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11/24/15

Peter Maurer, Planning Director
Calaveras County Planning Department
891 Mountain Ranch Road
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Dear Sir:

I. Public Records Act Request

Pursuant to the California Public Records Act (Gov. Code, sec. 6250, et seq.), I am requesting a copy of the Mintier-Harnish General Plan or plans delivered to the County sometime between December 2010 and February of 2011.

Apparently, the general plan policy document included nine elements: Land Use; Public Facilities & Services; Natural Resources; Scenic, Recreational, and Cultural Resources; Health and Safety; Economic Development; Water; Transportation & Circulation; and Energy. (See Attachment 1, Harnish, Memo to Willis, 10/11/11.) Document(s) fitting this description were referred to in a letter from Larry Mintier and Jim Harnish to the Board of Supervisors. (See Attachment 2, Mintier and Harnish, Letter to BOS of 12/11/12 to BOS, p. 1.) The introduction to the policy document, dated December 2010, was provided with that letter from Mintier and Harnish. (Attachment 3, 2035 General Plan Introduction.) The Economic Development Element and was released by the Planning Department prior to the December 13, 2011 hearing of the Board of Supervisors. (Attachments 4, Willis email, 12-11-11.) Apparently, all the electronic files containing the herein requested documents were provided to the County by Mintier-Harnish prior to the end of their general plan work for the County. (See Attachment 5, Harnish letter to Willis, 12/8/11.) This should be enough detail to reasonably describe the identifiable record(s) we seek. (Gov. Code, sec. 6253 subd. (b).) If the only copy of the record is currently in the possession of one of the County's past or current general plan consultants, please have them send a copy to me.

I realize that there will be a charge for the reasonable costs of reproducing this document, and I am prepared to pay that reasonable charge. If you would prefer not to spend valuable staff time on the reproduction of the document, I would be happy to bring in a portable copy/scanning machine and copy the document. If you have the document in a commonly readable and printable electronic format, I would prefer a copy of the document in that format. (Gov. Code, sec. 6253.9.)

As required by the Public Records Act, I expect your response within 10 days, unless you indicate a valid reason that you need an extension of up to 14 days. (Gov. Code, sec. 6253, subd. (c).)

I am not asking for any information that is exempt from disclosure under the Public Record Act, such as the contact information for in-home service providers, initiative petitions, bi-lingual ballot requests, documents produced for pending litigation; personnel, medical or similar files; utility or crop data provided to the County in confidence, criminal investigations, test questions, real estate appraisals, confidential taxpayer information, library circulation records, privileged evidence, personal financial data, records of Native American graves, hospital district records, licenses to carry weapons, contracts for health coverage, records relating to vulnerability to terrorist attack, the home addresses of school and public officials, County health plans, voter registration information, private wage data, corporate financial records or trade secrets, utility customer data, or AIDS test results.

If you deny all or any part of this request, please cite each specific exemption you think justifies your refusal to release the information, and notify me of any appeal procedures available to me. Please indicate briefly, in writing, the reason the document has not been provided. (Gov. Code, sec. 6255.) Please indicate the names and positions of each person responsible for denying the request for the record.

Please remember that, if only parts of the requested record are exempt from disclosure, "Any reasonably segregable portion" of the record shall be provided, "after deletion of the portions which are exempted by law." (Gov. Code, sec. 6253, subd. (a).)

II. The Mintier General Plan Report is not exempt from Disclosure.

In the past, on behalf of the Calaveras Planning Coalition, Tom Infusino politely and informally encouraged the County release this document. He made a verbal request for the document from Planning Director Maurer on 6/17/14 while meeting with him to discuss the Economic Development Element. Mr. Maurer said he would think about it. In the absence of an affirmative response from the Planning Director, Mr. Infusino made a verbal request for the document from the Planning Commission on 8/14/14. They did not provide the document. He made a verbal request of the document from the Board of Supervisors on 10/18/14. (Attachment 6, Comments on Agenda Item 20, 10-18-14.) That request was denied.

In two instances, County Counsel has claimed two bases for withholding the document from the public. First, County Counsel has argued that the County may withhold the document pursuant to the deliberative process privilege. Second, County Counsel has argued that the County may withhold the document because it is an administrative draft. In addition, Planning Director Maurer asserted that release of the Mintier-Harnish General Plan around the time of the Public Review Draft General Plan could cause confusion among members of the public regarding on which draft plan the County was collecting comments. Both Planning Director Maurer and Supervisor Edson also indicated that releasing the Mintier-Harnish General Plan would not be

consistent with their desire to move the process forward. These are incorrect bases for denying this Public Record Act request.

A) The deliberative process privilege does not apply to shield the Mintier General Plan from public review.

County Counsel has argued that the deliberative process privilege applies to the Mintier General Plan.

