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# F8a

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Staff:	S. Fiala – SF
Staff Report:	11/22/2016
Hearing Date:	12/9/2016

## APPEAL STAFF REPORT: DE NOVO HEARING

**Appeal Number:** A-2-MAR-12-008

**Applicants:** Wayne and Susan Trivelpiece

**Location:** 5959 State Route One (APN 188-100-35) in the unincorporated Bolinas area of Marin County.

**Project Description:** After-the-fact authorization to install a domestic water well and associated distribution infrastructure.

**Staff Recommendation:** Approval with Conditions

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### SUMMARY OF STAFF RECOMMENDATION

In 1985, Marin County issued a “Permit to Operate Mutual Water Supply System” for a domestic water supply well to serve two single-family residences on adjacent parcels at 5959 and 5963 State Route One in Bolinas, Marin County. The Permit to Operate included a provision that it was valid only after approval of a coastal development permit (CDP) for the installation of the well. However, the well was subsequently constructed in 1987 without the benefit of a CDP. In 2012, Marin County approved after-the-fact CDP 2009-0377 for the well and associated underground piping. The County found that because this project entailed only the legalization of an existing well, it would not result in depletion of water supply, grading, vegetation removal, physical changes in any identified sensitive habitat area, or other potentially adverse impacts on the environment. The County’s CDP approval was appealed to the Commission by Terence Carroll.

On March 11, 2015, the Commission found that the County’s action approving the CDP for the project raised substantial LCP conformance issues with the LCP’s stream and wetland protection

policies and took jurisdiction over the CDP application. In taking that action, the Commission also required that the Applicants submit additional information prior to the scheduling of a de novo hearing in order to evaluate the project for consistency with the County's certified LCP, including requiring an alternative analysis that compares the impacts associated with installing the well at the current location with other alternatives for providing domestic water to the two properties. Staff worked closely with the Applicants to help them meet that requirement, and the Applicants' alternatives analysis was submitted on June 7, 2016.

The LCP requires protection of stream, lagoon and wetland resources, including through the application of buffer areas in which very limited uses and development are allowed. The approved well and its infrastructure are located within the minimum LCP-required 100-foot buffer of Cronin Creek, a tributary to Pine Gulch Creek, which has a designation of special significance under the Marin LCP as a primary tributary to Bolinas Lagoon and as a salmonid-bearing stream. The approved well and its infrastructure were also constructed within the LCP-required 100-foot buffer of wetlands that had been previously mapped on the property.<sup>1</sup> The LCP does not allow anything other than resource-dependent uses to be located in wetland buffers, and thus the well and its infrastructure are not consistent with the LCP.

The Applicants' recent alternatives analysis confirmed that potential alternative locations for a well on the subject property are highly constrained due to sensitive habitats, existing development, steep slopes, and unsuitable soils. Complete removal of the installed well and restoration of the former well location is also not an option as the subject property is outside the jurisdiction of the Bolinas Community Public Utilities District, and the two residences that rely on the subject well for domestic water supply would be left without a source of domestic water supply. Thus, although the LCP would ordinarily direct denial of the project, staff believes that such a denial could engender a successful takings claim, and that approval to avoid same is the best course of action in this case. Thus, the staff recommendation is for an approval that recognizes that fact set, and that provides for mitigation to offset impacts associated with the well and its infrastructure. While the installation of the well and associated distribution pipe would have certainly impacted sensitive resources at the time of development, it is evident today that both native and introduced wetland species have since established (or reestablished) and have proven to be largely self-sustaining. As conditioned to provide for mitigation in the form of habitat enhancement, by removing non-natives, and monitoring the success of the removal effort for the benefit of the wetland and stream habitat, leaving the well in its current location is the least environmentally damaging alternative.

Finally, the project can be found consistent with all other policies of the Marin County LCP and with the public access and recreation policies of the Coastal Act. Therefore, staff recommends the proposed project, as conditioned, be approved. The motion and resolution to approve the project subject to the staff recommendation are found on page 4 of this report.

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<sup>1</sup> Wetlands on the property were mapped in the "Dogtown Biological and Wetland Assessment Report" prepared for a prior project with adjacent property owners in 2007.

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**APPENDICES**

Appendix A – Substantive File Documents

**EXHIBITS**

Exhibit 1 – Project Site Map

Exhibit 2 – Project Site Images

Exhibit 3 – Project Plans

Exhibit 4 – Applicants’ Well Siting Alternatives Analysis (June 2016)

## I. MOTION AND RESOLUTION

Staff recommends that the Commission, after public hearing, **approve** a coastal development permit for the proposed development. To implement this recommendation, staff recommends a **YES** vote on the following motion. Passage of this motion will result in approval of the CDP as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

***Motion:** I move that the Commission approve Coastal Development Permit Number A-2-MAR-12-008 pursuant to the staff recommendation, and I recommend a yes vote.*

***Resolution to Approve CDP:** The Commission hereby approves Coastal Development Permit Number A-2-MAR-12-008 and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with Marin County Local Coastal Program policies and Coastal Act access and recreation policies. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.*

## II. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

- 1. Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the Permittees or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
- 2. Permit Expiration and Condition Compliance.** Because all of the proposed development has already commenced, this coastal development permit shall be deemed issued upon the Commission's approval and will not expire. Failure to comply with the special conditions of this permit may result in the institution of an action to enforce those conditions under the provisions of Chapter 9 of the Coastal Act.
- 3. Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
- 4. Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
- 5. Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the Permittees to bind all future owners and possessors of the subject property to the terms and conditions.

### III. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

1. **Condition Compliance.** WITHIN 180 DAYS OF COMMISSION ACTION ON THIS CDP APPLICATION, or within such additional time as the Executive Director may grant for good cause, the Applicants shall satisfy all requirements specified in these standard and special conditions. Failure to comply with this requirement may result in the institution of enforcement action under the provisions of Chapter 9 of the Coastal Act.
2. **Habitat Restoration Plan.** The Permittees shall submit two copies of a Habitat Restoration Plan to the Executive Director for review and approval. The Plan shall provide for restoration of wetland and stream and related buffer habitats with a focus on the largest of the three onsite ponds (approximately 0.45 acres), which lies nearest the access road and offers the greatest opportunity for enhancement to benefit sensitive vegetation communities and wildlife. The Habitat Restoration Plan shall, at a minimum, include the following:
  - a. **Purpose Statement.** The Habitat Restoration Plan shall clearly express the goals of the desired biological resource and habitat characteristics, including those identified in the findings as well as any others that may subsequently emerge. This shall include an overview of existing site conditions as well as a description of the major components that the habitat enhancement activities are intended to provide.
  - b. **Existing Conditions Assessment.** For the eastern portion of the property (below the access road and including the ponds, as shown in Exhibit 4), the plan shall characterize the existing site conditions in detail. Surveys of existing vegetation shall document plant distributions and their percent cover, and shall be presented in one or more maps, illustrating the existing nature of both native and non-native species. All trees, non-native horticultural plantings, and invasive species (regardless of their extent), shall be clearly indicated on the maps. Existing traversable foot paths shall also be shown on the maps. A plant list to assess species richness and a narrative interpretation shall accompany the maps.

Any bird species, including raptors, known or observed to nest within 500 meters of the site shall be recorded along with the approximate locations of these nests on maps (*e.g.*, the Red-Shouldered Hawk nest in the *Eucalyptus* grove bordering the lower portion of the property). Lists to assess species richness of fauna shall also be provided, along with a narrative to interpret observations. Any known or observed aquatic wildlife occurring in the pond areas, including turtles, fish, and frogs, shall also be identified as feasible.
  - c. **Characterization of Desired Habitat.** The plan shall provide clear goals of what the enhancement activities aim to achieve immediately following the restoration, and as the desired condition that will develop and sustain into the future. One or more maps, based upon non-native vegetation removal and wildlife habitat needs as further described below, shall be included to illustrate the desired final site condition. The characterization shall also be informed by relevant literature (*e.g.*, descriptions of other natural ponds

occurring locally, wildlife ecology and needs), and the rationale for why the proposed design is appropriate shall be explicitly stated.

