

**To: Humboldt County Planning Commission**  
**From: Larry Henderson**  
**Date: July 1, 2020**  
**Subject: Accessory Dwelling Unit Ordinance re: Jacoby Creek**

At its July 9 meeting, the Planning Commission is scheduled to consider Section 69.05.6(g) of the draft ADU Ordinance. That section lists the Jacoby Creek Area as an ADU Special Permit Area district and sets a 5-acre density restriction for the Area. Following is a summary of arguments previously provided to Planning and the Commission for deleting the Section.

To disclose, I own a 5-acre parcel in the Jacoby Creek Area. I and some other property owners in the Jacoby Creek Area want to add ADUs to our properties. I am the spokesman for our group (who humorously have been tagged “Jack’s Club”) and the term “we” throughout the following summary is this group.

We support the draft ADU Ordinance as modified to date by the Commission, provided Section 69.05.6(g) is deleted.

Planning says the Commission has three options regarding the Section: Keep it, delete it, modify it. The modify-option suggested by Planning would change the Section from a fixed restriction to a more temporary restriction pending review of the Jacoby Creek Community Plan density policies.

We are opposed to any special restrictions for the Jacoby Creek Area without first updating the community plan with full participation of all stakeholders. This would be the consequence of Planning’s first and third options (keep or modify). Hence, we support only the second option...delete it.

The issue and decision is how to treat the Jacoby Creek Area—differently or alike—in relation to the other non-sewered, suburban (in contrast with rural) residential areas in the County where the density restriction is based on health standards. We see two options: (Option A) treat Jacoby Creek Area and the other non-sewered areas in the County *differently* with a special density restriction for Jacoby Creek; or (Option B) treat Jacoby Creek Area and the other non-sewered areas in the County *alike* with no density restriction.

This clearly is a choice to be made, as there is no law mandating the special restriction.

In making the choice, the most demanding test in constitutional law must be applied. That is, the government must choose the least restrictive means to further a compelling public interest.

There is no legislated public interest for the special restriction. No legislative rule or standard—local or state—has been disclosed that would compel the 5-acre density limitation.

However, as Planning points out, compelling public interests are also defined by general plan policies that set guidelines and priorities for making discretionary local-governmental decisions.

Planning references a policy in the Jacoby Creek Community Plan that imposes a 5-acre density limitation on non-sewered residential development. Under this policy, wherever public sewage services are not provided, new development that exceeds the 5-acre density limitation would be prohibited, even if it complies with the plan designations. For example, although my parcel has a plan designation for a 2½-acre minimum parcel size, I could not divide my 5-acre parcel into two parcels unless I connect to Arcata's sewage system...not probable in my lifetime.

To *delete* the Jacoby Creek Area special restriction in the ADU Ordinance would conflict with this referenced policy and, for that reason, be inconsistent with the County General Plan. This inconsistency could be deemed a compelling public interest for treating the Jacoby Creek Area differently.

But we do not buy that premise. It would also be inconsistent with the Plan to *keep* the special restriction, and there is no justification to override those other inconsistencies.

Attached is a chart (previously submitted to Planning) listing relevant plan policies and summarizing what I see as the consistencies and inconsistencies of both keeping and deleting the special Jacoby Creek Area density restriction. With the exception of the above referenced policy, there are no other policies set forth in either the County Plan or Jacoby Creek Community Plan that Option A (keeping the restriction) would be consistent with. On the other hand, Option B (deleting the restriction) is consistent with all other relevant policies in both Plans.

We in fact do not know the intent of the policy—a 40-year-old, never-been-updated policy—that sets the 5-acre density limitation. The original 1982 and current 2017 Jacoby Creek Community Plans do not provide an explanation; nor do their EIRs. Apparently, no other record has been found to explain why the limitation was imposed. There simply is no genuine justification to treat the Jacoby Creek Area differently...no reason that can be constructively scrutinized by the Jacoby Creek Area property owners.

Planning has speculated that the limitation was related to a 1979 State imposed waiver prohibition. But this is contradicted by the waiver prohibition measure itself, which has no explicit reference or recommendation for a 5-acre density limitation anywhere in the area covered by the waiver prohibition (which includes more communities than just Jacoby Creek). Plus, nowhere in the Jacoby Creek Community Plans, their EIRs, or any other document, is an nexus provided between the waiver prohibition and a 5-acre density limitation.