> "Under the deliberative process privilege, senior officials of all three branches of government enjoy a qualified, limited privilege not to disclose or to be examined concerning not only the mental processes by which a given decision was reached, but the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated." (Regents of University of California v. Superior Court (1999) 20 Cal.4th 509, 540, 85 Cal.Rptr.2d 257, 976 P.2d 808.) The privilege rests on the policy of protecting the " 'decision making processes of government agencies [.]' " (Id. at p. 541, 85 Cal.Rptr.2d 257, 976 P.2d 808.) "The key question in every case is 'whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.' [Citation.]" (Times Mirror Co. v. Superior Court (1991) 53 Cal.3d 1325, 1342, 283 Cal.Rptr. 893, 813 P.2d 240.)
>
> (As Quoted in *San Joaquin Local Agency Formation Commission v. Superior Court* (App. 3 Dist. 2008) 162 Cal.App.4th 159.)

Furthermore the deliberative process privilege is not absolute, but rather is qualified and narrowly interpreted. "Not every disclosure which hampers the deliberative process implicates the deliberative process privilege. Only if the public interest in nondisclosure clearly outweighs the public interest in disclosure does the deliberative process privilege spring into existence." (California First Amendment Coalition v. Superior Court (App. 3 Dist. 1998) 67 Cal.App.4th 159, 172.) The burden rests on the County to establish the conditions that justify nondisclosure.

The County's instinctive invocation of the deliberative process privilege is misplaced in this instance.

First, the Mintier General Plan was never the subject of deliberation by the Board of Supervisors. The Board met and voted on hiring a new general plan consultant. (Attachment 7, BOS Agenda & Minutes 11/23/12.) The actual text of the Mintier General Plan was not reviewed by the Board of Supervisors as part of that decision. The decision was made based upon the public staff report and recommendations of Planning Director Willis. (Attachment 8, Staff Report, 11/13/12.)

Second, the contents of the Mintier General Plan are not the type of private advice that is protected under the deliberative process privilege to promote frank advice to public officials.

The contents of the Mintier General Plan are public policy pronouncements. (Attachment 2.) The Mintier General Plan is not providing advice to the Supervisors. It is providing a technical planning product in response to a contract with the County. It is not private advice to the Supervisors to do or to refrain from any particular action. The Mintier General Plan is not a document advising the Board to fire or to retain its authors as consultants. It simply does not include the kind of advice from county staff or questions from County Supervisors that are protected under the deliberative process privilege.

Third, the County's decisionmaking process regarding the dismissal of Mintier-Harnish was far from a private consultation with County staff that now deserves the protection of the deliberative process privilege. County staff criticism of the Mintier General Plan was very public and very candid, as was the reply from Mintier-Harnish. (Attachment 9, Video of BOS meeting, 11-13-12; Attachment 2.) The four-year planning process facilitated by Mintier-Harnish was also very public. It seems inequitable to allow the County to arbitrarily go from paying a consultant over $900,000 dollars, engaging the public in a four year planning process, to then to publicly besmirching the professional reputation of that consultant, disregarding the work product, publicly hiring another consultant for close to $300,000, and then at the last minute hiding behind the deliberative process privilege to prevent the public from reviewing the fruits of their labor and their tax dollars.

The only portion of the Mintier General Plan that <u>may</u> reflect a deliberative process are the "tags" that Mintier added to the end of some policies in the Natural Resources Element to indicate their source. (Attachment 1, p. 1.) If the source listed on some of those tags are the names of planning commissioners or supervisors who will later vote on the general plan, or county staff giving the decisionmakers advice, then the names on those tags can be redacted prior to the release of the Mintier General Plan. On the other hand, if the tags merely identify the origin of a policy as another city or county's general plan, then they do not reveal a deliberative process.

B) The Mintier General Plan is not a draft document.

The County has argued that the Mintier General Plan is a preliminary draft document, not ordinarily retained by the county, and therefore can be withheld from disclosure under the Public Records Act, if the public interest in withholding the document <u>clearly</u> outweighs the public interest in disclosing the document. (Gov. Code, sec. 6254, subd. (a).)

However, in the most relevant sense, the Mintier General Plan is not a preliminary draft document.

First and most importantly, the Mintier General Plan is the final document that was produced pursuant to an over $900,000 public contract with the County. (Attachment 7, p. 4.) It is the product delivered by the contractor and received by the County that justifies the expenditure of public funds. The public has an interest in seeing what we bought, even though the Board of Supervisors rejected the plan sight unseen, and perhaps especially because the Board of Supervisors rejected the plan sight unseen. Accepting the County's argument, that virtually any

document not finalized by the government can be withheld from public scrutiny, would allow the government to hide its most expensive and embarrassing mistakes from public review, thereby thwarting the California Constitution's guarantee that, "The people have the right of access to information concerning the conduct of the people's business."

