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MEMORANDUM

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November 29, 2007

TO: Humboldt Coalition for Property Rights

FROM: Charles H. Bell, Jr. & Brian T. Hildreth

RE: Humboldt County TPZ Amendment Issue

The Humboldt County Planning Commission will consider today recommendation of an ordinance to prevent single family dwellings on TPZ parcels without a conditional permit.

This Memorandum outlines why existing law and ordinances are sufficient to deal with anticipated problems, even as the history of attempts to build residences on TPZ-zoned properties have been minimal in the past two decades. The Memorandum also outlines why such action by the County would not survive a legal challenge under state laws and the County's own ordinances.

In addition, an effort to label residences as incompatible with TPZ parcels would cause a number of concerned citizens to consider an array of political options to preserve the property rights of TPZ parcel owners to ensure that County representatives refrain from taking similar attempts in the future.

I. The County Has Failed to Identify Any Legitimate Issues Necessitating an Amendment to the Zoning Code Regarding TPZ Parcels

On November 15, 2007, Kirk Girard, the Director of Community Development for Humboldt County made statements in an open public meeting of the County Planning Commission to the effect that Humboldt County has no control over development on TPZ-zoned parcels within the County. These assertions by Mr. Girard were uninformed at best, and were a surreptitious effort to mislead the County residents at worst. Whatever the reasons for Mr. Girard's comments, they are patently false. Humboldt County has a number of avenues by which it may control building on TPZ-zoned parcels.

Presently, there are 7,128 TPZ-zoned parcels in Humboldt County. Despite this large number of parcels, less than 50 residential building permits have been issued for TPZ-zoned property over the past 16 years. Notwithstanding its failure to identify any tangible public problem associated with this rate of residential building on TPZ-zoned parcels, the County Planning Staff apparently intends to move forward with unnecessary and overbroad proposals to change the County's Zoning Code.

The proposed changes to the Zoning Code would lock down TPZ-zoned parcels from any residential building whatsoever. This would result in a massive and uncontrollable devaluation of property values in Humboldt County. The ripple effect also will affect property values in suburban areas of Humboldt County and potentially surrounding counties as well. Thus, in both the short-run and long-run, prohibiting residential building on TPZ-zoned parcels would devastate the local economy and cause a precipitous decline in County tax revenues, at a time when it can be least afforded and cause further hardships for the people of Humboldt County.

The County has failed to make any arguments that supersede the damaging long-term economic effects that will result in Humboldt County if the County restricts TPZ parcel property owners' rights. Calling residences incompatible with TPZ-zoned parcels will create more problems for the County and solve none.

In addition, in its rush to amend the Zoning Code, the County has failed to produce any reasonable analyses supporting its actions regarding TPZ-zoned parcels. Sadly, the little analysis that has been completed by the County, was done in error resulting in faulty conclusions. Most notably, the County Planning staff has misapplied concepts in the Timber Production Act ("TPA"). For example, the term "conversion" has a different meaning in the TPA than in common land-use parlance. The planning staff is apparently asserting that if a land owner builds a secondary residence on TPZ-zoned property, this effects a conversion of the property from timberland to something else. However, under the TPA and supplemental forestry laws in California, obtaining a California Department of Forestry Conversion Permit does **not** convert the entire property to non-timber productive uses.

Further, the County Planning staff also has misinterpreted the term "productivity" under state timberland laws. Putting a residence on a timberland property has never been held to reduce the parcel's productivity for timber production purposes. The County has been the recipient of volumes of public testimony supporting this concept, but apparently refuses to recognize such testimony.

II. CEQA and Existing County Ordinances Provide Adequate Protection for Timberland and Prevent Overdevelopment in Humboldt County

A number of other protections exist with respect to building on TPZ-zoned parcels. These are protections that have been carefully considered by the state legislature and, in some cases, Humboldt County itself.

A. Adequate Protections Exist Under CEQA to Accomplish the County's Goals Regarding TPZ-Zoned Parcels

The California Environmental Quality Act (Cal. Pub. Res. Code §§ 21000 et seq.; hereinafter "CEQA") and its related administrative regulations establish certain review requirements and environmental protections for construction projects, including residential projects. (No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 74, 118 Cal.Rptr. 34, 529 P.2d 66.) Public Resources Code § 21065 defines a "project," in pertinent part, as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment...."

