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Via E-Mail

San Bernardino County
Board of Supervisors
385 N. Arrowhead Ave #2
San Bernardino, CA 92415
Attn: Lynna Monell
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Re: Church of the Woods Project Appeal Hearing
Project Number P201700270/CUP- Response to Comments

Dear Members of the Board of Supervisors:

On behalf of Save Our Forest Association (“SOFA”) and Sierra Club – San Bernardino Mountains Group (“Sierra Club”) we are writing to address the responses to comments prepared by T&B Planning, Inc. dated September 29, 2020 (“County Responses”). The County’s Responses fail to remedy the deficiencies identified in our prior letters. We will not reiterate or repeat all of those deficiencies here. Rather, this letter addresses several inaccurate, incomplete, unsupported, or misleading assertions in the County’s Responses.

I. The County’s Responses Pertaining to Aquatic Resources Impacts Are Inaccurate and Misleading and Do Not Resolve the Deficiencies in the County’s Environmental Documentation.

A. The EIR’s Shifting Project Description Relating to the COTW Project and the Storm Drain Project Thwarts the EIR’s Analysis of Impacts to the Site’s Aquatic Resources.

The County fails to provide well-reasoned responses to our comments and fails to provide evidentiary support that impacts to jurisdictional waters, wetlands, and riparian habitats would be less than significant. As an initial matter, the EIR has never adequately disclosed the relationship between the Church of the Woods Project (“COTW”) and the

Rimforest Storm Drain Project. It is undebatable, however, that while the EIR explicitly stated it would evaluate environmental impacts under both scenarios (i.e., Storm Drain constructed before COTW and vice versa), the document never conducted this critical analysis. *See* DREIR at 2-16 and 2-22.

The County's Responses do not supply the missing impact analysis and only add to the confusion about the relationship between the two projects. The County's Responses assert that the Storm Drain Project will permanently eliminate jurisdictional waters on site. *See* Response A-6. This is incorrect. As the Storm Drain RDEIR explains, impacts to nearly all of the jurisdictional waters in the area that would be affected by the COTW Project would be *temporary*, not permanent. *See* Storm Drain RDEIR at 3.3-40 (stating "[t]emporary impacts to jurisdictional waters would occur in portions of the project site that may be impacted by project activities but would be restored at the end of the project"); *see also* Kamman Hydrology's 2019 Report at pdf page 8 (documenting the location of the *temporary disturbance area*). The Storm Drain RDEIR requires restoration of these temporarily affected areas as mitigation. Storm Drain RDEIR at 3.3-32 ("Mitigation Measure BIO-1c" requiring the County to conduct on-site restoration). The COTW Project would then fill the entire upper portion of the watershed with soil and build a roadway, ballfield and parking lots on the area that would be restored as mitigation for the Storm Drain Project. *Id.*

The County's Responses assert that it is the County's "intent" that the Storm Drain mitigation will not restore any jurisdictional waters, suggesting that the COTW Project will not affect jurisdictional waters or other riparian resources. Response A-6. This makes no sense. The Storm Drain RDEIR requires restoration of a riparian area that includes jurisdictional waters. The Storm Drain's impacts on this area are only temporary; it will remain a watercourse after construction of the Storm Drain, and a riparian area after restoration. Streams and riparian habitat, by definition, require a source of water; it would be impossible to restore a riparian area without the watercourse that makes the area riparian in the first place. Accordingly, it appears the County is trying to modify the Storm Drain mitigation to suggest that the COTW Project would have no impact. This is unlawful. Any changes to Storm Drain mitigation must be supported by adequate reasoning, substantial evidence, and further CEQA review. *See, e.g., Katzeff v. California Dept. of Forestry and Fire Protection* (2010) 181 Cal.App.4th 601; *Lincoln Place Tenants Ass'n v City of Los Angeles* (2005) 130 Cal.App.4th 1491. The County cannot surreptitiously recharacterize or modify Storm Drain mitigation measures through responses to comments on a separate project.

