

To: The Calaveras County Planning Commission  
From: Muriel Zeller, 2640 Stagecoach Drive, Valley Springs, CA 95252  
Regarding: The Calaveras County Draft Oak Woodlands Ordinance  
Date: January 29, 2024

*Via Email*

Honorable Members of the Planning Commission:

Thank you for the opportunity to comment on the Calaveras County draft Oak Woodlands Ordinance. I know it has not yet been put on your agenda, but I thought I would give you some things to consider in anticipation. I am referencing the draft copy that was discussed at the Board of Supervisors meeting on November 7, 2023. There seems to be some confusion, as the Hardwood Advisory Committee (HAC) was discussing a draft at their January 11 meeting that had a September date.

The draft reviewed by the Board of Supervisors included a donation to the state's California Oak Woodland Conservation Fund as one of the possible mitigation measures. The HAC's draft did not include that option. (I will present my comments in sections with headings that are direct quotations in bold lettering from the draft ordinance. Emphasis added with the use of underlining is mine.)

**Purpose 1: Mitigate any significant direct and cumulative impacts to oak woodlands in conjunction with discretionary project development**

In order to address the first purpose of the draft oak ordinance, it would be helpful to map the open space in the county and identify priority lands for conservation as required by Government Code Section 65565(a)(1)(K). As the draft ordinance proclaims in its Introduction, "the county must do its part to protect the species" for the litany of reasons outlined therein. It would only make sense then that oak woodlands would be designated as priority lands for conservation. This would also serve to help identify oak woodlands (owned by willing sellers) for the purpose of mitigation with perpetual conservation easements or even mitigation banking.

The introduction eloquently states the reasons for identifying oak woodlands as priority lands, "California's oak woodlands perform numerous important ecosystem services including scenic beauty, erosion prevention, improving water quality and infiltration, regulating water flow in watersheds, providing habitat for bird and animal species, increasing biodiversity, carbon

sequestration, as well as improving soil health. Oaks are healthy for rangelands for many of these same reasons, plus they provide shade for grazing animals and increase soil water storage for a longer 'green' period."

**Purpose 2: Address pre-development removal of oaks in conjunction with discretionary projects.**

**17.101.010 General Plan Policies Regarding Oak Woodlands**

**Mitigation: The purpose of Implementation measure COS-4D is to... address pre-development removal of oaks**

The stated purpose of the draft oak ordinance and the General Plan is to address pre-development removal of oaks, but the section of the draft ordinance that I assume is supposed to do that, namely, 17.101.040 Approval Required Prior to Removal, does not define what pre-development removal of oaks means, give a timeframe in which that removal would be considered subject to fines and penalties, discuss specific penalties, establish a process for determining if pre-mature removal of oaks has occurred, or designate an enforcement entity. Director Elliott did make a sad joke that the county could always use Google Earth to see if oaks had been removed (after the fact), because even he knows the ordinance really does nothing to stop pre-development removal beyond some vague reference to "assessment of fines."

Tuolumne County, for example, adopted Chapter 9.24 Premature Removal of Native Oak Trees (attached for your convenience), in which they do all of those things and more. Tuolumne's website explains, "On April 1, 2008, the Board of Supervisors adopted Ordinance 2903 which added chapter 9.24 to the Tuolumne County Ordinance Code. Chapter 9.24 is intended to discourage the premature removal of oak trees by establishing procedures and penalties for such removal.

"Premature removal means:

- Removal of native oak trees resulting in a 10% or greater average decrease in native oak canopy cover within an oak woodland
- Removal of any old growth oak tree
- Removal of any valley oak tree measuring five inches or greater in diameter at breast height (DBH) from a site within the five years preceding the submission of an application for a discretionary entitlement from Tuolumne County for a land development project.

"The premature removal of native oak trees is subject to penalties, including withholding approval of an application for a discretionary entitlement on the site for a period of up to five years, and monetary penalties as high as three

times the in-lieu fee established by the Board of Supervisors." I really think it should be at least ten years.

In addition, it should be made clear that the owner of any agricultural land that is exempt from the oak ordinance is not exempt from the penalties for pre-development removal under the guise of agricultural activity.

**Purpose 4: Leave oak woodlands connected, when possible, to retain wildlife corridors and avoid habitat fragmentation**

Purpose 4 of the draft oak ordinance is laudable, but again mapping of priority lands for conservation, oak woodlands, and existing conservation easements would be very helpful in retaining wildlife corridors and avoiding habitat fragmentation. This is just one instance in which a countywide HCP/NCCP would be invaluable. (Please see comments under 17.101.030 A below.)

Purpose 4 also embodies the type of project that the Wildlife Conservation Board (WCB), which administers the Oak Woodlands Conservation Fund, would consider for a grant from one of their other programs. For example, with their multiple programs they fund "Projects to improve open-space corridors and trail linkages" and "Projects for the acquisition, development, rehabilitation, restoration, protection, and expansion of wildlife corridors and open space to improve connectivity and reduce barriers between habitat areas (Wildlife Conservation Board General Grant Guidelines January 2023, pages 5-6)." Perhaps the county should apply for a grant to implement Purpose 4.

