impact VR-1

The applicant proposes to replace a 22-foot height restriction with the requirement that building heights be "consistent with the heights identified in the Lot Development Matrix, a copy of which is attached." (Ex. B, p. 41.) No such document is attached, and it is not clear that such a document even exists; the applicant's suggestion therefore lacks any evidentiary support. Moreover, the Board may not rely upon preparation of a future plan in order to find that impacts are less than significant. *See San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645.

Greenhouse Gas Impacts

Our previous letters demonstrated that Staff's proposed findings and mitigation measures are inadequate under CEQA. The applicant now proposes to delete one of those mitigation

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measures, again without any explanation or justification. (Ex. B, p. 56.) This proposal further weakens the already indefensible findings regarding the project's climate change impacts.

B. Class I Impacts

In order to approve the project despite its significant and unavoidable environmental impacts, the Board must find that specific considerations make the mitigation measures proposed in the EIR infeasible. Pub. Res. Code § 21081(a)(3); Guidelines § 15091(a)(3). By the same token, the Board must mitigate all of the project's significant impacts where it is feasible to do so. Pub. Res. Code § 21002.1(b). As detailed in our December 15, 2008 letter, Staff's proposed findings were inadequate to meet this standard. The applicant's suggested changes to those findings invite additional legal error.

As a threshold matter, the applicant's suggested findings set forth mitigation measures in detail, whereas Staff's proposed findings simply referred to those measures by the designations used in the FEIR. In the course of describing those measures, however, it appears that the applicant may have modified them. The Board must ensure that the mitigation measures proposed in the FEIR are actually carried forward into its final findings.

For example, the applicant apparently proposes to delete certain mitigation measures associated with the development's traffic impacts. (Ex. B, p. 53.) The applicant's justification for this proposal—that the mitigation measures “are not feasible because they are preexisting conditions”—makes no sense. In any event, there is a “rational nexus” between the project and the mitigation proposed in the FEIR. The findings recommended by the applicant are insufficient to show that these mitigation measures are infeasible.

The applicant also apparently proposes to modify findings and mitigation measures concerning water supply for the project based on comments at the November 18, 2008 Board of Supervisors hearing regarding water from the Nacimiento Water Project. These comments are insufficient to support deletion of any mitigation measures, and are similarly insufficient to justify deletion of Staff's proposed finding that water supply for this project remains uncertain.

Finally, the applicant proposes that mitigation measures be considered as project benefits that justify approving the project despite its numerous Class I impacts. (Ex. B, pp. 58-59.) This is frankly Orwellian. These mitigation measures are concededly insufficient to avoid significant impacts on a number of important resources. Both the natural and the human community in the area would benefit far more from denial of this project than they would from mitigation measures that do not adequately ameliorate the project's effects. This type of mitigation cannot be counted as a project benefit in support of a statement of overriding considerations.

C. Conditions of Approval

The applicant in Exhibits D and F has proposed numerous detailed modifications to, and deletions from, the conditions of approval suggested by staff. We have been unable to review these modifications in detail, but they appear to eliminate and/or modify mitigation measures

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recommended in the final EIR for the project. Mitigation measures must be made fully enforceable through conditions of approval or other legally binding instruments. Guidelines § 15126.4(a)(2). Feasible mitigation measures identified in the EIR cannot be eliminated from either the Board's CEQA findings or the conditions of approval.

II. The Findings in Support of the Tentative Tract Map and Conditional Use Permit Approvals Are Inadequate as a Matter of Law.

In our previous letters, we pointed out that the project is objectively inconsistent with both the San Luis Obispo County general plan and the land use ordinance.² The findings of consistency proposed in Staff's report for the December 16, 2008 Board meeting were both legally inadequate and substantively incomplete. The applicant has proposed additions to these findings (see Ex. C, E), but those additions, although lengthy, add nothing new or substantial. On the contrary, the evidence in the record demonstrates that this project may not be approved consistent with the general plan and land use ordinance.

For example, for the reasons set forth in our October 31, 2008 letter on the FEIR, the applicant's interpretation of the density standards for an agricultural cluster subdivision is erroneous. Put simply, the applicant seeks to build too many houses on too many parcels. The applicant's interpretation would elevate the area plan standards of the land use ordinance above the conflicting, objective, and controlling standards of the general plan, and thereby invert the legal hierarchy that governs all land use decisions in California. *See, e.g., Leshner Communications v. City of Walnut Creek* (1990) 52 Cal.3d 531, 541. The standards of the general plan—in particular, Agriculture and Open Space Element Policy AGP 22—are controlling here.³

Moreover, the applicant's suggested findings of consistency with the land use ordinance and specific policies of the general plan are unsupported. Several staff reports, and the findings of the Planning Commission, correctly identified numerous inconsistencies between the project and the County's general plan and land use ordinance. (*See* Planning Commission Staff Report (July 7, 2008); Planning Commission Staff Report (September 25, 2008); Planning Commission Staff Report and Findings (October 9, 2008); Board of Supervisors Staff Report (November 4, 2008).) The inconsistencies identified in these staff reports, and in the Planning Commission's findings recommending denial, preclude approval of the project. *See, e.g., Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 378-79 (development project may not be approved if it interferes with or frustrates the general plan's policies and objectives); *Land Waste Mgmt. v. Bd. of Supervisors* (1990) 222 Cal.

² Government Code section 65589.5(j) is inapplicable here due to the project's numerous, objective inconsistencies with the general plan and zoning ordinance.

³ The applicant also cites an interpretation of the Salinas River Area Plan, prepared several years ago by the Planning Department, concerning whether an agricultural cluster subdivision can create new lots or whether it is limited to reconfiguring existing lots. (Ex. C, p. 1; Ex. E, p. 1.) The Planning Commission, in its findings recommending denial of this project, rejected this interpretation. An erroneous interpretation of County law rendered by Planning Department staff is not binding on this Board and does not vest the applicant with any cognizable rights.

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App. 3d 950, 958 (land use permit issued contrary to zoning ordinance “may be set aside and invalidated as *ultra vires*”). Once again, North County Watch objects to Project approval based on each inconsistency identified in these staff reports and the Planning Commission’s findings.

Finally, the applicant’s reliance on Public Resources Code section 21159.26 and Guidelines section 15092(c) is misplaced. (See Ex. C, p. 2; Ex. E, p. 2.) The evidence does not support a finding that there are other specific, feasible mitigation measures that would provide a comparable level of mitigation to a reduced density alternative. Accordingly, those provisions are inapplicable here.

For all of these reasons, and for the reasons set forth in our previous letters, the County may not approve this project as proposed.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Kevin P. Bundy

cc: North County Watch

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**** Transmit Confirmation Report ****

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SHUTE MIHALY WEINBERGE Fax:415-552-5816

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TO:

Members of the Board of Supervisors Fax: 805-781-1350

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Kevin P. Bundy

Phone: 415/552-7272 Ext: 289

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MESSAGE:

Please see attached regarding Agenda Item C-8 (Santa Margarita Ranch Project), to be heard December 19 at 10:00 a.m.

Thank you.

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