The California Supreme Court has instructed that CEQA should "be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language. (Friends of Mammoth v. Board of Supervisors, 8 Cal.3d 247, 259 (1972) [disapproved and superceded on other grounds].) Following this instruction, California courts have broadly interpreted the phrase "or a reasonably foreseeable indirect physical change in the environment." (See e.g., Shawn v. Golden Gate Bridge etc. Dist., 60 Cal.App.3d 699, 702-703 (1976).) Likewise, Public Resources Code § 21065 bases the term "project" upon the term "change." "'Project' means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment...." (Public Resource Code § 21065.)

CEQA provides ample and adequate protections for Humboldt County timberland. Because residences built on TPZ-zoned parcels must be approved by the County, CEQA provisions can be applied fully to protect County timberland. In addition, the existing County Zoning ordinance already triggers CEQA review for secondary dwellings on TPZ-zoned parcels. Secondary unit applications are only granted upon issuance of a special permit (special permits may be issued by the County Planning Director without a hearing if neighbors to the affected parcel do not contest the permit application).

B. Local Coastal Plan Amendment Provide Further Protections for Many TPZ Parcels

The California Coastal Act of 1976 ("Coastal Zone Act") "was enacted by the Legislature as a comprehensive scheme to govern land use planning for the entire coastal zone of California." (Yost v. Thomas (1984) 36 Cal.3d 561, 565.) In enacting the Coastal Zone Act, the Legislature declared that the basic goals of the state for the coastal zone are

to “protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources.” (Cal. Pub. Res. Code, § 30001.5.)

A local coastal plan (“LCP”) consists of a local government’s land use plans, zoning ordinances, zoning district maps, and other implementing actions that satisfy the Coastal Act. (Cal. Pub. Res. Code, § 30108.6.) After certification by the Coastal Commission, a local government may amend its LCP, but the amendment is ineffective until the Commission certifies its consistency with the Coastal Act’s policies. (Cal. Pub. Resources Code, § 30514(a); Conway v. City of Imperial Beach (1997) 52 Cal.App.4th 78, 86.) Actions by the local government that authorize “a use other than that designated in the LCP as a permitted use ... require certification by the Commission...” (Yost v. Thomas, supra, 36 Cal.3d at p. 573, fn. 9; see also Cal. Pub. Res. Code, § 30514(e).)

The Coastal Zone Act provides ample protection for Humboldt’s timberland. The specific purpose of the Coastal Zone Act is to preserve coastal areas and prevent overdevelopment of such areas.

C. Existing County Laws Also Protect Timberland and Require Discretionary Permitting in Many Circumstances

Existing County ordinances also provide significant safeguards and protections for timberland property. For example, under section 314-7.4 of the Humboldt County Code, land owners are required to submit to the discretionary permitting processes under the following scenarios:

(1) The County’s Grading Ordinance is triggered if the parcel has an average slope of fifteen percent (15%) or more (Humboldt County Code, § 332-1),

(2) The County’s Streamside Management Ordinance is triggered if the property is within a Streamside Management Area and if the property is close to or must be accessed by crossing a stream (Humboldt County Code, § 314-61.1(e));

(3) The requirement for submission of a soils report also may trigger a special use permit in the discretion of the planning commission staff, and

(4) A proposed residential development on a parcel within a high geologic instability zone presently requires a special permit.

III. Amending the County's Zoning Code Would Not Withstand a Legal Challenge

California courts routinely issue writs of mandate preventing counties from implementing invalid laws (see e.g., Citizens for Jobs and the Economy v. County of Orange ("Citizens") (2002) 94 Cal.App.4th 1311); and preventing local governing bodies from executing land contracts which would violate city law (see e.g., Save the Welwood Murray Memorial Library Com. v. City Council (1989) 215 Cal.App.3d 1003).

If Humboldt County proceeds by enacting the proposed TPZ parcel zoning restriction, any County resident may seek a writ of mandate from the court prohibiting the County from enforcing the new ordinance. As discussed herein, a change to the Zoning Code resulting in removal of single-family residences from the listing of principally-permitted uses deemed compatible with TPZs would not withstand a legal challenge under California law and local ordinances of Humboldt County.

