

July 26, 2010

Humboldt County Planning Department
Community Development Services
Attn: Martha Spencer
3015 H Street
Eureka, CA 95501

Subject: CALFIRE's <3-Acre Conversion Exemption Process for Residences and Other Uses on Timber Production Zone ("TPZ") Parcels; Comments on the General Plan Update's Forest Resources Chapter and Draft Environmental Impact Report

Dear Planning Commissioners,

Thank you for the opportunity to comment on the Forest Resources chapter of Land Use Element of the County's draft General Plan Update ("GPU"). These comments are submitted on behalf of Healthy Humboldt and our member organizations. Healthy Humboldt is a group of conservation organizations and individuals working for a County General Plan that provides affordable housing and transportation choices, while protecting our working farms, ranches and forest lands and keeping our water clean and healthy for future generations.

Background: Current Trends in Timberland Ownership

Pacific Lumber's 2007 proposal to parcelize 20,000 acres of TPZ (the "Redwood Ranches" plan) was contingent upon individual owner's ability to build residences with ministerial permits on TPZ lands, and highlighted the absence of any discretionary review of such a proposal under current county regulations. The TPZ building moratorium enacted by the Board of Supervisors in response to this proposal was the only means to block the proposed parcelization of TPZ lands, yet once the TPZ moratorium expired, the current county land use regulations were reinstated, allowing this type of conversion of timberlands to primarily residential uses without any discretionary review. Indeed, 12,000 acres of Barnum Timber Co. land is currently proposed for parcelization via the Certificate of Compliance Determination process, after which neither the county nor the state has any discretionary review of construction of residences. These lands will continue to be enrolled in the state's preferential taxation program that was designed to prioritize timber production over residential value, yet these lands will be valued for residential use, eclipsing the timber value and making it nearly impossible for investment in these lands for timber production. In the past few years, as the value of timber has declined with the downturn in the housing market, real

estate investment advisors have begun to recommend investment in timberlands. The Realty Times advised in 2008,

If you're looking for counter-cyclical real estate investments -- those that defy the general downswing underway in the housing market -- you've heard us here at Realty Times talk about farmland, which is tied to global commodities demands and the biofuels boom. But there are other niches out there in land, such as timber property that you buy for its wood-product commodity value, but that you can later turn around and sell for its potential recreational or second home development value years down the road when those markets bounce back... [A]nother attraction for investors in timber tracts is that they may be acquirable at a commodity-based price -- that is, purely for its timber value -- but then resold years later at he calls its "B-H-U" value -- its "best and highest use" as recreational or second home development acreage.¹

In Humboldt County, 35,000 acres of TPZ have been broken down and sold into smaller parcels over the past decade, including the former holdings of Eel River Sawmills.² When combined with the TPZ lands that have been parcelized through the Joint Timber Management Plan (JTMP) process, along with the 12,000 acres of Barnum Timber Co. land currently in the process of being broken up into separate parcels, more than 50,000 acres of TPZ land will have been broken into small holdings primarily valued for residential purposes before the General Plan Update is adopted. This amounts to approximately 5% of the TPZ holdings in the County, and suggests an accelerating trend of such parcelization that is allowed to take place without any planning, environmental review, or public input.

The <3-Acre Conversion Exemption: What it is and What it is Not

Much has been said about the <3-acre conversion exemption process [14 Cal. Code Regs §1100 et al seq.], and it is important to clarify the role of this process relative to county land use decisions and assessment of impacts to the environment.

The California Dept. of Forestry and Fire Protection (CALFIRE) <3-acre conversion exemption does not involve any review, assessment, or mitigation of potentially significant environmental impacts related to residential use of Timber Production Zone (TPZ) parcels.

The <3-acre conversion exemption is merely a notice to CALFIRE; there is no approval, no discretionary review, and no conditions which must be met. CALFIRE merely verifies that the "*Notice of Timber Operations that are Exempt from Conversion and Timber Harvesting Plan Requirements*" has been filed. Since the process can be used once

¹ Kenneth R. Harney. Investor Report: Timber Report.
http://realtytimes.com/rtpages/20080321_investorreport.htm

² Effects of Timberland Parcelization and Regulatory Restriction on Annual Harvest Volumes, Humboldt County, California. An analysis Prepared for the North Coast Regional Land Trust by Jared Gerstein, Baldwin, Blomstrom, Wilkinson and Associates, Inc. Oct. 9, 2009.

every 5 years by any individual owner, it can be used to split large TPZ holdings into small units—as small as 40 acres—without any discretionary review once these lands are sold to individual owners.

