

pipings originally installed in 1987, and that County approval was appealed to the Commission. Subsequently, staff began working with the Applicants and the County to better understand potential LCP issues associated with the well, including because the County's administrative record was sparse.¹ Ultimately, the Applicants refused to provide additional biological information requested by staff, preferring to rely on submittals from 2007 which staff had indicated were not adequate², and the matter was set for a Coastal Commission substantial issue only hearing.³ 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 County LCP's stream and wetland protection policies and took jurisdiction over the CDP application. The Commission found that the installed well and infrastructure impacted wetland habitat on the property without proper wetland delineation and analysis of appropriate locations for the replacement well. In finding substantial issue, the Commission also required the Applicants to submit additional information prior to Commission staff scheduling the de novo portion of the hearing, specifically requiring the submittal of a wetland delineation and an alternatives analysis that compares the impacts associated with well installation at the current location with other alternatives for providing domestic water to the two residences. Commission staff again worked with the Applicants to provide such information, and has been working with the Applicants since then on issues related to alternatives and potential mitigation, including through site visits and telephone conferencing.

The LCP requires protection of stream and wetland resources, including requiring buffer areas in which very limited uses and development are allowed. The well and its infrastructure are located within the minimum 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 well and its infrastructure have also been constructed within the required 100-foot buffer of wetlands previously mapped on the property.⁴ The LCP does not allow any type of development other than resource-dependent uses to be located in these buffers. Thus the well and its infrastructure as developed are not consistent with the LCP.

¹ The County did not analyze the proposed well project as if it was a new proposal and not yet installed (as is the normal analytic framework for after the fact development), and thus the administrative record lacked detail on potential impacts. The County found that because the permit request only entailed the legalization of an existing well, it would not result in new depletion of water supply, grading, vegetation removal, physical changes in any identified sensitive habitat area, or other potentially adverse impacts on the coastal environment. In addition, and as a result, the County also did not attach mitigation for the impacts of well installation and use over time.

² Commission technical staff deemed the earlier report as insufficient because: 1) the report was over five years old; no delineation sheets were provided to the Commission for review; the report delineated wetlands per the USACE 3-parameter delineation and not a Coastal Commission 1-parameter delineation. Had the earlier report done a Coastal Commission 1-parameter wetland delineation, the report would have potentially discovered more expansive wetlands on the property than claimed in the report.

³ In an effort to have the Commission compel submission of required biological information as a prerequisite to de novo review.

⁴ Wetlands on the property were mapped in the "Dogtown Biological and Wetland Assessment Report" prepared for a different project proposed by adjacent property owners in 2007.

The Applicants’ alternatives analysis confirmed that alternative locations for a well on the property are problematic due to the presence of sensitive habitats, existing development, steep slopes, and unsuitable soils. Removal of the installed well, restoration of the well location, and service via other water purveyors is also not an option as the subject property is located outside the service jurisdiction of the Bolinas Community Public Utilities District, and the two residences that rely on the subject well would be left without a source of domestic water. Thus, although the LCP would ordinarily direct denial of the project, staff believes that such a denial could engender a takings claim, and that approval is the best course of action in this case. Thus, the staff recommendation is for an approval that recognizes the need for a reliable water supply, and that provides for habitat restoration 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 after thorough consideration that both native and introduced species have since established (or reestablished) and have proven to be largely self-sustaining. As conditioned to provide for restoration in the form of further habitat enhancement, including by removing non-natives, planting native vegetation where appropriate, restoring open water habitat and monitoring the success of the restoration effort for the benefit of the wetland and stream habitat, leaving the well in its current location is the least environmentally damaging alternative in this particular case pursuant to this fact set. In addition, as conditioned, the project can be found consistent with all other policies of the Marin County LCP.

Therefore, staff recommends that the Commission approve the proposed project with conditions. The motion and resolution to approve the project subject to the staff recommendation are found on page 5 of this report.

