To: Calaveras Board of Supervisors

From: Tom Infusino, CPC Facilitator

Re: Flaws in Findings of Fact for the GPU

Date: 11/10/19

I. Background

The Board Packet for adoption of the General Plan Update (GPU) on November 12 includes findings of fact, at statement of overriding considerations, and a mitigation monitoring and reporting plan. (Board Packet, Item 10, pp.127-204.) Even in the short time we were given to review this lengthy boar packet, it is evident that these documents are not in compliance with the California Environmental Quality Act (CEQA) in the ways identified below. We remind the Board of Supervisors that the failure to make proper findings, and failing to adopt an adequate mitigation monitoring plan, are serious violations of CEQA. Completing and using a detailed mitigation monitoring plan would give people hope that the most important of the over 80 deferred implementation measures, and the over 40 deferred ordinances, and the over two dozen implementation measures to be applied in reviewing development applications, will actually get done. Having an undetailed, one page, mitigation monitoring and reporting plan destroys that hope. Valid findings of fact, grounded in reason and evidence, demonstrate to people the integrity of the GPU and CEQA processes. Invalid findings of fact reflect the arbitrariness of the process, and the lack of integrity of those in charge. **Please correct these flaws in these documents.**

II. Findings of fact and mitigation monitoring and reporting plans must both comply with the letter of the law and serve the intent of CEQA.

To reject additional mitigation measures, a lead agency's findings may claim that the mitigation measures adopted will be sufficient to reduce the impact to a level of insignificance. However, a lead agency must have substantial evidence that mitigation is feasible and will be effective. (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1116-1118.) "A clearly inadequate

study is entitled to no judicial deference." (*Laurel Heights Improvement Association of San Francisco v. Regents of the University of California* (1988) 47 Cal.3d 376, 422 &409 fn. 12.)

To reject as infeasible measures to mitigate a significant impact, a lead agency must have a valid finding that each of the proposed mitigation measure is infeasible. The agency must show that there is some economic, environmental, legal, social, or technological barrier that makes implementing each of these measures impossible. (CEQA Guidelines, sec. 150364.) It is an abuse of discretion to reject alternatives or mitigation measures that would reduce adverse impacts without supporting substantial evidence. (*Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1175-1176.)

"[W]here an agency finds that significant adverse effects remain, even after the implementation of all feasible mitigation measures, the agency must balance the economic benefits of the project against its environmental harm to determine if the project should proceed. 14 Cal. Code Reg. § 898.1(g); Pub. Res. Code § 21081(d), 14 Cal. Code Reg. § 15093.) This "statement of overriding considerations," as the last step in the analysis, provides critical information to the public to fulfill the law's public disclosure requirement - that the EIR function as "a document of accountability" and "informed self government." *Sierra Club v. State Board of Forestry, supra*, 7 Cal.4th at 1229. (...the board retains the power to approve a plan that has significant adverse effects upon the environment, so long as it justifies its action in light of "specific economic, social, or other conditions.") Thus, "The EIR process protects not only the environment but also informed self-government." (*Laurel Heights,* 47 Cal.3d at 392.)

Mitigation monitoring is required to ensure that mitigation measure are not merely adopted on paper and never implemented. At the time of project approval, the lead agency adopts a mitigation **monitoring** and reporting plan to guide this ongoing process.

Later, during implementation of the project, agency reports confirms the implementation of mitigation measures, and may report on the effectiveness of the mitigation. In the case of a General Plan, these reports may take the form of the annual reports made to the Office of Planning and Research (OPR) and to Housing and Community Development (HCD).

III. The 1-page mitigation monitoring plan is incorrect and insufficient.

The Mitigation Monitoring and Reporting Program (MMRP) claims that it needs no detail because the mitigation measures in the GPU are "self-mitigating goals, policies, and implementation measures" and that adoption of the plan "would result in implementation of all mitigation measures included in this Final EIR" so that "further monitoring or reporting would not be necessary." (Board Packet, p. 204. See also pp. 137-138.) This is not entirely correct. The MMRP explains how it will **report** but not how it will **monitor**.

A) The immediately employed mitigation measures, that can be routinely implemented by planning staff, in the ordinary course of project review, should be easy to implement.

