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Sierra County Planning Commission
P. O. Box 530
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Via email

Re: Public Hearing Sierra County Zone Amendment Text change- definition addition

Dear Commissioners:

Thank you for the opportunity to submit these comments regarding a zone amendment to add a definition of "high water line" to the County's stream setback ordinance. The existing stream setback ordinance codified in 1974 has been problematic since the adoption of the Sierra County General Plan in 1996. The ordinance is inconsistent with the General Plan and lacks a clear definition of high water line, the base from which to measure the setback. In practice planners have used the long standing definition for high water line found in the more recently adopted Subdivision Code. In that section high water line is defined as the 100-year intermediate flood line. In 2005 the Planning Department issued a document entitled "Internal Policies Guidebook" with a "Memorandum of Understanding" regarding stream setbacks. The document explained problems encountered when the 100-year intermediate flood line is used as the definition of "high water line." The document proposed a new definition of "high water line" which the Planning Department began employing in project review. The HSRA objected to the policy change without CEQA review and a public process for a zone amendment. Shortly thereafter, the policy was revoked and the Planning Commission began discussing and holding hearings to amend the stream setback ordinance. HSRA supports the amendment of the ordinance to make it more practicable and consistent with the General Plan. Over the past three or four years many hearings and meetings have been held. The HSRA has submitted testimony and documentation supporting establishment of a stream setback ordinance consistent with General Plan direction.

Before you today is a proposed zone amendment adding a definition of "high water line" different from the definition currently in use. The definition currently in use for high water line is the 100-year flood line. Until today the amendment of the definition of high water line was always considered as a part of the amendment of the stream setback ordinance. Now, it is being argued the addition of the proposed definition of high water line is a separate project

from the amendment of the stream setback ordinance and is exempt from CEQA under the general or common sense exemption. Now, the Planning Department is arguing the high water line was not interpreted as the 100-year flood line until 2006 when, according to staff the HSRA insisted on the use. It is being argued the proposed definition for high water line cobbled from an 1851 Supreme Court decision and U.S. Army Corps of Engineers description used as a definition for “ordinary high water mark” which is used to define jurisdictional boundaries was the definition of high water line intended in 1974. That being the case staff argues reinstatement of the interpretation will not reduce existing code restrictions; and, therefore the addition of the proposed definition to the zoning code will not have a significant impact on the environment; and, the zone amendment is exempt from CEQA under the “common sense” or “general rule”.

The zone amendment, however, must not be approved because it is not consistent with the General Plan. Additionally, the proposed definition for high water line will reduce the distance from streams where construction can occur creating the potential for significant impacts on the environment because it will foreseeably lead to persons building closer to the stream zone. Given the County is taking a discretionary action to change the law in a manner which could result in potentially significant environmental impacts, CEQA requires an initial study.

The addition of the proposed definition of “high water line” to the zoning code is a project under CEQA and cannot be found to be exempt from CEQA pursuant to CCR section 15061(b)(3). For the following reasons:

- The proposed definition will reduce the size of stream buffers currently required in the County. Reduction of stream buffers will impact the environment. The HSRA has introduced evidence demonstrating the importance of stream buffers to protection of a number of environmental values protecting human health and safety, water quality, soils, wildlife, fisheries and habitat. Stream setbacks provide buffers which maintain the chemical, physical and biological integrity of water resources, remove pollutants delivered from urban stormwater, reduce erosion and sediment entering the stream, stabilize stream banks, provide infiltration of stormwater runoff, maintain base flows, contribute organic matter that is a source of food and energy for aquatic ecosystems, provide tree canopy to shade streams and promote desirable aquatic organisms, provide riparian wildlife habitat and furnish scenic value and provide recreational opportunities.
- Addition of the definition is part of a larger project. The larger project is the attempt to modify the stream setback ordinance. Since 2006 until as recently as the public hearing held November 10, 2009, the modification of the stream setback ordinance and definition of “high water line” were treated together as one public hearing. Today there is a public hearing for a zone amendment to add a definition of high water line to the stream setback ordinance and amendment of the stream setback ordinance is a topic for a separate discussion. In the last public hearing addressing both the stream setback and the definition of high water line, the Commission discussed reducing the required

setbacks from the high water line. The combination of reducing the limit of the high water line and the setback from the high water line compounds the potential impacts amending the stream ordinance will have. Considering the two amendments in isolation from each other amounts to segmentation of the whole project.

- The County has not provided evidence showing the proposed amendment re-defining “high water line” or the proposed amendment in combination with contemplated amendments to the stream setback will not have a significant environmental impact.

The proposed definition for high water line is taken from a Supreme Court Case decided in 1851. The particular description is taken from a partially dissenting opinion of one of the Justices. In the description the Justice was not attempting to define “high water line”, but rather trying to determine the location of a boundary line between the State of Georgia and the State of Alabama defined as the western bank of the Chatahoochee River (*Howard v. Ingersoll*, 54 U.S. 381, page 54 U.S. 427). The description was not meant to be useful for the protection of water quality or environmental values, but to determine jurisdictional boundaries. Likewise, the definition is used by the U.S. Army Corps of Engineers to determine jurisdictional boundaries.

That other jurisdictions use ordinary high water mark as a point from which to measure setbacks does not constitute evidence that changing the definition of high water line from the 100-year flood line to what is commonly known as “ordinary high water mark” will not result in significant environmental impacts.

