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Comment Letter No. PCO4b SHUTE, MIHALY & WEINBERGER LLP May 23, 2018 *Via E-Mail* County of San Diego Planning & Development Services 5510 Overland Avenue, Suite 110 San Diego, CA 92123 E-Mail: JeRae.Bailey@sdcounty Re: Harmony Grove Village South Final Environmental Impact Report Dear Members of the Planning Commission: PCO4b-1: This firm represents the Elfin Forest Harmony Grove Town Council in matters related to the proposed Harmony Grove Village South project ("Project" or "HGVS"). We have performed a preliminary review of the Final Environmental Impact Report ("FEIR") and related materials, which have been presented to the Planning Commission for consideration on May 24, 2018. Based on this review, it remains our opinion that the Project cannot legally be approved at this time for the following reasons. We intend to supplement these comments prior to the Board of Supervisors' consideration of the Project. PCO4b-2: The Project is inconsistent with the County's General Plan. The County spent millions of dollars updating the General Plan just a few years ago. But now, rather than following the blueprint that decision-makers and the community worked so hard to prepare, the County is establishing a pattern of changing land use designations to accommodate whatever development is proposed by developers. Essentially, the County is allowing developers to ignore the General Plan and make their own land use decisions. The County's approach of allowing sprawling development outside of areas designated in its General Plan, Community Plan, and by sibling agencies such as the San Diego Association of Governments, is not only contrary to the County's stated planning goals, but it further incentivizes land speculation such as Lilac Hills Ranch's proposal to develop a residential subdivision on agriculturally-designated land. In this particular circumstance, it also both adds hundreds of new homes to a Very High Fire Hazard	**Response to Comment PCO4b-1** These are summary introductory comments to the letter, stating that review has been completed, the commenter is providing reasons why they believe the Project cannot be legally approved, and that additional comments will be forthcoming. These summary comments are noted. Additional responses are provided to specific comments that follow. **Response to Comment PCO4b-2** The County disagrees with the contention that it is contrary to the policies of the General Plan to consider future amendments. It is also noted that the commenter has a incorrect understanding of planning document function. Planning documents are living documents, and may be amended during their planning life, in accordance with state law and expectations noted in the General Plan itself. The current General Plan was approved seven years ago, and it is reasonable for the County to consider modifications that will support County goals and policies. The General Plan allows for future amendments to the Land Use Map and Regional Categories Map to accommodate future growth. The General Plan on page 1-15 states that it is intended to be a dynamic document and any proposed amendment will be reviewed to ensure that the change is in the public interest and would not be detrimental to public health, safety, and welfare. There are also numerous policies in the General Plan that accommodate future growth that would require General Plan Amendments to the Land Use Map and Regional Categories Map, such as LU-1.2 (establishment of new villages) and LU-1.4 (expansion of existing villages). In any event, the County Board of Supervisors have the ultimate authority to consider whether General Plan amendments (GPAs) are appropriate and consistent with the policies of the General Plan when supported by findings and substantial evidence (No Oil, Inc. v. City of Los Angeles (1987) 196 Cal.App.3d 223, 243). Please also see the Global Responses to Project Consistency with General Plan Policy LU-1.4 and General Plan/Community Plan Amendments CEQA Impact Analysis. Specific to the issue of development consistent with San Diego Association of Governments (SANDAG) development goals, please see the Global Responses to Regional Plan Conformity, as well as comments submitted by SANDAG in Letter RL1, and the responses to those comments. The Project is consistent. Please note that SANDAG's Sustainable Communities Strategy, including the forecasted

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	development pattern, is not intended to regulate the use of land, as explicitly provided by the California Legislature when enacting SB 375. Rather, pursuant to Government Code section 65080(b)(2)(K), the SCS does not regulate the use of land; does not supersede the exercise of the land use authority of cities and counties within its region; and, does not require that a city's or county's land use policies and regulations, including its general plan, be consistent with it. References to Lilac Hills Ranch do not apply to this Project – the two projects vary in location, size, components, and environmental impacts. No additional response is required. Regarding fire hazard, the County disagrees that the Project exacerbates existing conditions and would be unsafe. Fire has been extensively reviewed by County and Rancho Santa Fe Fire Protection District (RSFFPD) technical staff as described in the EIR and associated technical documents and also was addressed by representatives of the San Diego County Sherriff's Department, RSFFPD and CAL Fire during the May 25, 2018 Planning Commission Hearing. The comment is inaccurate that fuel modification is not allowed in the wildland urban interface. The Project is conditioned to provide fuel modification, which in many cases, exceeds the typical 100-foot-wide requirements. Fuel modification zones will be maintained in perpetuity by a funded HOA and monitored by the RSFFPD. Dead end road length is provided acceptable alternatives by the Project. Please note that secondary access is one way of ensuring adequate access/egress under the Fire Code. Alternative methods are also available and appropriate under the Code, and are equivalent to secondary access in terms of fire safety if the fire code official is able to make a finding based on provided alternative measures. This is the case for this Project. Please see the Global Responses to Fire Hazards Impact Analysis and Adequacy of Emergency Evacuation and Access. The analyses explicitly find that the Project would not result in a "dangerous concentration of residential development."

