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SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

DARTMOND CHERK, and THE CHERK FAMILY TRUST, Plaintiffs and Petitioners, v. COUNTY OF MARIN, Defendant and Respondent.	No.: CIV 1602934 **MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON VERIFIED PETITION FOR WRIT OF MANDATE** Date: December 6, 2017 Time: 1:30 pm Place: Department B Judge: The Hon. Roy O. Chernus

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INTRODUCTION

Petitioners Dartmond Cherk and The Cherk Family Trust (Cherks) challenge an unlawful monetary exaction imposed by Marin County (County) as a condition of approving the division of their 2.79-acre parcel of land into two single-family residential lots. The Cherks paid the $39,960 fee, described by the County as an "affordable housing fee," under protest. They now ask the Court to set aside the County's decision imposing the exaction and order a refund.

There is little dispute that Marin County has a housing shortage which has resulted in exceedingly high prices and a lack of affordability. There are many ways in which the County might solve that problem, such as increasing the supply of homes by allowing more to be built or subsidizing affordable housing through taxes borne by the public as a whole. However, it is both inconsistent with state law and unconstitutional for government to leverage its permitting power to force individual property owners to pay extraordinary fees to mitigate a general social problem (like the lack of affordable housing) not caused by the permit applicant's proposed land use. That is precisely what is occurring in this case.

This Court should rule that the County's exaction was unlawful for two reasons.

First, the County imposed the $39,960 fee without determining that it was reasonably related to any deleterious public impact caused by the division of their single parcel into two lots, as required by the Mitigation Fee Act. *See* Gov't Code §§ 66001; 66020.

Second, the exaction is an unconstitutional condition on the Cherks' permit because there is neither a logical connection (*i.e.*, an "essential nexus") nor rough proportionality between the exaction and an adverse public impact caused by the division of their lot, as required by both the California and United States Constitutions. *See Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

Ultimately, the County cannot make either of these showings. The division of the Cherks' single parcel into two residential lots will result in *additional* land available for housing construction, thereby contributing to the affordability of housing, and nothing about splitting the

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lot creates or contributes to the County's housing shortage. Accordingly, the County's decision to impose its "affordable housing fee" is not in accordance with law.

BACKGROUND[1]

In 2000, the Cherks applied to subdivide their vacant residential parcel on Upper Road in San Rafael into two lots. Compl. ¶¶ 2, 9; AR000003-06. The lot had been in the Cherk family for more than 50 years.[2] AR000218. They planned to sell one lot to supplement the modest retirement income of Mr. Cherk and his wife Esther, and to keep the other parcel for their family's future generations. Compl. ¶¶ 8-9; *see also* AR000001 ("Lot One, which will be retained in ownership by the Cherk family, is 1.79 acres in size. Lot Two, which will be marketed for sale, is 1.0 acre in size."). When they submitted their original application, the County did not require an affordable-housing fee as a condition for splitting a single lot into two. Compl. ¶ 10; AR000020-22.

Approximately two years later, the County advised the Cherks that the Marin County Code was in the process of being revised and that they should wait until after the revisions were complete before pursuing a final decision on their application. Compl. ¶ 11; AR000102. After years of back and forth between the Cherks and the County concerning the number of lots that might be created from their parcel, including several revised plans and applications, the County in December 2007 finally agreed to approve the division into two lots. AR000274-85. That approval was conditioned, however, on payment of an "affordable housing" fee in the amount of $39,960, based on the County's affordable housing law, which became effective in August 2003.[3]

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[1] The Cherks filed a Verified Complaint for Peremptory Writ of Mandate and Complaint for Declaratory Relief on August 15, 2016. On August 17, 2017, the Court entered a stipulated Order Regarding Briefing Schedule, noting that the County had filed an answer to the Verified Complaint and that the Administrative Record had been lodged with the Court. The Court adopted a briefing schedule, under which the Cherks submit this Motion for Judgment. Citations to the Administrative Record will be shown as "AR____."

[2] Mr. Cherk is a beneficiary and trustee of The Cherk Family Trust, which held title to the property at issue in this case. AR00004.

[3] Marin County Ordinance No. 3393. (AR000116-19). *See* Marin County Code, Ch. 22.22.

Compl. ¶ 15; *see also* AR000278-85 (Section II.7 of Resolution Approving The Cherk Family Trust Land Division).

The Cherks' project stalled again after they determined that the value of their property was impaired by the nationwide financial crisis, making it an inopportune time to proceed with the planned division and sale. Compl. ¶ 17. During that time the County informed Cherk representatives that the fee would not be $39,960, as originally stated, but had risen to $92,808 according to a formula then in place to calculate the fee. AR000289-90. County officials later exercised their discretion to reduce the fee back down to $39,960, and offered a payment plan in light of the Cherks' financial hardship. AR000301-02.