With the only exception being the Jacoby Creek Community Plan, there is no community plan or health standard we know of that requires new development to connect to sewage services where the services are not and will not be provided.

The section listing the Jacoby Creek Area as an ADU Special Permit Area needs to be deleted. There is no legislative mandate or compelling public interest to keep it...either as is or as may be modified.

Respectfully submitted.

**JACOBY CREEK COMMUNITY PLAN  
CONSISTENCY/INCONSISTENCY COMPARISON  
OF SECTION 69.05.6(G) OPTIONS**

	<u><b>OPTION 'A'</b></u> <b>Treat Jacoby Creek Area and the other non-sewered areas in the County differently with a 5-acre density restriction [Keep Section 69.05.6(g)]</b>	<u><b>OPTION 'B'</b></u> <b>Treat Jacoby Creek Area and the other non-sewered areas in the County alike with no density restriction [Delete Section 69.05.6(g)]</b>
<b>JACOBY CREEK COMMUNITY PLAN POLICIES</b>		
<p><b>JCCP-P5 (Adequate Housing in Jacoby Creek).</b> It shall be the goal of the County to promote adequate and safe housing for the residents of the Jacoby Creek Area by requiring the provision of appropriate public services when development takes place.</p>	<p><b>Not consistent</b></p> <p>Option 'A' would require water supply and sewage disposal services where and when the 5-acre density limitation in the Jacoby Creek Area is exceeded.</p> <p>However, the services may not be "appropriate" where and when the development could meet current health standards without the services.</p>	<p><b>Consistent</b></p> <p>Option 'B' would require compliance with water supply and sewage disposal regulations, including connection to appropriate services as needed.</p>
<p><b>JCCP-P22 (Residential Uses).</b> A variety of housing types and densities should be encouraged to be located within the (Jacoby Creek Area) Urban Development Area.</p>	<p><b>Not consistent</b></p> <p>Option 'A' would limit residential density to no greater than one dwelling unit per 5 or more acres in the Jacoby Creek Area.</p>	<p><b>Consistent</b></p> <p>Option 'B' would not impose any density limitation in the Jacoby Creek Area, subject to compliance with water supply and sewage disposal regulations.</p>
<p><b>JCCP-P25(Provision of Urban Services).</b> This plan is predicated on the intent that either the City of Arcata or the Jacoby Creek County Water District will be the provider of urban services within the (Jacoby Creek Area) Urban Development Area.</p> <p><i>Note: This 40-year old basis for the Jacoby Creek Community Plan policy of a maximum 5-acre density without public sewage disposal services is no longer valid, as the City of Arcata (the responsible service agency) is on</i></p>	<p><b>Not consistent</b></p> <p>Option 'A' would impose special restrictions to further an interest that is no longer applicable.</p>	<p><b>Consistent</b></p> <p>Option 'B' would not cause or contribute to a need for extended services, resulting in burden on the affected service agency.</p>

<p><i>record that it will not extend sewage services beyond the current service area in the foreseeable future. Further, the Water District's service area has not been extended to serve the Urban Development Area as predicated.</i></p> <p><i>The provision of new urban services to serve new residential development has been insignificant for the last 40 years since the Jacoby Creek Community Plan was adopted. There are no plans to change this, and the expectations now are no expansion of services to allow new development in the Jacoby Creek Area to help resolve our current pressing housing problems.</i></p> <p><i>This information is from the following reports referenced by the GPU:</i></p> <ul style="list-style-type: none"> <li>• <i>Water Resources Technical Report, prepared for Humboldt County by Winzler and Kelly Consulting Engineers (November 2007)</i></li> <li>• <i>Community Infrastructure and Services Technical Report, prepared for Humboldt County by Winzler and Kelly Consulting Engineers (July 2008)</i></li> <li>• <i>City and District Sphere of Influence Reports, LAFCO (January 2009)</i></li> <li>• <i>Water Quality Control Plan for the North Coast Region (Basin Plan), North Coast Regional Water Quality Control Board (May 2011)</i></li> </ul>		
<p><b>JCCP-P26 (Residential Densities).</b> Residential development at <b>one dwelling unit per five or more acres</b> may be permitted within the Urban Development Area if (specified determinations are</p>	<p><b>Consistent</b></p> <p>Option 'A' conforms to this policy in that it allows new development at densities of 5 or more acres per dwelling unit in</p>	<p><b>Consistent</b></p> <p>Option 'B' does not violate this policy in that new development at densities of 5 or more acres per dwelling unit is permissive where applicable.</p>