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APPENDICES

Appendix A – Substantive File Documents

Appendix B – Staff Contact with Agencies and Groups

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 prior to CDP issuance 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 and Enhancement Plan.** PRIOR TO ISSUANCE OF THE CDP, the Permittees shall submit, for Executive Director review and approval, two copies of a Habitat Restoration and Enhancement Plan (Plan) for the area shown in [Exhibit 4](#). The Plan shall provide for the restoration and enhancement of wetland, stream, and related buffer habitats at the eastern portion of the property (below the access road) with a focus on the largest of the three onsite ponds and its surrounding area as identified in [Exhibit 4](#). The Plan shall be prepared by a qualified expert in restoration ecology, and shall take into account the specific conditions of the site (including soil, exposure, temperature, moisture, wind, etc.), as well as restoration and enhancement goals. The Plan shall, at a minimum, include the following:
 - (a) **Baseline Assessment.** A baseline assessment, including photographs, of the current physical and ecological condition of the restoration and enhancement area. All existing topography, existing footpaths, stream features, wetlands, and existing vegetation, including distribution of types and percentage of cover, shall be depicted on one or more maps. Any sensitive species detected shall be depicted on a map that includes the footprint of the restoration areas. The assessment shall include a list of existing plant species and a narrative description to accompany the maps.
 - (b) **Goals.** A description of the goals of the Plan, including in terms of topography, hydrology, vegetation, sensitive species, and wildlife usage. Goals shall include but are not limited to: reducing overall vegetation cover (e.g., primarily invasives but also limited overgrowth of non-sensitive native species) surrounding the ponds, maintenance of a mosaic of native vegetation types, establishment of a series of corridors radiating from the ponds to upland habitat areas, reduction of existing aquatic vegetation to facilitate California Red-Legged Frog use, placement of logs and flat rocks to create Northern Western Pond Turtle habitat, and leaving existing willow thickets intact in support of Saltmarsh Common Yellowthroat habitat. Maps based upon non-native vegetation removal and wildlife habitat shall be included to illustrate final desired site conditions.
 - (c) **Plant Removal.** A description of planned site area preparation and plant removal including all non-native and invasive species but exclusive of any sensitive native species. Plant removal shall reduce overall vegetation cover surrounding the ponds, focusing on non-native and invasive plants, including large horticultural plants (e.g., *Gunnera*). Plant removal shall also occur in the ponds, including substantial reduction of both water fern and water lily cover, in order to create open water habitat conducive to

California Red-Legged Frog needs. After vegetation removal, the plan shall include log and flat rock placement intermittently around the large pond to improve habitat complexity to support target species. A description of plant removal techniques shall be provided.

Exotic seed banks shall be reduced and invasive weeds, including within upland areas, shall be removed.

Herbicide use shall be avoided, if feasible. However, if removal of vegetation by hand is not possible, herbicide use shall be restricted to where needed for purposes of habitat restoration only, with allowance for spot application of Glyphosate Aquamaster™ (previously Rodeo™) or equivalent only for invasive and non-native species. No use of any herbicide may occur between November 1 and March 31 (rainy season), or if wind speeds onsite are great than 5mph, or 48 hours before predicted rain. If a rain event occurs outside the rainy season, herbicide application shall not resume again until 72 hours after rain has ceased.

Native Planting. Where site area preparation has left disturbed ground, a planting plan to plant native vegetation shall be provided. This shall include the planting palette (made up exclusively of locally-appropriate native species), sources of plant material, plant installation methods and timing, erosion control measures, duration and use of irrigation, and measures for remediation if success criteria are not met.

- (d) **Fuel Modification.** Mowing is allowed only for the purposes of fuel modification as required by the Marin County Fire Department, and only outside of the 100-foot buffer area of the wetland and riparian areas. If necessary, fuel may be removed by weed whacker or by hand within the 100-foot buffer area of the pond, provided a minimum of 4 inches of vegetation is left standing for habitat purposes within the buffer zone subject to fuel modification.
- (e) **As-Built.** A report documenting and reporting the physical and biological “as-built” condition of the restored site area shall be prepared by a qualified restoration ecologist independent of the (restoration practitioners/Trivelpiece as Permittee), submitted to the Executive Director for review and approval within 30 days of completion of the initial Plan implementation activities. The as-built report will describe the field implementation of the approved Plan in narrative and photographs, and shall identify any implementation problems and how those problems were resolved.
- (f) **Monitoring and Maintenance.** The Plan shall include details describing interim monitoring and maintenance, including a schedule, interim performance standards, statistically-robust field sampling design, quantitative field methods, and data analysis methods. Annual monitoring reports shall provide each year’s monitoring results, an assessment of progress toward meeting final success criteria (see subdivision (h) below), any remedial activities implemented, weeding schedules, and recommendations to address changes that may be necessary in light of monitoring results. These reports shall be cumulative, summarizing all previous results, and include documentation of the current site conditions with photographs consistently taken from the same fixed points, in

the same directions. The annual reports shall be submitted to the Executive Director for review and approval, beginning the first year after the submission of the as-built report called for in subdivision (f) of this Special Condition. .

