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September 8, 2015

James S. Mitrison,  
Clerk of the Board of Supervisors  
County of El Dorado  
330 Fair Lane  
Placerville, CA 95667

(transmitted by email)

Community Development Agency  
County of El Dorado  
2850 Fairlane Court, Building C  
Placerville, CA 95667

Re: Request for Appeal of the Planning Commission's September 2, 2015 Recommendations to approve the Targeted General Plan Amendment (TGPA), to adopt the Zoning Ordinance Update (ZOU), to certify the TGPA/ZOU Final Environmental Impact Report (FEIR), to adopt the Community Design Standards, and to adopt the Mitigation Monitoring and Reporting Program.

Dear Sirs:

My name is Tom Infusino, and I am filing this request for appeal on behalf of Ellen Van Dyke and Rural Communities United (RCU). Ms. Van Dyke and RCU are requesting a hearing before the Board of Supervisors to present evidence and argument in opposition to the recommendations of the Planning Commission regarding approval of the TGPA, adoption of the ZOU, approval of the Community Design Standards, certification of the TGPA/ZOU EIR, and approval of the Mitigation Monitoring and Reporting Program.

First, please coordinate your response to this request with your Office of County Counsel, as Mr. Livingston has expressed doubts regarding the rights of the appellants to receive an appeal hearing.

Second, please note that after consulting both the Office of County Counsel and Planning Services, I have been unable to get an answer regarding the appropriate filing fee for this sort of appeal. Until that issue is resolved, please accept my assurance that we will pay the reasonable established appeal fee, should one be found to exist.

Third, it is also unclear if there is an appropriate form for this appeal. I have attached a completed appeal form from the Planning Services website, along with a letter of acknowledgement from the appellant. If there are any additional forms that need to be filed, please notify me and I will file them as soon as possible.

## I. Rights to Appeal

Any “interested party” has the right to pay the fee and appeal a recommendation regarding a general plan amendment to the Board of Supervisors, within five days of the planning agency action. Such an appeal must be filed with the Clerk of the Board of Supervisors. (Government Code, Sec. 65354.5.) This right is confirmed by secondary authorities. “The planning commission is required to make a written recommendation to the legislative body on the adoption or amendment of a general plan...The written recommendation of the planning commission is subject to appeal to the legislative body under local appeal procedures.” (Lindgren et al, *California Land Use Practice*, CEB, 2014, Sec. 2.35, p. 2-27.) “A city with a planning agency which has the authority to consider and recommend approval, conditional approval, or disapproval of a proposed amendment to a general plan must establish procedures for any interested party to file a written request for a hearing before the legislative body.” (66 Cal Jur 3d, Requested hearing on general plan amendment; fees, Sec. 55, 2005.)

Furthermore, El Dorado County Code provides procedures for filing appeals of Planning Commission decisions to the Board of Supervisors. (El Dorado County Code, Secs. 2.09.010 – 2.09.110.) The Planning Commission decided to recommend adoption of the ZOU, adoption of the TGPA, the Community Design Standards, the Mitigation Monitoring and Reporting Program, and certification of the TGPA/ZOU FEIR on September 2, 2015.

An appeal is needed to provide RCU members with a meaningful opportunity to be heard by the decision-making body. RCU members have many concerns relating to the effects of the proposed project on their health, safety welfare, due process, and property interests. Getting a fair hearing is critical when the issue is as important as the county general plan; considered the land use constitution of the County. Getting a fair hearing is complicated by the complexity of the changes to the Zoning Ordinance. RCU members will not have a meaningful opportunity to be heard in the absence of an appeal hearing.

An appeal hearing may have benefits for the County as well as the appellants. First, an appeal hearing provides the Board of Supervisors with a broader set of options than a typical legislative hearing. The typical legislative hearing tends to narrow the Board’s options to approval, conditional approval, denial, or continuance. An appeal hearing opens up more options for the Board to pursue conflict resolution and alternative dispute resolution. Second, an appeal hearing gives the Board’s attorneys a peak at the arguments and evidence that they may have to confront later in court. This helps them to prepare their defense of the County. Third, an appeal hearing gives the government the chance to make an appellant feel heard. Sometimes merely experiencing the fair hearing is enough to address the appellant’s major complaint: that nobody seems to be listening to them. Finally, the appeal hearing gives the County timely notice of any inadvertent mistakes that the County may want to correct prior to project approval. That timely notice to the government, that creates an opportunity to cure, is at the heart of the doctrine of exhaustion of administrative remedies. This is the major government benefit of appeal hearings.

## II. Standing

Ms. Van Dyke and RCU have standing to appeal the Planning Commission recommendations regarding the TGPA, the ZOU, the TGPA/ZOU FEIR, the Community Design Standards, and the Mitigation Monitoring and Reporting Program.

The members of RCU and their families live in the Sierran foothills of El Dorado County. Members of RCU want to maintain the quality of their neighborhoods, and to pass that on to newcomers and future generations.