It is true that **some** of the GPU mitigation measures are part of the over two dozen implementation measures that will be immediately employed by planning staff during their review of new discretionary project applications. (For example see IM COS-5I Air Quality, IM COS-5J Asbestos, IM COS-5K Odors, PF-4d Emergency Communications, RP-1E Farmland, COS-5H Air Quality Guidelines, COS-5F Air Pollution, COS-4H Biological Resources, COS-4I Biological Communities, COS-4P Bats, COS-4I Riparian Habitat, COS-4K Invasive Species, COS-4N Riparian Corridors, COS-4D Oak Woodlands, COS 4L Wetlands, COS-4M Wildlife Corridors, COS-4O Road Crossings.) It should be a simple matter to for staff reports to reflect these analyses, and for the Planning Department to report this implementation of the GPU to OPR in the April 1 annual report.

B) There is no guarantee that any of the deferred implementation measures will ever be implemented.

Other mitigation measures are part of the over 80 specific deferred actions, and the over 40 deferred zoning ordinances. (For example see RP 4A Code Amendment – Minerals, , LU-5A Telecommunications Ordinance, COS-71 Park Funding, RP-1F Resource Production Land Conversion, COS-5G Emission Reduction, COS-5E Alternative Fuels Ordinance.)

These measures will only be implemented if and when they are chosen during the Board of Supervisor's annual selection process, and necessary funding for the work is secured. (GPU, Implementation Measure LU-1A, Annual Work Plan.) . There is nothing "self-mitigating" about these measures. There is no assurance that any of these measures will ever be implemented. For example, we have seen many implementation measures promised in past Housing Elements that have not been implemented.

It is true that, in its annual report to OPR, the County could identify which of these mitigation programs have and have not been implemented.

C) The MMRP does not explain if and how mitigation effectiveness will be monitored.

However, it is not clear from the mitigation **monitoring** and reporting plan if the County intends to follow up on development projects, to see if the mitigation measures are employed and are actually successful in reducing impacts. If the County intends to do such monitoring, the MMRP does not explain how the County intends to do that for each measure.

For example, while the annual report might reflect that the County required 6 projects in the year to do acoustical analyses and to apply noise impacts mitigation measures, the MMRP does not indicate if and how the County intends to determine if those measures were implemented at the project site, and if they were effective in reducing noise.

Only with such diligent monitoring will the people be assured that the County is implementing successful efforts to reduce the impacts of development under the GPU. Only with such diligent monitoring will decisionmakers have the information they need to know if the measures they are imposing are working. Only with such diligent monitoring will the intent of CEQA to avoid unnecessary environmental harm be fulfilled.

IV. The findings of fact are flawed.

A) The need for additional flexibility for economic development and the protection of property rights is an unsupported rationale for rejecting mitigation measures, as it presents a false choice, and it undermines the basic intent of CEQA.

The County's major premise justifying the rejection of mitigation measures is:

> "One of the primary objectives of the General Plan is to provide the flexibility desired and necessary to meet the needs of the County, while protecting property rights and promoting economic prosperity. Many of the mitigation measures suggested during the comment period would prevent the County from achieving these project objectives and are therefore infeasible mitigation measures." (Board Packet, p. 141, see also for example pp. 150, 152, .154, 156, 159, 161, 163, 166.)

By definition, mitigation measures are mandatory and enforceable. If allowed to stand, the logic of the findings would give any agency a free pass to avoid complying with all the mitigation requirements of CEQA, and completely undermine the intent of CEQA to avoid unnecessary harm to the environment. The finding is not based upon reason and evidence, but upon unsupported presumptions and false choices.

1) The level of flexibility intended by the legislature is already inherent in the planning process.

The claim in the findings that the desire for flexibility wipes out mitigation responsibilities, is consistent with the philosophy of some members of the public who argued that the General Plan Update must be "flexible," and who opposed commitments to impact mitigation. (A2 Other DEIR Comments, pp. 218-221.) They view some mitigation measures as unsuitable government intrusion into private property rights. (CL5 General plan vision changes directions.) The reluctance on the part of some public officials and their constituents to mitigate environmental impacts is the very reason that the law **requires** that these mitigation measures be mandatory and enforceable.