- (g) Final Success Criteria.** The Plan shall identify final success criteria for each habitat type, including as appropriate: species richness, including total number of native taxa and number of invasive non-native taxa; percent covers of total vegetation, native vegetation, and non-native vegetation; wildlife usage as evidenced by incidental and other observations; open water in the ponds; and, the presence and abundance of sensitive species or other individual “target” species. A method for judging “success” shall be specified and rationalized, whether based upon fixed or relative standards. Final success shall be determined after a period of at least three years during which the study site has been subject to no remediation or maintenance activities other than pond vegetation cover removal and weeding (to be known as the end of the monitoring period).
- (h) Final Report.** The Plan shall include provisions for submission of a final monitoring report to the Executive Director for review and approval 90 days after the end of the monitoring period. The final report shall evaluate whether the site area conforms to the goals and success criteria set forth in the approved Plan. If the final report indicates that the project has been unsuccessful, the Permittees shall prepare a revised or supplemental restoration and enhancement plan to compensate for those portions of the original Plan that did not meet the approved success criteria.
- (i) Sensitive Species Restrictions.** In the absence of protocol-level surveys and given the high potential for their occurrence within the restoration area, California Red-Legged Frogs shall be assumed to be present at the site. To protect frogs, ground-disturbing activities associated with the restoration (including plant removal and fuel modification) shall be allowed only between May 1 and October 31. If Northern Western Pond Turtles or Saltmarsh Common Yellowthroats are observed at the site, the restoration activities shall be limited to occur only between September 1 and October 31 to protect these ground-nesting species.

If any frogs, turtles or bird species as identified above are encountered during restoration activities, then those activities shall be immediately halted to allow the species to leave the area on their own. If any sensitive plant species are encountered, they shall be clearly documented. Any encounters with sensitive species (including but not limited to California Red-Legged Frogs, Northern Western Pond Turtles and Saltmarsh Common Yellowthroats) shall be reported to the Executive Director within 24 hours of discovery and similarly to U.S. Fish & Wildlife and the California Department of Fish and Wildlife as appropriate. Restoration activities may resume only following consultation and written approval from these authorities.

All requirements above and all requirements of the approved Habitat Restoration and Enhancement Plan shall be enforceable components of this CDP. The Permittees shall undertake development in accordance with the approved Plan. Any proposed changes to the approved Plan shall be reported to the Executive Director. No changes to the approved Plan

shall occur without a Commission amendment to this CDP unless the Executive Director determines that no amendment is necessary.

- 3. Deed Restriction.** PRIOR TO ISSUANCE OF THE CDP, the Permittees shall submit, for review and approval by the Executive Director, 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 within the watershed of Bolinas Lagoon. Cronin Creek and Coppermine Creek, two tributaries to Pine Gulch Creek, a stream of special significance, run adjacent to and through the 10-acre subject parcel. The site also contains three ponds that have been identified as freshwater wetlands under the National Wetlands Inventory. 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. See [Exhibit 1](#) for a location map and see [Exhibit 2](#) for photographs of the site and surrounding area.

B. PROJECT DESCRIPTION AND HISTORY

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 prior landowner constructed the well and associated infrastructure 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, and it too is also located within 100 feet of wetlands and within 25 feet of the adjacent property lines. For the past thirty years, the well has provided the sole source of domestic water for the residence on this parcel and for another residence on an adjacent parcel at 5963 State Route One.

In 2012, when the then landowner requested additional improvements to his water system, Marin County staff realized the subject well and infrastructure had never received the required CDP

when it was installed. Subsequently Marin County approved an after-the-fact CDP for the well and associated underground piping (County CDP 2009-0377). 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. That well and related infrastructure is the project proposed in this CDP application (see [Exhibit 3](#) for proposed project plans).

