

November 15, 2007

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**TO WHOM IT MAY CONCERN:**

Re: The Treatment of Residences as Compatible Uses Within TPZ Lands

Dear Sir or Madam:

We have been asked to comment on the Timberland Productivity Act (TPA) with respect to questions of whether the provision providing that a residence is a compatible use within Timberland Production Zone (TPZ) lands, and if so, whether it must be necessary for the management of the timberlands.

This letter analyzes the statutory framework governing the treatment of residences as compatible uses within TPZ lands and responds to the positions advocated by the Humboldt County planning staff and counsel to the effect that a residence is only a compatible use if necessary for management of the timberlands.

**The 1976 and 1982 legislative histories of relevant provisions of the Timberland Productivity Act ("TPA")**

The Act was initially passed in 1976 and then substantially amended in 1982. What does the legislative history tell us with respect to the interpretation of Government Code section 51104(h)(6) which provides that compatible uses includes: "A residence or other structure necessary for the management of lands zoned as timberland production."

The original TPA was adopted as AB 1258 in 1976. The legislative history of subsection 51100(h) is interesting. "Compatible use" was originally defined as "any use which does not significantly *detract* from the use of the property for, or in any way inhibit, growing and harvesting timber." (Emphasis added.) The definition was expanded somewhat by section 51110.5(e), which listed certain uses that are determined to be "compatible uses." This included management for watershed; open space; fish and wildlife conservation; uses integrally related to the growing, harvesting, and processing of forest products; and gas, electric, water and communication facilities.

The original version was then amended during the same legislative session, before final adoption, to read as follows:

“Compatible use” is any use which does not detract from the use of the property for, or inhibit, growing and harvesting timber, and shall include, but not be limited to, the following, unless in a specific instance such a use would be contrary to the proceeding definition of compatible use:

[Then follows the list of the specific items set forth in section 51110.5(e), referred to above, along with the following addition:]

(6) A single family dwelling, as defined in subdivision (d) of section 218 of the Revenue and Taxation Code, occupied by an owner thereof as his principal place of residence, and to which is extended the homeowners’ property tax exemption.

The single family residence provision was then eliminated during the next revision of the legislation in that session. No explanation is given. We surmise that the legislature did not intend to preclude residences, since the legislative file reveals that homeowners who owned properties within what would become TPZ lands were important advocates of the legislation. It seems to us that the fundamental definition of “compatible use” expressed in subparagraph (h) was considered broad enough to incorporate residences and, therefore, a more specific reference (such as those contained in subparagraphs 1 through 5) was not necessary. Keep in mind that the basic definition was that a “compatible use” is any use that does not “*significantly detract* from the use of the property for, or inhibit, growing and harvesting timber and shall include, but not be limited to the following ....” (Emphasis added.) That is broad enough to include residences.

The compatible use section remained unchanged until the 1982 amendments. At that time, a subparagraph (6) was again added to paragraph (h) to read as it presently does.

(6) A residence or other structure necessary for the management of lands zoned as timberland production.

No explanation is given in the legislative history concerning the addition of subparagraph (6) in 1982, which would suggest that it was not deemed to be a controversial amendment. The logical interpretation is that although a residence would seem to fall within the basic definition of “compatible use,” the legislature in 1982 wanted to make sure.

Moreover, it does not make any sense to qualify a residence by the phrase “for the management of land zoned as timberland production” for a number of reasons. Most

November 15, 2007

Page 3 of 8

importantly, given the history of the legislation and the role of homeowners within TPZ lands supporting the 1976 legislation—many of whom undoubtedly had nothing to do with the management of lands zoned for timberland production—it is most unlikely that the legislature was trying to place a restriction upon them. Moreover, even grammatically, it doesn't read the way the County construes it. The obvious intent was that residences were to be included and, along with them, "other structures necessary for the management of lands zoned as timberland production."

The County's past interpretation is consistent with the above. Government Code section 51111 authorizes the county to adopt a list and detailed description of additional compatible uses for parcels zoned as a timberland production. The County's ordinance allows for one dwelling unit or manufactured home on timberland in TPZs and allows for one dwelling unit per 20 acres of TPZ land. This would be consistent with statutory language which allows a residence without qualifying that it must be used or associated with the management of the timberland.

The bottom line is that Humboldt County staff's interpretation of the statutory provision is incorrect. The state statute treats a residence as a compatible use without qualification. The ability of the County, by ordinance, to qualify that determination is limited.

#### **Response to Humboldt County Planning Commission's Staff Report #10**

On November 1, 2007, Kirk A. Girard, Director of Community Development Services for Humboldt County, submitted Staff Report #10 to the Humboldt County Planning Commission. This report discusses the County's Timberland Production Zone ("TPZ") regulations and forest resource policies. In this report, the Planning Commission staff misreads the state statute governing TPZs and also misunderstands the context of the County's own regulations.