In 2014, the Cherks renewed the process to finalize the lot-split. Compl. ¶ 18. The Cherks were compelled to resubmit their plans for the property (and again pay substantial review fees) for reconsideration of the lot-split. AR000306-10. In August 2014, the County reconsidered its original approval, together with updated plans and analysis, and issued a decision confirming approval of the lot-split conditioned on the Cherks' payment of a $39,960 affordable-housing fee. Compl. ¶ 19; AR000311-12. The Cherks' proposal was finalized in July 2015—twelve years after their original application was submitted—and they paid the $39,960 fee under protest. Compl. ¶ 20 & Ex. A; AR000338-39.

In February 2016, a lawyer for the Cherks demanded from the County a refund of the $39,960 exaction. Compl. ¶ 28 & Ex. B; AR000340-43. The Cherks' lawyer also asked the County whether a process existed to appeal the exaction; he noted that the County had not provided the Cherks with statutory notice of their right to judicially challenge the fee, as required by the Mitigation Fee Act. Compl. ¶ 28 (citing Gov't Code § 66001(d)(1)); AR000344. The County offered no substantive response, and the Cherks filed this lawsuit.

In this motion, the Cherks seek judgment on their Sixth Cause of Action for Peremptory Writ of Mandate.

ARGUMENT

The County's decision to impose an "affordable-housing" fee on the Cherks' project is unlawful. Under California's Mitigation Fee Act, before imposing a fee as a condition for

approving a property-development application, a government agency must first determine that the fee is reasonably related to a deleterious public impact caused by the proposed development. Further, pursuant to the California and United States Constitutions, a public agency is required to establish an essential nexus and rough proportionality between the exaction and any public impact caused by the proposed use of land. The County has failed to meet its statutory or constitutional burden; nor can it do so. Because the County's imposition of the affordable-housing fee violates California statutory law and the Constitutions of California and the United States, the County failed to proceed in the manner required by law and exceeded its jurisdiction. Code of Civ. Proc. § 1094.5(b). The remedy for an unlawfully imposed monetary exaction is a refund. *See* Gov't Code § 66020(e).

I. STANDARD OF REVIEW

In determining whether an administrative agency has failed to proceed according to the law, the Court evaluates the claim by independent review, giving no deference to the agency's interpretation of the law. *McAllister v. Cal. Coastal Comm'n*, 169 Cal. App. 4th 912, 920 (2009); *Schneider v. Cal. Coastal Comm'n*, 140 Cal. App. 4th 1339, 1344 (2006) ("A court does not . . . defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature.") (internal citation omitted). Even where an agency is judged to have acted within its jurisdiction, a reviewing court still "must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision," resolving reasonable doubt in favor of the agency. *Topanga Ass'n for a Scenic Cmty. v. Cnty. of Los Angeles*, 11 Cal. 3d 506, 514 (1974). A determination that substantial evidence supports the agency's decision and its findings must be made "in light of the whole record." *JKH Enters., Inc. v. Dep't of Indus. Relations*, 142 Cal. App. 4th 1046, 1057 (2006).

II. THE COUNTY'S ACTION WAS UNLAWFUL BECAUSE NO REASONABLE RELATIONSHIP EXISTS BETWEEN THE "MITIGATION" FEE AND THE LOT-SPLIT'S IMPACT ON HOUSING AFFORDABILITY

A. The Mitigation Fee Act Requires the County to Show a "Reasonable Relationship" Between the Fee and the Deleterious Public Impact Caused by the Proposed Development

The Mitigation Fee Act, Gov't Code § 66000, *et seq.*, established "uniform procedures for local agencies to follow in establishing, imposing, collecting, accounting for, and using development fees." *Walker v. City of San Clemente*, 239 Cal. App. 4th 1350, 1357 (2015). Government agencies must comply with the Mitigation Fee Act before establishing or imposing development fees. Gov't Code § 66001(b); *Homebuilders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore*, 185 Cal. App. 4th 554, 560 (2010).

The Act was enacted in response to concerns that local agencies were imposing development fees on development projects for purposes unrelated to the proposed developments. *See Ehrlich*, 12 Cal. 4th at 865. Pursuant to the Act, before imposing an established development fee as a condition of approval for a specific development project, a local agency must "determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility . . . attributable to the development on which the fee is imposed." *Walker*, 239 Cal. App. 4th at 1358; Gov't Code § 66001(d)(1)(B).