Second, the fact that the document was not adopted by the Board of Supervisors only means that it is not the County's legally binding land use "constitution". Failure to adopt such a plan does not negate the fact that it is the final product that was delivered by the contractor and received by the county as justification for spending over $900,000.

Third, since the Mintier General Plan was rejected, and a new consultant was hired to draft a different General Plan, the Mintier General Plan is not really a draft of anything, in that it will never be the basis for the final plan adopted by the Board of Supervisors. Webster's defines the word "draft" as… "a preliminary sketch, outline, or version (the author's first -) (a – treaty)" The Mintier General Plan is not connected to the new General Plan drafted by a different consultant. The author of the Mintier General Plan is not the author of the subsequently contracted for General Plan. The Mintier General Plan is not its author's preliminary draft or first draft that will be followed by another version. The Mintier General Plan is the author's FINAL version.

Finally, even if one considers the Mintier General Plan a draft document, it is far from a "preliminary draft." According to its authors, at the time is was presented to the County in February 2011, "[T]he General Plan Update process was more than 80% complete" and was on track to be completed "within a year or less." (See Attachment 2, p. 1.)

In all these critical respects, the Mintier General Plan is not the sort of "preliminary draft" that can be withheld from public disclosure.

C) The Public interest in disclosure outweighs the government interest in withholding the document.

Even if the Mintier General Plan is ruled a draft document, or found to reflect a deliberative process, the Public Records Act does not universally exempt such documents from public review. Instead, the exemption for such documents is much narrower. (Gov. Code, Section 6254 (a) & 6255.) In addition, exemptions from disclosure are to be narrowly construed, and the burden of proof to justify non-disclosure rests with the County. (*City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411; *Sacramento County Employees' Retirement System v. Superior Court* (App. 3 Dist. 2011) 195 Cal.App.4th 440.)

For example, draft documents that are normally retained, or have been retained, in the ordinary course of business are subject to public review. (Gov. Code, sec. 6254, subd. (a).) "[I]f preliminary materials are not customarily discarded or have not in fact been discarded as is customary they must be disclosed." (*Citizens for a Better Environment v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 704, 714.) The CPC has reviewed many files of the

Planning Department. Frequently, the administrative draft reports from consultants are retained in the files. Generally, such reports are an important "deliverable" called for under the consultant's contract, and may trigger the release of funds to the consultant. Similarly, such reports are often retained as part of the administrative record of a project or plan approval. (Public Resources Code, Sec. 21167.6.) Furthermore, Mintier Harnish has indicated that it retains a copy of the Mintier Draft General Plan, and will release it pursuant to a direction by the County, or if required to in connection with litigation. (Attachment 10 – Mintier email, 12/23/14.) Since the Mintier General Plan is the type of report ordinarily retained by the County, and is currently in the County's possession and that of its consultant/author, the report is not exempt from disclosure.

In addition, draft reports are only exempt from disclosure if the public agency can show that the public interest in nondisclosure clearly outweighs the public interest in disclosure. In determining the public interest, "the weight of that interest is proportionate to the gravity of the governmental task sought to be illuminated and the directness with which the disclosure will serve to illuminate." Citizens for a Better Environment v. Department of Food and Agriculture (1985) 171 Cal.App.3d 704.) In the case of the Mintier General Plan, the gravity of the governmental task is substantial, and the weight of the public interest is overwhelming.

1) The County's "constitution" for future development will broadly and directly affect people's lives for decades.

The general plan has been called the constitution for all future developments. It is the fundamental document that empowers a Board of Supervisors to make land use decisions. It has a long-term perspective of twenty years. It includes land use maps and policy pronouncements on a variety of topics that affect people's lives every day. It identifies the potential future locations of homes and businesses. It identifies acceptable levels of traffic congestion and noise that people may have to endure. It determines the efforts that the County will take, or not take, to conserve its water supply, to protect water quality, to preserve wildlife habitat, and to maintain the viability of farms, ranches, and forestlands. It will identify efforts the County will take, or not take, to protect residents from crime, from floods and from wildfires. It will identify, or not, efforts the County will take develop park and recreation facilities. (Attachment 29, OPR General Plan Guidelines, 2003; Attachment 30, Excerpts from general plans.)

Thus, the governmental task at issue has gravity, because it is the County's update of its constitution for all future development, and it will thoroughly affect every resident's health, safety, and wellbeing every day, for decades. The disclosure of the Mintier General Plan will directly illuminate this process, by presenting professionally produced policy options, custom crafted for Calaveras County, while there is still time for the Board of Supervisor and the public to consider them prior to a final plan decision.

2) The public has a major interest in the financial dealings of County government.