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Comment Letter No. PCO4b Severity Zone, which is also in a Wildland Urban Interface Area where fuel modification is not allowed, and then exacerbates that fire hazard by providing no secondary egress. For each of these reasons, the County should maintain the General Plan designated semi-rural use at this location rather than allowing ill-conceived and dangerous concentration of residential development in a location that cannot safely support the influx of new residents. [PCO4b-2] The EIR fails to comply with CEQA. The FEIR fails to resolve the myriad legal deficiencies identified in our June 20, 2017 and April 9, 2018 submissions to the County, both of which are incorporated herein in their entirety by this reference. As those letters make clear, the EIR may not be certified as adequate under the California [PCO4b-3] Environmental Quality Act ("CEQA"). Moreover, the Project represents poor planning as it seeks to redesignate semi-rural land to village residential uses, thus moving the County in the opposite direction of its goals related to locating growth in developed, infill areas that are close to existing transportation, jobs, and infrastructure, and away from both unmitigatable fire hazards and sensitive biological resources. While we are still reviewing the final document, we note the following glaring deficiencies: [PCO4b-4] • ***The proposed Project remains inconsistent with the General Plan designation and zoning for the site.*** As described above, the Project is proposed in a location that is poorly suited to suburban residential development, as recognized in existing planning documents. This fundamental problem underlies the majority of the impacts and flaws in the EIR that we identified in prior correspondence and briefly highlight below. [PCO4b-5] • ***The FEIR's fire hazard analysis is inadequate.*** Even the County's responses to comments acknowledge that the Project does not provide the secondary emergency access as required by the General Plan. In addition to that inconsistency, this flaw further violates CEQA by concluding, without supporting substantial evidence, that the Project will not create fire hazards, despite bringing hundreds of new homes to an extraordinarily high risk area with limited egress. As a result of, and compounding, this erroneous conclusion, the EIR fails to analyze and adopt feasible and essential mitigation measures. [PCO4b-6] • ***The FEIR's proposed mitigation for the Project's significant greenhouse gas emissions remains insufficient.*** The Project's proposed mitigation — based primarily on a to-be-determined carbon offset program—fails to sufficiently mitigate for the Project's GHG emissions. The proposed offset mitigation does not meet CEQA's requirement that it be "fully [PCO4b-7]	**Response to Comment PCO4b-3** The County disagrees that the contentions as to legal deficiencies in your letters of June 20, 2017 and April 9, 2018 were not resolved. Please refer to those letters and the responses to them, in Letters O3a, b, and c, as well as RO6, respectively. The County also disagrees that contentions in those letters make it "clear" that the EIR cannot be certified. That is a decision for the Board of Supervisors. **Response to Comment PCO4b-4** The Project is located near the cities of San Marcos and Escondido, both of which contain shopping, educational and job opportunities, as well as public transit hubs. Proximity to these uses and amenities is depicted on Figure 8.3.6-1, HGV + HGV South Adjacent Land Uses. The combination of location in the western extent of the County, within less than 0.5 mile from developed uses in the City of Escondido, immediate adjacency to this City's boundary on the south side and abutting County developed uses and City sphere of influence on the west – combined with the contiguous nature of HGV existing and planned uses – indicate that the Project's location is consistent with County goals to locate growth in proximity to developed areas contiguous with existing villages, and close to existing transportation, jobs and infrastructure. General Plan Policy LU-1.4 also permits future expansions of existing or planned villages provided all of the criteria of the Policy are met. The Board of Supervisors will decide whether this Project is consistent with this Policy. Furthermore, the Project is located on a site that is substantially disturbed in nature, and would set approximately 35 acres of the most pristine habitat on site into permanent protected open space. Please also see the Global Responses to Project Consistency with General Plan Policy LU-1.4, General Plan/Community Plan Amendments CEQA Impact Analysis, Regional Plan Conformity (Section 8.3.6.1, The Project Location is Consistent with Goals to Reduce Sprawl and Site New Development Adjacent to Jobs, Services and Shopping), and Fire Hazards Impact Analysis, and Adequacy of Emergency Evacuation and Access. Continued review of the FEIR is noted. **Response to Comment PCO4b-5** The comment expresses the opinions of the commenter only. The comment will be included as part of the record and made available to the decision makers prior to a final decision on the proposed project. However, because the comment does not raise an environmental issue,