Members of RCU and the public, rely upon El Dorado County's roads as the arteries of commerce, public service, community relations, and family life. It is on these roads that they run a broad spectrum of life's errands. RCU members are suffering, along with other members of the public, from declining levels of service on their roads, due to the County's repeated failures to mitigate the impacts of its land use actions. RCU members use now congested and often unsafe County roads. RCU members are disturbed by noise from increased traffic. RCU members breathe unhealthy air, polluted by motor vehicles stuck in traffic. The ills identified above will be exacerbated by the approval of a TGPA/ZOU, and its FEIR that mask and underestimate the significant traffic impacts of the project.

Approval of the TGPA, the ZOU, and the TGPA/ZOU FEIR in accord with the Planning Commission recommendations will cause irreparable harm by causing significant impacts to the human environment that should have been reduced or avoided, pursuant to CEQA and the 2004 General Plan. Also, RCU and the public would be harmed by the County's failure to provide an environmental document that fully informs interested persons of the program's potential impacts. Such a document would enable County residents to better understand the environmental and economic values of their elected officials, and would demonstrate to an apprehensive citizenry that the County has considered the environmental implications of its actions.

The California Environmental Quality Act is designed to help local governments identify and mitigate the potentially significant impacts of their actions. Land use law is designed to promote the balanced development of a community, and to spare it the ills associated with uncoordinated development.

If the Board of Supervisors approves the TGPA, the ZOU, and the TGPA/ZOU FEIR, as recommend by the Planning Commission, the County will fail to conform to CEQA and land use law. The County's failures will not only delay the day when it will begin to solve the problems suffered by the Appellants as a result of rapid and poorly coordinated urbanization, but also exacerbated the magnitude and intensity of those ills.

Thus, as described above, RCU members have particular beneficial interests at stake in the County's compliance with CEQA and land use law. The public has similar beneficial interests. The Appellants' interests in this matter fall squarely within the zone of interests protected by the statutes. The Appellants are precisely the class of party that this body of law was designed to protect.

### III. Exhaustion of Administrative Remedies

Members of RCU have participated in various advisory committee hearings over the last three years of the TGPA/ZOU process. They raised their concerns in detailed comments on the DEIR and the Revised DEIR, and substantiated these comments with submitted evidence. They participated in Planning Commission hearing on the TGPA/ZOU in August of 2014. They presented written evidence and oral testimony before the Planning Commission during their recent hearing on the TGPA/ZOU on August 27, 2015 and September 2, 2015. They have filed a timely appeal of the Planning Commission's recommendations, and they are prepared to pay the necessary appeal fee should it be identified by the County. Despite their participation in the TGPA/ZOU process; and their repeated voicing of concerns to planning staff, consultants, and advisory bodies; the Appellants' grievances remain outstanding, and should be given detailed consideration by the Board of Supervisors. The Appellants are entitled to an appeal hearing before the Board of Supervisors.

IV. Issues on Appeal

The CEQA problems with the TGPA/ZOU FEIR include:

A) Project Description Flawed

- project includes policies that are unclear and not yet written.
- project includes conflicting policies.
- allowing new uses in riparian zones not noted in project description.
- Piecemealing Project Description TGPA/ZOU & Biological Resources Policy & Scenic Corridor.
- Zoning Ordinance Update goes far beyond what was required for conformity to the 2004 General Plan, and in many cases is contrary to general plan goals, policies and objectives.
- Project objectives too narrow to allow for reasonable alternatives.

B) Incorrect environmental setting regarding level of service on Highway 50.

C) Impact analyses not a good faith effort at full disclosure.

- Scenic corridor analysis.
- Traffic analysis: Refusal to provide two directional LOS breakdowns on roads. Failure to provide LOS for intersections and interchanges as required by the General Plan. Failure to provide cumulative impact of proposed future development in LOS calculations. Failure to answer questions posed by commenters including Caltrans. Assumption of unrealistic job creation numbers when no supporting data is included for these assumptions, which in turn affects the likely number of commuter trips in and out of the county. Failure to correlate salary potential of created jobs to housing costs, which in turn affects the likely number of commuter trips out of the county.
- Water impacts analysis.
- Making site specific changes but not performing site specific environmental review.
- Inadequate analysis of Ag. and Timber land impacts.
- Misleading statement about not granting entitlements or changing land use designations when by right uses are expanded.
- Not providing impact detail when feasible to do so.
- Misleading claim that the ZOU is just to comply with state law. The Zoning Ordinance Update goes far beyond what was required for conformity to the 2004 General Plan, and in many cases is contrary to general plan goals, policies and objectives.
- Misleading statement that the TGPA is not a "change in policies".

-Failure to examine the impact of changes to the noise ordinance. Failure to examine the impact of reducing Ag setbacks while simultaneously making categorical noise exemptions for Ag.

D) Flawed Mitigation

-Relying on mitigation measures and enforcement mechanisms that have already proven ineffective.

-Refusing to adopt proven, effective, and feasible mitigation.

E) Inadequate evaluation of the impacts of Alternatives.

Exhibit O – Misleading Table.