Given the proximity to known occurrences of California Red-Legged Frogs, Northern Western Pond Turtles, and Saltmarsh Common Yellowthroats, the plan shall address the specific habitat needs for these species and incorporate elements that will favor their potential use of the site in the future. To specifically enhance the habitat for California Red-Legged Frog and Northern Western Pond Turtle use, the plan shall include:

1. A reduction in overall vegetation cover surrounding the ponds, primarily focusing on non-native and invasive plants, but also large horticultural plants such as the *Gunnera*;
2. Maintenance of a mosaic of native vegetation types to ensure diverse opportunities for refuge from predators;
3. Establishment of a series of corridors radiating out from the ponds to upland habitat areas;
4. Extensive removal of the existing aquatic vegetation, including both water fern mats and water lilies, in order to create suitable open-water habitat; and
5. Placement of logs and flat rocks near the pond for additional habitat complexity that will serve as refuge (for frogs and turtles) as well as basking stations (for turtles).

Willow thickets shall be left intact in order to promote Saltmarsh Common Yellowthroat use. Deep-rooted vegetation such as trees may be left in-place to avoid excessive disturbance to the ground and aquatic basin.

**d. Invasive Plant Management and Maintenance Techniques.** The plan shall identify best management practices for addressing invasive vegetation, which will be implemented during habitat restoration to enhance habitat quality. These shall include practices to:

1. Reduce exotic seed banks and minimize the ongoing presence of invasive weeds (particularly in upland areas);
2. Protect sensitive wetland and riparian habitat, as well as wildlife species of concern, from the adverse impacts of herbicides. Removal of vegetation shall be completed by hand, where feasible. Herbicide use shall be restricted strictly to where needed for the purposes of habitat restoration only, with allowance for spot applications of Glyphosate Aquamaster™ (previously Rodeo™) or equivalent only for invasive and non-native species. No use of any herbicide may occur during the rainy season (November 1 – March 31), or if wind speeds on site are greater than 5 mph, or 48 hours prior to predicted rain. In the event that rain does occur, herbicide application shall not resume again until 72 hours after rain;

3. Minimize disturbance and mortality of California Red-Legged Frogs, Northern Western Pond Turtles, and ground-nesting birds (including Saltmarsh Common Yellowthroats) that may be present in vegetated upland areas (i.e., grasslands and riparian areas within one mile of aquatic habitat), including underground burrows. Mowing shall not be allowed at any time. Creation and maintenance of wildlife corridors and foot-paths for accessing the subject well infrastructure may be completed using a weed-whacker when vegetation is cut to a height of no less than 4 inches, thus reducing the potential for incidental take of animals crouching and taking refuge below this height (i.e., frogs). With these precautions, vegetation trimming may be allowed May 1 – October 31, unless Northern Western Pond Turtles and Saltmarsh Common Yellowthroats are observed at the site, in which case, vegetation trimming shall be limited to September 1 – October 31 to protect these ground-nesting species; and
4. Minimize disturbance and mortality of California Red-Legged Frogs and Northern Western Pond Turtles in aquatic habitat during the removal of water fern mats and water lilies to create open-water habitat. Given that the large pond is perennial, and thus, there is a risk of overwintering tadpoles being present, removal of water fern mats should be accomplished by hand-netting along the water's surface and subsequently allowing them to compost elsewhere on-site. If possible, the pond should be waded through on-foot to generate vibrations that will drive tadpoles down and away from netting. If inadvertently caught in nets, tadpoles shall be immediately placed back into the pond with minimal handling. If mechanical methods become necessary to thin water lilies, the Executive Director shall be consulted for guidance prior to removal.
- e. **Erosion Control.** Methods to control erosion and maintain water quality shall be specified for any areas identified as requiring significant soil disturbance. Soil disturbance shall be limited to the minimum necessary for sufficient vegetation removal and the creation of wildlife corridors radiating out from the ponds to upland habitat areas. Topographic alterations (including grading) may not be undertaken.
- f. **Native Plantings.** Though the restoration shall involve reducing the overall vegetation density with a focus on removing non-native and invasive species, in order to benefit sensitive wildlife, it may become necessary or appropriate to plant native vegetation where the ground has been significantly disturbed. In this case, a palette of native vegetation to be planted (including species, numbers, sizes, and sources) shall be provided along with the rationale, locations where they will be placed (as indicated on a site plan view), a schedule for planting timing, and the methods to be used (e.g., spacing). If plants, cuttings, or seed will be obtained through a nursery, the Permittees shall receive certification from the nursery that plants, cuttings, or seeds are of local genetic stock and are not cultivars. Other than any initial hand-watering to aid in the establishment of native plantings, irrigation shall not be allowed.

**g. Restoration Planning.**

1. The plan shall identify the timing of restoration activities, whether completed in phases or at once, with the following restrictions to avoid incidental take of sensitive wildlife. The Permittees shall assume California Red-legged Frogs occur at the site. Therefore, to avoid impacts to the frogs' breeding and dispersal, all restoration activity shall be conducted during the dry season (i.e., April 15 – October 31, or prior to the onset of the rainy season, whichever occurs first). If Northern Western Pond Turtles are found to reside at the site during initial surveys or at any point, restoration activities within upland habitat may take place only from September 1 to October 31 to protect turtle nesting periods; and
2. Prior to any restoration activities, the Permittees shall submit brief summary documents that demonstrate familiarity with the life histories, legal protections, and best management practices all for sensitive species potentially occurring on-site. These summaries shall include several images of each species to enable recognition should they be encountered in the course of restoration. Specifically, the summaries should address, at a minimum, California Red-Legged Frogs, Western Pond turtles, and Saltmarsh Common Yellowthroats.

**h. Monitoring.** The plan shall include an interim monitoring program, to be conducted annually in the spring (April 1 – June 30) to capture vegetation bloom periods, beginning the first spring following initial restoration activities.

1. The interim monitoring shall track restoration progress towards the final site condition goals, and inform any adaptive management strategies that may become necessary to ensure success. Field activities and the methods to assess the site's vegetation shall be recorded with photographs, along with maps similar to those required under subsection (c) of this Special Condition, to document the site's current condition and shall be used for assessing progress. Wildlife observations, species lists, and site photographs (from the same fixed points, in the same directions, each year) shall also be included in the annual monitoring; and
2. Final monitoring to determine restoration success shall be conducted no sooner than three years following completion of construction, in the absence of any significant maintenance and remediation activities over that duration. Should significant maintenance or remediation activities become necessary following completion of the initial restoration event, then final monitoring should occur no sooner than three years after the final maintenance or remediation activity. The final monitoring event shall use the same metrics as the annual events.

**j. Reporting.** Following completion of the initial restoration activities, a report summarizing activities carried out and an "as-built" description of the initial site condition achieved, including maps, shall be provided within 30 days. This should be a brief report describing the field implementation of the approved restoration plan in narrative and photographs, reporting any problems in the implementation and their



resolution, any sensitive species encountered during implementation, and any expectations concerning future maintenance.

1. Annual monitoring reports shall be provided to the Executive Director for the duration of the required monitoring period, beginning the first spring after submission of the initial “as-built” report. These reports shall be submitted no later than 60 days following the annual monitoring event, or August 31<sup>st</sup>, whichever is earlier. A narrative describing the field surveys, wildlife observations, and plant and wildlife species lists shall be included in the reports. In addition, site photographs (from the same fixed points, in the same directions) and maps (similar to those required under subsection (c) of this Special Condition illustrating the site’s current condition shall be included for review each year. Each report shall be cumulative and shall summarize all previous results, including a discussion of progress towards achieving the final site condition goals. Details of any maintenance or remediation activities, and any other observations that may be pertinent to sustaining the enhanced habitats shall also be provided; and
  2. A final report, following the same requirements as described in subsection (j)(1) above, shall be provided for review no later than August 31<sup>st</sup> of the expected final monitoring year. In addition, the final report shall indicate any considerations appropriate for future assurance of the restoration site’s self-sustenance.
- k. **Procedure for Judging Success.** The final report shall be used to evaluate restoration success. The evaluation shall be based upon similarity between the maps illustrating the final site condition goals as provided in subsection (c) of this Special Condition, and the final site condition observed as provided in subsection (j) of this Special Condition, with consideration of, at a minimum, site photos, species lists, wildlife observations, maintenance and remediation patterns, and restoration trajectory.
1. **Provision for Possible Further Action.** If on review of the final monitoring report, the Executive Director determines the restoration effort is not successful relative to the final site condition goals, the Executive Director may require remedial actions and continued monitoring until success is achieved.