On the surface, the desire to be flexible and to leave one's options open is understandable. Under certain circumstances such flexibility is beneficial. That is why applicants for zone changes have the option to seek variances when the strict application of the ordinance would be unfair under the circumstances. That is why **many** general plan policies can be optional. That is why program-level mitigation may be deemed infeasible under the circumstances when applied to a specific project. That is why a general plan may be amended up to four times per year to

allow mitigation measures an opportunity to evolve. All of these reasonable provisions for flexibility are already in existing planning law and CEQA.

However, if as adults we chose to **consistently** "leave our options open," then we would not live productive lives. "Well, I would like to buy a car, but there are so many kinds, I want to 'leave my options open.'" "Well, I would like to get a job, but there are so many jobs out there, I want to 'leave my options open.'" "Well, I would like to start a family, but there are so many potential spouses out there, I want to 'leave my options open.'" The same is true for a local government. If it commits to **nothing**, it is unlikely to achieve anything.

No law says that every policy in the general plan has to be mandatory. Plenty of policies in the general plan can be and are optional. A zoning ordinance that implements mandatory program level mitigation programs can include circumstances when variances are allowed. This **appropriate** level of flexibility is already **inherent** in planning law. What is not allowed is **refusing** to adopt the feasible mitigation programs in the first place, and refusing to apply them in most instances. We know that people will pursue residential and economic development in the next generation under the General Plan Update based upon their own financial self-interest. What CEQA ensures is that this development will be balanced by a parallel commitment on the part of local governments to protect health, safety, and natural resources in the public interest.

2) Violating the law will not promote investment in the economy.

The findings seek to dispense with mitigation measures to keep a flexible general plan. Some see the apparent lack of regulation as a way to promote property rights and economic development. They believe that project applicants will prevail in arguments against impact mitigation in the context of individual project approvals. They believe that plan flexibility gives the Planning Commission and the Board of Supervisors greater power to approve a broader spectrum of private development projects regardless of the harm to the larger community. Some believe that state law requirements for specificity and impact mitigation are unconstitutional interferences with their property rights. Others would rather have the Board approve the projects (lawful or not) and force the violated members of the public to seek legal recourse.

The desire to protect property rights and to dispense with **unnecessary** regulation is understandable. However, the problem with trying to deregulate the development project review

process at the **county** level is that many of the development requirements are actually imposed by **state** law. For example, a specific plan includes "Standards and criteria" as well as "implementation measures, including regulations" to address natural resource conservation and the financing of public infrastructure. (Government Code, sec. 65451.) A large subdivision must be designed for passive heating or cooling, must provide for a sufficient water supply, must avoid substantial environmental damage, must not cause serious public health problems, must not result in violations of regional water quality control board requirements, and must meet fire safety standards including those for emergency ingress and egress. (See Section VI, B, 7, Government Code, secs. 66473.1 – 66474.6.) Thus, while the County has the **power** to ignore these reasonable requirements when approving development projects, those approvals can be set aside by the courts, for the County has no legal **authority** to make such approvals. Given these circumstances, those seeking to deregulate the County's development review process should instead seek reforms at the State Legislature where the development requirement laws can actually be changed.

Attempting to continue on the path of legal violations in the hope of promoting freedom and economic development will not stimulate investments in the local economy. It will only lead to further economic stagnation and litigation in this county, while people with capital to invest go to other counties where their investments will be less risky. Trying to develop in the absence of clear standards and safe regulatory harbors will not make people free to do what they want with their land. It will make them slaves to the whims of the Board of Supervisors and to litigious development opponents. Because virtually all the County's discretionary decisions regarding public and private development projects must be consistent with a valid general plan, a substandard general plan and a substandard environmental impact report cripple the valid exercise of property rights to develop real estate.

The CPC's members would prefer that the County comply with planning and environmental laws that have been on the books for decades and found constitutional. They would like the County to finally establish development standards and programs that mitigate impacts so that there is no **need** for repetitious and divisive debates about the same issues for each project that comes along. They would prefer that the Board of Supervisors make legally valid project approvals to protect the interests of both project applicants and existing residents.

3) Mitigation measures protect the exercise of property rights.

