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| **From:** | Gillian Fennessy |
| **To:** | Gillian Fennessy |
| **Subject:** | FW: EDC Comment Letter on City of Goleta"s New Zoning Ordinance Re Streamside Protection Areas 33 |
| **Date:** | Monday, September 23, 2019 9:03:33 AM |
| **Attachments:** | Comment Ltr to PC re NZO and SPAs_2019_09_20.pdf |

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**From:** Tara Messing <tmessing@environmentaldefensecenter.org>
**Sent:** Friday, September 20, 2019 2:41 PM
**To:** Anne Wells <awells@cityofgoleta.org>; Andy Newkirk <anewkirk@cityofgoleta.org>; Jay Ritterbeck <jritterbeck@cityofgoleta.org>; Peter Imhof <pimhof@cityofgoleta.org>
**Cc:** Linda Krop <lkrop@environmentaldefensecenter.org>; Brian Trautwein <btrautwein@environmentaldefensecenter.org>
**Subject:** EDC Comment Letter on City of Goleta's New Zoning Ordinance Re Streamside Protection Areas

Hi All,

Attached please find the comment letter submitted today by the Environmental Defense Center ("EDC") on behalf of our clients, Urban Creeks Council and EDC, regarding Streamside Protection Areas and the implementation of Policy CE 2.2 of the General Plan.

Best regards,
Tara

environmental
DEFENSE CENTER

September 20, 2019

Ms. Jennifer Smith, Chair
Planning Commission
City of Goleta
130 Cremona Drive, Suite B
Goleta, CA 93117

**Re: Comments Opposing the City of Goleta's Draft New Zoning Ordinance Regarding Streamside Protection Areas**

Dear Chair Smith and Commissioners:

The Environmental Defense Center ("EDC"), on behalf of EDC and Santa Barbara Urban Creeks Council ("UCC"), submits these comments in opposition to the proposed revisions to the City of Goleta's ("City") Draft New Zoning Ordinance ("NZO") concerning Streamside Protection Areas ("SPAs").[1]

UCC is a non-profit grassroots organization dedicated to protecting and restoring streams and watersheds in Santa Barbara County ("County"). Over the past thirty years, UCC has partnered with a number of organizations on creek restoration projects and has been committed to educating people of all ages about the values of creeks. UCC members include many families who live and recreate in Goleta and Santa Barbara. EDC is a non-profit, public interest law firm that protects and enhances the environment in Santa Barbara, Ventura, and San Luis Obispo counties through education, advocacy, and legal action.

For years, the City has struggled with the implementation of the City's General Plan Policy Conservation Element ("CE") 2.2 concerning streamside protection areas.[2] Despite the Policy's strong protections for creeks and riparian habitats, the City has approved projects with

[1] We are submitting this letter based on the information released at this time. On Thursday, September 19th, we were informed that an Errata Sheet would be released by noon on Friday, September 20, 2019, but it is now our understanding that the Errata Sheet will not be publicized until later today or possibly Monday. In order to ensure that the Planning Commissioners have sufficient time to review our letter, we are submitting the letter today and may draft an addendum based on the new information in the Errata Sheet. Going forward, we request that new information, especially substantive changes to the New Zoning Ordinance, are released at least a week before the hearing to ensure that the public has adequate time to review and comment on the changes.

[2] City of Goleta, General Plan, Ch. 4 Conservation Element at 4-13 to 4-14.

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reduced creek setbacks without the necessary findings and evidence to support claims that adherence to the minimum 100-foot setback was infeasible. For this reason, EDC, on behalf of our clients, is advocating for the development of an ordinance that effectively implements Policy CE 2.2 by setting forth a process, required findings, and evidentiary requirements for feasibility determinations. The need for a clear process was echoed repeatedly by the City's Planning Commissioners at the NZO Workshops as well as at the Planning Commission hearing held on September 9, 2019.[3] Nevertheless, adequate changes have not been made in response to this direction.