Nor do the County's modified Conditions of Approval ("COA") resolve the deficiencies in the EIR's analysis. COA #37 states that if the COTW Project were to be

substantially revised such that its drainage system does not connect to the Storm Drain Project, these revisions would require subsequent County approval. As we have repeatedly explained, there is no excuse for the County to defer this analysis; it must evaluate the COTW's impacts on aquatic resources, now, prior to Project approval. CEQA allows deferred analysis and mitigation only if there is a reason or basis for the deferral and the measures contain specific performance standards that will be met. *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 669-71. We can find no logical reason why the County could not conduct this necessary analysis now. Nor has the EIR identified any performance standards that would ensure the protection of these important resources.

COA #37 is also vague and ambiguous. COA #37 suggests that the Storm Drain Project might be built first, but the COTW Project may be revised so its drainage does not connect to the Storm Drain Project. Yet the EIR provides no information regarding where else drainage from the COTW Project would go, given that the COTW Project will occupy most of the top of the watershed, and the Storm Drain Project will route all of Rimforest's flows into Little Bear Creek. It is undeniable (as the EIR concedes) that storm drainage is an integral part of the proposed Project as is the County's Rimforest Storm Drain Project. (See COTW DREIR at 2-16 and 2-22, stating that the proposed Project's drainage plan is dependent on connecting to facilities that will be installed as part of the Storm Drain Project). If, on the other hand, COA #37 is intended to apply only if the COTW Project is built before the Storm Drain Project (or the Storm Drain Project is never built), it only underscores the complete absence of analysis in the EIR of the actual, independent impacts of the COTW Project. The County's whiplash approach to the relationship between the COTW and the Storm Drain Project is a classic example of a shifting project description making it impossible for the County or the public to assess the impacts of the COTW Project.

As we have stated, the County must determine the timing of the Storm Drain Project vis-à-vis the COTW Project, evaluate the environmental impacts from both projects, identify feasible mitigation for these impacts (including impacts of the COTW Project on Storm Drain Project mitigation), and then again recirculate the EIR for public review and comment.

B. The County's Responses Do Not Remedy the EIR's Deficient Analysis of Impacts to the Site's Spring, Stream, and Perennial Creek Flow.

The County ignores the substance of our prior comments and provides a misleading response to our comment pertaining to potential impacts to the site's spring, stream, and perennial creek flow. The end result is that the EIR fails to evaluate or

mitigate these impacts. Hydrologist Greg Kamman explained that an on-site spring likely sustains the flow in an on-site perennial stream as well as jurisdictional waters, wetlands and riparian habitats downstream of the spring outfall. *See* Kamman 2019 Report at 3 and Kamman 2020 Report at 2,4. The DREIR made no mention of this spring and thus failed to analyze how the Project could impact these interrelated aquatic resources.

The COTW FEIR takes the same approach to these resources as it does with jurisdictional waters and wetlands; that is, it denies any obligation to analyze impacts by claiming that the Storm Drain Project would mitigate any impacts to the spring. COTW FEIR-165; 167. The County's Response does not correct this problem.

Compounding matters, the County's Response ignores substantive comments from Kamman. Kamman informed the County back in January that groundwater is released at the spring site year-round in sufficient quantities to maintain at least 4130-feet of perennial creek flow and that this perennial creek flow supports associated jurisdictional wetlands/waters and aquatic habitat. Kamman 2020 Report at 4.¹ Kamman also documented how much of the recharge area would be influenced by the Project's facilities. The County's Response sidesteps this reality entirely; indeed, the Response seems to assert, contrary to the facts, that there may not be any groundwater on the site at all. (*See* County Response A-7, stating "[t]here was no groundwater observed in the borings and "the underlying bedrock is not as conducive to groundwater filtrations as one might expect..."). Whether a well was abandoned on the site is entirely beside the point. The fact is that there is a year-round spring on the site that supports perennial flow in the stream. The water feeding that spring is groundwater, and it has to be coming from somewhere, most likely upgradient in the Little Bear Creek headwaters. The COTW Project will completely remove a steep hilltop upgradient of the spring and bury the headwaters area that is almost certainly supporting the spring and the streamflow. Yet the EIR never addressed this impact.