A. California Law Would Preempt County's Proposed Amendment

Under the California Timberland Productivity Act of 1982, parcels located within a TPZ may be used for any purpose so long as that purpose does not "significantly detract from the use of the property for, or inhibit, growing and harvesting of timber." (Cal. Gov. Code, § 51104(h).) Section 51104(h)(6) states specifically that "...residences or other structures necessary for the management of the land..." are considered compatible uses for TPZ parcels. Government code Section 51111 authorizes city and/or county governments to adopt "compatible use" definitions *in addition* to those enumerated in section 51104(h)(6). (Emphasis added).

The County erroneously asserts that Government Code section 51104 requires the County to review ALL residential applications within a TPZ to ensure such residences will not significantly detract from the use of the property for growing and harvesting timber. Essentially, the County has chosen to unlawfully re-interpret section 51104 in order to review all residential projects. The County's re-interpretation of the California Government Code literally ignores all previous County legal and legislative findings and determinations over the past thirty years (and also the findings and determinations of the Coastal Commission and its legal and professional staffs) as well as the practices of the County over the same period with respect to the placement of single-family residences on TPZ-zoned lands.

In addition, California case law authority also would preempt any initiative by the County to reinterpret section 51104. In Clinton v. County of Santa Cruz ((1981) 119 Cal.App.3d 927), the First Appellate District Court held that California law restricts the use of timberland parcels to the growing and harvesting of timber "and compatible uses." (*Id.*, at 932.) The Appellate Court further explained that the term "compatible" is given a "broad discretion" as describing uses which "do not 'significantly detract from' or 'inhibit' the growing and harvesting of timber." (*Id.*) No court has rendered a decision overturning

the Clinton case or the Appellate Court's definition of the term "compatible." It remains valid and reliable legal authority.

Moreover, the County's misinterpretation of the Government Code leads it to the illogical conclusion that it may adopt blanket restrictions on the construction of residences on TPZ- designated properties. However, because that interpretation directly conflicts with Government Code section 51104(h)(6)'s explicit allowance of residences within TPZ zones, any such amendment to the Zoning Code would be preempted by California law. A blanket restriction as contemplated by the Humboldt County Board of Supervisors also conflicts with the County's authority to establish compatible (and define non-compatible) uses within TPZ-designated properties.

B. Humboldt County Code Also Would Prohibit the Proposed Amendment

Section 312-50.3 of the Humboldt County Code specifies the specific findings that must be made in order to approve the County's Zoning Code amendment. Section 312-50.3 holds that any proposed Zoning Code change must be "in the public interest," and also "consistent with the General Plan." (Humboldt County Code, § 312-50.3.) The County simply cannot meet these two critical criteria.

1. Proposed Zoning Code Amendment is not in the Public Interest

First, the proposed amendment by the County is not in the public interest. As discussed above, only a fraction of the TPZ-zoned parcels in Humboldt County actually contain residences. This is supported by the fact that a mere 50 residential building permits have been issued in the last 16 years. In addition, calling residences "incompatible" with TPZ-zoned parcels would devastate the values of all TPZ parcels. The ripple effect of this significant devaluation would eventually consume all of Humboldt County, and would eventually do serious damage to the County's economy.

2. Proposed Amendment is Inconsistent with General Plan

In addition, the proposed change would not be consistent with County's General Plan. California's "consistency doctrine" has been described as "the linchpin of California's land use and development laws; it is the principle which infused the concept of planned growth with the force of law." (*deBottari v. City Council* (1985) 171 Cal.App.3d 1204, 1213.) The essence of the consistency doctrine is that land use decisions, including local zoning changes, must be consistent with the local jurisdiction's general plan. (Cal. Gov. Code, § 65860(a); *Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 536.) California Government Code section 65860(a) states specifically:

County or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974. A zoning ordinance shall be consistent with a city or county general plan only if:

- (i) The city or county has officially adopted such a plan, and
- (ii) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in such a plan.

The zoning consistency requirement requires local governments to maintain their zoning in a manner consistent with their general plans. Every zoning action must be consistent with the plan, and a zoning ordinance that is inconsistent with the general plan at the time it is enacted is "invalid when passed." (Sierra Club v. Board of Supervisors (1981) 126 Cal.App.3d 698, 704.)

To be consistent with the general plan, an action, program, or project must "further the objectives and policies of the general plan and not obstruct their attainment." (General Plan Guidelines, p. 212, Governor's Office of Planning and Research, 1990.) The Governor's Office General Plan Guidelines are advisory only, but they are meant to assist in determining compliance with general plan laws. (See also Twain Harte Homeowners Assn. v. County of Tuolumne (1982) 138 Cal.App.3d 664, 702; Bownds v. City of Glendale (1980) 113 Cal.App.3d 875, 886.)

