



Third District Holds Plumas County General Plan Update EIR Complies With CEQA And Update's Compatible Use Determinations Do Not Violate Timberland Act

By [Arthur F. Coon](#) on November 27, 2018

In an opinion filed October 19, and later ordered published on November 15, 2018, the Third District Court of Appeal affirmed a judgment upholding Plumas County's First comprehensive update of its 1984 general plan, and rejecting arguments that the update violated the California Timberland Productivity Act of 1982 (the "Timberland Act" or "Act") and that the related EIR violated CEQA. *High Sierra Rural Alliance v. County of Plumas* (2018) ____ Cal.App.5th ____.

Relevant Context: County's Geography And Population

While at 1.67 million acres Plumas County is geographically large, its population barely tops 20,000 residents, actually declined by 817 residents from 2000 – 2010, and is projected by Caltrans to increase by only 0.7 percent annually through 2050. The City of Portola, with a population of 2,069 people, is County's only incorporated city. Public lands managed by the U.S. Forest Service comprise 65 percent of the County, with another 6 percent owned and managed by State and County agencies, and 29 percent privately owned; of the privately owned lands, 33.4 percent are located within the County's Planning Areas.

Accordingly, Plumas County has little direct control through its land use regulations over much of the property within its jurisdiction. Development in County is further constrained by its rivers, forests and mountainous terrain, as well as by County's policies precluding loss of wetlands and other sensitive habitats.

General Plan Update And EIR

County's general plan update process began in 2005, and is intended to address existing and anticipated development through a 2035 planning year horizon. The update requires future residential, commercial and industrial development to be in or adjacent to existing "Planning Areas," which are defined as urban growth boundaries for each Town, Community, Rural Place, or Master Planned Community in the County. The FEIR explained the update's and DEIR's assumption that future growth will be focused within Planning Areas was based on historic development patterns, i.e., over 90% of total issued building permits were for those areas; and between 2000 and 2010 only 88 parcels were created, and only 55 (out of 1,656 total) residential building permits were issued, outside those areas.

The County prepared a "first-tier" programmatic EIR for its general plan update, which was developed after extensive public input and contained policies and objectives directing new development to the Planning Areas. The EIR and update assumed (based on both historical trends and proposed restrictive new policies) that most future growth would be focused there, but also recognized that a very modest amount of new development would occur outside the Planning Areas. After County certified the FEIR (which included a supplemental staff report deemed to be an addendum), and the Board adopted the update, plaintiff and appellant High Sierra filed an action challenging both. The trial court rejected all of High Sierra's arguments, entered judgment dismissing the petition, and High Sierra appealed.

The Court Of Appeal's Decision On General Plan Update's Consistency With Timberland Act

The Court of Appeal rejected Appellant's arguments challenging County's general plan update under the Timberland Act, and also rejected Appellant's CEQA arguments that the EIR failed to disclose foreseeable "rural sprawl" and that County failed to recirculate the EIR.

The Court of Appeal's holding that the update did not conflict with the Timberland Act turned primarily on its interpretation of Government Code § 51104 and its review of the administrative record. Appellant essentially argued County's general plan update illegally determined all residences must be treated as "compatible uses" on timberland production zoned lands, whereas § 51104 requires County to make a case-by-case determination of compatibility based on whether a particular residence is (a) "necessary for" management of such lands, and (b) not otherwise incompatible with underlying timber operations. (As legal background, the Timberland Act provides that growing and harvesting timber on timberland production zoned parcels is regulated solely through mandatory restrictions imposed by state statutes and regulations, although cities and counties are required and empowered to enforce such zoning restrictions.) Statutorily-enumerated compatible uses include watershed, habitat, logging-related uses, utility transmission facilities, grazing, and a "residence or other structure necessary for the management of land zoned as timberland production." (§ 51104(h)(1)-(6).)