Despite Kamman's extensive commentary on this potential impact and his explicit request that the EIR evaluate how the Project would impact the spring and downstream jurisdictional wetlands and waters and riparian areas, the County's Response still does not provide this analysis. Instead, the Response refers to a new COA that will require Low Impact Development ("LID") design features such as directing roof drains to

¹ On behalf of appellant Save Our Forest Association, Hugh Bialecki submitted a short video file by email to the Clerk of the Board, Members of the Board of Supervisors, and other County staff on October 18, 2020. According to Mr. Bialecki, the video file shows that water is currently flowing in Little Bear Creek now, even though it has not rained in more than six months.

landscaped areas. Response A-7. Yet, the County fails to provide *any* evidence that this COA would effectively reduce or avoid impacts to the spring and downstream flows. Until the County conducts the necessary analysis of impacts, it cannot determine if the LID features or other infiltration requirements would be sufficient to protect on-site resources or existing, perennial flows in Little Bear Creek.

II. The County's Responses Do Not Remedy the EIR's Flawed Analysis of Impacts to Sensitive Wildlife Species.

The County's Responses pertaining to the Project's impacts to sensitive wildlife species do not resolve the EIR's deficiencies identified in our previous letters. We elaborate here on several inaccurate or unsupported assertions in these Responses.

A. The Project's Mitigation Measures for Wildlife Impacts Remain Inadequate.

The County's Responses continue to mischaracterize the EIR's mitigation measures and the EIR therefore lacks evidentiary support that the Project's impacts on wildlife would be less than significant. The Responses assert that impacts to Southern Rubber Boa ("SRB"), San Bernardino Flying Squirrel ("SBFS"), and California Spotted Owl ("CSO") will be mitigated via an Incidental Take Permit ("ITP"). (*See* Response B-18; *see also* Response 7-9, FEIR at 69 ("Appropriate mitigation . . . will be determined through the Project's ITP process with CDFW. . . CDFW's ITP process requires that potential impacts to SRB be fully mitigated"). As we have explained, however, the EIR does not explicitly require that the applicant obtain an ITP. *See* October 8, 2020 letter to the Board of Supervisors at 7. Nothing in the EIR's mitigation measures for biological resources require the Project to obtain an ITP—indeed, the measures do not mention ITPs at all. DREIR at 3.C-25 to 3.C-27 (MM-3.C1(a), MM-3.C1(b), MM-3.C2(c)). Nor does the EIR's Biological Resources section include any other mention of ITPs. A project applicant cannot assert that a mitigation measure would require a particular outcome when the mitigation measure itself does not contain that requirement, even if the purported requirement is described elsewhere in the EIR. *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 514–515 (purported "additionality" requirement described in EIR text but not included in mitigation measure was not, in fact, required under the mitigation measure). Unless the EIR actually requires that the applicant obtain an ITP, the County may not rely on this mitigation measure to conclude that the Project's impacts on SRB, SBFS and CSO would be less than significant. Here, the County merely assumes that Project impacts will be mitigated by an ITP, without requiring an ITP or explaining why this assumed mitigation would be adequate. Response 10-54, FEIR at 166 ("...areas with moderate or higher quality [habitat] will be assumed

to be occupied and mitigated through the acquisition of an Incidental Take Permit (ITP) from CDFW. . .”); FEIR at 422 (same).