Minor adjustments to the Habitat Restoration Plan may be allowed by the Executive Director if such adjustments: (1) are deemed reasonable and necessary; and (2) do not adversely impact coastal resources. All requirements above and all requirements of the approved Habitat Restoration Plan shall be enforceable components of this coastal development permit. The Permittees shall undertake construction in accordance with the approved Habitat Restoration Plan.

3. **Pre-Construction & Construction Monitoring.** If any restoration activities will occur during the bird nesting season (February 15 – August 31), then surveys shall be completed no less than 3 days prior to the commencement of restoration activities, and no more than 30 days prior to commencement, in order to evaluate whether sensitive bird species or raptors may be impacted. These surveys shall extend 500 feet beyond the restoration area. The Permittees shall submit the conducted surveys to the Executive Director. If any sensitive bird

species or raptors are determined to be breeding or nesting within the restoration area plus the additional 500 feet, the Permittees shall halt restoration activities until the end of the nesting season.

A qualified wildlife biologist shall monitor any ground-disturbing activities to ensure no take of sensitive species during project construction. If any sensitive species (adult or juvenile, plant or animal) are encountered during ground-disturbing restoration activities, then those activities shall be immediately halted. Sensitive animals shall be allowed to leave the area on their own; sensitive plants shall be clearly documented. Encounters with California Red-Legged Frogs, Northern Western Pond Turtles, Saltmarsh Common Yellowthroats, or any other federally-protected species shall be reported to the Executive Director, and to the Bay-Delta Region of United States Fish and Wildlife Service. State-protected species and Species of Special Concern shall be reported to the Executive Director as well as to the California Department of Fish and Wildlife.

- 5. Deed Restriction.** The Permittees shall submit to the Executive Director for review and approval documentation demonstrating that the landowners have executed and recorded against the parcel(s) governed by this permit a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; and (2) imposing the Special Conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the Property. The deed restriction shall include a legal description of the entire parcel or parcels governed by this permit. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this permit shall continue to restrict the use and enjoyment of the subject property so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.

## **IV. FINDINGS AND DECLARATIONS**

### **A. PROJECT LOCATION**

The proposed project is located at 5959 State Route One in Bolinas, Marin County, more than two miles inland of the Pacific Ocean and within the watershed of Bolinas Lagoon. Cronin Creek and Coppermine Creek, two tributaries to Pine Gulch Creek, a stream of special significance under the Marin LCP, run adjacent to and through the 10-acre subject parcel. The site also contains two ponds that were identified as freshwater wetlands under the National Wetlands Inventory, as well as one additional ephemeral pond. The parcel is zoned C-RSP (Coastal-Residential, Single-Family Planned). Land uses adjacent to the subject property include Point Reyes National Seashore to the north, single-family residential parcels to the east and south, and a larger, predominantly agricultural parcel to the west.

## **B. PROJECT DESCRIPTION AND BACKGROUND**

In 1985, Marin County issued a “Permit to Operate Mutual Water Supply System” for the subject well, which included a provision that the permit was valid only after approval of a CDP for the well. However, without the benefit of a CDP, the well and associated infrastructure were constructed in 1987, at a location within 100 feet of Cronin Creek and within 100 feet of wetlands identified on the property. In addition, approximately 375-feet of underground piping connects the well to the distribution system and storage tanks. The piping is also located within 100 feet of previously identified wetlands and within 25 feet of the adjacent property lines. For the past thirty years, the well has provided the sole source of water for two existing residences on adjacent parcels at 5959 and 5963 State Route One.

In 2012, Marin County approved after-the-fact CDP 2009-0377 for the well and associated underground piping. The County found that because this project entailed only the legalization of an existing well, it would not result in depletion of water supply, grading, vegetation removal, physical changes in any identified sensitive habitat area, or other potentially adverse impacts on the environment. Thus, the County approved the well as constructed and did not require any analysis of alternative locations or any mitigation for the location of the well. In 2012, roughly at the same time as the appeal was filed with the Commission, Richard Kirschman sold the property to Wayne and Susan Trivelpiece, the current owners. On March 11, 2015, the Commission found that the County’s action approving the project raised a substantial issue of conformance with the County’s LCP stream and wetland protection policies and took jurisdiction over the CDP application. The Commission required that the Applicants submit additional information prior to de novo review in order to evaluate the project for consistency with the County’s certified LCP, including an alternative analysis that compares the impacts associated with installing the well at the current location with other alternatives for providing domestic water to the two properties, including alternative well locations. The well siting alternative analysis was submitted on June 7, 2016.

The standard of review for de novo review of the CDP application is the Marin LCP, and because the project site is located seaward of the first through public road, the Public Access and Recreation policies of the Coastal Act. The Marin County LCP is divided into two LUP units; this project is subject to LCP LUP Unit I.

See **Exhibit 1** for a location map; see **Exhibit 2** for photographs of the site and surrounding area; and see **Exhibit 3** for the project plans.

## **C. NATURAL RESOURCE PROTECTION**

The Marin County LUP Unit I policies on stream protection state:

*3. A riparian protection area and a stream buffer area shall be established for all streams within Unit I. The riparian protection area shall include all existing riparian vegetation on both sides of the stream. The stream buffer area shall extend a minimum of 50 feet from the outer edge of the riparian vegetation, but in no case shall be less than 100 feet from the banks of the stream.*

*4. No construction, alteration of land forms, or vegetation removal, shall be permitted within the riparian protection area. However, if a parcel is located entirely within the stream buffer, design review shall be required for any proposed structure and shall consider impacts on water quality, riparian vegetation/and the rate and volume of streamflow. In general, development shall be located on that portion of the site which results in the least impact on the stream, and shall include provision for mitigation measures to control erosion and runoff and to provide restoration of disturbed areas by replanting with plant species naturally found on the site.*

The Marin County LUP Unit I policies on lagoon protection state:

*18. To the maximum extent feasible, a buffer strip, a minimum of 100 feet in width, shall be maintained in natural condition along the periphery of all wetlands as delineated by the Department of Fish and Game and in accordance with Section 30121 of the Coastal Act and with the criteria developed by the U.S. Fish and Wildlife Service. No uses other than those dependent upon the resources shall be allowed within the buffer strip.*

The Marin County IP policies on stream and wetland resource protection (IP Section 22.57.130(G)) state:

*G. The following standards shall apply to all development within or adjacent streams identified as blue-line streams on the most recent edition of the USGS seven and one-half minute quadrangle map(s) for the project area. ...*

*3. For proposed projects located adjacent to streams, application submittals shall include the identification of existing riparian vegetation as a riparian protection area. No construction, alteration of land forms or vegetation removal shall be permitted within such riparian protection area. Additionally, such project applications shall identify a stream buffer area which shall extend a minimum of fifty feet from the outer edge of riparian vegetation, but in no case less than one hundred feet from the banks of a stream. Development shall not be located within this stream buffer area. When a parcel is located entirely within a stream buffer area, design review shall be required to identify and implement the mitigation measures necessary to protect water quality, riparian vegetation and the rate and volume of stream flows. The design process shall also address the impacts of erosion and runoff, and provide for the restoration of disturbed areas by replacement landscaping with plant species naturally found on the site. Where a finding based upon factual evidence is made that development outside a riparian protection or stream buffer area would be more environmentally damaging to the riparian habitat than development within the riparian protection or stream buffer area, development of principal permitted uses may occur within such area subject to design review and appropriate mitigation measures.*

*4. Development applications on lands surrounding Bolinas Lagoon and other wetlands as identified on the appeals area map(s) shall include the designation of a wetland buffer area. The buffer area shall include those identified or apparent wetland related resources but in no case shall be less than a minimum of one hundred feet in width from the subject*

*wetland. To the maximum extent feasible, the buffer area shall be retained in a natural condition and development located outside the buffer area. Only those uses dependent upon the resources of the wetland shall be permitted within the wetland buffer area.*

The Marin County LUP Unit I policies on wildlife habitat protection state:

*22. Butterfly trees and other trees or vegetation identified on the natural resource maps on file with the Marin County Planning Department, which provide roosting and/or nesting habitat of wildlife, shall be considered major vegetation, and significant alteration or removal of such vegetation shall require a coastal project permit pursuant to Section 30106 of the Coastal Act. Such trees shall not be altered or removed except where they pose a threat to life or property.*

*23. Development adjacent to wildlife nesting and roosting areas shall be set back a sufficient distance to minimize impacts on the habitat area. Such development activities shall be timed so that disturbance to nesting and breeding wildlife is minimized and shall, to the extent practical, use native vegetation for landscaping.*

*28. Invasive exotic plant species are proliferating in the Coastal Zone at the expense of native plants. In order to preserve indigenous native plant species within the Coastal Zone, development permits shall be conditioned, where applicable, to require the removal of any invasive, non-indigenous plant species such as Pampas Grass, Brooms, and Thistles.*

## **Analysis**

### *Stream protection*

The Marin County LCP is very protective of streams, wetlands, and Bolinas Lagoon. Within the County's coastal zone, two streams are labelled with special significance because they support annual runs of steelhead trout and Coho salmon. One of these is Pine Gulch Creek, the principal source of freshwater to Bolinas Lagoon, contributing approximately half of the Lagoon's freshwater inflow. Pine Gulch Creek is also the most important steelhead and salmon stream tributary to Bolinas Lagoon, an estuarine area composed of salt water, tidal mudflats, marshlands, and sandbars, most of which are flooded by high tides.