The staff report quotes the publication entitled “Riparian Setbacks- Technical information for Decision Makers” submitted by the HSRA to imply that because other jurisdictions use ordinary high water mark as a basis from which to measure stream setbacks, its use in Sierra County is equally appropriate. The argument misses the point. CEQA requires environmental review when a policy is changed reducing environmental protections. It is unargued that for the past three to four years, at least, the definition of “high water line” has been the 100-year floodline. The proposed amendment changes the definition and reduces the baseline standard from which setbacks are measured. Evidence in the record exists showing the 100-year floodline has been used as a definition for high water line for a considerably longer time as well.

Coincidentally, the quote from “Riparian Setbacks” cited by staff and referred to above is used out of context. The staff report states on page 38 of “Riparian Setbacks” the document “recommends minimum setback widths...as measured from the “ordinary high water mark.” The report was speaking of a model regulation where the recommended setback would be in the range of 25 to 300 feet as measured from the ordinary high water mark. Planning staff adopts the quote as corroboration of the use of the ordinary high water mark as opposed to the 100-year floodline as a basis from which to measure the setback, but this does not take into account the environmental values found in a stream with a measurable floodplain. The document, explains:

“As components of the riparian corridor, wetlands and floodplains are critical for the flood storage and pollutant removal functions of a riparian setback.

Minimum setback widths should be expanded to include these components...To ensure reasonableness of its riparian setback regulation, a community should focus protection on the 100-year floodplain.”

A setback of any set distance from the ordinary high water mark does not ensure wetlands and floodplains will be included. Evidence in the record supports the need to protect the 100-year floodplain from encroachment where practicable to protect environmental values.

The most recent staff report contends the proposed definition of “high water line” is the definition intended by the stream setback ordinance codified in 1974 and used until 2006. The contention is contradicted by evidence previously submitted in the record including the “Memorandum of Understanding” regarding Stream Setbacks and Minor Floodplain Construction dated September 14, 2005 found in the Planning/Building Department’s “Internal Policies Guidebook”; Sierra County Code Section 15.29.040 (b); and a letter dated April 13, 2006 by the HSRA objecting to the change in policy issued through the “Internal Policies Guidebook”.

The 1974 stream setback ordinance is not consistent with the General Plan adopted in 1996. The HSRA recognizes the need to amend the stream setback ordinance to accommodate unique circumstances found in community core areas. We have advocated for an ordinance consistent with the direction of the General Plan and supporting CEQA review since April 2006. Specific policies and implementation measures can be found in the Sierra County General Plan pages 13-37 through 13-38. Among other policies and implementation measures, the Sierra County General Plan directs the County to amend the stream setback ordinance to include special review procedures for Downieville and Sierraville. Introduction of a definition of high water line to make the stream setback ordinance consistent with an ordinance adopted in 1974 frustrates rather than promotes making the Zoning Code consistent with the General Plan. In sum, the revised definition will reduce stream buffers county-wide without environmental review and in violation of General Plan policies.

Specific responses to Staff Recommendation 1527

- Staff states HSRA fails to realize a “floodway” is separate and distinct from a “floodplain”. Staff states “a “floodway” is designated by FEMA and Sierra County has ZERO designated “floodways”. In regards to the Sierra County Floodplain Ordinance, the governing definition of floodway can be found in section 32.05.019:

“Floodway” means the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than one foot. Also referred to as “Regulatory Floodway.”

And, 32.05.003 defines:

“Base flood” means a flood which has a one percent chance of being equaled or exceeded in any one year (also called the “100 –year flood”. Base flood is the term used throughout this ordinance.”

It cannot be stated that Sierra County does not have floodways.

- Evidence that the climate is warming at seven times the global rate in the Downieville area can be found in a statement made by climate scientist Patrick Gonzalez in an article published in the Sierra Sun on May 31, 2008 entitled “Climate Change: Forests, Wildlife, Fire Danger All Expected to be Affected by Warming Sierra.” As a result of the warming experts predict more frequent and more intense flood events in the Sierra, a reason to strengthen not weaken stream setbacks.
- The studies submitted by HSRA demonstrate the importance of stream buffers; the reasons for their importance; and the varying factors necessary to consider when crafting a stream setback ordinance. Proper environmental review is necessary to determine how to apply modern scientific information to regulations governing construction near streams. The General Plan identifies FEMA mapped 100-year floodplains as special treatment areas and requires conditional use permits to build within the floodplain. For that reason using the 100-year flood line as the base from which to measure setbacks has been an efficient method of ensuring protection in the past.

Since 2006 the Planning Commission and Planning Department have been working on modification of the County’s stream setback ordinance. Part and parcel of the effort has always been the definition of “high water line”. As recently as last month the Planning Commission held a public hearing on the Stream Setback/High Water Line Definition. The HSRA has submitted testimony and evidence at several public hearings regarding the need for CEQA review when modifying the stream setback ordinance to be less restrictive. We request that the administrative proceedings of this process – including all testimony and transcripts from the public hearings held by the Planning Commission regarding the modification of the stream setback ordinance be -- included in the record for this public hearing entitled “Sierra County Zone Amendment Text change – definition addition.”

Sincerely,


Stevee Duber

Enclosures:

HSRA letter to Board of Supervisors dated 4/13/2006
Sierra County Planning/Building Department Internal Policies Guidebook
Sierra Sun article quoting climate scientist Patrick Gonzalez