F) Failure to cumulatively consider impacts of changes to Biological Resources Policies.

- Need to recirculate the EIR re new Biological Resource Policies cumulative impact section.

G) Inadequate Responses to Comments

-Conflicting responses to comments.

-Water comments.

-Home Occupations comments.

-Master Responses.

H) Substantial evidence does not support the findings of fact and the statement of overriding considerations.

-Regarding traffic circulation.

-Invalid findings regarding the removal of mitigation measures from the 2004 General Plan.

-Streamside setbacks, noise standards, Ag. land setbacks, hillside development, open space requirements.

-Economic theory misapplied.

-Economic theory not applicable to El Dorado County.

-SOC Noise Standards

I) Improper use of tiering to avoid environmental review entirely.

- Too unspecified to evaluate.

- No site specific evaluation later.

- Using the ZOU to reduce the mitigation in the General Plan.

The land use law problems with the TGPA/ZOU include:

- A) Inconsistency between Land Use and Circulation Elements
- B) Zoning Ordinance not a reasonable accommodation of competing regional interests.
  - Removal of zoning ordinance provisions that reduced the impacts of the 2004 General Plan.
  - Adding zoning ordinance provisions to increase the impacts of the 2004 General Plan.
  - Removing the basis for the court's approval of the 2004 General Plan.
  - Inconsistency with state policy to reduce environmental impacts.
  - Reduced noise and streamside standards.

We will provide more detailed explanations of these issues, and present additional evidence, prior to and during our appeal hearing.

V. Requested Remedies

First, we request that the Board of Supervisors choose not to approve the TGPA, the ZOU, the Community Design Standards, the Mitigation Monitoring and Reporting Program, and not certify the TGPA/ZOU FEIR at this time.

Second, we request the opportunity to meet with a task force including two Planning Commissioners, two Supervisors, representatives of the TGPA/ZOU planning team, and County Counsel's office to begin talks to resolve the substantive issues with the TGPA/ZOU, to further reduce its adverse impacts, and to narrow or eliminate the differences between the County and RCU.

Third, we request that the Board of Supervisors direct the Planning Staff and Consultants to properly amend the proposed project approval documents (i.e. the findings of fact, the statement of overriding considerations; the resolutions) to reflect any changes in the project description and the impact mitigation agreed upon by the task force.

Fourth, we request that the Planning Commission then review and recommend, and the Board of Supervisors then consider, adopting the TGPA/ZOU as so modified to reduce its impacts and to narrow or eliminate the differences between the County and RCU.

VI. Time and Date of Appeal

We respectfully request that the hearing be held on Tuesday September 29, 2015 or Tuesday October 6, 2015.

We request that the hearing be scheduled for an entire day (9 am-12, 1:30-5 pm, with a break for lunch). We anticipate presenting evidence to the Board during the morning portion of the hearing. The afternoon portion would provide County Counsel and the Planning Department with the opportunity to provide rebuttal arguments and evidence. In addition, there would be time in the afternoon for public comment before the Board of Supervisors' deliberation and decision.

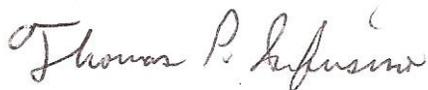
VII. It is unwise to risk violating RCU members' fundamental constitutional due process rights.

While we would like to resolve our issues with the County out of court, should the matter end up in court, the County's refusal to provide appeals allowed by law could be construed as a violation of RCU

members' due process rights under the United States Constitution. (United States Constitution, Amendments 5 & 14.) This is especially true of staff's recommendations to rezone specific parcels. These rezones employed the quasi-adjudicatory practice of methodically applying a set of general protocols to specific parcels. Such decisions trigger due process considerations. (*Horn v. City of Ventura* (1979) 24 Cal.3d 605, 612-616.) Federal law precludes the deprivation of a person's fundamental constitutional rights under color of government authority. When a public official, or a group of public officials, engage in such behavior, they are stripped of the shield that generally protects them from personal liability for their acts as public officials. Thus, a successful plaintiff can collect financial damages directly from the public official, rather than from the public agency for which the official works. (42 USC Sec. 1983.) To prove a violation of 42 USC Section 1983 against a local government, the violation must be caused by action pursuant to a municipal policy. (*Monell v. New York City Dept. of Social Servs.*, 436 U. S. 658, 691.)

Thus, there is a spectrum of judicial remedies to cure a due process violation. On the one hand, a court may simply remand the TGPA/ZOU approval back to the Board of Supervisors, so that they may hear the RCU appeal prior to making a decision on the TGPA/ZOU. On the other hand, a Federal Court may deem the due process hearing denial a violation of the Civil Rights Act, and may issue large monetary penalties personally against the Supervisors who denied RCU member's fundamental constitutional rights under color of state authority. With stakes this high, and the costs of providing an appeal hearing so low, we strongly encourage the County to provide the requested appeal hearing.

Sincerely,



Thomas P. Infusino, for  
Appellants Ellen Van Dyke &  
Rural Communities United.