In the Public Record Act, the Legislature declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Government Code, sec. 6250.)

The Mintier General Plan cost Calaveras County over $900,000. (Attachment 7, p. 4.) The next consultant was hired for nearly $300,000. (Attachment 7, p. 5.) Yet another general plan consultant was hired for another $50,000. Her contract was later extended for another $63,000. (Attachment 11, Augustine Contract, 5-27-14.) While $1.3 million may not sound like a lot of money in the context of national, state, and large metropolitan government budgets, it is a lot of money to Calaveras County. That is more than the annual budget for the entire Planning Department. (Attachment 12, 2014-2015 Final Budget, pp. 109-110.).

The taxpayers have an interest in reviewing the document on which the County spent over $900,000, and that the County Board of Supervisors rejected sight unseen. Taxpayers deserve to judge for themselves whether or not the money was wasted on a bad consultant, and whether or not the subsequent and ongoing expenditures on new consultants are justified.

3) The public has an interest in reviewing the government's awarding of contracts.

The California Supreme Court has held that the public has a valid and weighty interest in scrutinizing government dealings with contractors. (*Michaelis, Montanari, & Johnson v. Superior Court* (2006) 38 Cal4th 1065.)

There have been three separate general plan contractors hired by the County. We know who the contractors are. We know how much they are being paid. We have the work product of the current general plan contractor. We do not have the work product of the prior contractor. As Planning consultants are frequently hired to produce plans and environmental documents for the County, the public has an interest in reviewing their work so they can intelligently advise the County with regard to whom to hire. Public scrutiny of such contracting issues is recognized as a valid public interest for PRA purposes.

4) The Public has an interest in reading the Mintier General Plan that it worked so hard to produce.

The public has an interest in seeing the Mintier General Plan because it was produced after hundreds of people spent in hours of public workshops, at public hearings, and making written comments. The Mintier General Plan was not produced by a consultant in a vacuum. It was the product of a work plan that included extensive public participation. (Attachment 13, General Plan Update Work Program, 12-1-06) The first round of workshops were held in 7 locations. Over 500 people participated in identifying the County's top assets and top problems. The second round of workshops were held in 6 locations. About 300 people helped to identify a vision for the county, noted specific improvements they would like to see, and selected useful guiding principles. (Attachment 14, Issues and Opportunities Report, June 2008. p. 5.) The third

round of workshops were held in 7 locations, and lasted over two hours each. 216 people participated by identifying their preferred general plan alternative and suggested changes. (Attachment 15, Alternative Workshops Results, pp. 1-2.) In addition, there were Board of Supervisor hearings (and some jointly with the Planning Commission) on many dates. Dozens of people attended, and many spoke at those meetings. The Mintier General Plan was the culmination of these efforts. The people who invested all those hours in the process deserve to see the fruits of their labors.

5) The public has an interest in trying to get any nuggets of wisdom from the Mintier General Plan into the County's new general plan.

The public has an interest in getting the best possible general plan. The plan will determine how the county administers land use, circulation, housing, open space, resource production, resource conservation, noise, public safety, and public facilities for the next two decades. (Gov. Code, Sec. 65302; Attachment 13; Attachment 29, Attachment 30.)

Prior to preparing the Mintier General Plan, Mintier and Associates evaluated the current 1996 Calaveras County General Plan in detail, and identified aspects that needed to be upgraded. (Attachment. 16, Calaveras GP Evaluation, 10-12-06.) Some who reviewed the County's 2014 Public Review Draft General Plan assert that it has not adequately addressed these flaws in the 1996 General Plan. (Attachment 17, CPC Comments on the 2014 Draft General Plan, 3-20-15, Cover Letter, p. CL-2; Attachment 31, 2014 Public Review Draft General Plan.)

Mintier and Associates used its expert professional judgment to custom craft a general plan for Calaveras County to correct the flaws outlined in its evaluation of the 1996 Calaveras County General Plan . Thus, the Mintier General Plan may include policies that were overlooked in the 2014 Public Review Draft General Plan. It may include a measure to reduce environmental impacts of the 2014 Public Review Draft General Plan. It may even be sufficiently less impacting that it could serve as an alternative for evaluation in the upcoming environmental impact report on the general plan. The reduction of significant impacts and the analysis alternatives is required by CEQA. (CEQA Guidelines, secs. 15126.4 & 15126.6.) If only one overlooked policy is salvaged, or one lost mitigation measure is found, it would be worth allowing the public to review the Mintier General Plan.

Allowing an such exercise to verify that the 2014 Public Review Draft General Plan did not miss any key suggestions from the Mintier General Plan, and to re-include in the 2014 Public Review Draft General Plan any inadvertently excluded provisions, would reconnect the first part of the General Plan Update process with its Mintier and Associates guided public participation, to the second part of the General Plan Update process. Such continuity is needed for the general plan update public participation process to regain its integrity. (Attachment 29. OPR General Plan Guidelines, pp. 142-148.)