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	no further response is required. Please see the Response to Comment PC04b-4, immediately above. **Response to Comment PCO4b-6** Please see the Response to Comment PC04b-2 of this letter. Appropriate mitigation measures for the development, and additional measures supporting an RSFFPD finding that the requested modification would not lessen health, life, and fire safety requirements, have been incorporated into Project design. These details are provided in the EIR, the Project Fire Protection Plan (FPP), and prior responses to your comments. These measures have been reviewed and approved by the County and RSFFPD. The County finds that there is substantial evidence to support the conclusion that the Project would not expose people or structures to a significant risk of loss, injury or death from wildland fires. In support of this conclusion see the Project's FPP (Dudek 2016) and the Wildfire Risk Analysis report (Rohde & Associates 2016). See also Global Responses to Fire Hazards Impact Analysis. The commenter also incorrectly asserts that the Project does not provide the secondary emergency access as required by the General Plan. In conformance with Policy S-3.5, the Project would provide three separate access ways to the project from Country Club Drive. The FPP found that the Proposed Project complies with all applicable fire regulations, with the exception of provision of a secondary access road. Secondary access to the east and south of HGV South has been explored and continues to be explored, but initial analysis indicates that potential routes are constrained by extreme terrain, fuels, significant biological habitat/environmental concerns, and/or easement issues. Consequently, the Project has developed an approach for secondary access that meets the intent of the Fire Code and General Plan Policy S-3-5 through the implementation of a list of specifically developed measures and features including clustering of the residential footprint to minimize placement of homes adjacent to wildland fuels and shorten emergency response time. The widening of Country Club Drive will also provide additional emergency evacuation through the provision of a three-lane, improved accessway that connects to a looped interior road system accessible by all residents. The internal roadway network provides several options to access these points of ingress/egress, including a service road provided from the terminus of Private Drive J to Country Club Drive. Therefore, the Project provides for safe access of

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	emergency equipment and civilian evacuation concurrently. See also EIR Section 3.1.5 regarding consistency with General Plan. **Response to Comment PCO4b-7** The County disagrees. Although the Project is not proposed for approval based on consistency with the adopted Climate Action Plan (CAP), it proposes measures that are equivalent to that plan, and which fulfill County goals. Prioritization of credits located within the County (as available) is expressly required in Mitigation Measures GHG-1 and GHG-2. Standards exist to ensure that the credits truly are "additional." These issues are addressed in the Global Responses to Carbon Offsets and Climate Action Plan. Increases in mitigation ratios are not anticipated to be necessary. Impacts were already conservatively assessed based on assuming construction and initial operation years in modeling earlier than would actually occur (and therefore assuming more polluting construction machinery and resident vehicles). California state law requires continued and increased diminution of GHG emissions as time passes. The commenter's assertion that a protocol for increased emissions is required is therefore unfounded. Qualified County staff are able to make consistency determinations, and do so routinely. Nonetheless, the Applicant decided to delete this potential future action. This is no longer part of the Project.

