



STAFF BRIEFING PAPER

Forest Practice Committee Agenda Item #3:

“Issues Related to Re-zoning and Conservation Easements”

Committee consideration of this item was prompted by correspondence from the owners of undeveloped property currently zoned as “Timberland Production” (“TP”) pursuant to the Timberland Productivity Act (TPA). Staff’s intent is to introduce this item for the Committee’s consideration and commence discussion of issues raised by the situation set forth below.

DEL NORTE COUNTY PURSUIT OF IMMEDIATE REZONE

The owners of a timbered parcel in Del Norte County have conveyed future development rights to their ownership through a conservation easement held by a local land conservancy. The Del Norte County Assessor has asserted that the conservation easement has restricted the growing and harvesting of timber to a point where the property is no longer in compliance with the TPA. It has accordingly notified the owners of its intention to seek immediate re-zone of the property from “TP” to the “Agriculture-Forestry” designation. This action would increase the property tax rate and is accompanied by the County’s intention to recoup the tax rate difference for the period of time in which the property has been under the easement.

The assessor contends that the easement’s deeds and covenants expressly prohibit commercial tree cutting. However, the easement’s “Exhibit Three: Prohibited Uses and Practices” specifies that commercial harvesting of timber is an allowable use provided that the grantor and grantee mutually agree upon a sustainable plan to do so. The only other constraint is that all revenue generated through commercial harvests must be returned to the property for ongoing maintenance (no profits to landowners). This latter constraint on profits may have been misunderstood to mean that harvesting must not generate taxable revenue. But, payment of timber yield taxes would be compelled regardless of where the revenue generated is spent.

Based upon the plain English reading of the easement, Board staff believes that commercial timber harvest is not prohibited. Regardless of the stated intentions of the easement holder and the property owners, the timber is still available for commercial management. The County Assessor’s position is that the property owners and easement holder have no intention of ever conducting a commercial harvest on the ownership. According to the Assessor, there are other such TP-zoned properties in the County in which commercial harvest is precluded by easement or some other mechanism. It is the County’s intention to seek immediate rezone of those properties as well.

QUESTIONS FOR CONSIDERATION

Does a conservation easement preclude commercial timber harvesting?

An easement can be written to completely preclude or significantly constrain timber harvesting. Where an easement constrains harvesting such that commercial operations are rendered economically infeasible, it may as well be viewed as a prohibition. As is the case with the Del Norte County example however, it seems more likely that the majority of easements are drafted to prevent or significantly limit future development opportunities. Timber management may be geared toward low intensity, unevenaged regeneration methods, but is not prohibited.

Indeed, to be eligible for State Forest Legacy Program funding pursuant to the Board's own regulations, timber harvesting may not be prohibited by conservation easement. "Working forest" conservation easements are consistently exhorted as a tool to constrain development potential while preserving timber management income opportunities. When coupled with a Non-industrial Timber Management Plan, a conservation easement could be a particularly effective approach to preserving intergenerational ownership.

Clearly, the Board's Forest Practice Rules would not function differently where timber harvesting was proposed on lands under a conservation easement. Like any other commercially managed timberlands under the purview of the State's Forest Practice Program, compliance with permitting and rule requirements would be expected.

Is it reasonable to presume by the lack of apparent timber harvest activity for some specified period time interval that the owner of a property has no intention of harvest in the future?

For a variety of reasons including log market and timber stand conditions, timber harvesting may be delayed or otherwise limited for significant periods of time. Absent some clear indication, as in a strict prohibition spelled out in deed restrictions, there is no reliable manner in which to discern owner intent with regard to timber harvest. Even in the event that harvesting had not occurred for decades, intergenerational land transfer or new ownership often results in obvious changes to management philosophy and harvest activity. So long as a prohibition on harvesting has not been irreversibly recorded through an easement or other legal instrument, a succeeding owner is free to alter the historic management regime.

In the Del Norte County example, both the conservancy and the property owners would have to agree on a plan for commercial timber harvest. But, this is not a prohibition on harvesting. It is reasonable to conclude that the conservancy and property owners could at some point in the future see some value in funding restoration or other activities on the property through commercial timber harvest.

By what means and authority may a County choose to immediately remove Timberland Production zoning from a property?

Pursuant to GC § 51133, a property owner who intends to convert their ownership to a non-timber use and is requesting an immediate rezoning from TP may receive a tentative approval from the local government. However, this tentative approval is conditioned upon Board approval of a Timberland Conversion Permit (TCP) before the rezoning action may become final. According to former Cal Fire Environmental Protection Program Manager, Allen Robertson however, local governments and landowners have occasionally argued that a TCP is not required where no change in land use is proposed. Indeed, according to Mr. Robertson there are examples of local governments taking this argument a step further to immediate rezoning without Board knowledge or consent. As in the Del Norte County example, where Board and Department action on a TCP application was not requested and actual physical conversion of the land is not occurring state oversight is limited significantly. As a point of fact, the Board and Department were not made aware of the Del Norte County matter until three months after the County's attempted action.

Where a TCP is not required, immediate rezoning may occur without Board of Forestry and Fire Protection involvement pursuant to GC § 51134. But, this Code Section appears to specify that the property owner must request this action as indicated in the excerpt from GC § 51134 below:

If an application for conversion is not required pursuant to Section 4621 of the Public Resources Code, the board or council may approve the immediate rezoning request only if by a four-fifths vote of the full board or council it makes written findings that all of the following exist: (Italics and underline added).

Del Norte County has initiated the attempted rezone without a request from the property owner. Board staff is not aware of the authority upon which the County is basing this action and the County's notification to the property owners did not cite such authority. The property owners have questioned this point and it seems logical to conclude that this element would be a key feature of any legal proceeding should that come to pass.

What are the implications of successful immediate rezoning actions upon properties under conservation easement?

Conservation easements for timberlands have become a popular instrument of conservation and preservation of working landscapes. Timber easements are recognized as a tool for climate change mitigation in state policy discussions and legislative proposals. As such, it seems doubtless that legal and legislative action to thwart prospective county government TP rezoning attempts would be swift. It is not known if other counties are considering immediate rezoning of TP properties, but some would likely follow suit in the event that Del Norte County is successful in their pursuits.

It is perhaps pointless to speculate further, suffice to say that the future role of conservation easements for TP zoned timberlands could be altered or diminished should the Del Norte County action hold up.

POSSIBLE NEXT STEPS

The Committee may wish to consider the following possible actions along with any others in response to this item:

- Drafting of correspondence to the Del Norte County Assessor and Board of Supervisors.
- Drafting of a guidance or informational document on the relationship of TP zoning and conservation easements.
- Request a presentation by the Del Norte County Assessor on the purpose and expectations for proposed TP rezoning actions.
- Continue tracking and reporting on Del Norte County's activities.

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