6) The County must disclose in good faith any feasible mitigation measures and alternatives it has produced during the CEQA review of the General Plan Update.

The California Environmental Quality Act (CEQA) requires the County to develop and adopt feasible mitigation measures to reduce potentially significant impacts of the General Plan Update. Failure to adopt feasible mitigation measures is a violation of CEQA. These mitigation measures must be disclosed in the EIR for the General Plan Update. Failure to disclose mitigation measures in an EIR is a violation of CEQA. (CEQA Guidelines, sec. 15126.4)

Similarly, CEQA requires that the County develop and analyze a broad spectrum of alternatives to the project that can reduce its impacts, while still meeting most of its objectives. While there is no set number of alternatives that must be evaluated, the alternatives must be chosen to inform decisionmakers and the public. (CEQA Guidelines, sec. 15126.6.)

The County spent five years, hundreds of volunteer hours, and over $900,000 developing the Mintier General Plan. If the Mintier General Plan would reduce otherwise significant impacts of the of the county general plan, then the County must consider analyzing the Mintier General Plan as an alternative in the DEIR. If there is even one policy in the Mintier General Plan that would reduce a significant impact of the county general plan, then that policy must be considered by the County as a mitigation measure in the DEIR.

There are many ways that agencies have failed to meet their obligations under CEQA to address alternatives and mitigation measures. Some agencies have done a poor job of identifying mitigation measures and alternatives. Once identifying them, some agencies have refused to evaluate them in an EIR. Other agencies have improperly failed to adopt mitigation measures. However, it would be an unprecedented violation of CEQA for a County to spend so much time and so much money developing an alternative and mitigation measures, and then to refuse to disclose them in good faith during the CEQA process.

The two pillars of CEQA are the protection of the environment and the disclosure of useful information to do so. "[T]he 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110; citing *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376, 390.) For an EIR to be adequate it must reflect “a good faith effort at full disclosure.” (CEQA Guidelines, sec. 15151.) Failing to disclose the content of the Mintier General Plan would totally undermine those two pillars. It is completely antithetical to the foundational principals of CEQA.

7) The Mintier General Plan will be publicly available as part of the record of proceedings for the CEQA review of the General Plan Update.

The General Plan Update process includes preparation of an environmental impact report in conformity with the California Environmental Quality Act (CEQA). (Attachment 13, pp. 11-12.)

The administrative record for a project prepared under CEQA includes documents like the Mintier General Plan. (Public Resources Code, sec. 21167.6, subds. (e), 2, 3, 7, and 10.)

In *County of Orange*, the court noted that CEQA, "[C]ontemplates that the administrative record will include pretty much everything that ever came near a proposed development *or* to the agency's compliance with CEQA in responding to that development." (*County of Orange v. The Superior Court of Orange County* (2003) 113 Cal.App.4th 1, 8.)

The court went on to explain the importance of including draft documents in the administrative record. The court reasoned that the CEQA process, "[C]ontemplates revisions, to a greater or lesser degree, in any 'project.' That is, indeed, one of the major objectives of the CEQA process -- to foster better (more environmentally sensitive) projects through revisions which are precipitated by the preparation of EIR's. As *County of Inyo v. City of Los Angeles* (1984) 160 Cal.App.3d 1178, 1185 has stated, CEQA is an 'interactive process of assessment of environmental impacts and *responsive project modification* which must be genuine.' (Emphasis added.) It is thus the very nature of CEQA that 'projects' will be 'modified' to protect the environment, and it is the logic of section 21167.6 that there be a record of such modifications, not just those documents relating only to the finished product." (*County of Orange v. The Superior Court of Orange County* (2003) 113 Cal.App.4th 1, 10.)

The administrative record is publicly available for review pursuant to CEQA. (CEQA Guidelines, sec. 15094, subd. (b)(9).)

Thus, even if the County were to withhold the Mintier General Plan from the public now under the Public Records Act, the document will become publicly available after the General Plan EIR is certified and the general plan is adopted. It makes no sense to withhold the document from the public, and from the Supervisors, and from candidates for Supervisors now, when it could actually still improve the general plan update and the future of Calaveras County, only to release the document after the County has made the critical decision to adopt the general plan. Since the document cannot be kept secret, the government's interest in withholding it now is even less weighty.

By way of contrast, the public interest in disclosing the document now is weighty. Disclosed now, the document can influence the ultimate general plan decision, and potentially improve the County's future. Disclosed now, the document will provide for more informed public policy debate in an election year. Is it legitimate under the Public Records Act for incumbents to quash public debate in an election year simply by withholding government documents that raise questions about government wisdom and effectiveness? We think not. We agree with the California Supreme Court that the Public Records Act exists to check "the arbitrary exercise of official power and secrecy in the political process." (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, sec. II.)