By not requiring the applicant to obtain an ITP, the EIR improperly defers mitigation for the Project. As just discussed, the County asserts that mitigation for the Project’s impacts will be determined through the Project’s ITP process in coordination with the CDFW. County Response B-18 at 10. Earlier responses to comments in the FEIR state that “[a]s part of the ITP process, CDFW will evaluate the adequacy of the Project’s mitigation measures. The CDFW may or may not require additional mitigation as part of the ITP process. However, because the ITP process cannot be completed with the CDFW until after certification of the Project’s EIR, it is not possible at this time to determine what, if any, additional mitigation may result from the ITP process.” Responses 10-60 and 10-61, FEIR at 170. Unspecified mitigation measures that CDFW may later impose through the ITP process after Project approval do not absolve the County of its responsibility to mitigate Project impacts and cannot be relied upon in the EIR. As explained previously, CEQA allows a lead agency to defer development of mitigation measures until after Project approval only when strict criteria are met. *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 94-95; *San Joaquin Raptor Rescue Center*, 149 Cal.App.4th at 669-71; Guidelines § 15126.4(a)(1)(B). Here, the County has not set out specific performance standards, has not explained why it would be impractical to develop additional mitigation measures now, and has not shown that the deferred mitigation measures would be feasible and effective.

The County asserts that it is not improperly deferring development of mitigation measures on the grounds that “the ITP process is a regulatory requirement” that imposes sufficient performance criteria. Response 10-60, FEIR at 170. This assertion is incorrect. As noted above, the EIR does not explicitly require the Project to obtain an ITP; it simply assumes the applicant will apply for an ITP and that the ITP process will adequately mitigate Project impacts. Moreover, regulatory compliance does not automatically establish that impacts will be less than significant, and it cannot be used to bypass the obligation to analyze and mitigate those impacts. See *Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1, 15-17; *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1108-09. Even if an ITP is obtained for the project, the EIR cannot rely on regulatory compliance to claim that impacts will be mitigated to a less than significant level.

The County’s Responses also lack support for the conclusion that mitigation measure MM-3.C1(a) (calling for a preclearance survey) and MM-3.C1(b) (calling for a habitat conservation easement) would be sufficient to reduce wildlife impacts to a less

than significant level. The Responses repeatedly assert that the habitat conservation measure, MM-3.C1(b), is by itself “sufficient” to “mitigate the Project’s impacts to sensitive species below a level of significance.” County Responses B-18, B-21, B-22, B-23, at 10-11. On the contrary, as we have explained, the 13.4 acres set aside for habitat conservation under measure MM-3.C1(b) is entirely insufficient to mitigate impacts to the SRB. *See* October 8, 2020 Letter to Board of Supervisors at 6-7. Additional mitigation is needed. Indeed, the County’s Responses implicitly acknowledge this when they concede that “additional mitigation may be imposed by the CDFW as part of their ITP permitting process.” County Response B-21 at 11.

The County improperly seeks to avoid taking full responsibility for development of those additional mitigation measures. County Responses B-18 and B-22 assert that [i]t is not within the purview of the County to determine the exact mitigation requirements that will be imposed by other authoritative agencies, such as the CDFW. . . It is within CDFW’s authority to require comparable or additional mitigation.” Response B-21 at 10, 11. To the extent the County is claiming that it lacks authority to impose additional mitigation measures beyond those already identified in the EIR, and that development of mitigation measures must be left to CDFW, that assertion is incorrect as a matter of law. A lead agency must adopt all feasible mitigation measures that can substantially lessen a project’s significant impacts, and it must ensure that these measures are enforceable. Pub. Resources Code § 21002; CEQA Guidelines § 15002(a)(3), 15126.4(a)(2); *City of Marina v. Bd. of Trustees of the Cal. State Univ.* (2006) 39 Cal.4th 341, 359, 368-69. An agency cannot avoid mitigating a project’s significant environmental impacts simply because another agency may have jurisdiction over implementation of mitigation measures. *City of Marina*, 39 Cal.4th at 359-60, 366-67.