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Comment Letter No. PCO4b enforceable." Instead, the FEIR violates the County's own policies by relying on registry programs that provide few if any offsets located within the County and that lack sufficient protocols to ensure that they are truly additional, as required to provide effective mitigation for CEQA purposes. In addition, the FEIR allows the applicant to decrease mitigation base on no public notice or process, but rather submission to County staff. It expressly rejects any equivalent provision for increasing mitigation even if evidence shows that construction and operation of the Project will generate greater emissions than assumed, simply because this outcome "is not anticipated." Such a one-sided approach has no support in the record and further erodes the Project's already inadequate mitigation. PCO4b-7 • ***The County failed to respond to detailed comments.*** Jacqueline Arsivaud submitted a June 20, 2017 letter on behalf of by the Elfin Harmony Grove Town Council that attached and expressly referenced a spreadsheet that lists 100 individual comments, organized by impact. The FEIR fails to include or respond to the comments submitted in that spreadsheet. Such an omission violates CEQA's requirement that an agency provides a "written response" that provides a "good faith, reasoned analysis in response" to the comments. CEQA Guidelines § 15088(c). We are attaching the overlooked comments to this letter. PCO4b-8 The County must maintain correspondence between County, applicant, and EIR consultants for administrative record. It has come to our attention that the County may be automatically destroying e-mail communications between the County, applicant, and EIR consultants that are more than 60 days old. If the Project is approved, these communications may be part of the administrative record. *See, e.g., Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889 (pre-approval communications between city attorney and applicant attorney not subject to common interest privilege). As a result, the County must maintain them pending final action on the Project and any subsequent litigation. This policy also appears inconsistent with State guidelines, which the Board has apparently adopted in Policy A-129, which recommends maintaining administrative record documents for two years. *See* Secretary of State, Local Government Records Management Guidelines. PCO4b-9 "Bundling" the Project's general plan amendments together with amendments for other large development projects is inconsistent with the purpose and intent of Govt. Code § 65358. Government Code section 65358 prohibits the County from amending a mandatory element of its general plan more frequently than four times during any calendar year. Attempting to avoid this prohibition, the County is considering PCO4b-10	**Response to Comment PCO4b-8** The County appreciates the resubmittal of Ms. Arsivaud's comments from June 20, 2017. This spreadsheet was not listed in the list of exhibits and drop box attachments to the letter, and the spreadsheet became separated from the letter. The comments are fully responded to as part of DEIR Letter O6 in FEIR Chapter 8.0, have been provided to the commenter, and have been included prior to Project consideration by the decision makers. The responses document the finding that no issues were raised that resulted in identification of new significant impacts. It is also noted that a substantial number of the issues were presented in other comments received on the DEIR that received detailed responses, which are now also duplicated here (see, for example, the comments on Recreation and Alternatives provided in Letter I37 on the DEIR, which contain verbatim comments). **Response to Comment PCO4b-9** This comment addresses issues that are not "ripe" and are currently not in contention. The County follows its protocols required for preparation of the Administrative Record. The comment regarding attorney-client privilege is noted, but the County is not asserting that parts of the Administrative Record are privileged. Portions of the record that the County deems important as part of the Administrative Record also will be maintained for appropriate periods of time. **Response to Comment PCO4b-10** The comment incorrectly asserts that "bundling" the Project's proposed amendment to the General Plan together with amendments for other development projects is inconsistent with the purpose and intent of Government Code Section 65358. Section 65358 prohibits the County from amending a mandatory element of its General Plan more frequently than four times during any calendar year. However, Government Code Section 65358(b) specifically states that "[e]ach amendment may include more than one change to the general plan." The rationale behind limiting amendments to no more than four times during the calendar year was first explained in Karlson v. City of Camarillo (1980) 100 CA3d 789, as one of promoting public participation in the GPA process. The court also explained that this policy would not be thwarted by permitting the consideration of more than one parcel in a GPA (Id at 808). In other words, there are no other limitations under Government Code Section 65358 other than limiting the number of occasions in each calendar year

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	that an amendment can be considered. If the Legislature had intended other limitations such as suggested by the commenter relating to number of parcels that could be considered in one amendment, it would have been a simple matter for the legislature to indicate this by narrowing the scope of the subject matter, or the number or size of parcels. In DeVita v. County of Napa, 9 Cal.4th 763, the Court subsequently interpreted Section 65358(b) as a way to curb excessive "ad hoc planning" by limiting the number of GPAs that could occur each calendar year to four such amendments to the mandatory elements of the General Plan (id at 716). Again, the limitation related to only the number of occasions in each year an amendment to the mandatory elements of the General Plan could be made, not the number of parcels that could be considered in one amendment. The Court believed that the planning law leaves it largely to each locality to balance the competing values of flexibility and stability in the planning process. With respect to the assertion that considering more than one amendment at a time is considered "haphazard planning," the opposite may be true. By considering GPAs as a group, the County can provide a better framework to consider the merits of a particular GPA in concert with other proposed GPAs, especially if such amendments are within the same Community Plan area or relative vicinity such as the case with HGV South and Valiano. It also encourages public participation, by making it more convenient for individuals to attend hearings by limiting the number of hearings where such matters are considered. Furthermore, given the County's massive size, adherence to the commenter's interpretation of Government Code Section 65358 would make the General Plan Amendment process impractical. Finally, the EIR expressly considers potential for other relevant projects in the EIR (FEIR Section 3.1.5.3) where it is noted that six of the cumulative projects are requesting GPAs (four in the County and two in the City of San Marcos). The environmental effects of these projects cumulatively (as well as non-GPA proposals) are addressed as appropriate throughout the EIR in the technical analyses in Cumulative Impact Analysis sections.