8) The public has an interest in confirming the wisdom of the Planning Department and the Board of Supervisors as they draft the next general plan.

On November 13, 2012, the Board of Supervisors hired a new general plan consultant, at a cost of approximately $300,000 to work on completing a new general plan. (Attachment 7) In May of 2013, the County hired yet another consultant for $50,000. In 2014, her contract was extended for an additional $63,000. The prior consultant Mintier-Harnish had received over $900,000 to produce a general plan. (Attachment 11) In a County where the annual budget for the entire Planning Department is under a million dollars, the 1.3 million dollars spent on general plan consultants is still a lot of taxpayer money. Only by reviewing the Mintier General Plan can members of the public decide for themselves the wisdom of the Planning Department and the Board of Supervisors in continuing to reject the Mintier General Plan.

As a Patrick Henry observed, “The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them.” In a democratic republic, we are not required to merely accept the dictates of technocrats or government officials at face value. We actually get to review the facts, make our own conclusions, and vote according to our informed convictions.

As Thomas Jefferson rhymed, “If you expect a nation to be ignorant and free, you expect what never was and can never be.” The totalitarian governments of the former Soviet Union, Red China, and Nazi Germany are prime examples of this adage. They destroyed books and record in a vain attempt to restrict the fundamental freedom of thought. By contrast, in American government; information educates, minds evaluate, and all the people can participate. Our freedom of information, our freedom of thought, our rights to respond by speaking out and by voting, are among the noblest ways that our American system of government distinguishes itself from the totalitarian regimes of the 20th Century. By releasing the Mintier General Plan, the County will uphold these foundational principle of our democratic republic.

Thus, the public interest in disclosing the Mintier General Plan is overwhelming.

9) The public interest in withholding the document is minor.

a) Confusion is unlikely

At one point, the Planning Director indicated that he did not want the Mintier General Plan released because releasing it when the 2014 Public Review Draft General Plan was out for public review would confuse people. They might not know to which general plan they should address their review and comment efforts. This would interfere with the General Plan Update process.

Releasing the Mintier General Plan to the CPC at this time is not likely to cause public confusion.

First, with the public comment period has been closed on the 2014 Public Review Draft since March of 2015. (Attachment 18, Maurer Release cover memo, 12-18-14.). There is no longer any chance that people will be confused about which draft to direct their review and comment efforts. Those comments have been made.

Second, the request is to release the document to the CPC, not to circulate the Mintier General Plan for public comment. The CPC has participated in the General Plan Update since the beginning. That participation has included: participating in the aforementioned general plan workshops, submitting two volumes of input for the background report, working with stakeholder efforts to prepare the draft Water Element, commenting on the draft land use maps, responding to the requests for policy suggestions from the County in 2013, and submitting comments on the 2014 Public Review Draft General Plan. (Attachment 19, CPC General Plan comments, 2006-2013; Attachment 17.) The CPC has been involved in the General Plan Update longer than the County's Planning Director, longer than County Counsel, and longer than the current general plan consultant. These experiences have helped CPC members develop a detailed understanding of the General Plan Update. The CPC understands the difference between the Mintier General Plan and the official 2014 Public Review Draft General Plan. The release of the Mintier General Plan will not confuse the CPC.

While it is true that once released, any member of the public can ask for and receive a copy of the Mintier General Plan, it does not follow that such a requester will be confused upon receipt of the plan. It is more likely that a person knowledgeable enough to request a copy of a document will also know why they want to look at it; and will do so. It seems even less likely that any confusion of such a requester would interfere with the County's completion General Plan Update process.

b) No deliberative processes will be divulged.

As noted above in section II, A, the Mintier General Plan does not include the sort of confidential advice to decisionmakers that is protected by the deliberative process privilege. Thus, its release will not injure the Supervisor's deliberative process.

c) Withholding the document does not ensure that we will be "moving forward."

One Supervisor objected to the release of the Mintier General Plan because he considered it moving backwards in the General Plan Update process, and he wanted to move forward. The Planning Director also said that he did not want to release the Mintier General Plan because it would cause people to again raise policy issues that he felt were dismissed with the hiring of a new consultant. He felt that continuing to debate those issues would be a step backward.

To be determine if you are moving forward toward a goal, you need both an initial reference point and a goal.

Some people differ on their General Plan Update goal. Originally the County's primary goal was a legally valid general plan, so the County sought to ensure legal compliance by following

established legal precedents and the General Plan Guidelines. Now the Planning Commission is seeking to do the minimum legally adequate general plan, while promoting private property rights to the greatest extent possible. The CPC has consistently sought a legally valid general plan that fairly balances competing local and regional interests, while making full use of state, federal, and private programs to enhance the health, safety, wellbeing, and environment of the good people of Calaveras County.