##### **A. Statutory Background**

As stated earlier, in 1976, the state passed Assembly Bill 1258. With this law, the legislature sought to maintain timberland by encouraging timberland investment and discouraging its unnecessary conversion to other uses. Cal. Gov't Code § 51102. "Timberland" means land "devoted to and used for growing and harvesting timber ... and compatible uses." *Id.* § 51104(f).

California Government Code section 51104(h) defines "compatible use" as

any use which does not significantly detract from the use of the property for, or inhibit, growing and harvesting timber, and shall include, but not be limited to, any of the following, unless

in a specific instance such a use would be contrary to the preceding definition of compatible use:

The statute then sets forth a list of compatible uses that must be allowed. Under the 1976 version of the act, there was no mention of residences. In 1982, the state legislature added subsection (h)(6), which adds residences to the list of compatible uses:

(6) A residence or other structure necessary for the management of land zoned as timberland production.

We discussed the legislative history of this provision above.

#### **B. Humboldt County's Zoning Regulations**

Section 51111 of the Timberland Productivity Act instructed local governments to "adopt a list and a detailed description of additional compatible uses for parcels zoned as timberland preserve."<sup>1</sup> Based on this provision of the state law, Humboldt County adopted such a list.

Section 314-7.4 of the Humboldt County Code sets forth the County's planning rules for timberland production. The code describes the principal uses of timberland production areas as "growing and harvesting of timber and accessory uses compatible thereto." The County Code then presents two further categories: (1) principal permitted uses compatible with timber production and (2) uses permitted with a use permit. The list of principal permitted uses parallels the 1976 version of Government Code section 51104(h), but adds housing to the list:

One-family dwelling or manufactured home and normal accessory uses and structures for owner or caretaker subject to the specific restriction of the following subsection, Special Restrictions Regarding Residences.

Similar provisions are contained in the TPZ section of the Coastal Zone Regulations (section 313-7, 3 TPZ (Timberland Production Zone)). Those regulations were adopted by the Board of Supervisors in the mid-1980's and were certified by the California Coastal Commission prior to their adoption by the Board.

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<sup>1</sup> Specifically, the section states that this list must be adopted on or before October 1, 1976. Cal. Code Govt § 51111. There is nothing in the statute about changing the list later. It is not clear that the County has the authority to change its list of compatible uses by either expanding them or limited them.

Thus, under current County law, residences qualify as compatible uses in timber production zones, and landowners in those areas are not required to obtain discretionary permits before building.

This addition to the County Code came in the fall of 1976. Minutes from the August and September meetings of the Humboldt County Planning Commission reveal the legislative intent behind this code section.<sup>2</sup> In those meetings, the commissioners, staff, and members of the public discussed proposed rules regarding residences in TPZs.

The County Planning Director (Stanley Mansfield) voiced his view that problems arise when residences are located on properties being logged. The Deputy County Counsel (John Cook) recommended that the County not add single family dwellings to the list. Members of the public protested any restrictions on home building, arguing that "single family dwellings should be a principal permitted use and should not be required to be necessary for timber operation." One landowner argued that banning single family homes would complicate matters by requiring landowners to carve out parcels of non-TPZ land for homes within larger TPZ areas.

After listening to the staff, the public comments, and each other, the Commissioners chose to add residences to the list of principal permitted uses. In fact, the Commissioners considered the specific question of whether residences would have to relate to land management. At the August meeting, "Commissioner Trichilo moved the Commission to adopt a Resolution recommending construction of only those single family dwellings necessary for timber operation in the Timberland Preserve Zone after approval of the Planning Director." (August 26, 1976 Planning Commission Minutes at 8.) That motion failed.

The subject of rules related to single family homes was again discussed at the September 2, 1976 Planning Commission meeting. Commissioner Trichilo continued to voice concern regarding single family dwellings, explaining that more control over residences was needed as people might abuse the TPZ as a tax shelter. (September 2, 1976 Planning Commission Minutes at 6-7.) The other commissioners did not share Commissioner Trichilo's concern. Commissioner Hill pointed out that because 70% of the privately owned land in the County would be classified as timberland, there would be enormous administrative problems to require review of every proposed single-family home.

In summary, the County Planning Commission recommended that residences be added to the list of compatible uses based on Government Code section 51111. The Commission carefully considered its decision and specifically chose not to require permits for single-family residences.

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<sup>2</sup> Minutes from those meetings are included in Report #10 as Attachment A.

### **C. The County's Continued Misinterpretation of State Law**

Report #10 demonstrates that the County not only misconstrues state law on this subject, but does not understand its own regulations.

#### **1. Report #10 Misreads section 51104(h)(6)**

First, with regards to the state law, the Report echoes comments we have seen from County staff members. The report misreads section (h)(6) as requiring any residences within TPZ lands to be "necessary for the management of land zoned as timberland production." A more sensible reading of the statute views that phrase as only modifying "other structure," not as modifying "residences."