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Comment Letter No. PCO4b bundling the Project's General Plan amendments with amendments necessary for other large development projects in the area. While Section 65358 states that "[e]ach amendment may include more than one change to the general plan," the Supreme Court has explained that this section "was presumably [drafted] to curb an excessively ad hoc planning process . . . . General plans that change too frequently to make room for new development will obviously not be effective in curbing 'haphazard community growth.'" *DeVita v. Cty. of Napa* (1995) 9 Cal.4th 763, 790. By repeatedly amending its General Plan to accommodate the whims of developers, the County is facilitating precisely the "haphazard community growth" the legislature sought to eliminate with Section 65358. Moreover, the EIR for the Project does not consider the cumulative land use and other impacts of these numerous General Plan amendments. PCO4b-10 The County may not approve the tentative map for this project before the proposed General Plan, Specific Plan, and zoning code amendments are effective. State law prohibits the County from approving development that is inconsistent with its General Plan. *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540. Here, the proposed General Plan amendments, which are necessary for the Project to be consistent with the General Plan, will not become effective until at least 30 days after the County approves them. *Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 773. Nonetheless, the County is considering approval of the proposed vesting tentative subdivision map, which will become immediately effective, at the same meeting where the General Plan amendments are being considered for approval. This "stacking" of approvals with different effective dates violates state law. PCO4b-11 The County should hold the remaining public hearings in the evening or on weekends. To ensure meaningful public participation, the County must hold the remaining public hearings on this Project closer to the Project site and at times when most members of the public can attend, including evenings and weekends. This is a highly controversial project, and members of the public should not be forced to choose between going to their jobs or expressing their concerns to their elected representatives. PCO4b-12 As noted above, we will augment these preliminary comments prior to the Board of Supervisors hearing. PCO4b-13	**Response to Comment PCO4b-11** The comment states that the Project Tentative Map (TM) may not be approved before the General Plan, Specific Plan and zoning code amendments are effective. The citation provided is Lesher Communications, Inc. v. City of Walnut Creek (1990), which reviewed the ability of a City to pass and act on an initiative that would be inconsistent with the General Plan. The Court reviewed