Fortunately for the City, the California Coastal Commission ("CCC") has already tackled this problem and crafted the solution. The CCC has drafted the findings and evidence necessary to make economically viable use determinations, which is directly relevant to the implementation of Policy CE 2.2 and assessing feasibility of the 100-foot setback. The CCC's language was adopted by the County in Article II of the Coastal Zoning Ordinance, which is incorporated by reference in the Eastern Goleta Valley Community Plan ("EGVCP"). For the reasons set forth herein, we request that the Planning Commission direct staff to incorporate the CCC's language for analyzing economic viability in the NZO. Maintaining the status quo will not solve the ongoing problem the City has had with implementing Policy CE 2.2 and is contrary to the interests of this community.

## I. The City of Goleta Must Adopt an Ordinance that Clearly Sets Forth the Process to Make a Determination of Feasibility with Regards to a Creek Setback.

The NZO must set forth a process, required findings, and the evidentiary requirements to inform the City's determination of feasibility. This clarity and transparency will benefit not only City decisionmakers, but also applicants and interested members of the public.

The language proposed by EDC mirrors the CCC's Suggested Modification No. 13 to the County's EGVCP Local Coastal Program Amendment, which is instructive in crafting the City's ordinance in the NZO. The CCC's recommended language establishes a detailed and clear process for making determinations of feasibility by evaluating whether adherence to the policy would not provide an economically viable use. The County adopted the CCC's suggested language in Sections 35-192.4 through 35-192.6 in the County's Coastal Zoning Ordinance and these sections are incorporated by reference in Policy EGV-1.5 of the EGVCP. To the best of our knowledge, this language was not challenged. The language suggested by the CCC is attached hereto as Exhibit A.[4] It is logical for the City to adopt this same language in the NZO because it was recommended by the CCC for the EGVCP and the County adopted this language.

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[3] City of Goleta, Response to Planning Commission Comments at 39-46, available at: http://nebula.wsimg.com/8714bb8793746cd61a460185ef09ae69?AccessKeyId=8B11547F66E8794DD29E&disposition=0&alloworigin=1.

[4] Excerpt from letter from the California Coastal Commission to Joan Hartmann, Chair of the Board of Supervisors for the County of Santa Barbara, regarding Santa Barbara County Local Coastal Program Amendment No. LCP-4-STV-17-0048-1 (Eastern Goleta Valley Community Plan) (August 18, 2017)("Exhibit A").

On July 17, 2019, the City of Santa Barbara also adopted findings substantially similar to Section 35-192.6 of the County's Coastal Zoning Ordinance based on suggestions by the CCC during the City of Santa Barbara's recent Land Use Plan ("LUP") update.[5] The CCC certified the updated Coastal LUP in August of 2019 and the findings recommended by the CCC are incorporated in Policy 1.2-3(C)(i)-(vi) of the City's Coastal LUP.[6]

Moreover, adopting language previously recommended by the CCC in the City's NZO is strategic because the CCC is required to certify the City's proposed NZO. Thus, in order to avoid future delays and unexpected surprises, it is important for the City to consider what language the CCC will require later in the adoption process.

Finally, the CCC's language may actually help the City avoid future litigation. Regulated land nearly always retains some economic use and landowners do not have a right to the most profitable use of their land. Thus, claims that a regulation denies economic uses of a property are unsuccessful if the property retains an economically viable use. If an economically viable use determination is analyzed by the City's decision-makers and its attorneys prior to a final decision on a project, the City will be more likely to avoid situations where Policy CE 2.2 may go too far and minimize the risk of legal challenges by allowing economically beneficial uses on the property. For these reasons, adopting provisions in the NZO that establish the criteria for determining when to reduce a buffer and, if so, the extent to which to do so, will reduce the City's exposure to non-meritorious claims.

For the foregoing reasons, EDC suggests that the CCC's language be incorporated as a stand-alone provision that is generally applicable to any requests to modify City zoning or policy requirements. Section 17.30.080, concerning SPAs, and other sections in the Chapter on Environmentally Sensitive Habitat Areas ("ESHA") would then cite to the general section with the CCC-recommended language. This is the same approach utilized by the County when adopting the EGVCP.