<p>made with respect to provisions for water supply and sewage disposal).</p> <p><i>Note: It is presumed that this policy does not prohibit new development at densities greater than 5 acres per dwelling unit. The basis of this presumption is the use of the term "may be permitted" and the acknowledgment that the designated density range for new development inside the Urban Development Area (originally, Urban Limit Line) is 0.2 to 1.0 du/acre (or, a maximum parcel size of 5 acres).</i></p> <p><i>This policy provides an exception, otherwise new development resulting in a density less than 0.2 du/acre in the Urban Development Area would conflict with the plan's allowable density range as designated in the plan text and map.</i></p>	<p>non-sewered areas, albeit only at that density range.</p>	
<p><b>JCCP-P26 (Private Water Sources).</b> The use of private water sources within the (Jacoby Creek Area) Urban Development Area is permitted only for residential development at densities of <b>one dwelling unit per five or more acres.</b></p>	<p><b>Consistent</b></p> <p>Option 'A' requires public water supply service (and sewage disposal service) at a density exceeding 5-acre per dwelling unit.</p>	<p><b>Not consistent</b></p> <p>Option 'B' would allow private water sources at higher densities where permitted by current standards.</p>
<p><b>JCCP-P27 (Development within the Urban Development Area).</b> Development within the (Jacoby Creek Area) Urban Development Area should occur at designated plan densities only when public water and public sewage disposal systems are available, except as provided in this Plan.</p>	<p><b>Not consistent</b></p> <p>Option 'A' requires public water supply and sewage disposal services at a density exceeding 5-acre per dwelling unit.</p> <p>However, the Policy's referenced exception has not been disclosed nor described to determine plan-consistency. If the exception is to permit development at the designated plan densities where the services cannot be secured (as inferred by policy GP-P6, see below), then Option 'A' would</p>	<p><b>Consistent</b></p> <p>Option 'B' would allow development at the mapped, designated plan densities where the services are not available when permitted by current health standards.</p> <p>However, Option 'B' would be consistent with an exception, if provided in the plan, to permit development at the designated plan densities where the services cannot be secured.</p>

	not be consistent, as it provides no exceptions.	
<b>JCCP-P40 (Development of Land Designated Suburban Residential) and JCCP-P43 (Urban Water Systems).</b> All new development on lands designated as Suburban Residential, and all proposed development within the Urban Development Area, shall be required to connect to a public water system as and when such system becomes available.	<b>Not consistent</b> Option 'A' requires public water supply and sewage disposal services at a density exceeding 5-acre per dwelling unit. But it has no provision allowing new development before the services become available	<b>Consistent</b> Where public water services are not nor will be available, Option 'B' would not permit new development that would be dependent on the services in order to comply with health requirements.
<b>JCCP-P47 (Rural Subdivision Limitation).</b> No new subdivision or minor subdivision which creates parcels of less than five acres shall be approved on lands designated as Suburban Residential until publicly maintained waste disposal systems are available to such lands.	<b>Not relevant</b> The policy addresses subdivisions, not ADUs. However, Option 'A' would conform to the 5-acre restriction.	<b>Not relevant</b> The policy addresses subdivisions, not ADUs. However, Option 'B' would conflict with the 5-acre restriction.
<b>OTHER GPU POLICIES</b>		
<b>G-P31 (Common Sense Principle).</b> The General Plan should be interpreted in a commonsense manner to encourage reasonable development which can meet the needs of the community with minimal impacts on the environment and demands on public services. Taking a comprehensive view of all relevant plan policies, the result must balance the intent of these policies, in a practical, workable, and sound manner. When using the Commonsense Principle, findings shall be made by the Planning Commission and/or Board of Supervisors indicating how the use of this principle balances the needs of the community and Plan policies.	<b>Not consistent</b> Option 'A' violates the Common Sense Principle in that it strictly applies a special restriction that—for the reason that the required services are not nor will not be provided—results in a de facto moratorium on ADUs in the Jacoby Creek Area for an undeterminable period of time until the services can be provided.  The "moratorium" factor is because there are very few, if not any, parcels in the subject area where new development or ADUs could comply with the 5-acre density restriction, with or without services.	<b>Consistent</b> Option 'B' simply represents sound practical judgement.