In 2012, roughly at the same time as the County's CDP approval was appealed to the Commission, the original landowner, Richard Kirschman sold the property to Wayne and Susan Trivelpiece, the current owners, and the Applicants for this CDP. Subsequently, Commission staff began working with the Applicants and the County to better understand potential LCP issues associated with the well, including because the County's administrative record was sparse due to the fact that it had not followed the normal analytic framework for reviewing after the fact development. Ultimately, the Applicants refused to provide additional biological information requested by Commission staff, insisting that staff utilize outdated information from an inadequate biological assessment performed approximately 10 years ago⁵, and the matter was set for a Coastal Commission substantial issue only hearing.⁶ On March 11, 2015, the Commission found that the County's action approving the project raised a substantial issue of conformance with the LCP's stream and wetland protection policies, and took jurisdiction over the CDP application. In taking CDP jurisdiction, the Commission required that the Applicants submit additional information prior to proceeding to the de novo portion of the CDP review in order to evaluate the project for consistency with the County's certified LCP. The Commission specifically required that the following materials be provided to staff before the matter was scheduled for the de novo portion of the hearing:

An updated biological report that identifies all streams, riparian, and wetland areas (including via a wetland delineation conducted pursuant to Coastal Act/LCP wetland delineation criteria), and any sensitive species habitats, on and adjacent to the project area, along with LCP-required buffers and mitigation measures necessary to both avoid impacts of the development on such resources to the maximum extent possible, and to mitigate for unavoidable impacts. The updated biological report must include an alternatives 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.

Commission staff provided the published staff recommendation and also hearing information to the Applicants (and the neighbor relying on the well) to ensure that they were aware of these

⁵ The Commission normally does not accept information collected more than 5 years ago. The information was also gathered at a time of year outside of representative conditions (i.e., drought-era data vs. presently normal condition data). The information also only identified wetlands with 3-parameter indicators as opposed to the Commission's practice of identifying wetlands with 1 parameter indicator.

⁶ In an effort to have the Commission compel submission of required biological information as a prerequisite to de novo review.

Commission requirements. On March 18, 2015, Commission staff wrote to the Applicants again explicitly identifying the information that the Commission required before moving the project forward. That letter confirmed that the Applicants had requested six months to respond to the Commission's informational request; therefore, Commission staff gave the Applicants until September 2015 to submit the required information.

In October, after Commission staff contact, the Applicants asked for additional time to respond, and staff again wrote to give them until November 1, 2015. On October 31, 2015 the Applicants submitted a letter rearguing points raised in the appeal but not providing the Commission-requested information. Commission staff responded that the Commission had already found substantial issue based upon the appeal, had taken jurisdiction over the CDP application, and thus that the appeal issues were no longer relevant. Commission staff again reiterated that the Applicants had been required by the Commission itself to provide the requested information before the matter could proceed, and again gave the Applicants additional time to respond until December 3, 2015. At the end of November, the Applicants indicated that they had hired experts to develop the requested biological and well information. Commission staff asked how much additional time was needed, and the Applicants indicated they would contact Commission staff when they had completed the requested information.

At the end of January 2016, instead of providing the promised information, the Applicants wrote to Commission staff to propose yet another substitute process for obtaining the requested biological information. Specifically, the Applicants resubmitted the outdated information previously received and rejected by staff and the Commission when determining substantial issue, and asked that Commission staff do a site visit and "truth check" the Applicants' claims based upon the old information. Commission staff responded as follows:

...As you recall, Commission staff had first asked you to submit a wetland delineation for your property, then in November, 2015 we agreed to accept a hydrology report from a hydrologist familiar with the area. We want the hydrologist to assess your property in terms of potential well locations. After we receive that information, we are to arrange a site visit to check those potential well locations identified by your hydrologist on site, to see where they lie in terms of potential and mapped wetlands. You contacted us in January and said you were having difficulty hiring a hydrologist and asked that we consider your professional opinions on this request. I appreciate the analysis you have done yourselves, but again I ask that you hire a qualified agent and submit the report from a qualified hydrologist as we requested. Once we have received that report, we would be more than happy to schedule a site visit with our staff biologists and meet with you on site.