The LCP requires the establishment of riparian protection areas and stream buffer areas for all streams to extend 50 feet from the edge of the adjacent riparian vegetation, which in no case shall be less than 100 feet from the banks of the stream, and states that no construction, alteration of land forms, or vegetation removal shall be permitted within the riparian protection area. The subject well and associated infrastructure was constructed within 100 feet of Cronin Creek, a tributary to Pine Gulch Creek, which flows to Bolinas Lagoon. Thus, the well and its infrastructure are located in the LCP-required riparian buffer.

Per the Marin County Unit I Land Use Plan, no construction, alteration of land forms, or vegetation removal is allowed within the riparian buffer. Per the Marin County Implementation Plan, if a parcel is located entirely within the buffer, the Marin LCP allows that where a finding based upon factual evidence can be made that development outside a riparian protection or stream buffer area would be more environmentally damaging to the riparian habitat than

development proposed to be located within the riparian protection or stream buffer area, the development of principal permitted uses may occur within such an area, subject to appropriate mitigation measures. The principal permitted use in C-RSP zoning district is single-family dwellings. As the Commission found in its Substantial Issue determination, the well is not a principally permitted use, and does not qualify for this LCP exception.

Consistent with the direction provided by the Commission at the Substantial Issue hearing, the Applicants conducted an alternatives analysis for the location of the well in May 2016, which confirmed that potential locations for a well on the subject property are highly constrained.<sup>2</sup> Within the low-lying eastern portion of the property, there are locations suitable for drill rig access and productive wells might be developed. However, the entire area is located within the LCP-required buffers for streams and wetlands. Within the steep, forested western portion of the property, there are some locations suitable for drill rig access (i.e., relatively horizontal and open areas along road switchbacks and at the top of the ridge), but it appears that productive wells could not be developed because these areas are already developed with septic systems, an animal enclosure and a pet cemetery, or their soils are unlikely to produce water, according to the Applicants' report. The remainder of the site is too steep to be accessed by drill rig equipment. Another alternative would be removal of the well and restoration of the former well location. However, this alternative would leave the two residences that rely on the subject well for domestic water supply without an on-site source of water. Thus, the preferred alternative is approval of the well in its existing location because there is no feasible, less environmentally damaging alternative location for the well on the subject property, provided project impacts are appropriately mitigated. However, this is not allowed by the LCP due to buffer requirements, and can only be approved to avoid a potential taking in this case, as discussed below.

#### *Wetland protection*

The LCP states that, to the maximum extent feasible, a buffer strip, a minimum of 100 feet in width, shall be maintained in natural condition along the periphery of all wetlands. The well and associated infrastructure are located approximately 50 feet from wetlands on the subject parcel, and thus the proposed development is located within the LCP-required 100-foot wetland buffer. Only resource-dependent development is allowed within a wetland buffer per both the LUP and the IP; it does not include any exceptions to this requirement. Thus, the well and its infrastructure are inconsistent with the LCP. Thus, again, approval would only be possible through the need to avoid a potential taking, as discussed below.

In conclusion, the well and its associated infrastructure are impermissibly located within the LCP required stream and wetland buffer areas, inconsistent with the LCP. Such inconsistency would require denial ordinarily, but the Commission here chooses to exercise its discretion to avoid a potential taking. In doing so, the Commission crafts the approval that is most LCP consistent by allowing retention of the well and its infrastructure provided its impacts are commensurately mitigated.

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<sup>2</sup> See Exhibit 4 for the Site Plan from the 'Consultation Regarding Potential Alternative Domestic Water Supply Well Locations'.

*Wildlife habitat protection*

The Marin LCP requires that development adjacent to wildlife habitat be set back a sufficient distance to minimize impacts on the habitat area and that such activities be timed so that disturbance to nesting and breeding wildlife is minimized.

California Red-Legged Frog (*Rana draytonii*), a federally threatened species and a California Species of Special Concern, were reported in the 2007 biological assessment for the subject property to have a moderate likelihood of occurrence at the project site because the three ponds and Coppermine Creek support potential habitat for the frog, including permanent sources of deep water with dense, shrubby or emergent riparian vegetation. Current CNDDDB records reinforce this likelihood with three occurrences reported within a two-mile radius in more recent years.<sup>3</sup> The perennial nature of the large pond serves to potentially foster the species throughout its life cycle, including over-wintering tadpoles, and provide a dry season refuge. However, the conditions observed during an August 2016 site visit revealed overgrowth with non-native vegetation leaving the necessary features for this frog species compromised, particularly the open-water habitat and corridors between the pond(s) and upland habitat. Water fern (*Azolla* sp.) has formed dense mats across nearly the entire large pond's surface, while planted water lilies (likely *Nymphaea* sp.) have also formed continuous stands along the pond's edges and across its center, eliminating the open-water space necessary for frogs to be able to view and evade predators, and the conditions that will favor algal blooms to support foraging tadpoles. Similarly, the density of vegetation surrounding the large pond prohibits frogs from being able to move readily to upland habitat, where they forage for as much as 90% of their prey items. Large non-native horticultural plants, such as *Gunnera* and plum trees, currently over-shade pond edges, where frogs typically lay their egg clusters in emergent vegetation but require sunlight to warm and mature them. Habitat mosaics and corridors are critical for the species. While there is strong potential at this site as evidenced by the successful establishment of native vegetation despite the installation of the subject well, the current condition of the site is neither natural nor conducive to California Red-Legged Frog use.

The Northern Western Pond Turtle (*Emys marmorata*), a California Species of Special Concern, has also been reported in CNDDDB from multiple sites in close proximity since 2015.<sup>4</sup> Moreover, the current landowners report having seen turtles in the pond, though the species was unknown at the time of inquiry and animals were not observed on the date of the aforementioned site visit. If these animals are the protected species, many of the habitat enhancements that would benefit the frogs would also benefit the turtles. *E. marmorata* is known to rely on upland areas for nesting, as much as 130-feet from its aquatic habitat. In addition, the species would benefit from natural structural additions surrounding the pond(s) in the form of logs or flat rocks for basking.

Although there are no records of the well's construction from 1987, Richard Kirschman, the owner of the subject parcel at the time of well construction, indicates that the well was installed using a drill rig and that a 375-foot long trench was excavated for the installation of the

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<sup>3</sup> CNDDDB records show occurrences of California Red-Legged Frog from 2015 and the species is presumed to be extant in the project vicinity.

<sup>4</sup> CNDDDB records show occurrences of Western Pond Turtle from 2015 and the species is presumed to be extant in the project vicinity.

distribution pipe connecting the subject well to the pre-Coastal water distribution infrastructure. In the absence of baseline data to adequately assess the impacts likely incurred, it is assumed that: there would have been significant ground disturbance – roughly estimated as 0.18 acres<sup>5</sup> and that the disturbance would have degraded and/or removed vegetation such that invasive species could readily colonize the area before native species could reestablish. The ground disturbance also would have likely impacted sensitive burrowing and/or ground-nesting wildlife species and construction may have impacted birds nesting in close proximity, including raptors and sensitive species. Erosion control would likely have been absent and thus, water quality in the two ponds nearest the well site, and Cronin Creek (a tributary to the salmonid-bearing Pine Gulch Creek), would have likely been impacted by elevated sediment loads and, that the period of functional loss to the ecosystem, as vegetation recovered, would have likely been three to five years in the absence of any restoration measures.