<p><b>GP-P2 (Urban Development Areas).</b> Establish and maintain Urban Development Areas within Community Planning Areas to reflect areas that are served with existing, or planned, public wastewater systems.</p>	<p><b>Not consistent</b></p> <p>Option 'A' continues the incorrect premise that the Jacoby Creek Area Urban Development Area is served with, or is planned to be served with, public wastewater systems. This is not true.</p>	<p><b>Consistent</b></p> <p>Option 'B' acknowledges the error.</p>
<p><b>GP-P5 (Connection to Public Wastewater Systems within Urban Service Areas).</b> All new development within Urban Service Areas shall connect to public wastewater systems.</p>	<p><b>Not consistent</b></p> <p>Option 'A' exceeds the scope of this policy and imposes this requirement to areas beyond the Jacoby Creek Area Urban Service Area.</p>	<p><b>Consistent</b></p> <p>Option 'B' does not violate this policy.</p>
<p><b>GP-P6 (Use of On-Site Sewage Systems within Urban Development Areas).</b> The utilization of on-site sewage disposal systems shall not be acceptable for new subdivisions in the Urban Development Area, unless the Planning Commission makes specific factual findings that:</p> <ul style="list-style-type: none"> <li>A. The extension of services is physically infeasible; or,</li> <li>B. The area is not planned for service in the service provider's Municipal Service Review and other written long-term plans; or,</li> <li>C. The services are not reasonably available in a timely manner.</li> </ul>	<p><b>Not consistent</b></p> <p>Jacoby Creek Community Plan policy JCCP-P27 is:</p> <p style="padding-left: 40px;">"Development within the (Jacoby Creek Area) Urban Development Area should occur at designated plan densities only when public water and public sewage disposal systems are available, <b>except as provided in this Plan</b>".</p> <p>A rational inference can be made that policy GP-P6 is that exception "provided in this Plan."</p> <p>However, in conflict with this policy, Option 'A' allows no exception that would permit development at the designated plan densities where the services cannot be secured.</p>	<p><b>Consistent</b></p> <p>Option 'B' applies this policy.</p>

**To: Humboldt County Planning Commission**

**From: Larry Henderson**

**Date: May 25, 2020**

**Subject: Proposed Accessory Dwelling Unit Ordinance**

Please consider the following input. I have four issues to address.

**First Issue: The requirement to connect to sewer system has detrimental consequence**

Section 69.05.3.6 (Sewer and Water Service) requires all new ADUs within a community service district's service area to connect to a public wastewater system. But some community service districts do not provide—nor can or plan to provide—sewerage facilities or other wastewater disposal systems. The requirement would be a de facto moratorium on ADUs in areas where the current State law would otherwise permit them.

There need be no requirement other than the ADU must comply with the requirements applicable on the primary residence or—as an alternative where service capacity is restricted—new residences.

**Second Issue: The permit provisions are vague**

Section 69.05.2 (ADUs Generally Permitted) provides that ADUs *may be* principally permitted in designated areas subject to specified conditions, and *may be* excluded or required to get a Special Permit in certain other designated areas.

The term “may” is discretionary. If an ADU may or may not be permitted or excluded, then the specifics must be added as to who gets to decide and what the criteria is for making the decision.

To correct the problem, delete the “permissive” text to read “is principally permitted” (rather than “may be principally permitted”), “is excluded” (rather than “may be excluded”), and “requires a Special Permit” (rather than “may require a Special Permit”).

**Third Issue: The Special Permit Area provisions are improper**

Section 69.05.6 provides that lots located in an ADU Special Permit Area “*are presumed* to have certain water and sewer service limitations, adverse impacts on traffic flow, and/or public safety conditions that may preclude construction of an ADU.”

The most demanding regulatory test in constitutional law is that the requirement or prohibition is the least restrictive means to further an overriding public interest. Is there a public interest and is it more important than other interests, and what are the options and is the proposed one the least restrictive?