A perhaps counter-intuitive effect of mitigation measures is that they actually support more people exercising their property rights. They do this by cutting the impact pie into smaller pieces, so that **more** development can occur before so many impacts accumulate as to reach thresholds that might stop development. For example, if there are ten developments awaiting approval, and the first five developers wastefully use up all of the available sewer capacity, then the last five developments have to wait, and wait, and wait, for a new sewer expansion. On the other hand, if the wastewater impacts are cut in half for each development, then all ten could proceed. In this way, the best mitigation measures prevent unnecessary development impediments.

Also, mitigation measures serve a regulatory function to avoid producers from externalizing costs and harming people and the environment. Development projects that unnecessarily foul the air, make noise, or destroy scenic vistas avoid imposing these costs on their consumers, and instead foist these costs on other people and the environment. Thus, in an un-regulated market, they will succeed over their competition, and an inefficient excess of harm will result. Mitigation measures regulate these activities to avoid this excessive harm. In this way, good mitigation measures help to cure a resource allocation flaw in the market. In the past these flaws has caused great harm, including harm to the rights of neighboring property owners. .

Finally, mitigation measures support property **values** by keeping communities and homes more desirable. For example, the scenic open space in conserved forests and agricultural lands gives neighboring properties value. Mitigation programs that compensate people for providing public benefits cure a flaw in the free market that would otherwise under-produce these public goods. So, if one really cares about property rights and property value, it makes sense to adopt the additional mitigation measures.

4) Additional GPU impact mitigation would not prevent economic prosperity, it would expedite project review and finances the infrastructure needed for economic development.

By mitigating the significant environmental impacts of development at the general plan level, the County would facilitate prompt and lawful future approvals of specific plans, subdivisions, and use permits. This is because the impact mitigation issues raised in the general plan can and do

come up with regard to the discretionary approval of specific plans, subdivisions, and use permits. Filling the gaps in the County Code with standards to mitigate development impacts both facilitates project approvals, and protects health, safety, welfare, and the environment. (A42 STARS Project Description.) By the way, this is no accident. California planning and environmental law is integrated to achieve this result. To efficiently comply with the law, a county that adopts mitigation programs in its general plan, refines them in its zoning ordinance, applies them to development proposals, and implements them in the field.

There will be adverse fiscal impacts on the County without the proper and timely employment of impact mitigation fee programs under CEQA. Failure to promptly establish and collect the maximum "fair-share" impact mitigation fees across the spectrum of significant impacts places an unfair burden on **existing** taxpayers and ratepayers to provide new and/or improved infrastructure in the **future**. These developer impact fees are not an undue burden on economic development. They are simply charges for the costs of providing the public goods (roads, water, sewer, etc.) necessary to support new development.

If these costs are not paid by developers and new residents through impact fees, the costs are passed on to existing residents in one of two ways. One way is that the level of infrastructure and services declines, e.g., roads get crowded, water supplies get rationed more severely, electricity browns out more often, etc. A second way the costs are passed on is through higher rates and taxes to pay for infrastructure expansions. As some would say, there is no "free lunch." Also, as economists would say, we cannot afford "free riders," those who will use the infrastructure without paying for their share of it.

The findings contend that mitigation regulations and impact fees will impede economic development. However, there is no direct correlation between the shortness of a county code and the economic prosperity of the county. Some counties with huge economies have very long county codes filled with regulations. Regulation has not choked prosperity in these areas. Counties with short county codes and fewer regulations can be ranked very low on the scale of economic prosperity. Lack of regulation has not spurred these local economies to success.

Neither have detailed general plans or high development fees stopped economic development in the region. In 2004, El Dorado County approved a valid and detailed general plan with a commitment for traffic impact mitigation fees. In 2006, El Dorado determined that it needed to

generate over $500 million from developers to build the roads needed to serve new development. (A43 TIM Fee Report 2006, p. 20.) That put traffic impact fees in some parts of the County at over $13,000 per house. (A44 Final TIM Fee EIR, p. 19.) Nevertheless, from 2000 to 2009, El Dorado County produced over 15,000 units of housing and 5 million square feet of non-residential/ job generating land uses. (A45 El Dorado Hills Workshop, pp. 12-13.)

Calaveras County has tried the flexible/vague regulation approach for decades. The result is a County with home values $150,000 below the statewide average. (A46 Census Bureau Quick Facts, p. 2.) It is time for the County to try to specify development standards to provide investors with financial security and existing residents with impact mitigation equity. It is time for the County to try to fully fund the infrastructure needed for economic development.