Thus, construction of the subject well would have resulted in more than temporary direct and indirect impacts to a significant area of wetland, riparian, and upland habitats (including their buffers). These impacts will be mitigated through the implementation of a habitat restoration plan, to manage the apparent proliferation non-native and invasive species, and enhance habitat for special-status species known to occur in close proximity (*i.e.*, California Red-Legged Frog, Northern Western Pond Turtle, and Saltmarsh Common Yellowthroat), as required by **Special Condition 2**. Currently, given the perennial nature of the ponds, as well as the presence of dense vegetation in the absence of any active management, it is unlikely that the subject well has imposed ongoing impacts by way of excessively drawing-down the water table. The surface footprint of the well is minimal and suggests no apparent impacts to the surrounding habitat in present day. Thus, the implementation of the measures described in the habitat restoration plan will be located and timed to avoid impacts to nesting areas of special-status species. Further, the habitat restoration plan will manage invasive, non-indigenous plant species and revegetate the subject property with native species, consistent with the Marin LCP wildlife habitat protection policies.

## **Conclusion**

As conditioned, feasible mitigation measures would be provided to minimize the adverse environmental effects associated with the construction-related impacts to natural resources, including streams, wetlands, and wildlife habitat. Thus, as conditioned, the proposed project is as consistent as possible with the habitat protection policies of the Marin County LCP to avoid a potential taking.

## **D. PUBLIC SERVICES**

Marin LUP Unit I Policies on Public Services state:

*5. Prior to the authorization of subdivision or construction of projects utilizing individual water wells, the applicant shall demonstrate that a sustained water yield of at least 1.5 gallons per minute per residential unit. Additional requirements for fire protection, including*

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<sup>5</sup> This is based on a trench length of 375 feet and estimating a 20-foot wide area along this for the machinery to maneuver through, plus an additional 400 square-feet surrounding the area of the well itself.



*increased yield rates, water storage facilities and fire hydrants shall be installed as recommended by the applicable fire protection agency.*

Marin IP Section 22.56.130 states:

*A. Water Supply. Coastal project permit shall be granted only upon a determination that water service to the proposed project is of an adequate quantity and quality to serve the proposed use.*

*1. Except as provided in this section, the use of individual water wells shall be allowed within the zone...*

*a. New development located within the service area of a community or mutual water system may not utilize individual domestic water wells unless the community or mutual water system is unable or unwilling to provide water or the physical distribution improvements are economically or physically infeasible to extend to the proposed site. Additionally, wells or water sources shall be at least one hundred feet from all property lines or a finding shall be made that no development constraints are placed on neighboring properties.*

*d. The issuance of a coastal permit for any well shall be subject to a finding that the well will not have an adverse impact on coastal resources individually or cumulatively.*

## **Analysis**

As discussed above, the subject property is located outside the jurisdiction of the Bolinas Community Public Utilities District. In 2010, Marin County's Department of Environmental Health Services confirmed that the subject well demonstrated a sustained water yield of at least 1.5 gallons per minute per residential unit. The subject well is located within 100 feet of the subject parcel's eastern property line. However, no development constraints have been placed on the neighboring property, which is developed with a single-family residence that is supported by its own individual water well. As conditioned, feasible mitigation measures will be provided to minimize the adverse environmental effects associated with the construction-related impacts of the subject well on coastal resources, including streams, wetlands, and wildlife habitat consistent with IP Section 22.56.130. Thus, the proposed project is consistent with the public services policies of the Marin LCP.

## **E. PUBLIC ACCESS AND RECREATION**

The public access and recreation policies of the Coastal Act require that maximum access and recreational opportunities shall be provided and that development shall not interfere with such access.

Coastal Act Section 30210 states:

*In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

Coastal Act Section 30211 states:

*Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.*

Coastal Act Section 30214 states:

*(a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following:*

*(1) Topographic and geologic site characteristics.*

*(2) The capacity of the site to sustain use and at what level of intensity.*

*(3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.*

*(4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter.*

*(b) It is the intent of the Legislature that the public access policies of this article be carried out in a reasonable manner that considers the equities and that balances the rights of the individual property owner with the public's constitutional right of access pursuant to Section 4 of Article X of the California Constitution. Nothing in this section or any amendment thereto shall be construed as a limitation on the rights guaranteed to the public under Section 4 of Article X of the California Constitution.*

*(c) In carrying out the public access policies of this article, the commission and any other responsible public agency shall consider and encourage the utilization of innovative access management techniques, including, but not limited to, agreements with private organizations which would minimize management costs and encourage the use of volunteer programs.*

### **Analysis**

The Coastal Act requires that all projects proposed between the first public road and the sea be analyzed for compliance with the public access and recreation policies of the Coastal Act. While the subject parcel is located seaward of the first public road, it is located approximately one mile north of Bolinas Lagoon and two miles east of the Pacific Ocean. No public access exists from the subject parcel to the lagoon or ocean. However, public access is available in the vicinity of the subject site, including at Bolinas and Agate Beach County Parks and Point Reyes National Seashore, which are located within two miles of the subject site. Agate Beach County Park provides visitor parking and trails along the shoreline. Therefore, no access is required to be provided by the proposed project. Thus, the proposed project is consistent with the public access and recreation requirements of the Coastal Act.

## **F. TAKINGS**

As detailed above, the proposed project is inconsistent with the stream and wetlands buffer policies of the Marin County LCP; the well is located within the mandated 100-foot buffer; further, the use of a private well does not qualify as a resource-dependent use, the only use allowed in a wetland buffer. However, denial of the CDP would in turn deny use of the water for this home and a neighboring home, likely substantially reducing the economic value not only of the applicants' land, but also of their neighbors' land. Neither home receives water service from the Bolinas Community Public Utilities District.

The subject parcel is designated in Marin County zoning regulations as C-RSP (Coastal-Residential, Single-Family Planned). The parcel is located in a rural residential neighborhood and is currently developed with a house and a few amenities such as a deck. The principally-permitted use is single family homes. Other uses that might allow economic development of the property would likely require zoning changes, including amendments to the LCP; likely uses such as agriculture or a cottage industry would need the same water supply.

Alternatives to move the well to a different location on the property appear either infeasible, because other areas are unlikely to produce a well, or ineffective, as areas likely to produce a well would nevertheless also be in a wetlands buffer.

### **The Coastal Act**

Denial of all or substantially all economic use of a parcel without just compensation may result in an unconstitutional "taking" of an Applicant's property. Coastal Act Section 30010 expressly forbids this result:

*The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission... to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefore.*

Consequently, the Coastal Act imposes on the Commission the duty to assess whether its action might constitute a taking. If the Commission concludes that its action does not constitute a taking, then it may deny the project on finding that its actions are consistent with Section 30010. If the Commission determines that its action would constitute a taking, then it applies Section 30010 to consider how the project may be approved. In the latter situation, the Commission may propose modifications to the development to minimize any Coastal Act inconsistencies, while still allowing a reasonable amount of development.

### **Takings Case Law**

Article 1, section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation...has first been paid to, or into court for, the owner." The Fifth Amendment of the United States Constitution similarly provides that private property shall not be taken for public use, without just compensation. Once used solely for condemnation cases, the Fifth Amendment is now used to require compensation for other kinds of government actions. (See *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393.)

Since *Pennsylvania Coal*, most of takings cases have fallen into two categories. First, there are the cases in which government authorizes a physical occupation of property. (See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419.) Second, there are the cases in which government regulates the use of property. (*Yee v. Escondido* (1992) 503 U.S. 519, 522-523). Because there is no physical occupation of the land at stake, a denial of the use of the well here would be evaluated under the standards for a regulatory taking.