The Applicants submitted a hydrologic and alternatives analysis several months later on June 7, 2016. On August 1, 2016, Commission staff, including the Commission's ecologist Dr. Lauren Garske-Garcia, met with the Applicants on the site to verify site conditions against submitted materials ([Exhibit 2](#), images 5-9), and to discuss potential resolution of LCP issues. Subsequently, Commission staff prepared a staff recommendation for Commission consideration at the December 2016 Commission meeting. The Commission staff recommendation was published on November 22, 2016. On December 3, 2016, the Applicants exercised their right to

postpone the hearing to continue discussing the recommended conditions of approval with staff. Ultimately, due primarily to the Applicants' travel schedule that kept them out of the County/Country for large chunks of time, sporadic discussions ensued. Following these discussions, Commission staff informed the Applicants in May of 2017 that the de novo hearing would be scheduled for the Commission's July 2017 meeting, including due to that meeting's relative proximity to the Applicants' property as compared to other potential meeting venues. The Applicants again asked for a delay until the August Commission hearing, which Commission staff granted. This hearing is the culmination of all of that coordination.

C. STANDARD OF REVIEW

The standard of review for the de novo portion of the hearing on the CDP application is the Marin County 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, and this project is subject to LCP LUP Unit I.

D. 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 wetland 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 saltwater, 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 bank 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 stream buffer ([Exhibit 2](#), image 5).

Per the Marin County Unit I Land Use Plan, no construction, alteration of land forms, or vegetation removal is allowed within the stream 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.

The Applicants submitted a hydrologic and alternatives analysis for potential well siting in June 2016, which confirmed that potential locations for a well on the subject property are highly constrained (see [Exhibit 4](#)). Within the low-lying eastern portion of the property, there are locations suitable for drill rig access, and a water well could possibly 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 in these western portions of the property because these areas are already developed with septic systems, an animal enclosure and a pet cemetery, and 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. Trucking in water was deemed infeasible.

Thus, the Applicants' hydrologic and alternatives analysis confirmed that alternative locations for a well on the property are problematic due to the presence of sensitive habitats, existing development, steep slopes, and unsuitable soils. Removal of the installed well, restoration of the well location, and service via other water purveyors is also not an option as the subject property is located outside the service jurisdiction of the Bolinas Community Public Utilities District, and the two residences that rely on the subject well would be left without a source of domestic water. Thus, although the LCP would ordinarily direct denial of the project, the Commission here exercises its discretion to approve a project due to concerns that a denial could engender a takings claim. Such an approval recognizes the need for a reliable water supply, and provides for habitat restoration 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 after thorough consideration that both native and introduced species have since established (or reestablished) and have proven to be largely self-sustaining ([Exhibit 2](#), images 5-9). As conditioned to provide for restoration in the form of further habitat enhancement, including by removing non-natives, planting native vegetation where appropriate, restoring open water habitat and monitoring the success of the restoration effort for the benefit of the wetland and stream habitat, leaving the well in its current location is the least environmentally damaging alternative in this particular case pursuant to this fact set (see Special Condition 2). Thus, the only feasible alternative is approval of the well in its existing location provided project impacts are appropriately mitigated, because there is no feasible, less environmentally damaging alternative location for the well on the subject property. However, this location and appropriate mitigation for this location is not allowed by the LCP due to buffer requirements, and thus, staff recommends that the Commission approve according to takings analysis, 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 buffer⁷. 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.

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 normally require denial, but the Commission here chooses to exercise its discretion to avoid a potential taking, as described above. In doing so, the Commission conditions the approval to

⁷ The Applicants did not complete a timely or single-parameter wetland delineation per Commission regulations and thus, the extent of wetlands on the property is likely more expansive. The well and associated infrastructure could be closer to the wetlands than 50 feet. The LCP calls for buffers to be no less than 50 ft. from the outer edge of riparian vegetation or 100 ft. from the blue line of the stream. Because the Applicants did not submit maps delineating the edge of riparian vegetation, the well could be further into the buffer than 50 feet.

achieve maximum consistency with the LCP; specifically by allowing retention of the well and its infrastructure and requiring the restoration of the wetland and related habitats at the site.