## II. Adopting a Business-As-Usual Approach for the Implementation of Policy CE 2.2 is Detrimental to the Health of the City's Creeks and Riparian Habitat, as Demonstrated by the Village at Los Carneros Project.

The Village at Los Carneros Project ("Project") is one of numerous examples which demonstrates the need for an ordinance that properly implements the requirements under Policy CE 2.2. There, the applicant proposed to reduce the Village at Los Carneros SPA by fifty percent. The 465-unit residential Project was proposed with a maximum 50-foot setback from Tecolotito Creek.[7] Public comments on the 2014 Draft Environmental Impact Report ("EIR")

[5] California Coastal Commission, *Final Suggested Modifications; LCP Amendment No. LCP-4-SBC-18-0062-1; City of Santa Barbara Land Use Plan Update* at 1-2, available here: https://documents.coastal.ca.gov/reports/2019/8/F14a/F14a-8-2019-report.pdf.
[6] City of Santa Barbara, Coastal Land Use Plan, *1.2 Santa Barbara's Local Coastal Program* at 6-7 (certified by CCC in August 2019), available here: https://www.santabarbaraca.gov/services/planning/mpe/lcp/clup/dclup.asp.
[7] City of Goleta, *Village at Los Carneros Scoping Document* at 12 (November 1, 2011), available at: https://www.cityofgoleta.org/home/showdocument?id=6014.

noted that the Project was inconsistent with Policy CE 2.2 because the Project did not have a 100-foot SPA and there was no evidence that a 100-foot SPA was infeasible. The Final EIR determined that several factors "make it difficult to achieve an alternative site plan that provides a 100-foot wide upland buffer...."[8] Moreover, the Final EIR concluded that, "[a] minimum 100 foot wide upland buffer along the entire length of the creek would reduce the number of units that could be built by as much as 30 percent...."[9] Ultimately, the 100-foot SPA buffer was determined to be infeasible and the Project was deemed "consistent with this Policy [CE 2.2]."[10]

Before the Project was approved by the City, EDC and UCC asked the applicant to voluntarily comply with Policy CE 2.2 by providing a minimum 100-foot SPA. In response, the applicant voluntarily redesigned the Project to comply with the Policy's 100-foot SPA buffer.[11] The redesigned Project retained all 465 units, confirming that the 100-foot SPA was in fact feasible.[12] This Project underscores the need for an ordinance in the NZO that implements—rather than simply mirrors—the language under Policy CE 2.2. The NZO must not keep the status quo by allowing decision-makers to reduce SPAs below 100 feet without adequate analysis or evidence that a minimum 100-foot SPA is infeasible. To ensure proper implementation of Policy CE 2.2, the City must adopt an ordinance that sets forth an effective process for making feasibility determinations.

## III. EDC's Recommendations are Consistent with the City of Goleta's General Plan.

The express purpose of the NZO "is to implement the General Plan," not to simply reiterate its provisions. (NZO at § 17.01.020) Government Code Section 65860(a) requires consistency between a city's zoning ordinance and the adopted general plan. "A general rule for consistency determinations can be stated as follows: An action, program, or project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and will not inhibit or obstruct their attainment."[13] A zoning ordinance must be in agreement with the general plan policies, but exact conformity with every detail is not required. Moreover, great deference is afforded to a local governmental agency's determination of consistency with its own general plan. *Save our Peninsula Comm. v. Monterey Cty. Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 142. Courts have reasoned that "the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity." *Id.*

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[8] City of Goleta, *Village at Los Carneros Final Environmental Impact Report* at 2-4 (June 2, 2014), available at: https://www.cityofgoleta.org/city-hall/planning-and-environmental-review/ceqa-review/village-at-los-carneros-project-feir.
[9] *Id*. at 2-4.
[10] *Id*. at 4.9-35
[11] Email from Jeff Malone, Comstock Homes, to Brian Trautwein, Environmental Analyst / Watershed Program Coordinator, Environmental Defense Center (June 27, 2014).
[12] *Id.*
[13] Governor's Office of Planning and Research, *General Plan Guidelines: 2017 Update* at 255, available at: http://opr.ca.gov/docs/OPR_COMPLETE_7.31.17.pdf.