The U.S. Supreme Court has identified two types of regulatory takings. The first is the “categorical” formulation identified in *Lucas v. South Carolina Coastal Council* ((1992) 505 U.S. 1003, 1014.) In *Lucas*, the Court held, without examining the related public interest, that regulation that denied all economically viable use of property was a taking. (*Id.* at p. 1014.) The *Lucas* Court emphasized, however, that this category is extremely narrow, applicable only “in the extraordinary circumstance when no productive or economically beneficial use of land is permitted” or the “relatively rare situations where the government has deprived a landowner of all economically beneficial uses” or rendered it “valueless.” (*Id.* at pp. 1016-1017; see also *Riverside Bayview Homes* (1985) 474 U.S. 121, 126 [regulatory takings occur only under “extreme circumstances”].) Even where the challenged regulatory act falls into this category, government may avoid a taking if the restriction inheres in the title of the property itself; that is, background principles of state property and public nuisance law would have allowed government to achieve the results sought by the regulation. (*Lucas*, *supra*, 505 U.S. at pp. 1028-1036.) Use of the well does not create a public nuisance; however, the inquiry into background principles is more opaque. Generally, a background principle is something that the owner did not acquire the right to use on buying the land. (*Id.* at p. 1029.)

The “background” of the Marin LCP’s wetlands protections (e.g. LUP Policy 18) was long in existence at the time of Trivelpieces’ purchase, providing environmental regulation in the coastal zone. Specifically, the well’s legal status was in play when they bought the land. However, and regardless of whether the prior existence of the LCP would defeat a *Lucas* claim, denial of a CDP for the well would not amount to the “total wipeout” that usually constitutes a taking under *Lucas*. Some of the economic use of the land, such as the home, would remain intact, albeit a home without on-site water supply. (See *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 616 [rejecting the *Lucas* categorical test where property retained value following regulation, but remanding for further consideration under the *Penn Central* test].)

The second circumstance in which a regulatory taking might occur is under the three-part, ad hoc test identified in *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 124 (“*Penn Central*”). Under the *Penn Central* test, a takings analysis considers the economic impact of the regulation, the interference, if any, with reasonable or “distinct” (actual) investment-backed expectations, and the character of the government action. (*Id.* at p. 134; *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005.) Because this test examines something lesser than a complete economic deprivation, it is generally appropriate to examine whether denial of this CDP could constitute a taking under the *Penn Central* factors.

## Water Law

In relation to California's complex system of water law, groundwater, like all water use, is first subject to the Constitutional mandate of reasonable and beneficial use (Cal. Const., art. X, § 2).<sup>6</sup> Domestic use of water, such as drinking, washing, and other household purposes, is the highest priority use. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1237, citing Water Code, § 106.) Groundwater in particular is a shared resource; a neighbor, for example, may pump water from an aquifer underlying someone else's land, as long as the neighbor's pumping does not create overdraft.<sup>7</sup> As serving a residence, the use of the well water here is reasonable; further, the current level of water use has not been demonstrated to harm the wetlands or to deplete the aquifer.

Specifically, whether a groundwater use rises to the level of a property right that can be taken, and must be compensated for, is a matter of some debate. Nationwide, numerous cases support that government deprivation of a water right (when it is a right) may constitute a taking.<sup>8</sup> California, as in so many situations, is different. There is no private ownership of groundwater. (*Central and West Basin Water Replenishment Dist. v. Southern Cal. Water Co.* (2003) 109 Cal.App.4th 891, 905; see also Cal. Water Code, § 102 [water belongs to the people of the State, but may be appropriated]). The nature of the Trivelpieces' right (assuming that it was acquired) is characterized as "overlying use," the right to use the water, rather than full ownership rights that, for example, exclude use by others. (See *Allegretti v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1277.) Professor Sax clarifies that water rights generally are "in no sense 'super-property'; additionally they are subject to laws protecting the commons, and where granted by permit, 'subject to the constraints articulated in the permits.'"<sup>9</sup> Nevertheless, the court in *Allegretti* examined overlying rights—a landowner's use of a well—under a *Penn Central* takings analysis. (*Allegretti, supra*, 138 Cal.App.4th at pp. 1277-1280.) Thus, the three-part test should be used to evaluate whether a takings claim here is viable.

## Analysis

### *Economic Impact*

Appraising the value of a well takes into account several factors, such as depth to groundwater, depth that water is drawn from, pumping costs, and well yield, as well as the age of the well, maintenance, and any records.<sup>10</sup> Economic impact is measured against the parcel as a whole; that is, the value of the land in its entirety, before and after the regulation. (*Allegretti, supra*, 138 Cal.App.4th at p. 1277 ["the relevant parcel is Allegretti's 2,400 acres, and not merely its right to draw water from it."]) In this case, the parcel is ten acres, the principally-permitted use is residential, and the well is the sole source of water. It is assumed without expert evidence that the value of the well in relation to the land is substantial. Simply put, the land is zoned for a

<sup>6</sup> Article X, Section 2 states "the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable."

<sup>7</sup> Steven J. Herzog, MAI, *Guidelines for the Appraisal of Water Rights in California*, Final Report submitted to the U.S. Fish & Wildlife Service (2006), p. ES-3, available at <https://www.fws.gov/cno/fisheries/docs/titlecontentsandexecutivesummary.pdf>.

<sup>8</sup> Owen, *Taking Groundwater, supra* n.8, at p. 266.

<sup>9</sup> Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law* (1990) 61 U.Colo.L.Rev. 257, 260.

<sup>10</sup> Herzog, *supra*, n. 10, *Guidelines for the Appraisal of Water Rights in California*, p. ES-8.

home, and it is difficult for people to live in a home without a reliable and convenient source of water.

#### *Investment-Backed Expectations*

According to RealQuest, the Trivelpieces bought the property on February 10, 2012 for an investment of \$1,100,000. At the time, the ten acre property included a modest (1,668 s/f) two bedroom home, built in 1976, with improvements, such as a deck, and the subject well, which was drilled in 1987. On March 29, 2012, Marin County approved the after-the-fact CDP for the well. At the same time, the Marin County permit application had been initiated by Kirschman, the seller, to legalize the well. Regardless of whether it was prudent to actually buy the land before County approval of the CDP and exhaustion of the appeal period, the Trivelpieces assuredly had an expectation that they would be able to use the well. A court might consider that expectation to be reasonable, inasmuch as Kirschman had been using the well for some 25 years at the time of the Trivelpieces' purchase and the subject parcel is located outside the Bolinas Community Public Utilities District. As it turned out, Marin County approved the CDP for the well about seven weeks after their purchase, and that action was appealed to the Commission.

#### *Character of the Government Action*

This final prong of the *Penn Central* test has been downplayed in recent years. (See, e.g. *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 529 [governmental action that substantially advances a public purpose alone does not insulate the government from a takings claim]).<sup>11</sup> Suffice to say that whatever the weight of this factor, the Coastal Commission advances a legitimate public interest when it regulates various uses according to the Chapter 3 policies of the Coastal Act, or as here, according to the policies and ordinances of the certified Marin County LCP, and specifically to protect streams and wetlands. The policy supporting such protection is clearly stated in the Coastal Act, where the Legislature found that the permanent protection of the state's natural resources is a "paramount" concern. (Coastal Act, § 30001(b).) In particular, California's wetlands are in crisis. The Commission has often noted California has lost some 90% of its wetlands, a threat aggravated by sea level rise.<sup>12</sup> Denial of a CDP for this well, placed in the middle of a wetlands buffer in clear violation of the Marin LCP policies, would not change the validity of the LCP's public purpose. However, as *Lingle* explained, the public value of such a denial cannot by itself eradicate the other two prongs of the test, evaluating the alleged harm to the property owner.

#### *Development for the Project Allowed to Avoid a Potential Taking*

Despite the validity of the Marin LCP's policies, due to the substantial value of the well in relation to economic use of the property and the hefty investment to purchase the land, and because a court might view the Trivelpieces' expectation of using the well as a reasonable one, the Commission finds that there exists the possibility of a credible takings claim if the well were to be denied.

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<sup>11</sup> See also Lewyn, Michael, *Character Counts: The "Character of the Government Action" In Regulatory Takings Actions*, 40 Seton Hall L. Rev 597, 599 (2010) stating that *Lingle* holds that the existence of a valid public purpose *standing alone* may not justify an otherwise problematic regulation (emphasis in original).

<sup>12</sup> E.g., California Coastal Commission Sea Level Rise Policy Guidance (2015), p. 63.