Wildlife habitat protection and Impact Assessment

The 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 wetlands and Coppermine Creek support potential habitat for the frog, including permanent sources of deep open 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.⁸ The perennial nature of the large pond serves to potentially foster the species throughout its life cycle, including the over-wintering tadpoles, and provides 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 ponds and upland habitat where adults forage and also estivate during summer months ([Exhibit 2](#)). 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, as well as the conditions that favor algal blooms to support foraging tadpoles ([Exhibit 2](#), image 7). 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 ([Exhibit 2](#), images 6, 7, 8 and 9). Large non-native horticultural plants, such as *Gunnera* and ornamental plum trees, currently over-shade pond edges, where frogs would 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 as conducive to supporting California Red-Legged Frogs as it could be.

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 to the property since 2015.⁹ 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 August 2016 site visit. If these animals are the protected species, many of the habitat enhancements needed at the property that would benefit the frogs would also benefit this turtle species. *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 ponds in the form of logs or flat rocks for basking.

⁸ CNDDDB records show occurrences of California Red-Legged Frog from 2015 and the species is presumed to be extant in the project vicinity.

⁹ CNDDDB records show occurrences of Western Pond Turtle from 2015 and the species is presumed to be extant in the project vicinity.

A Well Driller's Report prepared shortly after the subject well was drilled on October 26, 1987, indicates that the well was installed using a drill rig to a depth of 47 feet. Richard Kirschman, the owner of the subject parcel at the time of well construction, stated that the 375-foot long trench for associated water distribution pipes was excavated using a ditch witch covering an area 2 feet wide by 18-inches deep. Thus, there would have been ground disturbance – roughly estimated as 0.07 acres,¹⁰ and that disturbance would have degraded and/or removed vegetation such that invasive species could readily colonize the area before native species could reestablish themselves. The ground disturbance also could have impacted sensitive burrowing and/or ground-nesting wildlife species and construction may have impacted birds nesting in close proximity, including raptors and other sensitive species such as the Saltmarsh Common Yellowthroat (*Geothlypis trichas sinuosa*), a California Species of Special Concern, which is known from the area¹¹ and specifically relies on willow habitats. 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 during early seasonal rains. Thus, Dr. Garske-Garcia estimates that the period of functional loss to the ecosystem, as any native perennial vegetation recovered, would have likely been at least three to five years in the absence of any restoration measures and likely resulted in the proliferation of non-native vegetation observed on-site.

Therefore, construction of the subject well and its infrastructure would have resulted in more than temporary direct and indirect adverse impacts to a significant area of wetland, riparian, and upland habitats (including their buffers). Again, while ordinarily these types of impacts would require denial, the project is the least environmentally damaging feasible alternative in this case to avoid a potential takings, and the Commission exercises its discretion to approve a project in this case. These impacts will be offset through the implementation of a habitat restoration and enhancement plan, to eliminate non-native and invasive species, and to 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 seems unlikely that the subject well has imposed ongoing hydrological impacts by way of excessively drawing-down the water table. The implementation of the measures described in the approved 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-native plant species and revegetate the subject property with native species, consistent with the LCP's wildlife habitat protection policies.

¹⁰ This is based on a trench length of 375 feet over a 8-foot wide area for the machinery to maneuver (*i.e.*, 3,000 square-feet) plus an additional 10-foot by 10-foot area (*i.e.*, 100 square-feet) surrounding the area of the well itself, totaling approximately 0.07 acres. Note that given the extent of uncertainties and assumptions made in this analysis due to the lack of baseline data and sufficient documentation of the development activities themselves, and the nearly 20 years since the well was first put in place without mitigation, Staff is not recommending mitigation based upon this estimate but rather providing it for context only. Instead, the required mitigation is believed to be in-scale with the likely damage incurred to coastal habitats.

¹¹ CNDDDB records show occurrences of Saltmarsh Common Yellowthroat from 1985 and the species is presumed to be extant in the project vicinity.

To ensure that future property owners are properly informed regarding the terms and conditions of this approval, **Special Condition 3** requires a deed restriction to be recorded against the property involved in the application. This deed restriction will record the conditions of this permit as covenants, conditions, and restrictions on the use and enjoyment of the property.