In Government Code section 65860(c), the Legislature added muscle to the "consistency" provision in subdivision (a) of that section by requiring that any ordinance which becomes inconsistent with the general plan must be brought into conformity. Section 68560(c) provides:

In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to the plan, or to any element of the plan, the zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended.

The County's General Plan treats residential structures on TPZ parcels as compatible uses. Thus, the County may not amend its Zoning to create an inconsistency according to section 312-50.3 of the County Code. Thus, a court would strike any change in the Zoning Code until and unless the County's General Plan is brought into conformity. Moreover, judicial review of this issue would result in a holding that the County's General Plan preempts an inconsistency in the Zoning Code and would prohibit enforcement of a new zoning ordinance that is incompatible with the General Plan.

C. Inconsistency Between County's Adopted General Plan and Zoning Ordinances Cannot Be Resolved

"A zoning ordinance that is inconsistent with the general plan is invalid when passed...." (Leshar Communications, Inc. v. City of Walnut Creek (1994) 52 Cal.3d 531, 541.) In the present case, the Humboldt County general plan incorporates by quotation Government Code section 51114(h)(6)'s definition of "compatible uses" for timberland productions zones. (Humboldt County General Plan, p. 5.3-20.)

California Government Code section 65860(b) specifically allows an affected landowner to bring suit against the county under an inconsistency cause of action. "[Any] resident or property owner within a city or a county, as the case may be, may bring an action in the superior court to enforce compliance with the provisions of subdivision (a)." (See City of Los Angeles v. State of California (1982) 138 Cal.App.3d 526, 531.)

Were the County to approve of the TPZ zoning change, it would create an inconsistency between the General Plan and the County's Zoning Code and, thus, an additional cause of action for any affected landowner to bring legal action against the County to prohibit enforcement of said amendment.¹ Moreover, due to the necessity of CEQA compliance, the County would be unable to resolve any such inconsistency between the proposed TPZ amendment and the adopted or an amended General Plan in a manner that would comply with existing case law requirements.

D. County's Proposed Amendment Would Not Comply With Coastal Zone Plan Amendment Procedures.

The proposed amendment to the County's Zoning Code also would not comply with the California Coastal Zone Act. Under the Coastal Zone Act, the Board of Supervisors may review "the effectiveness and adequacy" of an LCP at any time and, commensurate with Chapter 3, Article 5, Calif. Gov. Code § 65361, may amend the plan up to three times per year.

However, **all** LCP amendments must be approved by the Coastal Commission. Humboldt County has adopted LCPs for six designated coastal zones (North Coast Area, Trinidad Area, McKinleyville Area, Humboldt Bay Area, Eel River Area, and South Coast Area). In 2003, the Planning Commission published a 2003 Local Coastal Plan Issues Identification Report.² This "Issues Identification Report" purported to identify critical issues identified by County Planning staff relative to possible amendment of the LCPs. Forest and timberland issues were not identified as critical issues in this report.

¹ The emergency interim law recently passed by the board of supervisors which conflicted with the general plan-adopted definition of "compatible use" also violated Government Code section 65860. The interim ordinance expired and has not been renewed.

² http://co.humboldt.ca.us/planning/Local_Coastal_Plans/pdf/IssueIdentificationReport/issue.pdf -- visited November 20, 2007.

Moreover, Section 1333 of the Humboldt County General Plan explicitly recognizes the relationship between the General Plan and the state-mandated elements of the LCPs, as follows:

Although the coastal land use plan is a requirement of the Coastal Act, lands located within the coastal zone are also subject to the Government Code which requires a General Plan. While these two requirements overlap, they also complement each other.

The coastal land use plans, in response to Coastal Act requirements, tend to be much more detailed or specific than this General Plan. The policies of the coastal plans address development and resource protection issues typically not included in a General Plan (diking, filling, shoreline structures, etc.). At the same time, the coastal land use plans do specify the types, intensities, and densities of land use in the Coastal Zone. Figure 1-1 generally indicates those elements specifically incorporated within the certified coastal land use plan and those General Plan elements which are applicable in the County's Coastal Zone but are not requirements of the Coastal Act and are therefore not part of the certified LCP.