In this case, the County is presuming there is an overriding public interest to apply the proposed restrictions. This is wrong. Government agencies must offer genuine justifications for important decisions...real reasons that can be scrutinized by the public and courts, rather than fabricated reasons that are asserted as self-evident truths.



To correct the problem, the underlying “special consideration” for the particular restrictions should be clearly defined, and the appropriate test for permitting the ADU described.

**Fourth Issue: Exclusion of ADUs in Jacoby Creek Area is unlawful**

Seven ADU Special Permit Areas are listed in Section 69.05.6. Six of them are truly areas having “special considerations” that—because of real, extraordinary hazardous conditions—the public interest justifies discretionary review through the special permit process. The seventh area listed (the Jacoby Creek Area) is not comparable and should not be excluded from the ADU provisions applicable to all other residentially zoned lands not having disclosed extraordinary hazardous conditions.

The proposed text is, “Within the Jacoby Creek area, ADUs must comply with the 5-acre minimum density limits as provided in the Jacoby Creek Community Plan, Appendix C of the General Plan.” This is misleading, as the 5-acre density reference is not law, but policy.

There is not a legislative 5-acre minimum density limit in the Jacoby Creek area. The residential zoning in the area permits parcels 2.5 acres and smaller subject to the same requirements and restrictions of all the other similar zoned properties throughout the County.

The 5-acre density reference is to the Jacoby Creek Area Plan that was adopted nearly 40 years ago in 1982. The plan was included by reference in the updated General Plan. But the “re-adopted” plan was not updated; nor was it’s “re-adoption” completed in compliance with CEQA mandate and public noticing and hearing requirements.

The County has the choice to include or exclude the Jacoby Creek area from the general permit provisions of the ADU ordinance. This will be a discretionary decision requiring (in addition to CEQA compliance) a showing of justification and the mandatory General Plan Consistency determination.

Planning will say the area must be excluded because including it would be inconsistent with the General Plan. Again, the reference will be the 5-acre density limitation of the 40-year old Jacoby Creek Area Plan.

The Plan allows a wide residential density range...from one dwelling unit per two and a half (2½) acres to a maximum of seven dwelling units per acre. However, the policy of that plan calls for **both** public water supply **and** sewage disposal services for new development at a density greater than one dwelling unit per five acres...effectively, for all new development in that area. The problem is there currently is no plan, budget, or projected schedule for a wastewater system in the area.

The adoption of this ordinance with Section 69.05.6(g) as proposed would now make this 40-year old policy limitation a legislative mandate.

Would it be consistent with the General Plan to make the 5-acre density limitation the law? Defendable arguments can be made that the limitation is inconsistent with numerous other goals and policies throughout the plan. For one, it would conflict with the Plan's policies—and with recent State mandate—that encourages and permits critically needed new housing...urban and suburban.

There is also the question of just cause. Is there an overriding public interest for making the 5-acre density limitation a legislative mandate...what is the problem? The current zoning has been in effect for over 40 years, and there has been no cause to change. Developments have been permitted in the area at a density higher than the 5-acre limitation.

County Planning has stated that the 5-acre density limitation protects public health. Planning references a 1979 resolution of the State Water Resources Control Board. They say the resolution (No. 79-101) identified a public health hazard related to development of residences served by on-site sewage disposal systems in the Jacoby Creek area. The assertion is that the policy—and now, the strict enforcement of the 40-year old policy—was and is necessary to mitigate this hazard.

But the referenced resolution only prohibited “waiver of criteria governing the use of individual waste treatment and disposal systems in portions of the nonsewered areas tributary to Humboldt Bay between the cities of Arcata and Eureka.” The criteria that was effective then—and is still effective today—did not mandate a 5-acre minimum standard. To the contrary, with strict application of the criteria, new housing can be accommodated in non-sewered areas at a density greater than 5 acres per unit without endangering public health.

In contrast, there are NO restrictions elsewhere in the County or State necessitating a minimum 5-acre per dwelling unit density where public water service is or will be provided without sewage disposal service. There is no legitimate reason to not apply to the Jacoby Creek Community Planning Area those policies applicable to new housing development in other areas in the County or State.

My request is to delete Section 69.05.6(g) listing the Jacoby Creek area as a Special Permit Area.

### Closing

I appreciate and thank the Planning Commission for considering my input and request.

Respectfully

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