The Mitigation Fee Act "thus codifies, as the statutory standard applicable by definition to nonpossessory monetary exactions, the 'reasonable relationship' standard employed in California and elsewhere to measure the validity of required dedications of land (or fees in lieu of such dedications) that are challenged under the Fifth and Fourteenth Amendments." *Ehrlich*, 12 Cal. 4th at 855.

B. The County Cannot Show a "Reasonable Relationship" Between the Fee and Any Deleterious Public Impact Caused by the Proposed Development

Ultimately, *any* fee imposed on a simple lot-split such as the Cherks by the County for the purpose of ameliorating its "affordable housing" problem is unlawful because the County cannot demonstrate "a reasonable relationship" between the fee and any impact on the affordability of housing *caused by* the Cherks' lot-split. *See San Remo Hotel L.P. v. City & Cnty. of San Francisco*

27 Cal. 4th 643, 671 (2002). When, as here, the proposed development will *not* cause increased public burdens, there is nothing to mitigate, and therefore, no fee can lawfully be imposed. *See Jefferson Street Ventures LLC v. City of Indio*, 236 Cal. App. 4th 1175, 1198 (2015) ("There was nothing in the record suggesting [the] project caused or contributed to the need for the Interchange Project.") (holding that the trial court had erred by denying a developer's petition for writ of mandate, challenging the conditions of approval that required the developer to set aside acreage for a freeway interchange).

Pursuant to the Mitigation Fee Act, the government has the burden to "show that a valid method was used for imposing the fee in question, one that established a reasonable relationship between the fee charged and the burden posed by the development." *Homebuilders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore*, 185 Cal. App. 4th 554, 561 (2010); *City of San Marcos v. Loma San Marcos, LLC*, 234 Cal. App. 4th 1045, 1058 (2015). To the extent that the County engaged in any method or made any findings at all concerning the relationship between the Cherks' lot-split and housing, it is this:

> The project is consistent with the goals and policies of the Countywide Plan because it would create two residential parcels . . . without disrupting existing public services for water supply, fire protection, waste disposal, schools, traffic, circulation, and other services or adversely impacting natural resources. . . . The project would result in a future increase in the availability of housing opportunities in an existing residential community.

AR000278 (Staff Report in recommending approval of lot split with conditions); *see also* AR000190 (initial study stating that "[t]he project would result in future development of two single-family residences on a vacant property, and therefore, would not result in the displacement of existing housing stock"). Therefore, contrary to any adverse impact on housing affordability, the impact of the Cherks' project is to help the affordability of housing in the community.

Here, the County's fee is an example of what the California Supreme Court calls "regulatory leveraging"—imposing an "*unrelated* exaction[] as a condition for . . . permit approval[.]" *Ehrlich*, 12 Cal. 4th at 867-68 (emphasis in the original). That is, the fee at issue here "*purportedly* offset[s]"—but does not *actually* offset—a deleterious impact arising from the Cherks' proposed lot-split. *Id*. at 868 (emphasis in the original). It is, rather, an exaction that "is

not merely excessive but truly arbitrary," *Sterling Park L.P. v. City of Palo Alto*, 57 Cal. 4th 1193, 1205 (2013), and "thus entirely illegal." *Id*. at 1209.

There *is in fact no* deleterious impact arising from the Cherks' lot-split. The Cherks' proposal will not result in a decrease in housing—affordable or otherwise. To the contrary, by dividing their residential parcel into two lots, the Cherks will *increase* the available land that can be developed for housing. Without any deleterious impacts—indeed, given the positive effects on future housing availability—the County cannot impose any fee on a simple lot-split, much less can it show that the fee it did impose is reasonably related to increased public burdens *caused by* the Cherks' property division. *See San Remo Hotel*, 27 Cal. 4th at 671. Therefore, the County's affordable-housing fee violates the Mitigation Fee Act and should be set aside.

C. The Method of Calculating the Exaction Does Not Require a Different Conclusion

The Cherks anticipate the County to argue that the fee imposed here was a "legislative," not an "adjudicatory," exaction, and that therefore, the County need not make the "reasonable relationship" showing here. This argument lacks merit.

First, the fee at issue here, while established by the Marin County Code, was ultimately calculated and imposed upon the County's discretion. *See* Resolution Approving The Cherk Family Trust Land Division, § II.7 (AR000278-85). According to the County's Code, the "fee as established by the County shall be multiplied by the fraction of the inclusionary requirement to determine the applicable fee to be paid." Marin Cnty. Code § 22.22.090(B). Here, the fee imposed on the Cherks was purportedly based on 40% of a full unit. *See id*. Moreover, the County ultimately used its discretion to modify the fee and reduce it from $92,808 to $39,960. AR000294-95. Therefore, any argument that the fee imposed here was mechanically determined and imposed upon a mandatory or formulaic application of the County's Affordable Housing Regulations lacks merit.