Because the County has failed to seek review by the California Coastal Commission of its proposed Zoning Code amendment, the County is prohibited from enacting an amended Zoning Code as applied to parcels within the Coastal Zone Act purview. This failure to seek Coastal Commission review presents a cause of action for the affected landowners, discussed more fully below.

E. County Has Failed to Adhere to CEQA Provisions

The proposed TPZ-zone parcel amendments to the Humboldt County Code and any similar General Plan amendment would require the County to comply with the requirements of CEQA. This means the County must prepare and issue an environmental impact report ("EIR"). Moreover, any EIR would have to be completed on a timeline that would be impossible to meet under CEQA in order to meet the reasonable time requirements for consistency of general plans and zoning laws.

The County assertion that Government Code section 51119 exempts any action to zone land TPZ parcels from the requirements to prepare an EIR³ is seriously flawed and not tenable, for several reasons. First, Government Code section 51119 applies to changes in zoning from one zone to TPZ zoning. Second, at least one of the provisions of the proposed ordinance would lead to environmental effects. This is the "hardship provision" where property could be rolled out (with concomitant rezoning from TPZ zoning into a zone other than TPZ). The direct, indirect and cumulative impacts of this rezoning could require the hardship re-zoning matter to be subject to CEQA. Finally, the proposed

³ November 1, 2007 Staff Report to Planning Commission for November 15, 2007 Meeting, at p. 5.

ordinance does not implement the adopted General Plan (both its coastal and non-coastal elements). In fact, as discussed herein, the proposed ordinance is inconsistent with the adopted General Plan. This inconsistency could elevate consideration of the ordinance into a matter having potentially significant environmental impacts.

IV. Residents and TPZ Parcel Owners have an Array of Political Remedies Available to Them.

In addition to the numerous legal causes of action that will be created by the County's passage of an amendment to the Zoning Code, Humboldt County residents and voters could bring this issue to the ballot and let voters legislate the issue. In addition citizens could also promote a recall of the sitting County Board of Supervisors. Article II, sections 8 and 9 of the California Constitution create the statewide initiative and referendum powers. Article II, section 11 extends these powers to voters in local elections. This law firm specializes in qualifying recall, initiative and referenda measures and litigation related thereto.

A. Referendum of Zoning Ordinance and/or General Plan Amendments

In local jurisdictions, the referendum is the power of the people to approve or reject statutes or parts of statutes enacted by the local legislative bodies. As applied to Humboldt County's enactments, a number of would-be referendum proponents stand ready to circulate petitions seeking to qualify a referendum measure to challenge the County Board's amendment of the zoning code that removed "one-family dwelling" from the list of compatible uses for TPZs, should that amendment be passed by the Board.

Once a referendum has qualified for the Humboldt County ballot, the Zoning Code amendments would be suspended pending outcome of the referendum election (alternatively, the Board may repeal the challenged measure). (Cal. Elec. Code, § 9144.) The challenged ordinance can only be enacted if it is approved by a majority of the voters in an election. (Cal. Elec. Code, § 9145.) Upon approval by the voters, the Humboldt County Board of Supervisors is then prohibited from implementing the recalled ordinance or an ordinance similar to the recalled ordinance. (Id.)

B. Prescriptive Initiative Measure(s)

The initiative is the power of the people to directly propose and enact local laws and amendments to a county's general plan. (Associated Home Builders, Inc. v. City of Livermore (1976) 18 Cal.3d 582.) Under the initiative process, voters are given the power to enact their own land use regulations, including for example language that affirms the protections of the state law for residential building on TPZ-designated property and additionally prohibits the County from requiring land owners to obtain conditional use permits for construction of residential dwellings on TPZ-designated property, or both. The enactment of an initiative would require that in the future, any amendment of the policy language must be made by a vote of the people.

Moreover, unlike the requirements for enactment of legislation by the legislative body of a county or other jurisdiction, Title 14 California Code Regulations section 15378, subdivision (b)(3) specifically exempts initiatives proposed by the electorate from environmental review. (14 C.C.R. 15378(b)(3); DeVita v. County of Napa, *supra*, 9 Cal.4th at 794; Stein v. City of Santa Monica (1980) 110 Cal.App.3d 458, 460-461.)

C. Recall of County Supervisor(s)

The California Constitution provides voters with the power of recall. (Cal. Const. Art. II, § 19 [recall of local officers].)

We trust this memorandum sufficiently details the pitfalls of moving ahead with the Zoning Code amendments. Please let us know if you have any questions or require additional information.