**Purpose 5: Protect oak woodland working landscapes that provide a variety of ecosystem goods and services**

I am in complete agreement with Purpose 5, but beyond mitigation for the conversion of oak woodlands, I don't see anything in the draft ordinance that actually protects or improves working landscapes that are home to oak woodlands other than handing out booklets and encouraging use of the Oak Woodland Voluntary Management Guidelines.

In implementing Purpose 5, the county has the opportunity, for example, to also sequester carbon on working landscapes. According to PRC § 21083.4, the county may develop its own mitigation measures and, thereby, actually protect and improve oak woodland working landscapes by creating, for example, the Calaveras County Oak Woodlands Conservation Fund to which developers may donate as mitigation. (See below under 17.101.060 Oak Woodland Mitigation.)

**17.101.030 A: Exemptions from the requirements of the oak ordinance include: "Projects undertaken pursuant to an approved Natural Community Conservation Plan or approved subarea plan within an approved Natural Community Conservation Plan that includes oaks as a covered species or that conserves oak habitat through natural community conservation preserve designation and implementation and mitigation measures that are consistent with Public Resources Code § 21083."**

It is true that a Natural Communities Conservation Plan (NCCP) would provide an exemption from the Oak Woodlands Conservation Act, but we don't have an NCCP, and, given our past failures, this seems an unlikely exemption, but let's be optimistic. Apply for a grant to develop an NCCP, and, voilà, no mitigation. A Natural Community Conservation Planning Local Assistance and 30x30 Grant from Fish & Wildlife would be perfect. I have previously provided information about this grant to the Planning Director. The WCB also funds projects to implement the goals and objectives of NCCPs and HCPs (Please see the California Grants Portal for additional funding opportunities.)

A federal Habitat Conservation Plan (HCP) and a state NCCP are often done in conjunction with one another. A countywide HCP/NCCP would streamline California Environmental Quality Act (CEQA) review for discretionary development projects while protecting vulnerable species habitat. It is an opportunity to benefit the economy and the natural environment of Calaveras County and has the added benefit of fulfilling another important implementation measure of the current General Plan, COS-4C: Habitat Conservation Plan for Amphibians.

Of course, COS-4C is limited in that it intends to "pursue a countywide habitat conservation plan to allow incidental take of California tiger salamander and California red-legged frog habitat." Yet, it also says, "Consider expanding the plan to include special status species occupying similar habitats." If the goal is to attract sustainable growth and development to Calaveras County, the Board of Supervisors should make a countywide HCP/NCCP a priority.

**17.101.050 B: The Oak Woodlands Evaluation Plan shall be prepared by a qualified professional. Exceptions to this may be considered by the Planning Director based on limited scale of the project or other factors.**

In the General Plan, under COS-4D Oak Woodlands, it says, "In the interim, require development that is subject to a discretionary entitlement and subject to CEQA review to enlist the services of a qualified professional (meaning a qualified biologist, botanist, arborist, or Registered Professional Forester) to survey the property in question for oak woodlands and to recommend options for avoidance and/or mitigation consistent with the provisions of RPC 21083.4 if potentially significant impacts to oak woodlands are identified."

The "interim" in this case would be the time between when the General Plan was adopted in November 2019 and such time in the future as an oak ordinance may be adopted. It seems odd that the General Plan would not allow the Planning Director the discretion to dispense with the services of a qualified professional for the purpose of creating an Oak Woodlands Evaluation Plan, but the proposed draft oak ordinance would allow it based upon the unspecified "scale of the project" or other undefined "factors." The General Plan does not currently allow the Planning Director to make such a decision and certainly not based on such vague criteria. Why would the oak ordinance do so?

**17.101.060 Oak Woodland Mitigation 2: The mitigation of oak woodlands shall take place within Calaveras County.**

**17.101.060 C: Contribute funds to the Oak Woodlands Conservation Fund, as established under Fish and Game Code §1363 for the purpose of purchasing oak woodlands conservation easements as described in by (sic) Public Resources Code § 21083.4. (An applicant that chooses this option may not receive a grant from the Oak Woodlands Conservation Fund as part of project mitigation.)**

If a developer opts to donate to the state's Oak Woodland Conservation Fund as mitigation for his/her project, the money will not be used in Calaveras County without the Board of Supervisors creating or designating an entity whose purpose is oak conservation or without the development of one or more specific projects to conserve and protect oak woodlands through the use of conservation easements. In addition, in order to receive money from the state fund, the entity or project would have to apply for a grant, and the success of the grant application is not guaranteed. Without taking such action as described and then being awarded a grant, the two above statements from the county's draft oak ordinance under 17.101.060 cannot be reconciled. They are contradictory, which makes the ordinance internally inconsistent.

The WCB, which, as I said, administers the Conservation Fund, does not, in general, provide funding for mitigation properties. As stated on their website, "in some cases WCB may partner on projects that include a mitigation component, so long as the mitigation component can be clearly delineated and separated from WCB funding. For example, if mitigation funds are available to acquire 100 acres of habitat, and the property contains an additional 50 acres of prime habitat that can be acquired using additional funds, WCB may provide funding for the additional 50 acres," which, incidentally, the 50 acres could be deposited in a mitigation bank.