B. The County’s Responses Do Not Resolve Deficiencies Relating to the EIR’s Analysis of Wildlife Corridor Impacts.

The County’s Response pertaining to the Project’s impacts on wildlife corridors is misleading and the EIR’s analysis of and mitigation for these impacts remains inadequate. Response B-24 implies that the Project would not adversely impact wildlife corridors because the Strawberry Creek wildlife corridor is located off-site to the west and does not fall within the COTW property. While the wildlife corridor is in fact located immediately west of the Project site, the Response fails to disclose that this area is already developed with homes. *See* DREIR at 2-6 (“The Project site is bordered on the west by single-family residences”). Because that area is already developed, it is no longer a suitable wildlife corridor, leaving the undeveloped Project site as the best remaining route for wildlife passage. *See* January 22, 2020 Letter to the Planning Commission at 12. As wildlife biologist Steve Loe explains, “[i]f one looks at the habitat in and around the

project from the air or aerial photos, it is clear that this project is in the most viable landscape linkage remaining that connects the north-side habitats from the Mojave River Watersheds of Grass Valley Creek, and Deep Creek to the south side watersheds of City Creek and Strawberry Creek.” Comment 166 G, FEIR at 355. The County’s failure to recognize the importance of the Project site as a wildlife corridor is a serious flaw.

C. The County’s Responses Do Not Remedy the Flaws in the EIR’s Analysis of Cumulative Impacts to Wildlife.

The County’s Response pertaining to cumulative impacts to wildlife (Response B-26) is inadequate for the reasons we explain in our October 8, 2020 letter to the Board of Supervisors (*see* page 10). The EIR asserts that impacts to the SRB, CSO and SBFS would be cumulatively significant and unavoidable even after mitigation. DREIR at 3.C-25; Response 10-65, FEIR at 171, 172. However, it provides no meaningful analysis in support of this conclusion. County Response B-26 asserts that “a quantified analysis of the cumulative loss of sensitive species and their habitats . . . is not required” and that “the County’s basis for concluding that the Project’s impacts are cumulatively considerable is based on the fact that the County General Plan designates land for future development that contains habitat for SRB, SCO, and SBFS, and the Project’s direct loss of habitat will contribute to Countywide habitat reductions.” County Response at 12, 13. The County’s Response errs because it makes no attempt to explain how development contemplated by the General Plan will affect habitat loss for these species. A bare conclusion that a project’s impact is significant and unavoidable cannot take the place of the required description and supporting analysis of that impact. *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm’rs* (2001) 91 Cal.App.4th 1344, 1371; *see also Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182 (invalidating EIR that had failed to adequately analyze water supply impacts but found them to be significant and unavoidable).

III. The EIR Fails to Adequately Disclose, Analyze, and Propose Mitigation For the Project’s Water Quality Impacts.

The County’s Responses fail to address significant flaws in the EIR’s water quality analysis. As discussed in our prior letters and in other public comments, Dr. Jennifer Alford submitted recent data from two sites along Little Bear Creek indicating that nutrient and bacteria levels in the stream already frequently exceed regulatory standards. The County’s Responses (at B-42 and B-43) completely fail to address this data. Nor does the EIR accurately describe existing conditions in Little Bear Creek. *See* FEIR at 3.F-21 (claiming “there is no measured data on storm water quality for the

Project site'). As a result, the EIR lacks an adequate description of the environmental baseline, rendering accurate analysis of impacts impossible.

The County's Responses also attempt to dismiss Dr. Alford's conclusions as out of date and based on hydrology from other regions. *See* Response B-43. Yet the Responses fail to acknowledge that the Water Quality Management Plan ("WQMP") for the Project is itself significantly out of date, having been last revised in May 2011.² DREIR Technical Appendix F, Appendix I. Moreover, although the WQMP acknowledges that expected and potential pollutants of concern from the Project include nutrients and bacteria (*id.* at 6), it neither specifically addresses current concentrations of these pollutants in Little Bear Creek nor provides evidence to support a conclusion that this Project will not further exacerbate the already serious water pollution problems in Little Bear Creek, including existing violations of current regulatory standards. *See Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 718-21.