The record showed that County was well aware of this applicable State law, and that it had previously applied it in practice by requiring findings of necessity and compatibility for approval of structures on timberlands consistent with the Act; even though County had deleted some language parroting that of the Act as "redundant to State law," it was unnecessary for County to include it for it to apply, and nothing in the update changed County's practice or actually conflicted with State law. High Sierra's skepticism that County would actually enforce the Timberland Act's requirements did not present a ripe justiciable claim because it had neither shown the policies it challenged conflicted with State law nor presented any proper argument or record addressing County's *implementation* of its general plan.

High Sierra's challenge to County's "ministerial" process for determining residences or structures to be necessary and compatible uses on timberland production zoned lands, based on its argument that the exercise of discretionary authority was necessary to make the Act's required findings, also failed. Agreeing with the County, the Court held that "the finding that a residence or structure is necessary for the management of a timberland production zoned parcel is not an exercise of discretion as used in the CEQA context." Rather, the "consideration of compatibility under the Timberland Act is not constrained, or even informed, by CEQA."

In reaching these conclusions, the Court noted that State law (Gov. Code, § 51119) "expressly exempts from CEQA review any decision of a County board of supervisors to place parcels into timberland production zones" and that because such a decision "necessarily involves the State law's authorization of residences and structures necessary for the management of these parcels, the findings of compatibility are governed solely by the Timberland Act." Per the Court: "The statutory guidance given by the Timberland Act for determining whether a residence or structure is necessary for the management of a timberland production zone parcel is the reason why the discretionary review paradigm of CEQA analysis does not apply." Under CEQA's "functional" test for distinguishing between ministerial and discretionary approvals, a permit is ministerial where the applicant can legally compel its issuance without change, and the agency lacks the power (i.e., discretion) to lawfully deny or condition the permit to mitigate environmental damage in any significant way. Per the Court, once County has made the Timberland Act's required determination and found a residence or structure to be necessary to the management of a timberland zoned parcel, the "Act affords the County no discretion to stop or request modification of the proposed residence or structure in order to mitigate environmental impacts."

The Court thus "reject[ed] High Sierra's contention the County is required to engage in discretionary review under CEQA for proposed structures that are compatible with timberland production zoned parcels as defined by Government Code section 51104, subdivision (h)." (In a footnote, the Court indicated that due to the limited nature of High Sierra's essentially facial challenge to the general plan update, it was not called upon to address, inter alia, the contention of various amici regarding the manner in which a residence or structure is found to be a compatible use under State law, or the criteria that might inform a finding of necessity.)

The Court Of Appeal's Decision On The FEIR's And County's Compliance With CEQA

Turning to the CEQA claims challenging the legal sufficiency of the EIR's analysis of expected development outside County's Planning Areas, the Court held High Sierra's claims that the general plan update encouraged enormous amounts of analyzed development and subdivision on resource lands in those outlying areas were not supported by the record evidence of *reasonably foreseeable* development.

The Court applied some basic CEQA principles relevant to its analysis. An EIR is an informational document, the purpose of which is to provide information on a project's *likely* environmental effects, as well as mitigation and alternatives that could minimize such effects. The environmental effects of unapproved future expansion or other action must be analyzed only if it is a "*reasonably foreseeable* consequence of the initial project" "that will be significant in that it will *likely* change" the project's scope, nature, or environmental effects, whereas "detailed environmental analysis of every precise use that may conceivably occur is not necessary at this stage." (Quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396, 398, emph. added.) Judicial review of an EIR's sufficiency as an informational document is deferential; it does not encompass the correctness of its conclusions (but only its sufficiency as an informational document), and does not allow courts to substitute their judgment for that of the lead agency or to determine "an opposite conclusion would have been equally or more reasonable."