The WCB website states that a donation as mitigation "requires narrative appraisals completed by certified State of California Appraisers for all acquisitions. In some cases where federal matching funds are included, the appraisal should be completed according to Uniform Appraisal Standards for Federal Land Acquisition. Project proponents should contact the assigned WCB project manager to determine appraisal requirements." The narrative appraisal would, I assume, be paid for by the developer. (As an example, I have attached the Sonoma County Guidelines and Standards for Preparation of Narrative Appraisal Reports, which are, apparently, quite extensive.)

According to a representative of the Oak Woodland Conservation Fund with whom I spoke recently, it will be Calaveras County officials who will ultimately approve the amount of the donation that will fulfill the mitigation requirements. Of course, as we know, if this mitigation option remains in the oak ordinance, the requirement for mitigation to take place in Calaveras County will have to be removed from the ordinance.

Another option to keep funds in the county is mitigation banking, but it isn't even mentioned in the draft ordinance. Why? As the California Council of Land Trusts explains, "Mitigation banks are simply formed through the acquisition and protection of land by purchasing land or a conservation easement in excess of what is currently required by any specific development project. The excess land or conservation easement that is available for use to mitigate for other projects is the 'mitigation bank.'" (Additional mitigation option information is attached.)

Serendipitously, at the January 22 Local Agency Formation Commission meeting, The Municipal Service Review (MSR) and Sphere of Influence (SOI) for the Calaveras Resource Conservation District (RCD) was adopted to include my comments (attached), and a finding regarding coordination with local agencies was added. A partnership, for example, among the Agriculture Commissioner, the RCD, the Mother Lode Land Trust, and the Cattleman's Association would make a great beginning for the proposed *Calaveras County Oak Woodlands Conservation Fund*. Think of the possibilities when

public, private, quasi-private, and non-profit entities work together for the benefit of Calaveras County. This is, ultimately, home to us all.

**17.101.060 Oak Woodland Mitigation: B. In-lieu fee payment made to an accredited land trust or qualified land conservation organization.**

**17.101.090 Definitions: H. In-lieu Fee: Cash payments made as a result of a land appraisal to an accredited land trust or other qualified land conservation organization for mitigation for oak woodland loss.**

Again, according to the California Council of Land Trusts, "Local governments are strongly encouraged to adopt any in-lieu fee by resolution rather than establishing the fee on an ad-hoc basis. Generally applicable fees provide greater certainty to all parties and are likely to receive more deferential judicial scrutiny in the event of a legal challenge." Here is a link to their booklet on a model mitigation ordinance for farmland, which discusses in-lieufees:<https://farmlandinfo.org/wpcontent/uploads/sites/2/2019/09/conserving-californias-harvest-web-version-6.26.14.pdf>.

One way to address an in-lieu fee resolution is to complete a simple nexus study based upon a survey of prices for oak woodlands in Calaveras County as compared to oak mitigation fees elsewhere in California. If the Calaveras fee ends up being well within the statewide distribution of fees, it is unlikely to be successfully challenged in court. To conform to California's Mitigation Fee Act (CA Gov. Code 66000 et seq), the nexus study must be reviewed at least every five years.

(I have learned that there is some short-term uncertainty regarding in-lieu fees pending the decision in Scheetz v. County of El Dorado, which is currently before the U.S. Supreme Court. That uncertainty will be resolved when that case is decided this year. It may be prudent to do the nexus study and set the fee after that case is decided.)

Please remember that although a land trust may hold and administer the conservation easement purchased with in-lieu fees, it is the county who determines the amount of the in-lieu fee. Responsible land trusts will not accept in-lieu fees based on a mere "land appraisal" that is not defensible. There will need to be provisions in the in-lieu agreement so that it keeps up with changes in the real estate market. As the California Council of Land Trusts points out, in addition to paying for the development rights, the land trust will need funds for all the other costs including:

- Identifying and negotiating for the mitigation land or easement ( the county has not mapped oak woodlands or identified priority lands for conservation)
- Surveys, appraisals, title research
- Legal review
- Preparation of transaction documents
- Other due diligence including environmental site assessment and mineral remoteness evaluation
- Preparation of baseline condition reports for the mitigation site
- Escrow costs and title insurance
- Staff time
- Funding for long term stewardship and monitoring of the mitigation site.

All of this information should be spelled out in the oak ordinance.

Thank you for your time and consideration. I appreciate your hard work.

Muriel Zeller

Attachments:

Tuolumne County Premature Removal of Native Oaks

El Dorado County In-Lieu Fee Ordinance

Sonoma County Guidelines and Standards for Preparation of Narrative Appraisal Reports

California Council of Land Trusts Mitigation Information

Comments to LAFCO on The Municipal Service Review (MSR) and Sphere of Influence (SOI) for the Calaveras Resource Conservation District (RCD)

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