Regardless of your General Plan Update goal, you cannot tell if you are making progress toward it unless you can compare where you are now, to where you were. The Mintier General Plan defines where we were in February 2011. The December 2014 Public Review Draft General Plan released by the County is another reference point. Does the County's 2014 Public Review Draft General Plan constitute moving forward? Without the Mintier General Plan, no one can say.

The release of the Mintier General Plan would allow all to judge, using their own criteria, whether the County is making progress on the General Plan Update. Some may feel that moving farther away from the policy proposals in the Mintier General Plan is progress. Some may feel it is regressing farther away from the goal of a legally valid general plan that promotes a balance of competing local and regional interests. Until we can compare the Mintier General Plan to the current draft general plan, there is no way for anybody to tell which direction the General Plan Update is going, relative to where we were in 2011. Thus, the desire to evaluate the progress on the General Plan Update weighs in favor of releasing the Mintier General Plan.

Finally, we have to ask ourselves whether the County articulates a legitimate rationale for nondisclosures, when it seeks to squelch <u>informed</u> public debate about a local government decision that will dramatically effect, for the next two decades, countywide land use, resource conservation, open space, public facilities, water supply, energy conservation, public safety, and economic development. Regardless of who the general plan consultant is, these general plan issues will continue to be the subject of public debate. (Attachment 20, Video of BOS General Plan Hearing; June 30, 2015.)

County staff members have expressed concern about the controversial nature of the policy recommendations in the Mintier General Plan. (Attachment 1, p. 2.) Nevertheless, these policy recommendations remain those of respected planning professionals who spent four years and over $900,000 first overseeing three rounds of public workshops where these issues were debated, and later writing up policies to address these issues. Does the fact that a public document may stimulate informed public debate on critical policy issues justify government nondisclosure? Does the fact that people may question why, after spending over $900,000 of taxpayer money on a plan, the County BOS rejected it, sight unseen, justify not even giving the public a chance to read the plan? We think not. If simply claiming that a document will create a public policy controversy is enough to justify the government withholding it from the public, then that exception would swallow the rule that dwells at the heart of the Public Records Act: that government should be accountable for its actions. Instead, we agree with the Supreme Court of the State of California, that openness in government is essential to the functioning of a democracy. (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, sec. II.)

d) The release of other portions of the Mintier General Plan have caused no problems.

Sections of the Mintier General Plan have been release to the public without causing any of the problems that would justify nondisclosure.

The draft Water Element and the draft Agriculture Element were first produced by stakeholder groups. (Attachment 17; Attachment 4.) At one point, the County accepted the Agriculture Element and forwarded it to the Planning Staff for use in the General Plan. (Attachment 21; BOS Minutes, 2-10-09) The Economic Development Element was drafted by consultants other than Mintier-Harnish. (Attachment 1.) It was also released by the Planning Department. (Attachment 22, Economic Development Element, 12-13-11.) The Energy element was also prepared by a different consultant, and was released by the Planning Department. (Attachment 23, Energy Element.) Furthermore, the County issued an entire Public Review Draft General Plan in December 2014, prepared by a planning consultant other than Mintier-Harnish. (Attachment 18; Attachment 31.)

These general plan components and documents were made available to the public, and there has been no resulting threat to public health, safety, and wellbeing. There has been no outbreak of criminal activity associated with the release of this material. There has been no violent over-through of the local government as a result of these releases. There has been no violation of people's rights to privacy associated with these releases.

Just as all of the previous general plan releases have posed no risks, the release of the Mintier General Plan poses none of the risks that would justify nondisclosure by the County. The disclosure of the remainder of the Mintier General Plan does not risk exposing the type of personal or embarrassing information, or trade secrets, that are usually exempt from public disclosure. Nor does it contain the kind of information that would expose the County to a risk of terrorist attack, and would thus be exempt from disclosure. Essentially, there is no legitimate public interest in restricting disclosure of the Mintier General Plan.

Since the public interest in keeping the report confidential does not clearly outweigh the public interest in disclosure, the County must disclose the Mintier General Plan.

III. Other Legal Arguments for Disclosure

A) The Mintier General Plan is akin to land use data bases that courts have ruled must be disclosed.

Courts have recognized that Geographic Information System (GIS) databases, in which government agencies store location specific information about resources and land uses throughout their jurisdiction, are subject to public disclosure. (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157; *County of Santa Clarita v. Superior Court* (2009) 170 Cal.App.4th 1301.) In *Sierra Club*, the California Supreme Court accurately described openness in government as

essential to the functioning of a democracy, and access to information as a fundamental and necessary right enshrined in the California Constitution.