With regard to the efficacy of this approach in streamlining development review, you do not have to take the CPC's word for it. All you have to do is look at the recommendation of one of the County's outside legal counsels on land use and CEQA. The County frequently contracts with Remy, Moose and Manley for its CEQA legal work. (A47 Remy Moose and Manley Contract.) Senior Partner, James Moose includes this approach as among the options for completing a general plan in compliance with CEQA. His guide includes an entire section entitled, "The Adoption of Stringent General Plan Language Does Provide Some Future Advantages: It Can Help to Streamline Future, Project-Specific Environmental Review." (A4 CPC DEIR Comment Attachments, Agriculture, General Plan Updates and Amendments, p. 13-15..)

CEQA has been in existence for over 45 years. Over that time, cities and counties throughout California have implemented the law. Over that time, California has grown from just under 20 million to just under 40 million of people. (A48 California Population 1970 & 2018.) California has moved up from the ninth largest economy in the world in 1991 to the fifth largest economy in the world today. (A49 Economic Data 1991 & 2018.) All the while, other California cities and counties have managed to mitigate the significant impacts of development whenever feasible. In this way, CEQA has achieved the Legislature's policy hope that "man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations." (Public Resources Code, sec. 21001, subd. (e).)

The time is long overdue for Calaveras County to embrace the opportunity to implement this law in a way that promotes both economic development and environmental protection. Because of its broad scope, its long-term application, and its many potentially significant impacts, there is no more important decision of the Board of Supervisors upon which to properly apply CEQA than the General Plan Update.

5) CEQA and planning law put the human environment above petty ideological disputes.

By passing CEQA and planning law, the Legislature ensured that planning for the protection of the human environment would not be sacrificed on the altar of petty ideological differences. All government agencies, regardless of the ideology of their governing bodies, must do all that is feasible to protect the human and natural environment when taking discretionary actions. Why? Because despite our ideological differences, we all need to wake up in the morning and breathe clean air, turn on the lights, flush the toilet, drink clean water, eat food reared on agricultural lands, use roads get to work or to school, recreate to keep our bodies strong, return to a safe home constructed from timber and minerals, and use the peace and quiet of the night to enrich our minds with the written word, to say our prayers, and to get a good night's sleep.

B) Many mitigation findings are based on the incorrect presumption that mitigation measures will be timely implemented by the County to avoid harm from development under the GPU.

The adoption of many claimed mitigation measures are actually deferred indefinitely, and may never be implemented. (See for example RP-4A County Code-Minerals, PF-2J Groundwater Recharge, LU-5A Telecommunications Ordinance, COS-7I Parks Funding, RP-1F Resource Production Land Conversion, RP-1A Code Amendment-Resource Production Lands, COS-5G Emission Reduction, COS-5E Alternative Fuels Ordinance.)

Throughout the GPU process, the CPC has repeatedly asked the County to set timeframes for completing implementation measures, and to give priority to implementation measures the County claims will mitigate impacts. We also asked for measureable objectives in the GPU that would specify interim expected achievements (e.g. funds to be secured by when, acres of habitat to be protected by when) so that there was some commitment to implementing mitigation measures. The County has repeatedly refused. Instead, these measures will only be implemented

if and when they are chosen during the Board of Supervisor's annual selection process, **and** necessary **funding** for the work is secured. (GPU, Implementation Measure LU-1A, Annual Work Plan.) . Under these circumstances, impacting developments can be approved indefinitely, and the mitigation programs may never be implemented.

C) Many findings are based on the incorrect presumption that regulating currently defined discretionary development, and not regulating currently defined ministerial or by right development, will be sufficient to reduce GPU impacts to a level of insignificance.

Upon adoption of the GPU, many of the mitigating implementation measures will only apply to developments that are currently defined as discretionary and subject to CEQA review. (See for example COS-5K Odors, COS-5F Air Pollution, COS-4H Biological Resources, COS-4I Biological Communities, COS-4P Bats, COS-4I Riparian Habitat, COS-4K Invasive Species, COS-4N Riparian Corridors, COS-4D Oak Woodlands, COS-4M Wildlife Corridors.)