The purpose of Policy CE 2.2 of the City's General Plan is to "[e]nhance, maintain, and restore the biological integrity of creek courses and their associated wetlands and riparian habitats as important natural features of Goleta's landscape."[14] Policy CE 2.2(a) requires a minimum 100-foot setback, but allows the City to reduce the SPA upland buffer "if (1) *there is no feasible alternative siting for development that will avoid the SPA upland buffer*; and (2) the project's impacts will not have significant adverse effects on streamside vegetation or the biotic quality of the stream."[15] Although the Policy identifies two broad standards for decreasing the 100-foot setback, the process for evaluating each factor is more appropriately set forth in an ordinance.

The EDC-recommended language is consistent with the City's General Plan. Policy CE 2.2(a)(1) requires an analysis of whether alternative siting for the proposed development is feasible prior to reducing a setback, but the Policy itself does not explain how to perform this analysis. The NZO is the proper vehicle to set forth a process, the required findings, and evidentiary requirements for making the feasibility determination envisioned in Policy CE 2.2. The standard language that the CCC recommends will not prohibit creek setback reductions or interfere with the intent of Policy CE 2.2 because it still allows for a decrease in a SPA buffer to a minimum of 25-feet as long as the reduction is supported by the necessary findings and evidence. The intent of the language is to encourage compliance with the 100-foot setback requirement by ensuring decisions to reduce a setback are made only after sufficient analysis has occurred. Providing a mechanism for SPA buffer reductions under Policy CE 2.2 allows for flexibility and may alleviate potential hardship, but to ensure a thorough analysis before making a decision on an applicant-requested reduction, there must be an ordinance in place that sets forth the proper procedures for evaluating feasibility.

Finally, Policy CE 2.2(b) explicitly involves a takings analysis and states:

> "If the provisions above would result in any legal parcel created prior to the date of this plan being made unusable in its entirety for any purpose allowed by the land-use plan, exceptions to the foregoing may be made to allow a reasonable economic use of the parcel, subject to approval of a conditional use permit."

The Policy relies on the U.S. Supreme Court's decision in *Lucas v. S.C. Coastal Council* in which the Court established a "total takings" test for evaluating whether a regulatory action constitutes a regulatory taking that requires compensation. 505 U.S. 1003 (1992). The CCC language that EDC is recommending for the NZO concerns the findings and evidence required to make an economically viable use determination. The economic viability analysis crafted by the CCC relies in part on a takings analysis. Nevertheless, as confirmed by subsection (b), the Policy itself expressly acknowledges that a takings analysis may be necessary if an applicant alleges that adherence to the 100-foot buffer would make his or her property unusable in its entirety. Policy CE 2.2 and the

[14] City of Goleta, General Plan, Ch. 4 Conservation Element at 4-13.
[15] City of Goleta, General Plan, Ch. 4 Conservation Element at 4-13 (emphasis added).

EDC-recommended language are therefore consistent and adoption of the CCC language in the NZO is appropriate.

## IV. The NZO Definition of "Feasibility" Lacks a Process for Evaluating the Feasibility of Maintaining a 100-Foot Creek Setback.

"Feasible" is defined in the NZO as "[c]apable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (NZO at VI-37) The definition, although instructive, does not identify the process, findings, and evidence necessary to support a determination that a project cannot feasibly adhere to the 100-foot setback requirement under Policy CE 2.2. It is well-established that a land use ordinance cannot be so vague or uncertain that a person of common intelligence and understanding must guess as to its meaning. *Zubarau v. City of Palmdale* (2011) 192 Cal. App. 4th 289, 308. "'An ordinance must be clear, precise, definite, and certain in its terms, and an ordinance vague to the extent that its precise meaning cannot be ascertained is invalid, although otherwise it is constitutional and valid.'" *Id.* (internal citations omitted). The definition of "feasibility" in the NZO does not adequately inform how to analyze what is feasible with regards to SPAs. The definition is broad and silent as to any criteria for evaluating feasibility. Reliance on this definition alone with regards to SPA buffers will not solve the problems with implementation of Policy CE 2.2.