Second, the California Supreme Court has made clear that even legislatively mandated exactions require the municipality to demonstrate a reasonable relationship between the fee and the application of that fee to a proposed development project. "While the relationship between

means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees . . . the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster." *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 471 (2015) (citation omitted). If it does not pass constitutional muster, it also does not satisfy the Mitigation Fee Act. *See Ehrlich*, 12 Cal. 4th at 866 ("the Act's 'reasonable relationship' language should be construed in light of *Dolan*'s 'rough proportionality' test"). Here, there is no relationship at all because the lot-split does not cause housing to become less affordable in the County. Moreover, the County made no findings at all in support of its imposition of the fee to the Cherks' land division. That is a classic example of an arbitrary fee in violation of the Mitigation Fee Act.

III. THE MONETARY EXACTION IS AN UNCONSTITUTIONAL CONDITION UNDER THE FEDERAL *NOLLAN*/*DOLAN* TEST

A. The County's "Affordable Housing" Fee is an Exaction, and the *Nollan*/*Dolan* Test Applies

Both the United States and California Constitutions protect property owners from takings without just compensation. U.S. Const. amend. V;[4] Cal. Const. art. I, § 19. The Supreme Court has observed that "land-use permit applicants are especially vulnerable" to government pressure "to giv[e] up property for which the Fifth Amendment would otherwise require just compensation." *Koontz*, 133 S. Ct. at 2594. "So long as the building permit is more valuable" than the demand, "the owner is likely to accede to the government's demand, no matter how unreasonable." *Id.* at 2595.

While the government may require property owners to mitigate the negative public impacts of a proposed property development as a condition of receiving a permit, the government may not abuse this authority by demanding money or property that would, outside of the permitting process, amount to taking without just compensation. *Dolan*, 512 U.S. at 391. The *Nollan*, *Dolan*, and *Koontz* cases "involve a special application" of the unconstitutional conditions

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[4] The Fifth Amendment's Takings Clause applies to local governments through the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

doctrine aimed at prohibiting "[e]xtortionate demands of this sort [that] frustrate the . . . right to just compensation." *Koontz*, 133 S. Ct. at 2595. Under that well-settled doctrine, government may constitutionally exact money from property owners as a condition of changing the use of their property only if (1) the exaction has an "essential nexus" (*i.e.*, a logical connection) to the public impact of the proposed new use, *Nollan*, 483 U.S. at 837 and (2) the exaction is roughly proportionate in both nature and extent to negative public impacts caused by the new use, *Dolan*, 512 U.S. at 391.

This "*Nollan*/*Dolan*" rule applies to "monetary exactions" like the County's affordable-housing fee here. *Koontz*, 133 S. Ct. at 2599-60. Indeed, the County's affordable-housing fee here was an "action[] that divest[s] the developer of money or a possessory interest in property." *Sterling Park*, 57 Cal. 4th at 1204-06. These "so-called 'in-lieu of' fees are functionally equivalent to other types of land use exactions." *Koontz*, 133 S. Ct. at 2599. Accordingly, these fees or monetary exactions are subject to the same constitutional standards, and limitations, as are other forms of exactions and dedication requirements. As such, they "must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*." *Id*.

Accordingly, the County may condition the approval of development permits on a fee *only if* it can demonstrate an "essential nexus" and "rough proportionality" between the fee and an adverse impact of the development. *Koontz*, 133 S. Ct. at 2595 (citing *Nollan*, 483 U.S. at 837, and *Dolan*, 512 U.S. at 391). The County's demand for a lump-sum of money for "affordable housing" fails on both counts. *See San Remo Hotel*, 27 Cal. 4th at 666 ("*Nollan* and *Dolan* require a *factually* sustainable proportionality between the effects of a proposed land use and a given exaction.") (internal quotation marks and citation omitted) (emphasis in the original).

B. The County Cannot Demonstrate a Nexus Between the Exaction and Any Adverse Public Impacts Caused by the Cherks' Lot-Split

The County cannot show an "essential nexus" between the "affordable-housing" fee and the public impact of the Cherks' lot division. An exaction will meet this "essential nexus" test if it "serves the same governmental purpose as the developmental ban[,]" *Nollan*, 483 U.S. at 837, that is, if it "substantially advance[s] the *same* interests that land-use authorities assert[] would

allow them to deny the permit altogether." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (emphasis in original). If the government's demand would be a taking outside of the permitting process, then the exaction is not a valid regulation of land use but an "out-and-out plan of extortion" in violation of the unconstitutional conditions doctrine. *Nollan*, 483 U.S. at 837.