Ginevra K. Chandler, Chief Legal Counsel for CALFIRE, made the following remarks regarding the <3 acre conversion exemption at the North Coast Environmental Law Conference in Eureka on May 7, 2009:

“Less than 3 acre conversions are an exemption from the requirements of the Forest Practice Act. So a less than 3 acre conversion exemption is essentially a notice, you file a notice of application with the Department, it is a ministerial permit. We basically grant it, as long as you’ve dotted all of the I’s and crossed the T’s, we grant it. We would personally like to be out of the entire <3 acre conversion business, because it is a workload issue for us **without any meaningful ability for us to be able to impact what actually happens on the land.** And I’ll give you a classic example, and it comes out of your own county: we’ve had people come to us and say, now wait a minute, the Forest Practice Act requires that you leave trees x amount of canopy up to 50 feet away from a live stream; well, under your own local rules, you don’t have to do that. So the minute you get a <3 acre conversion, you’re no longer governed by the Forest Practice Rules, and the basic stream protections may not be as stringent as what we have in the Forest Practice Act.” [emphasis added]

During the question and answer portion of the panel discussion, this issue was further elucidated when Senior County Planner Tom Hofweber asked:

Q: “Does CDF or CalFIRE apply CEQA to the <3 acre conversion?”

Chandler: “No, because they’re exempt; we don’t have any jurisdiction—once someone has met the criteria for a <3 acre conversion, we are out of the game.”

Q: “So essentially, that process is prescriptive that if it meets that criteria, it is exempt from your review, and you do nothing further to rule on it, or mitigate the impacts of it, in any way.”

Chandler: “That’s correct, and there are times where that is a real issue. I’ll give you a real life example in Mendocino County that came up recently: we had not one, but two THPs on an adjacent parcel that required as a mitigation for that THP the retention of a number of trees [to prevent] windthrow. Well the property sold, and those trees were in a <3 acre portion of the property, and the new landowner decided he wanted to cut the trees down and put up an orchard, and so he did. And we were not able to use those previous mitigations because the THP was at that point complete—we had no jurisdiction at that point to hold the landowner to those mitigation measures. So the <3 acre conversion is totally and completely a problem for us as a department, because we’re just out of the game. Once it’s determined that we have no jurisdiction because it’s no longer subject to the Forest Practice Rules, and the Act, it’s up to you as locals to take up the cudgel and analyze that as a project.”

County Lacks Enforceable Restrictions or Assessment of Environmental Impacts

State law calls for enforceable restrictions, with compatible uses defined by the local jurisdiction, in exchange for enrollment in the TPZ preferential taxation program. According to the California Timberland Productivity Act of 1982,

Land use under a TPZ will be restricted to growing and harvesting timber, and to compatible uses approved by the county (or city). In return, taxation of timberland under a TPZ will be based only on such restrictions in use. [Cal. Govt. Code § 51110 (a)]

Parcels zoned as timberland production shall be zoned so as to restrict their use to growing and harvesting timber and to compatible uses. The growing and harvesting of timber on those parcels shall be regulated solely pursuant to state statutes and regulations. [Cal. Govt. Code § 51115]

Current Humboldt County regulations lack any meaningful way for such restrictions to be enforced, since there is no process by which non-timber uses are found to be compatible uses. The County's process as it currently functions is in conflict with state law, which places the burden of regulation of TPZ properties on local jurisdictions:

Land zoned as timberland production under this chapter shall be enforceably restricted within the meaning of Section 3(j) of Article XIII of the Constitution and the restriction shall be enforced and administered by the city or county in a manner to accomplish the purposes of that section and this chapter. [Cal. Govt. Code § 51118]

This section makes clear that the land must be enforceably restricted (e.g. subject to a zoning consistency determination) in a manner that justifies the tax deferment. It could be argued that there is an unfair tax advantage for TPZ land if the allowed residential uses on TPZ lands are indistinguishable from other rural timbered properties.