Report #10 expands on this argument through examination of the phrase "or other structure." (Report #10 at 2.) The report asserts that "[t]he word 'other' in the clause ties 'structure' and 'residence' together." (*Id.*) This argument is unpersuasive and truthfully a bit confusing. If the state legislature did not intend to differentiate residences from other structures, there would no need for the word "residence" in the statute at all. A residence is, after all, a type of structure, which the County acknowledges. If the state legislature only wanted to permit buildings necessary for land management, it could have left out the word "residence" entirely. In that case, section (h)(6) would read:

(6) A structure necessary for the management of land zoned as timberland production.

This definition would have encompassed residences. The fact that the state legislature chose to single out "residences" from "other structures" indicates that the legislature viewed these two categories as different.

Report #10 also reads (h)(6) as only permitting one residence because the subsection begins with "A." As the Report itself notes, however, it is common to list uses in the singular in zoning ordinances. Additionally, (h)(6) is not the only subsection in this code section written in the singular, and there is little to indicate that the state legislature was specifically seeking to limit residences to one per parcel.

#### **2. Report #10 Misunderstands the Context of the County Regulations**

Beyond its misstatement of state law, Report #10 demonstrates that the County staff has misunderstood the context of the County regulations regarding residences in TPZs.

It appears that the County is unaware that section (h)(6) was not added until 1982. The report states that the Planning Commission and the Board of Supervisors did not propose or adopt any compatible uses beyond those set forth in the state statute. This is clearly

incorrect. The County's regulations for residences *were* an additional compatible use. At the time of the regulation's passage, the State did not require residences to be considered compatible uses.

*The difference in timing and statutory interpretation has profound implications.* The County adopted its rules regarding residences based on the authority of Government Code section 51111, which instructs the "Board" to "adopt a list and a detailed description of additional compatible uses for parcels zones as timberland preserve." This means that there is no need for the County code to conform to section 51104(h)(6). Section 51104(h) states specifically that compatible uses are not limited to the ones listed there. The County added its regulations regarding residences as an *additional* compatible use, not with the intention of promulgating regulations to carry out (h)(6), which did not yet exist.

For the foregoing reasons, there is no need to couch the County's regulations in terms of (h)(6). The County had the authority to list additional compatible uses, and it did so. The state legislature enabled counties to go beyond the state list. Therefore, even if one were to regard the County code as less stringent than the state regulation, this does not mean that the County regulation conflicts with the state statute.

The next question then becomes whether the County can change its list of compatible uses. Throughout the minutes of the August and September 1976 Planning Commission meetings, staff members warn the Commissioners that it might be difficult or impossible to change the list of compatible uses once adopted. The state statute instructs adoption of a list by October 1976, it does not indicate rules or processes for changing that list later.

#### **D. Requiring Permits for All Compatible Uses**

The County argues that, based on the general definition of "compatible use" under the state statute, the County must review all residences to ensure that they do "not significantly detract from the use of the property for, or inhibit, growing and harvesting timber." § 51104(h). If the County interprets this statute as requiring permits for residences, then it must also review all listed compatible uses before approval including, for example, watershed management activities, utility transmission lines, and log storage areas. It does not appear from the Report and proposed amendments to the regulations that the County intends to require permits for all such uses.

#### **E. Other County's Regulations**

Report #10 includes, as an attachment, a chart describing the TPZ regulations from other counties. The Report offers these regulations as examples of what other counties have done to regulate residences in TPZs. The Report also includes El Dorado County's regulations as offering some example language to adopt (Attachment E to Report #10). Interestingly, the section of El Dorado County's regulations entitled "Criteria for residential use," upon which

November 15, 2007

Page 8 of 8

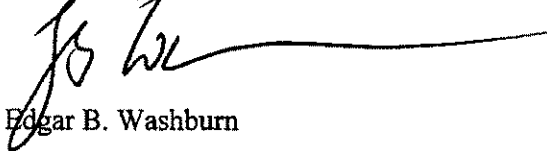
staff suggests the ordinance could rely, was adopted in 1981, a year before the Legislature adopted 51104(h)(6) clarifying that residences are *per se* compatible uses in TPZ lands. It is ironic that staff suggests that Humboldt County must come into compliance with its reading of state law, when the evidence it cites is itself out of compliance.

Upon examination, the TPZ regulations for ten different counties reveal that counties all treat residences differently. There is no one guiding principle. Some counties require discretionary permits for single-family homes (e.g. Del Norte, El Dorado, Shasta) and others do not (e.g. Butte, Siskiyou (with a Timber Management Plan), Tuolumne, Plumas, and Mendocino). Thus, the County's contention that permits are always necessary for residences in TPZs is not one widely held. Many counties do not require discretionary permits.

**F. Conclusion**

Report #10, prepared for the Humboldt County Planning Commission, demonstrates that County staff members misunderstand both state law regarding TPZs and the County regulations promulgated to carry out the state law. Humboldt's County regulations regarding residences do not currently violate state law, and it is questionable whether the County has the authority to alter its list of compatible uses.

Very truly yours,

A handwritten signature in black ink, appearing to read "Edgar B. Washburn", with a long horizontal line extending to the right.

Edgar B. Washburn