The County's Responses also fail, as discussed above, to provide analysis or evidence in support of the conclusion that new conditions of approval requiring vague, generic infiltration and Low Impact Development features will be adequate to prevent hydrological or water quality issues. Finally, mitigation of construction impacts is improperly deferred pending development of a storm water pollution prevention plan and compliance with a NPDES permit. Accordingly, the EIR's conclusions that the Project will not have significant hydrological and water quality impacts are inadequately supported.³

IV. Last-Minute Inclusion of Architectural Renderings Cannot Cure Deficiencies in the Project Description.

Our prior letters objected that the EIR contained insufficient information about the Project's design to allow for meaningful evaluation of and comment on aesthetic impacts. *See* January 22, 2020 Letter to Commission at 6-7. Failure to provide details about siting, size, mass, and appearance of buildings renders an EIR's project description inadequate. *See Stopthemillenniumhollywood.com v. City of Los Angeles* (2019) 39 Cal.App.5th 1, 16-20.

² The WQMP thus appears to predate revisions in 2012 to "the County's WQMP template" that the County's Responses claim would apply to this Project.

³ The County's Responses list a number of documents that the County claims "substantiate" that BMPs proposed for the Project will be effective, but lack any analysis to support this conclusory statement.

The County's Responses reference a "proposed building elevation" that is also attached to the Staff Report. *See* Response B-14; Staff Report Attachment 10. The last-minute addition of this document to the record does not remedy the EIR's inadequate project description. First, the "elevation" consists of a single view that does not even show the entirety of a single building, much less describe the entirety of the Project in sufficient detail to allow for meaningful analysis and comment. Second, the elevation was not included or analyzed in the EIR, but rather was released on the afternoon of Friday, October 16, 2020—leaving only one full working day for public review prior to the Board of Supervisors hearing on the Project. The project description remains inadequate under CEQA.

V. Project-Related Traffic Congestion Will Violate the General Plan and Lake Arrowhead Community Plan.

The County's Responses fail to acknowledge the Project's conflicts with fundamental, mandatory and clear General Plan and community plan policies requiring maintenance of a specific level of service ("LOS") on area roadways. *See* October 8, 2020 letter to the Board of Supervisors at 25. Rather, the Responses insist that traffic congestion is no longer considered a significant impact under CEQA following implementation of SB 743. *See* Response B-31. SB 743, however, explicitly preserved local jurisdictions' authority to continue enforcing "local general plan policies." Pub. Resources Code § 21099(b)(4). The County General Plan and Lake Arrowhead Community Plan both contain policies requiring the County to ensure that projects do not degrade LOS below certain specific standards. General Plan Policy M/CI 1.1; Lake Arrowhead Community Plan Policy LA/CI 1.1. Both the EIR and the County's Responses effectively concede that this Project will violate these policies. *See* Response B-49; FEIR at 0-16.

Rather than confront these conflicts, the County's Responses simply declare that the relevant policies are not fundamental, mandatory or clear. Response B-4. The plain text of the policies demonstrates otherwise. Their language is clearly mandatory and their standards are specific. The County may not rationally adopt an interpretation of its General Plan that conflicts with the plan's plain text and context. *See, e.g., California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 642. If the County wishes to amend the General Plan and Lake Arrowhead Community Plan to allow approval of projects along roadways maintained by Caltrans notwithstanding traffic congestion, it may do so according to the procedures provided in state law. *See* Gov. Code § 65350 et seq. But the County may not simply disregard its own General Plan policies on a project-by-project basis.

VI. Conclusion

For all of the foregoing reasons, as well as the reasons presented in our prior letters and other public and expert comments, and in light of the evidence in the record, the Board of Supervisors should uphold the appeal, reverse the Planning Commission's decision, and deny the proposed Project. In any event, the Board cannot lawfully approve this Project without first preparing a thorough, accurate, and complete EIR that discloses, analyzes, and provides mitigation for the Project's impacts to this unique environment.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

A handwritten signature in black ink, appearing to read "Kevin P. Bundy", written over a horizontal line.

Kevin P. Bundy

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