> The PRA and the California Constitution provide the public with a right of access to government information. As this court has explained: “Openness in government is essential to the functioning of a democracy. ‘Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.’ [Citation.]” (International Federation of Professional & Technical Engineers, Local 21, AFL–CIO v. Superior Court (2007) 42 Cal.4th 319, 328–329 (Local 21).) In adopting the PRA, the Legislature declared that “access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.” (§ 6250.) “As the result of an initiative adopted by the voters in 2004, this principle is now enshrined in the state Constitution. ″ (Local 21, at p. 329.) The California Constitution, article I, section 3, subdivision (b)(1) provides: “The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”
> (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, sec. II.)

The court also recognized that exceptions to the disclosure of records should be narrowly construed. It quoted the California Constitution noting;

> [A]rticle I, section 3, subdivision (b)(2), of the California Constitution: “A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.”
> (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, sec. II, D.)

Finally, the court recognized that the information in the GIS database would be useful to non-profit groups monitoring government actions regarding real property, seeking the location of open space, and determining if open space was protected or threatened by development. It is worthy to note that the court ruled only on whether the format of the information made it unavailable for disclosure. The inherent nature of the land use information was not considered as a factor that might make the information unsuitable for disclosure.

The Mintier General Plan includes information about the county’s land uses, public facilities, natural resources, scenic resources, recreational resources, conservation resources, open space resources, and public safety. (Attachment 1, Harnish, Memo to Willis, 10/11/11.) This is similar to the information contained in the database the Supreme Court ruled a public record in *Sierra Club*. The Mintier General Plan should be released to the public, because it contains information similar to a GIS database that the Supreme Court said must be released.

B) The Mintier General Plan is akin to the publicly available General Plans adopted by every City and County in California.

In its ruling that a County GIS database was a public record, the California Supreme Court noted that 47 of the 58 California Counties provide access to GIS databases as public records. (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157.) Similarly, all of California's cities and counties, including Calaveras County, provide access to their general plans as public records. (Attachment 30, Excerpts from General Plans) There is nothing inherent about the information in a general plan that would justify its nondisclosure.

By law, every City and County in California must adopt a general plan. (Government Code, sec. 65300.) The law requiring such master plans was passed in 1937, and codified into the Government Code in 1951. The requirement for the land use and circulation elements was passed in 1955. The requirement for a housing element was passed in 1967. The requirements for the conservation and open-space elements was passed in 1970. The requirements for the safety element were passed in 1975. (Attachment 24, OPR General Plan Guidelines, 1990.)

There are over 480 incorporated cities in California and 58 counties. (Attachment 25, DOF list of cities and counties, 2015.) The California Supreme Court has stated that a general plan is "the constitution for all future developments within the city or county." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 531. 570.) These general plans are reviewed and referenced by public and private planners, local citizens, and local governments regularly as they prepare, review, and approve specific plans, subdivisions, and use permits. (Government Code, secs. 65451, 66473.1- 66,474; *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176.) The residential and non-residential development that follows these land use approvals statewide is valued at around three billion dollars per month. (Attachment 26 & 27.)

It is illogical for Calaveras County to suggest that there is any harm to releasing to the public the type of document that is both totally public and critically useful in every city and every county in California; and has been for decades.

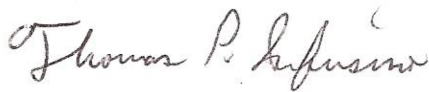
IV. Any opinions and recommendations may be severed.

The courts have agreed that, when the issue is the release of a draft document, a government agency may redact, "A statement of opinion concerning whether county conduct, policy, or practice conforms to the law", or whether the County should "take some other action in view of the conduct, policy, or practice." (*Citizens for a Better Environment v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 704, 717.) For example, there would be no need to disclose the identities of the commenters through "source tags at the end of the policies" as noted in the Harnish memoranda. (Attachment 1, p. 1.) Although I would prefer that the County waive this privilege, and produce the entire document, please feel free to redact such information from the Mintier General Plan before producing a copy for me. Such redaction was done when the County released a report in 2006. (Attachment 28, Excerpts of redacted report.)

V. Conclusions

Ultimately, the County must decide whether it is in its best interest to try to withhold this document from the public. Please consider these questions. Do the Supervisors really want to be the kind of government officials who abuse their position of authority to force their own citizens to go to court, just to get County government to do what it is required to do? Given the arguments noted above, do you really believe that a court will not require the County to release the document? Do the Supervisors want to be counted with those American founding fathers who valued the role of an informed electorate in the practice of democracy, or with the international despots of the most despised regimes of the 20th century, who suppressed good ideas under the guise of protecting the state? I look forward to your response.

Sincerely,



Thomas P. Infusino,
For Calaveras Planning Coalition

cc. County Counsel,
Supervisors