whether such use of an initiative would be legal and found that it would not be legal as it did not provide the necessary notice and public hearing required for a GPA. The City then asserted that passage of the initiative would result in automatic amendment of the General Plan and that no inconsistency would occur. The Court also did not agree with that proposal. Neither of these issues is applicable to the Project, which proposes a GPA, and has provided public notice of that intention starting with the Project Notice of Preparation of an EIR in 2015, and continued with disclosure and discussion of that action in the DEIR and FEIR, as well as noticing for the Planning Commission and Board of Supervisors hearings on the Project. Similarly, the cited Midway Orchards v. County of Butte (1990) case is not on point. That case reviewed the effect of a referendum on County actions in rescinding prior agreements regarding agricultural permits and its effect on timing. Regardless, although approval of Project documents would occur at one time, during public hearing, and thus provide for appropriate public input on the issues, the TM would be conditioned to take effect only if and when the zoning code amendment becomes effective. The General Plan Amendment would take effect immediately upon its adoption, and thus before the TM approval becomes effective. In fact, in order to expedite processing of development applications and to prevent inconsistency between the general plan and zoning, the state legislature enacted Government Code Section 65862, which allows for the concurrent processing of applications for GPA and zoning changes. Thus, this is appropriate and does not violate state law. **Response to Comment PCO4b-12** County residents are not "forced to choose between going to their jobs or expressing concerns to their elected officials." The County provides varied opportunities for public participation – public hearing attendance (with such hearings noticed in advance of the hearing), and/or submittal

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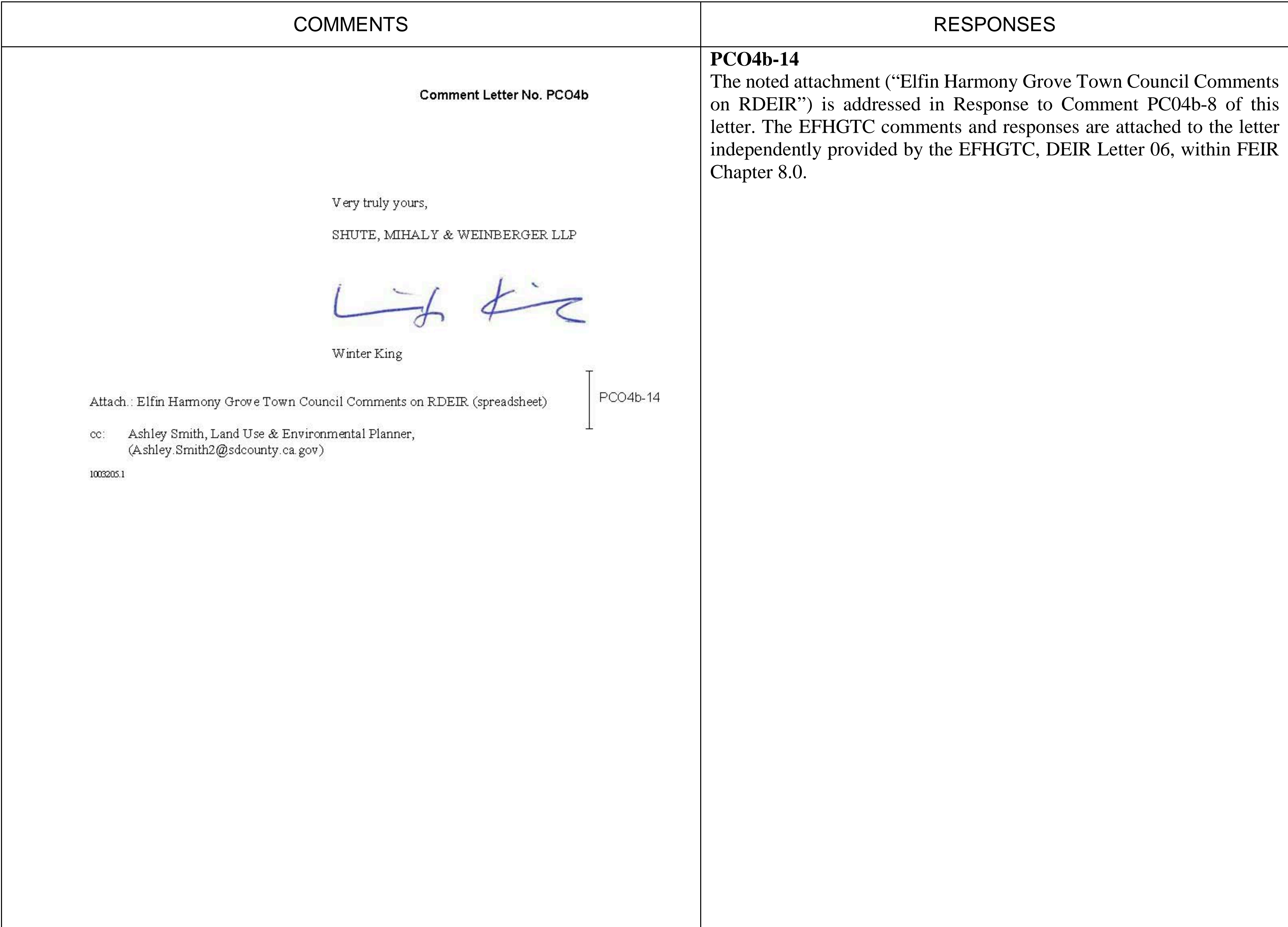
	of comments during appropriate time periods. All of this is "meaningful," and the decision makers take all comments into consideration. **Response to Comment PCO4b-13** Comment noted.



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Comment Letter No. PCO4b Very truly yours, SHUTE, MIHALY & WEINBERGER LLP Winter King Attach.: Elfin Harmony Grove Town Council Comments on RDEIR (spreadsheet) — PCO4b-14 cc: Ashley Smith, Land Use & Environmental Planner, (Ashley.Smith2@sdcounty.ca.gov) 1003205.1	**PCO4b-14** The noted attachment ("Elfin Harmony Grove Town Council Comments on RDEIR") is addressed in Response to Comment PC04b-8 of this letter. The EFHGTC comments and responses are attached to the letter independently provided by the EFHGTC, DEIR Letter 06, within FEIR Chapter 8.0.