## V. Conclusion

Therefore, we urge the Planning Commission to instruct staff to develop a general provision applicable to any request to modify City zoning or policy requirements based on the language recommended by the CCC in the EGVCP regarding economically viable use determinations. In order to protect and enhance the City's creeks and riparian habitat, the NZO must include a clear and adequate process for determining feasibility with regards to SPA buffer reductions.

Sincerely,

Tara C. Messing

Tara C. Messing
Staff Attorney

cc: Santa Barbara Urban Creeks Council

**Attachments:**
A – Excerpt from letter from the California Coastal Commission to Joan Hartmann, Chair of the Board of Supervisors for the County of Santa Barbara (August 18, 2017)

# EXHIBIT A

STATE OF CALIFORNIA -- NATURAL RESOURCES AGENCY
EDMUND G. BROWN, JR., *Governor*

CALIFORNIA COASTAL COMMISSION
SOUTH CENTRAL COAST AREA
89 SOUTH CALIFORNIA ST., SUITE 200
VENTURA, CA 93001
(805) 585-1800

August 18, 2017

Joan Hartmann, Chair
Board of Supervisors
County of Santa Barbara
105 East Anapamu Street
Santa Barbara, CA 93101

**RE: Santa Barbara County Local Coastal Program Amendment No. LCP-4-STB-17-0048-1 (Eastern Goleta Valley Community Plan)**

Dear Honorable Chair Hartmann and Supervisors:

On August 10, 2017 the Coastal Commission approved the subject Local Coastal Program (LCP) amendment with suggested modifications. The Commission's resolution of certification is contained in the staff report dated July 27, 2017. The suggested modifications, as approved by the Commission on August 10, 2017, are attached to this correspondence.

Section 13544 of the Commission's Administrative Regulations requires that after certification the Executive Director of the Commission shall transmit copies of the resolution of certification and any suggested modifications and findings to the governing authority, and any interested persons or agencies. Further, the certification shall not be deemed final and effective until all of the following occur:

(a) The local government with jurisdiction over the area governed by the Local Coastal Program, by action of its governing body: (1) acknowledges receipt of the Commission's resolution of certification, including any terms or modifications suggested for final certification; (2) accepts and agrees to any such terms and modifications and takes whatever formal action is required to satisfy the terms and modifications; and (3) agrees to issue coastal development permits for the total area included in the certified Local Coastal Program. Unless the local government takes the action described above the Commission's certification with suggested modifications *shall expire six months* from the date of the Commission's action.

(b) The Executive Director of the Commission determines in writing that the local government's action and the notification procedures for appealable development required pursuant to Article 17, Section 2 are legally adequate to satisfy any specific requirements set forth in the Commission's certification order.

(c) The Executive Director reports the determination to the Commission at its next regularly scheduled public meeting and the Commission does not object to the Executive Director's determination. If a majority of the Commissioners present object to the Executive Director's determination and find that the local government action does not conform to the provisions of the Commission's action

to certify the Local Coastal Program Amendment, the Commission shall review the local government's action and notification procedures pursuant to Articles 9-12 as if it were a resubmittal.

(d) Notice of the certification of the Local Coastal Program Amendment shall be filed with the Secretary of Resources Agency for posting and inspection as provided in Public Resources Code Section 21080.5(d)(2)(v).

The Commission and staff greatly appreciate the County's consideration of this matter.

Authorized on behalf of the California Coastal Commission by:

John Ainsworth
Executive Director

By: Megan Sinkula
Coastal Program Analyst

Cc: Dianne Black, Santa Barbara County Planning and Development Department

In the Coastal Zone, when siting a new dwelling or addition on a parcel, the goal should be to disturb as little vegetation as possible, with a priority placed on retaining healthy, native species and those trees that, by definition are protected (i.e., mature native trees that do not pose a threat to health and safety).[2] Fire prevention measures should also be considered. Refer to fire hazard prevention requirements in Section 10, page 55.