Here, the County forced the Cherks to pay $39,960 as a condition of receiving permission to change the use of their property, purportedly to ameliorate the County's lack of affordable housing. Had the County commanded a payment of that sum from the Cherks outside the permitting process, it surely would constitute a taking of their money. Yet, the County cannot show that there is any logical connection that might make its demand permissible between the County's lack of affordable housing and the Cherks' lot-split.

As discussed above, the Cherks' proposed property division will result in *no* deleterious impacts arising from the division of the Cherks' land into two residential lots. The Cherks' proposal will not result in a decrease in housing—affordable or otherwise. To the contrary, by dividing their residential parcel into two lots, the Cherks will *increase* the available land that can be developed for housing. The severe lack of affordable housing is the result of market forces and the County and other regional governments' long-term land-use policies. *See Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1084 (N.D. Cal. 2014) (holding that there is no nexus between a monetary exaction conditioning the withdrawal of rental property from the city's rental market and a lack of affordable housing that was "caused by entrenched market forces and structural decisions made by [the municipality] long ago in the management of its housing stock").

Because the division of the Cherks' lot does not create or contribute to the County's housing affordability problem, the County cannot impose ***any*** fee, let alone the substantial fee imposed by the County. *San Remo Hotel*, 27 Cal. 4th at 671 (2005). Indeed, the only findings in the record related at all to the public impact on housing of the Cherks' lot-split establish that it will increase housing opportunities and ameliorate the housing supply problem that the County purportedly seeks to address. AR000278.

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C. The County Cannot Show a "Rough Proportionality" Between the Amount of the Exaction and Any Adverse Public Impact Caused by the Cherks' Lot-Split

Nor does the "affordable-housing" fee meet the "rough proportionality" test, which requires the County to show that "the degree of the exaction[]" bears a "rough proportionality" to the projected negative impact of the Cherks' proposed property division. *Dolan*, 512 U.S. at 388, 391. The County was required to "make some sort of individualized determination that the required [condition]" is "related both in nature and extent to the impact of the proposed development." *Id.* at 391. Here, the County offered no determination—other than that the fee was (purportedly) required by the Marin County Affordable Housing Regulations.

Further, the County cannot make this showing. In *Dolan*, the Court held that the city of Tigard, Oregon failed to carry its burden of showing a "rough proportionality" when the city determined that its demand for a dedication of property for public use "could offset some of the traffic demand and lessen the increase in traffic congestion." *Id*. at 389 (quoting the city's findings). But here, again, there is no finding that alleges an adverse public impact (and which there is none in fact) resulting from the Cherks' proposal to divide residential property into two lots. The only "impact" will be the additional availability of land for housing development. Therefore, because the lot-split produces no negative impact warranting mitigation, no fee would satisfy the "rough proportionality" requirement. *Id*. at 388, 391.

The monetary demand in this case cannot withstand scrutiny under *Nollan* and *Dolan* because, at bottom, there is nothing to mitigate. Rather, the County has singled out individual property owners who have the misfortunate of needing a land-use permit to pay what is, in effect, subsidies for affordable housing to ameliorate the County's housing shortage. That is a general social problem, however, that "in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

The Cherks respectfully request, for the reasons discussed above, that the Court grant this Motion and issue a writ of mandate ordering the County to set aside its decision to impose the $39,960 fee and to refund that fee in the full amount, with interest.

DATED: October 2, 2017.

Respectfully submitted,

LAWRENCE G. SALZMAN
Pacific Legal Foundation

By _____
LAWRENCE G. SALZMAN

Attorney for Plaintiffs and Petitioners

DECLARATION OF SERVICE

I, Barbara A. Siebert, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On October 2, 2017, a true copy of MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON VERIFIED PETITION FOR WRIT OF MANDATE was placed in an envelope addressed to:

BRIAN E. WASHINGTON
TARISHA K. BAL
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3501 Civic Center Drive, Room 275
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Counsel for Defendant and Respondent
County of Marin

which envelope, with postage thereon fully prepaid, was then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

On October 2, 2017, a true copy of MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON VERIFIED PETITION FOR WRIT OF MANDATE was sent via electronic mail addressed to:

BRIAN E. WASHINTON
E-Mail: bwashington@marincounty.org
TARISHA K. BAL
E-Mail: tbal@marincounty.org
Counsel for Defendant and Respondent
County of Marin

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 2nd day of October, 2017, at Sacramento, California.

_____
BARBARA A. SIEBERT