The <3-acre conversion exemption is not intended to provide a substitute for County oversight and zoning. Section 1104.1(a)(1) of the California Forest Practice Rules clearly allows that the County has decision-making authority as to whether the conversion complies with County zoning, and specifically requires:

(D) incorporation of a signed and dated statement from the authorized designee of the County Board of Supervisors stating that the conversion is in conformance with all county regulatory requirements, including county public notice requirements. When counties do not have an authorized designee, the RPF shall certify that the county has been contacted and the conversion is in conformance with county regulatory requirements (this may be incorporated into the notice);

The Guide to the California Forest Practice Act and Related Laws (Duggan and Mueller, 2005) states:

If a timberland conversion exemption applies, the conversion generally is not regulated by CDF [California Department of Forestry and Fire Protection, now known as CALFIRE]. Instead, both the timber operations and proposed new uses are regulated primarily at the local government level.

...timber operations pursuant to any of the above exemptions still must comply with all applicable city or county general plans, zoning ordinances, and other implementing ordinances, including local coastal programs. This may include environmental review of timber operations exempt from CEQA.

The County is the lead agency in any determination of compliance with County zoning ordinances. However, the County's ability to effectively regulate pursuant to CEQA is dependent upon the County having discretionary review. Such review is simply not provided through the exemption process.

Current County regulations, in combination with the <3 acre conversion exemption process, also fail to assess environmental impacts of residential use of TPZ lands, because by current Humboldt County ordinance, construction of a residence merely requires a ministerial permit on TPZ parcels. There is no discretionary review, no public input, and no opportunity for agency review and assessment of significant impacts to water resources, biological resources, and air resources. As a result, unmitigated impacts to listed salmonids, Threatened & Impaired waterbodies, and other resources are likely to continue.

The 2004 Guiding Principles Direction to Increase Restrictions on Resource Land Subdivisions and Patent Parcel Development

In March 2004, the Board of Supervisors adopted Guiding Principles to direct the Planning Commission and staff in the General Plan Update. One of the adopted principles is:

"The plan must contain long-term agriculture and timber land protections such as increased restrictions on resource land subdivisions and patent parcel development."

These protections can be achieved in one of two ways: 1) requiring for discretionary review of housing on lands zoned TPZ and 2) placing limits on housing densities for lands planned Industrial Timber (IT) as proposed in the GPU Alternative A version of Forest Resources Policy FR-P8 and in Chapter 4.8 of the Draft Land Use Element.

According to the November 1, 2007 staff report by the Community Development Services Director, the Board of Supervisors received a report from County Counsel on October 23 indicating that current County TPZ regulations were inconsistent with State statutes, and referred the matter to the Planning Commission for a report back within 60 days, not to exceed 90 days. The Board directed specific consideration of the following issues:

- 1) Revisions to the inland and coastal TPZ zoning regulations to make residences conditionally permitted uses where necessary for the management of timberland.
- 2) Provide criteria for determining where residences would be considered necessary for the management of timberland, and give consideration to approval by conditional use permit or special permit where criteria are met.

- 3) Consider revisions to ensure consistency between County second unit and non-conforming use regulations and State TPZ statutes.
- 4) Consider two general plan land use designations, Industrial Timberland and Timberland, and address entitlements and consider inclusion of incentives like transfer of development rights to more suitable areas.

These issues remain unresolved, and the General Plan Update must include policies, standards, implementation measures, and ordinances to address and mitigate them where necessary.

The General Plan Update must adopt policies, standards, and implementation measures that will discourage the use of TPZ lands primarily for residential purposes.

Unless the General Plan Update includes changes in the current County planning policies and ordinances that govern the process by which timberlands are developed, such development will continue without the benefit of planning, environmental review, or public input. Residential use of TPZ zoned parcels must require conditional use permits that allow for discretionary review and environmental analysis of the impacts of road construction, stormwater runoff related to impermeable surfaces, encroachment into riparian and wetland buffer zones, and other impacts stemming from the residential use of lands zoned for Timber Production. For further discussion of the specific impacts related to residential use of timberlands, please see comments submitted by the California Department of Fish and Game on July 17, 2007 and January 28, 2008.

Please include these comments in the administrative record for the General Plan Update's Draft EIR.

Thank you for your work and for your careful consideration of these issues.

Sincerely,

A handwritten signature in black ink that reads "Jennifer Kalt". The signature is written in a cursive, flowing style.

Jennifer Kalt
Healthy Humboldt Coalition