## SUGGESTED MODIFICATIONS TO THE IMPLEMENTATION PLAN/COASTAL ZONING ORDINANCE

The County's proposed amendment language to the certified Implementation Plan/Coastal Zoning Ordinance is shown in straight type. Language approved by the Commission to be modified is shown in ~~line out~~ and underline.

**SUGGESTED MODIFICATION NO. 13**

**Article II Coastal Zoning Ordinance**

**Section 35-192.4** ***Economically Viable Use.*** If an applicant asserts that the application of the policies and standards contained in the Local Coastal Program regarding use of property within the Eastern Goleta Valley Community Plan area would constitute a taking of private property without just compensation, the applicant shall apply for an economic viability determination in conjunction with the associated Coastal Development Permit application and shall be subject to the provisions of this section.

**Section 35-192.5** ***Economically Viable Use Determination.*** The application for an economic viability determination shall include the entirety of all parcels that are geographically contiguous and held by the applicant in common ownership at the time of the application. Before any application for a Coastal Development Permit and economic viability determination is accepted for processing, the applicant shall provide the following information, unless the County determines that one or more of the particular categories of information is not relevant to its analysis:

1. The date the applicant purchased or otherwise acquired the property, and from whom.
2. The purchase price paid by the applicant for the property.
3. The fair market value of the property at the time the applicant acquired it, describing the basis upon which the fair market value is derived, including any appraisals done at that time.
4. The general plan, zoning or similar land use designations applicable to the property at the time the applicant acquired it, as well as any changes to these designations that occurred after acquisition.
5. Any development restrictions or other restrictions on use, other than government regulatory restrictions described in subsection 4 above, that applied to the

[2] Eastern Goleta Valley Community Plan Policy ECO-EGV-4.1 (COASTAL)

property at the time the applicant acquired it, or which have been imposed after acquisition.

6. Any change in the size of the property since the time the applicant acquired it, including a discussion of the nature of the change, the circumstances and the relevant dates.
7. A discussion of whether the applicant has sold or leased a portion of, or interest in, the property since the time of purchase, indicating the relevant dates, sales prices, rents, and nature of the portion or interests in the property that were sold or leased.
8. Any title reports, litigation guarantees or similar documents in connection with all or a portion of the property of which the applicant is aware.
9. Any offers to buy all or a portion of the property which the applicant solicited or received, including the approximate date of the offer and offered price.
10. The applicant's costs associated with the ownership of the property, annualized for each of the last five calendar years, including property taxes, property assessments, debt service costs (such as mortgage and interest costs), and operation and management costs.
11. Apart from any rents received from the leasing of all or a portion of the property, any income generated by the use of all or a portion of the property over the last five calendar years. If there is any such income to report it should be listed on an annualized basis along with a description of the uses that generate or has generated such income.
12. Any additional information that the County requires to make the determination.

***Section 35-192.6 Supplemental Findings for Approval of Coastal Development Permit.*** A Coastal Development Permit that allows a deviation from a policy or standard of the Local Coastal Program to provide a reasonable use may be approved or conditionally approved only if the appropriate governing body, either the Planning Commission or Board of Supervisors, makes the following supplemental findings in addition to the findings required in Section 35-169 (Coastal Development Permits):

1. Based on the economic information provided by the applicant, as well as any other relevant evidence, each use allowed by the Local Coastal Program policies and/or standards would not provide an economically viable use of the applicant's property.
2. Application of the Local Coastal Program policies and/or standards would unreasonably interfere with the applicant's investment-backed expectations.
3. The use proposed by the applicant is consistent with the applicable zoning.
4. The use and project design, siting, and size are the minimum necessary to avoid a taking.
5. The project is the least environmentally damaging alternative and is consistent with all provisions of the certified Local Coastal Program other than the provisions for which the exception is requested.
6. The development will not be a public nuisance or violate other "background principles of the State's law of property," as that phrase was used in the U.S. Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S.

1003, 1028-30 (e.g., public trust doctrine). If it would violate any such background principle of property law, the development shall be denied.