E. 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 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.

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 approved and as conditioned to avoid a potential taking (see below), feasible measures will be provided to minimize the adverse environmental effects associated with the 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.

F. PUBLIC ACCESS AND RECREATION

The public access and recreation policies of the Coastal Act require, among other things, that maximum access and recreational opportunities be provided and that development not interfere with such public recreational access. The Coastal Act states as follows:

Section 30210. 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.

Section 30211. 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.

Section 30214. (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.

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.

G. APPROVAL TO AVOID POTENTIAL TAKINGS

LCP Requires Denial

As detailed above, the proposed project is inconsistent with the stream and wetlands buffer policies of the Marin County LCP because the well and related infrastructure is impermissibly located within the LCP-required wetland and stream buffers, and 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 related residential development. 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, and it is likely that alternative 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 wetland or stream buffer, or have other habitat issues.

Coastal Act Takings Provisions

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, which is not allowed by the Coastal Act. Coastal Act Section 30010 states:

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 could 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). It does not appear that use of the well creates a public nuisance in this case. 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 LCP’s wetlands protections (e.g., LUP Policy 18) was long in existence at the time of the Applicants’ 2012 purchase, providing environmental regulation in the coastal zone. Specifically, the well’s legal status was in play when they bought the land. As the Supreme Court noted in a recent case, the homeowners “could have anticipated public regulation might affect their enjoyment of their property, as the [river] was a regulated area under federal, state, and local law long before petitioners possessed the land (*Murr v. Wisconsin* (582 U.S. 2017) [slip opinion at p. 18]). 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. 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 (California Constitution Article X, Section 2).¹² 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 Section 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.¹³ 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.¹⁴ 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 Applicants’ 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). A treatise on water law 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.”¹⁵ 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.

¹² 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.”

¹³ 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>.

¹⁴ Owen, *Taking Groundwater, supra* n.8, at p. 266.

¹⁵ Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law* (1990) 61 U.Colo.L.Rev. 257, 260.

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.¹⁶ 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 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 Applicants 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 square-foot) two bedroom home, built in 1976, with improvements, such as a deck, and the subject well, which was drilled in 1987. At the same time as the Applicants were considering and purchasing the property, Mr. Kirschman, the prior owner and seller, had submitted a CDP application with Marin County to legalize the well. On March 29, 2012, Marin County approved the after-the-fact CDP for the well and related infrastructure. Regardless of whether it was prudent to actually buy the land before County approval of the CDP and exhaustion of the appeal period, the Applicants had an expectation at the time of purchase 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 albeit illegally at the time of the Applicants’ 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)).¹⁷ Nevertheless, it is still part of the *Penn Central* analysis, and 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 Section 30001(b)). In particular, California’s wetlands are and have been in crisis for many, many years. The Commission has often noted California has lost some 90% of its wetlands, a threat aggravated by sea level rise.¹⁸

¹⁶ Herzog, *supra*, n. 10, *Guidelines for the Appraisal of Water Rights in California*, p. ES-8.

¹⁷ 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).

¹⁸ For example, see California Coastal Commission Sea Level Rise Policy Guidance (2015), p. 63.

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 residential property and its improvements, and because a court might view the Applicants' 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.

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 LCP, would constitute a taking. 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 in this case.

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 (and by extension, LCP) 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 and enhancement 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 protect, as much as feasible, the affected buffer habitat.

H. 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 Number A-2-MAR-12-008, as a component of this application, are resolved in a timely manner, **Special Condition 1** requires that the Applicants satisfy all prior to issuance conditions of this CDP within 180 days of Commission action. Failure to comply with this requirement may result in the institution of enforcement action under the provisions of Chapter 9 of the Coastal Act. Approval of this CDP 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.

I. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Section 13096 of the California Code of Regulations requires that a specific finding be made in conjunction with CDP 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 CDP 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

- *Water Well Driller's Report*, prepared for John Kostelic, by Weeks Drilling and Pump Company, November 2, 1987.
- *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.

APPENDIX B: STAFF CONTACT WITH AGENCIES AND GROUPS

- Prior Owner (Richard Kirschman)
- Applicants (Wayne and Susan Trivelpiece and Evan Waterman)
- Environmental Action Committee of West Marin (Terence Carroll)
- Celia O'Connor
- Marin County Community Development Agency