Further, “an EIR is not required to engage in speculation in order to analyze a ‘worst case scenario.’” (Quoting *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 373.) Thus, the Court held that “[a]lthough High Sierra imagines a worst case scenario for rural sprawl in Plumas County, it does not demonstrate the County erred in relying on its experience and data showing minimal growth outside the planning areas would occur in the reasonably foreseeable future.” To the contrary, substantial record evidence supported County’s population growth and development estimates, based on which the EIR calculated “full build-out” under the update would take 300 years – a time period impracticable to study and far beyond the scope of reasonably foreseeable effects within the 2035 Planning Horizon analyzed. Further, the update’s proposed restrictive policies requiring fire protection infrastructure for new development would predictably limit residential development in remote areas, rather than encouraging unlimited and unmitigated development in such areas, as feared by High Sierra – whose arguments “all rest on an unsupported assumption of rampant future growth in a County where population is expected to begin shrinking during the project’s time period.” Because the “EIR is required to study only reasonably foreseeable consequences of the general plan update” and “CEQA does not require an agency to assume an unlikely worst-case scenario,” the evidence showing “the reasonably foreseeable lack of demand and development” within the “first tier programmatic EIR[s]” relevant time period supported its sufficiency as an informational document under CEQA.

Finally, the Court rejected High Sierra’s related arguments that County violated CEQA by failing to recirculate the EIR due to “significant new information” after public comment closed. These arguments were premised on High Sierra’s claims that (1) the Draft EIR represented to the public that future development would occur *solely* within the Planning Areas, and (2) the draft update and EIR failed to disclose building intensity standards.

Rejecting these claims, the Court held the inclusion of certain maps of areas outside the Planning Areas not included until the Final EIR did not constitute significant new information requiring recirculation since throughout the update/EIR process everyone had access to other maps with land use designations for the entire County, and the scope of the project did not change in a manner requiring recirculation between the Draft and Final EIRs. The Draft EIR disclosed the nature and scope of expected development both inside and outside the Planning Areas with specific numbers of dwelling units and population growth.

Moreover, *new* building intensity restrictions imposed by the County after the close of the public hearing on the general plan update (e.g., 35-foot height restriction, one-acre maximum coverage limitation for rural residential categories) did not lessen previously existing and disclosed restrictions, did not change the scope of the project, and did not render the DEIR “so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comments were precluded.” The Court noted “[r]ecirculation is not required where the new information added to the EIR merely clarifies or amplifies or makes insignificant modifications to an adequate EIR” (quoting Guidelines, § 15088.5(b)), and held: “The draft EIR did not fail as an informational document and the County’s final EIR does not need to be recirculated. ... [T]he addition of the maximum sizes of structures did not constitute significant new information for this first-tier environmental review.”

CEQA Conclusions And Takeaways

An EIR need only analyze a project’s reasonably foreseeable effects, and need not engage in analysis of a “worst case scenario” that is not reasonably foreseeable in order to be legally adequate. Here, substantial evidence supported the general plan update EIR’s population and development growth assumptions, and it was unnecessary for that “first-tier,” programmatic document to analyze Appellant High Sierra’s speculative and unlikely “rural sprawl” scenario.



Recirculation of an EIR for further public review after circulation of the draft EIR is the exception, not the rule; it is unwarranted when significant new information does not change the scope of the project so as to reveal a new unmitigated significant impact or show that meaningful public review and comment was precluded.

A County's determination whether a residential or other structure is a necessary and compatible use under the Timberland Act is a ministerial process governed solely by State law pursuant to that Act, and is thus not subject to CEQA.

Questions? Please contact [Arthur F. Coon](#) of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written Miller & Starr, California Real Estate 4th, a 12-volume treatise on California real estate law. "The Book" is the most widely used and judicially recognized real estate treatise in California and is cited by practicing attorneys and courts throughout the state. The firm has expertise in all real property matters, including full-service litigation and dispute resolution services, transactions, acquisitions, dispositions, leasing, financing, common interest development, construction, management, eminent domain and inverse condemnation, title insurance, environmental law and land use. For more information, visit www.mslegal.com.

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