Discretionary projects subject to CEQA are only a small proportion of the new development that happens in the County. Because the County has tens of thousands of exiting vacant parcels where residential development is by right, none of these implementation measures will mitigate the impacts that will result from such development under the GPU. Similarly, because the current Agricultural Zoning and the Agricultural Tourism Zoning allow many impacting projects by right or ministerial approval, none of these implementation measures will mitigate the impacts from such development under the GPU.

The CPC asked the County to re-consider the list of projects that are not discretionary, or to adopt objective standards for the application to all project approvals. For example, a simple building setback from streams that applies to both discretionary and ministerial projects can protect riparian habitat that is critical for some special status species. Keeping these species off the endangered list, and avoiding development injunctions that could follow, are important to both the economy and to the exercise of property rights. The Planning Department staff and consultants recommended the adoption of such standards as mitigation measures. The Planning Commission and the Board of Supervisors rejected the setbacks, but provided no valid justification. We impose residential building setbacks from roads for safety and noise, we even

impose setbacks from floodplains for safety, but we refuse to provide setbacks from streams to avoid wasting habitat for sensitive species; the loss of which could cripple the local and regional economy. Such findings are arbitrary because they do not reveal a **logical** route from the evidence in the record to the County's ultimate action.

D) Many findings that impacts are significant and unavoidable are incorrect because they improperly reject additional feasible mitigation measures.

1) The findings globally reject numerous potentially feasible mitigation measures without individual logical analyses based upon facts in the record.

The findings for many classes of impacts globally reject numerous potentially feasible mitigation measures without individual logical analyses based upon facts in the record. The findings simply refer back to the EIR. (See for example findings for Aesthetics, Agriculture Forest & Mineral, Air Quality, Biological Resources.)

The only consideration given proposed mitigation measures was in boilerplate responses to comments on the DEIR that did not address the comments in a commensurate level of detail, and did not correctly justify the rejection of the measures. (See Tom Infusino, Inadequate Responses to Comments on GPU DEIR, 11/7/19.)

Contrary to the implications in the findings, many of the suggestions were proper plan-level mitigation measures. Many of the mitigation measures suggestions were drawn from general plan elements specifically drafted for Calaveras County with the help of County staff. (For example the draft Water Element, the draft Energy Element). Many measures were from community plans that are currently in the exiting 1996 General Plan. Many mitigation suggestions were drawn from general plans in other counties.

Also, the certainty in these proposed mitigation measures was needed to comply with CEQA. As noted above, the claim that **additional** flexibility is needed to protect property rights and for economic prosperity is not supported by evidence in the record.

2) The Board did not review suggested mitigation measures.

The findings repeat a statement to the effect that, "The Board has reviewed all additional suggested mitigation measures and finds the suggestions infeasible." (Board Packet, pp. 149, see also for example pp. 151, 153, 155, 158, 161, 162, 166.) This is not true.

In January of 2019, the CPC begged the Board of Supervisors to hold GPU workshops, in part to review GPU impacts and proposed mitigation measure options made in comments on the GPU DEIR. The Board refused. Later that month the CPC submitted written and verbal testimony encouraging the Board to fix the flaws in the GPU DEIR, including the impact mitigation flaws. The Board again refused. The CPC presented mitigation options to the Planning Commission in May and June and asked the Commission to consider them. The Planning Commission did not. In June, we asked to appeal the rejection of our General Plan mitigation suggestions to the Board of Supervisors. The opportunity for an appeal hearing was denied. We sent our mitigation suggestions to the Board so they could discuss them during their July 2019 hearing. With the exception of the traffic impact mitigation, the Board did not. Findings must be based upon facts in the record. The facts do not support this aspect of the finding.

This inaccuracy is highly prejudicial and misleading to the public. The inaccuracy does not reflect a good faith effort at full disclosure. (CEQA Guidelines, sec. 15151.) One of the key policies in CEQA is that the EIR is to demonstrate to an apprehensive citizenry that the agency has, **in fact,** analyzed and considered the ecological implications of its actions. (CEQA Guidelines, sec. 15003.) By not giving the mitigation measures proposed by the public, organizations, and agency experts a proper review, the County has failed to consider the ecological implications of its actions, and shirked its duty to avoid unnecessary harm to the built and natural environments.