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March 12, 2009

Via E-Mail and U.S. Mail

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Re: Forest Conservation Initiative

Dear Devon:

Thank you for taking the time to speak with me regarding the County's schedule for adopting the General Plan Update and the County's position regarding the termination of the Forest Conservation Initiative ("FCI"), assuming it is not extended by the voters. On behalf of Save Our Forest and Ranchlands, I am writing to explain why the Elections Code, the text of the initiative, and its legislative history dictate that the FCI designations will remain in place after December 31, 2010, FCI's sunset date while the voter approval requirement will expire.

We strongly disagree with the County's position that the land use designations modified by FCI will automatically revert back to pre-FCI designations after the Initiative's sunset. The County's position has no legal support and, as a practical matter, would wreak havoc on land use planning for the County's forest lands. We understand that the County intends to adopt its GPU in late 2010, effective January 1, 2011, and that the GPU may change land use policy for the areas covered by FCI. However, in the event that this schedule is delayed, there would be a period of time

when, under the County's theory, the pre-FCI designations would be reinstated before the new GPU is adopted. This "lapse period" would open the floodgates to development applications because the pre-FCI designations authorize significantly more development than FCI's or the proposed GPU's land use designations. The reversion to pre-FCI land use designations would also have enormous environmental consequences as property owners seek to subdivide lands under the pre-FCI rules. This letter details why the County's position is without merit.

FCI's Sunset Clause Merely Removes the Voter Approval Requirement

FCI states that its purpose is to amend the San Diego County General Plan to impose a minimum parcel size of about 40 acres on all privately owned lands within the boundaries of the Cleveland National Forest and outside Country Towns "through December 31, 2010." Although the Initiative does not state what will happen after 2010, the Elections Code fills the gap. Specifically, Elections Code section 9125 states:

> No ordinance proposed by initiative petition and adopted either by the board of supervisors without submission to the voters or adopted by the voters shall be repealed or amended except by a vote of the people, unless provision is otherwise made in the original ordinance.

Absent a sunset clause, FCI's land use designations would continue eternally unless the voters enacted a change in the measure. The sunset clause simply "provides otherwise" for this default rule, specifying that the voter approval requirement will disappear in 2011.

Neither the sunset clause nor any other provision of FCI suggests that the previous land use designations will be reinstated in 2011. *See Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-01 (courts apply traditional rules of statutory construction when interpreting an initiative). Instead, FCI expressly states that the former designations, to the extent they are inconsistent with "National Forest and State Parks (23)" designation, are "repealed." In addition, the Initiative attaches nine community and subregional plan maps. The Initiative drafters placed text on each map stating that the land use designations are "repealed" to the extent they are inconsistent with "National Forest and State Parks (23)" designation. Accordingly, rather than providing that the land use designations would be reinstated in 2011, FCI expressly provides that they are repealed.

FCI's legislative history confirms that the measure did not intend to reinstate the previous land use designations in 2011. County Counsel's Impartial

Analysis states that the pre-FCI land use designations are "repealed", and does not suggest that this repeal would somehow be nullified after the Initiative sunsets. Even the opponents of the Initiative did not believe the land use designations would revert back in 2011. The "con" ballot argument states that FCI "is a dangerous precedent – *wiping out* careful planning guidelines." (Emphasis added.) The voters who thought they were "wiping out" planning guidelines could not possibly have imagined that these planning guidelines would be reinstated. *See Robert L.*, 30 Cal.4th at 901 (the court's "task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent").

Furthermore, the County's theory that the pre-FCI land use designations will be reinstated after FCI's sunset undermines the long-term purpose of land use planning. General plans do not terminate when they reach their scheduled horizon year. *See* Gov't Code § 65300 *et seq.* Indeed, the absence of a general plan would interfere with ongoing projects and vested rights. *See Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800. Like a general plan with a horizon year of 2010, FCI's land use designations will simply continue until such time, if ever, that the County adopts new designations. The County's theory that the land use designations will revert back to pre-FCI designations creates legal uncertainty that is contradictory to sound planning principles.

GPA 95-01 Does Not Support the County's Interpretation of FCI

When we last spoke, you indicated that GPA 95-01, adopted on January 11, 1995, established the County's position that FCI's land use designations will revert back to pre-FCI designations in 2011. GPA 95-01 does no such thing. GPA 95-01 was a "clean-up" amendment intended to eliminate purported inconsistencies between the General Plan and FCI. The resolution adopting GPA 95-01 does not even address the issue of what happens after FCI expires. Indeed, the resolution could not have decided that the land use designations would revert back to pre-FCI designations because such action would have been an amendment to FCI requiring a vote of the people. *See* Elec. Code § 9125.

The Board of Supervisors adopted the text amendments in GPA 95-01 with an expiration date of December 31, 2010, so that they would ostensibly be in effect only as long as FCI. This was a mistake, but one that is easily fixed. The staff report accompanying GPA 95-01 provides no analysis to support its conclusion that upon expiration of FCI the pre-FCI land use designations will be in effect. To the extent that the County believes that GPA 95-01's "clean-up" amendments are necessary for internal General Plan consistency, it can easily readopt these amendments in a manner that eliminates the expiration date.

Summary

The County's position on FCI's expiration is legally incorrect and creates a land use planning nightmare for County planners and property owners. Moreover, any decision to construe the Initiative as mandating a reversion back to pre-FCI land use designations would have tremendous physical impacts on the environment that would require the preparation of an EIR under CEQA.

The County should consider issuing a formal statement modifying its incorrect position regarding the implications of FCI's sunset clause. Otherwise, the County will have promulgated misinformation that has been and will be relied upon by local planning groups and property owners alike. The County has a duty to explain that, if FCI is not extended, its voter approval requirement will disappear but its land use designations will remain in place until such time, if ever, the County amends them. Such a statement is necessary to correct the County's legal interpretation, avoid widespread confusion, and to avoid the planning calamity that will transpire if the GPU is delayed beyond 2011.

Please contact me if you have any questions regarding the contents of this letter.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Catherine C. Engberg

cc: Duncan McFetridge

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