To preclude a claim of takings and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section 30010, the Commission finds it appropriate to leave the existing well in place, in order to provide a reasonable economic use of the subject property. In view of the evidence that denying the well could constitute a regulatory taking, there is a reasonable possibility that a court might determine that the final denial of use of the well, based on inconsistencies with the Coastal Act, would constitute a taking. Denial of the well could actually create more adverse impacts, such as the need to deliver the water by truck, given that alternative locations for the well aren't available, and that the well is not currently causing any identifiable adverse impacts on coastal resources. Additionally, two homes have relied on the well for decades, and the water is used for high priority, domestic use. Therefore, the Commission determines that the Applicants are entitled to this particular development on their property.

#### *Conditions of Approval*

However, while approving a project that allows the owners reasonable economic use of the land, the Commission must consider alternatives or set conditions that avoid or minimize impacts on coastal resources. Setting conditions of approval does not constitute a regulatory taking, even if they cause some loss of value. (See *Penn Central*, supra, 438 U.S. at p. 130 [finding claim “untenable” that interference with an undeveloped property interest, while viable economic uses continued, constituted a taking].) Section 30010 instructs the Commission to construe the applicable Coastal Act policies in a manner that will avoid a taking of property; it does not eviscerate the policies of the LCP or the public access and recreation policies of the Coastal Act. In this case, the development may be approved only subject to several conditions, including the implementation of a habitat restoration plan, monitoring requirements, a future development restriction, and a recording to supply notice of the CDP's restrictions on development. The conditions act in tandem to protect the wetlands and to restore, as much as feasible, the natural growth of the habitat.

#### **G. VIOLATION**

Development of the well has taken place without benefit of a CDP. Although development has taken place prior to submission of this CDP application, consideration of the application by the Commission has been based solely upon the policies of Chapter 3 of the Coastal Act and the Marin County LCP. Commission review and action on this CDP does not constitute a waiver of any legal action with regard to the alleged violations, nor does it constitute an implied statement of the Commission's position regarding the legality of any development undertaken on the subject site without a CDP, or that all aspects of the violation have been fully resolved.

In order to ensure that the outstanding conditions of CDP No. A-2-MAR-12-008, as a component of this application, are resolved in a timely manner, **Special Condition 1** requires that the Applicant satisfy all conditions of this permit related to unpermitted development that are prerequisite to the issuance of this permit within 180 days of Commission action. Approval of this permit does not constitute a waiver of any legal action with regard to any alleged violations nor does it constitute an admission as to the legality of any development undertaken on the subject site without a coastal permit.

## **H. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

Section 13096 of the California Code of Regulations requires that a specific finding be made in conjunction with coastal development permit applications showing the application to be consistent with any applicable requirements of CEQA. Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The County as the lead CEQA agency concluded that the development was categorically exempt under CEQA. The Coastal Commission's review and analysis of land use proposals has been certified by the Secretary of Resources as being the functional equivalent of environmental review under CEQA. The Commission has reviewed the relevant coastal resource issues associated with the proposed project, and has identified appropriate and necessary modifications to address adverse impacts to such coastal resources to the extent allowed while avoiding a taking of private property without just compensation. All public comments received to date have been addressed in the findings above. All above findings are incorporated herein in their entirety by reference.

The Commission finds that only as modified and conditioned by this permit will the proposed project avoid significant adverse effects on the environment within the meaning of CEQA. As such, there are no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects that approval of the proposed project, as modified, would have on the environment within the meaning of CEQA. If so modified, the proposed project will not result in any significant environmental effects for which feasible mitigation measures have not been employed consistent with CEQA Section 21080.5(d)(2)(A).

## **APPENDIX A: SUBSTANTIVE FILE DOCUMENTS**

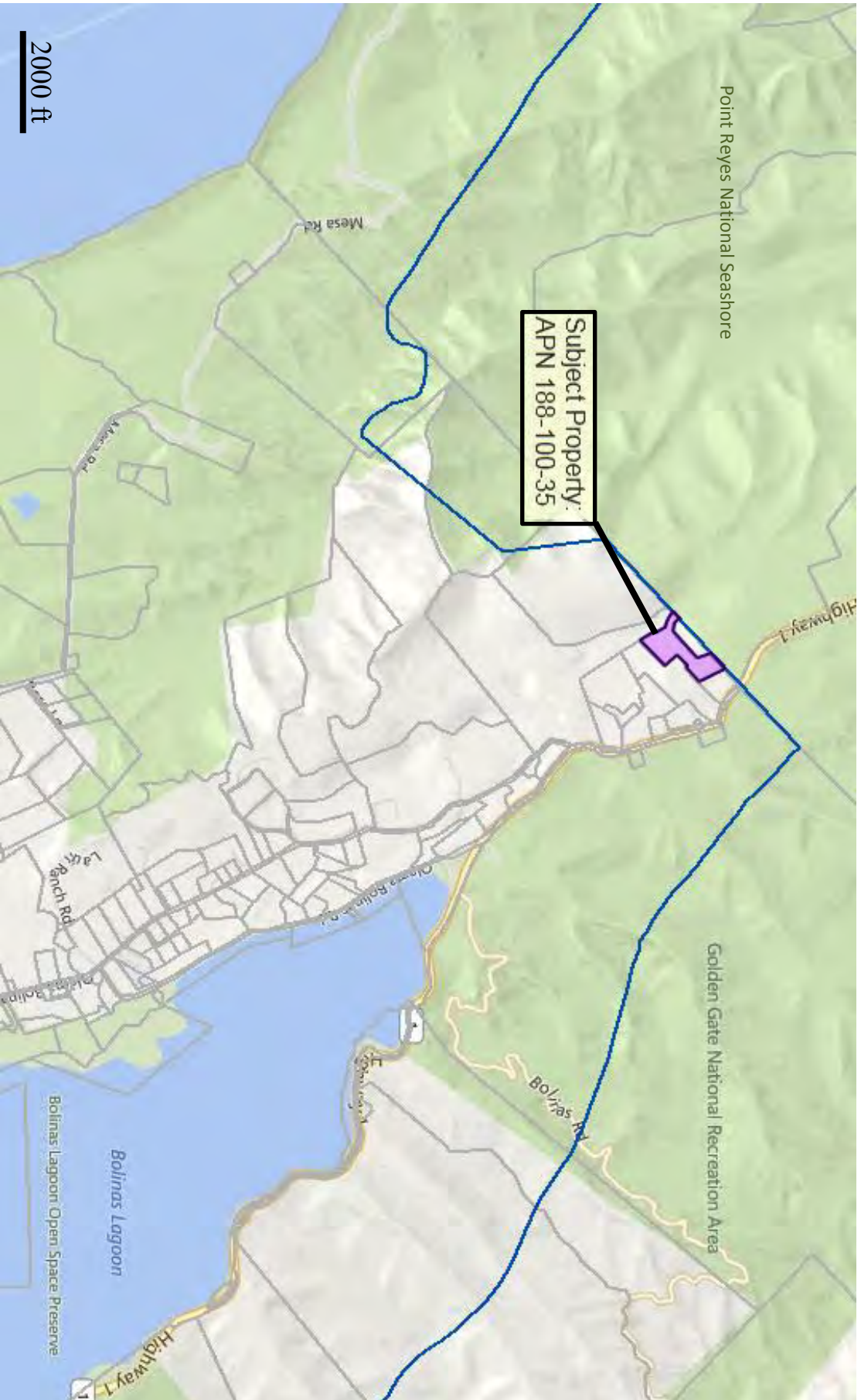
Dogtown Biological and Wetland Assessment Report, prepared for Russell Faure-Brac, et. al., by EIP Associates, May 2007.

Dogtown Biological and Wetland Assessment Addendum, prepared for Richard Kirschman, by PBS&J, April 28, 2010.

Consultation Regarding Potential Alternative Domestic Water Supply Well Locations, prepared for Wayne and Sue Trivelpiece, by Robert M. Gailey, May 2016.



# Project Site Map





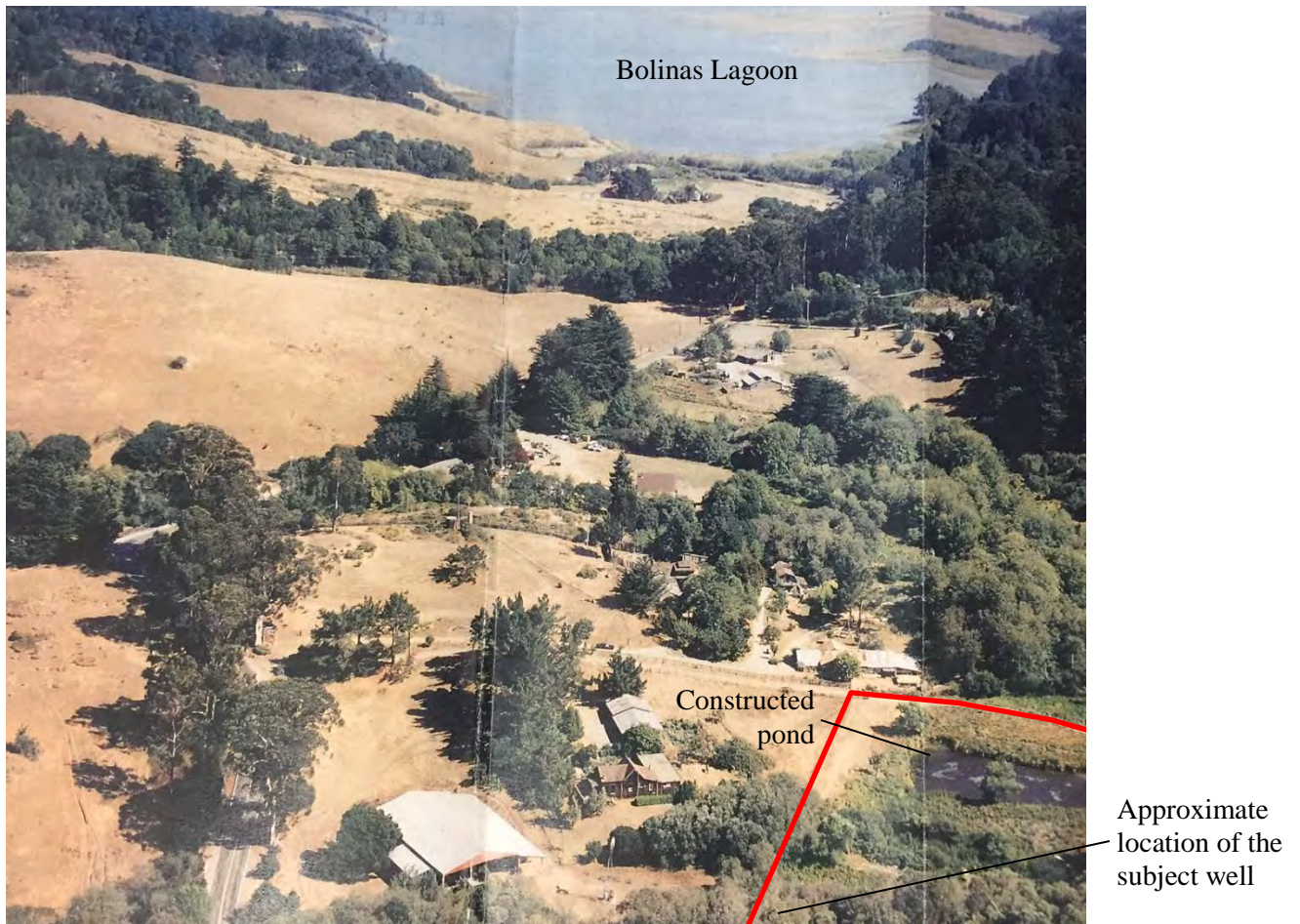


Image 1. The subject property (outlined in red) looking south to Bolinas Lagoon.



Image 2. Constructed freshwater ponds on the subject property.





Image 3. Property line of subject parcel and Point Reyes National Seashore, near the location of the subject well.

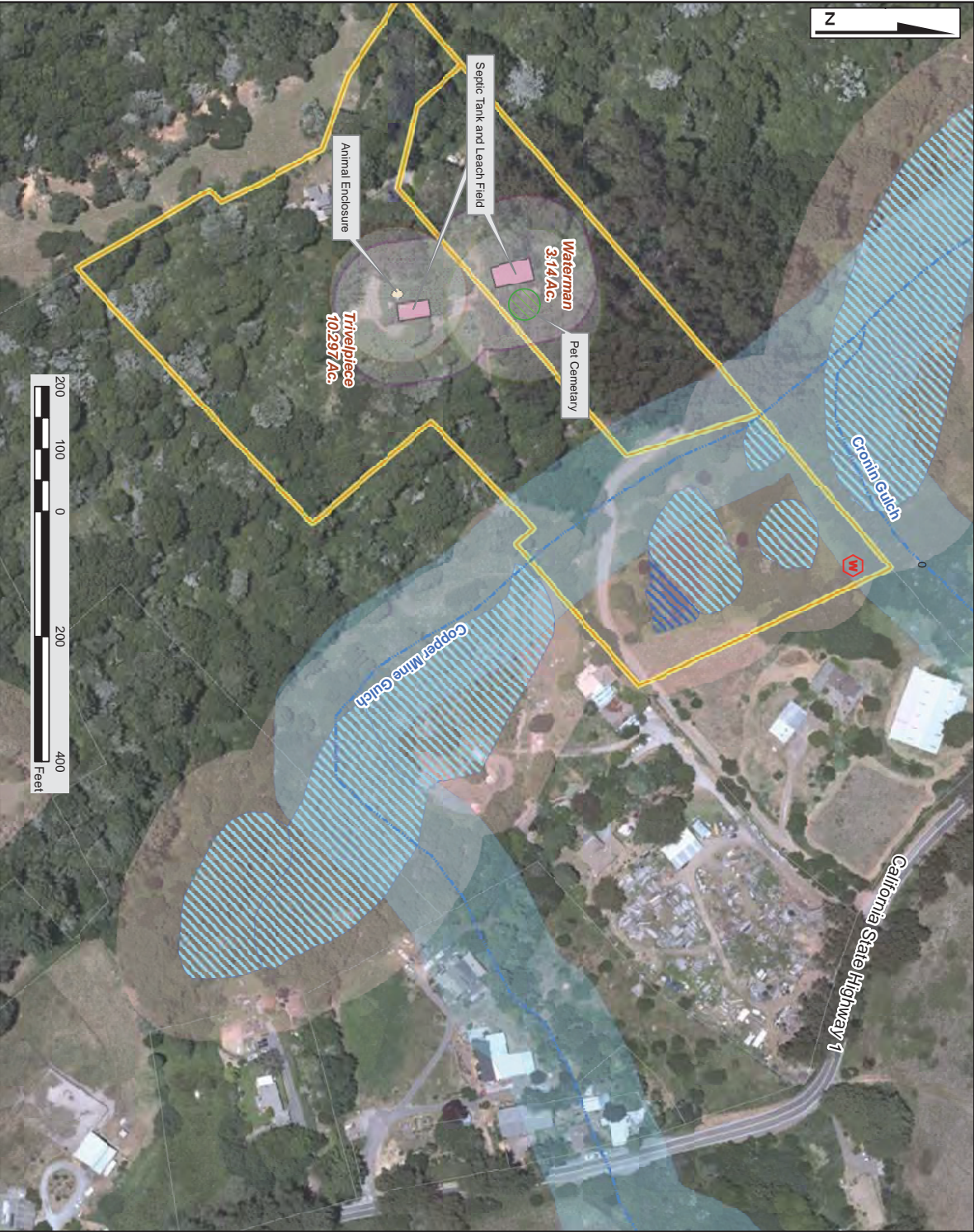


Image 4. The site of the subject well.









**Legend**

- Existing Well Location
- Septic and Leach System
- 100' Septic and Leach Field Buffer
- Pet Cemetery
- 100' Pet Cemetery Buffer
- Animal Enclosure
- 100' Animal Enclosure Buffer
- Streams
- 100' Stream Buffer
- Parcel Boundary
- 5 ft Property Buffer
- Standing Water Observed May 11, 2016
- Identified Wetland
- 100' Wetland Buffer

**NOTES**

Wetlands Data From Marin Maps GIS Database, extracted from Cowardin et al. (1979) and maintained by MarinMap, a group of local governments, special districts and other public agencies organized as a project of the Marin General Services Authority (MGSA).

The stream location data is from the Bolinas, Ca 1:24000 USGS Topographic Map

Parcel data from Marin Maps GIS Database; Assessor's Map Book 188, Page 10, County of Marin, California.

FIGURE 1 SITE PLAN				
PROJECT NO.	DATE	DR. BY:	APP. BY:	RG
	5/31/16	FH		

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