

CALIFORNIA COASTAL COMMISSION

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W11a

Prepared February 5, 2019 (for February 6, 2019 hearing)

To: Coastal Commissioners and Interested Persons

From: Dan Carl, North Central Coast District Director
Jeannine Manna, North Central Coast District Manager
Sara Pfeifer, North Central Coast District Planner

**Subject: STAFF REPORT ADDENDUM for W11a
Marin County Local Coastal Program Amendment Number LCP-2-MAR-19-0003-1 (Marin County IP Update).**

In the time since the staff report was distributed on January 25, 2019, staff has received letters from the Environmental Action Committee of West Marin (EAC) and from the Pacific Legal Foundation (PLF) (both dated February 1, 2019; see attached), and has participated in phone conversations with Marin County to discuss clarifications regarding the staff recommended findings. This addendum provides a response to such comments received thus far. In addition, this addendum provides for minor changes to a few paragraphs in the findings, and for correction of typos. Importantly, the changes herein do not modify the basic staff recommendation, which is still a recommendation to certify the Marin County LCP amendment as submitted by the County.

Where applicable, text in underline format indicates text that is being added, and text in ~~strikethrough~~ format indicates text that is being deleted. In all cases, and unless modified by the Commission, the revisions to the recommended findings set forth below will be incorporated into the Commission's adopted findings. In addition, the responses to these comments provided by this addendum will be inserted into the Commission's adopted findings within the section addressing the relevant topic.

Limitation of Development Rights

PLF raises concerns regarding the policy implications for development on agricultural lands. Specifically, PLF asserts that the proposed amendment includes provisions that would significantly reduce the development rights of landowners tantamount to a taking. PLF also expresses concern regarding the language pertaining to affirmative agricultural easements and restrictive covenants. PLF's concerns were conveyed to the County throughout the LCP amendment approval process at the County level, and the County has responded to such concerns including via a memo to the Marin County Planning Commission dated October 9, 2018 (see attached).

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A colorable taking claim rests on the deprivation of economic use of a property. Importantly here, PLF fails to recognize the limitations in the *existing* LCP that apply to development in the C-APZ zoning district (i.e., the “agricultural production zone”, and the main LCP agricultural zoning district). First, the County has other areas of the coastal zone designated for residential development, as well as two other agricultural zones that explicitly contemplate residential development, wherein residential development is to be concentrated. By contrast, the C-APZ zone is designed to facilitate bonafide agricultural production. It is not a residential zone. Second, there was never an entitlement to develop a single-family residence in the C-APZ zone; the County’s agricultural production zone is not a residential zone and the denial of a single-family residence would still leave the farmer with the ability to grow agriculture as a commodity for commercial purposes. Third, single-family residences in the County’s agricultural production zone are currently subject to stringent use limitations, including that any permissible residence must “protect and enhance continued agricultural use and contribute to agricultural viability.” Fourth, the existing LCP allows for one single-family residence per parcel, with parcel defined as all contiguous assessor’s parcels under common ownership (unless legally divided) and limits the density of dwelling units to a maximum density of one unit per sixty acres, with the actual density to be determined through a master plan process. Lastly, the existing LCP requires permanent conservation easements recorded over the portion of the property not used for physical development, and a prohibition on further division of the property to be executed as a covenant against the property.

Rather than deviate from the framework set up in the existing LCP, the Commission-certified LUP policies serve to limit the proliferation of agricultural dwelling units in the coastal zone by acknowledging that the “farm tract,” defined as all contiguous lots under common ownership, can consist of multiple legal parcels that together constitute one unified farming operation. Instead of allowing the potential for the same farmer to develop multiple farmhouses spread across multiple contiguously owned legal parcels that are under common ownership in the commercial agricultural zone, certified LUP Policy C-AG-5 allows for one farmhouse, or one farmhouse and up to two intergenerational homes per farm tract, to allow for family members (or any other person authorized by the owner) to live on the farm property. As observed in the existing LCP, the agricultural policies are intended to avoid inappropriate residential development, inefficiently utilizing the agriculturally productive land and requiring large investments for public service, and instead to facilitate agricultural production. Therefore, the LCP Update provisions seek to cluster permissible agricultural residential development and to direct other residential-type construction to other zoning districts and to existing communities where it can better be accommodated.

Further, proposed IP Sections 22.32.02(D) and 22.32.025(B), require a recording of a restrictive covenant with the development of a farmhouse or intergenerational home ensuring that such agricultural dwelling units will not be divided or sold separately from the rest of the agriculturally zoned legal lot. However, proposed IP Section 22.32.024(F) expressly relieves agricultural leases from the limitation on dividing farmhouses and intergenerational homes from the rest of the legal lot containing the farmhouse and intergenerational home. In addition, proposed IP Section 22.32.024(D) expressly states that nothing in its provisions shall be construed to prohibit the sale of any legal lot comprising the farm tract, nor require the imposition of any restrictive covenant on any legal lot comprising the farm tract, other than the

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legal lot upon which the farmhouse and up to 2 intergenerational homes is authorized. Thus, any legal lot sold from a farm tract could be developed consistent with the LCP provisions.

The bottom line is that the proposed IP protects and enhances the agricultural productivity and viability of the County's agricultural production zone consistent with the already Commission-certified LUP policies. And, in fact, the restrictions that PLF is concerned about in its February 1, 2019 letter have largely been in place (albeit in a slightly different form) as part of the certified LCP for decades as discussed above, and do not represent some type of new level of restriction on agricultural property interests. By limiting agricultural dwelling units within the agricultural production zone, land values are driven agriculturally rather than residentially, helping to sustain the long term viability of agriculture and prevent large residential estates from driving up the cost of the agricultural land. At the same time, agricultural property owners are provided similar use and development as before, and arguably additional homes via the LCP's intergenerational policies, subject to certain limitations designed to foster and sustain Marin's agricultural land, community, and economy. This issue is also further addressed within the staff report on pages 30-32.

Ongoing Agriculture

PLF has also expressed concern that the definition of ongoing agriculture would provide the County's Community Development Agency (CDA) Director with too much discretion over determining what types of agricultural production activities meet the definition of ongoing agriculture. However, any determination made by the CDA Director per this definition would have to be considered within the context of all other language contained within the definition. For example, while the definition includes the statement that ongoing agricultural activities include "other production activities the Director of CDA determines are similar in nature and intensity" it also provides examples of such activities including crop rotation, plowing, and tilling that have not been expanded into areas never before used for agriculture. These activities, and their related nature and intensity, will serve as a basis for comparison when the CDA Director is considering any other type of agricultural production activity not specifically listed in the definition. Similarly, in identifying other agricultural production activities that do *not* meet the definition of ongoing agriculture because they will result in significant impacts to coastal resources, the CDA Director will be able to consider additional production activities within the context of the already identified activities listed in the definition that are not considered ongoing agriculture, regardless of where they are occurring, such as new or expanded water sources or irrigation systems, or terracing, or slopes over 15%, or cannabis/viticulture. In short, the definition provides applicable criteria to be used in making any particular judgment, and the evidence does not suggest that it would be inappropriately applied. This issue is also further addressed within the staff report on pages 23-29.

Text and Typographic Errors

EAC identifies inadvertent text errors in one paragraph of the staff report, and typos in several parts of the proposed amendment. With respect to the former, EAC indicates that the paragraph at the top of staff report page 31 is missing descriptive text required to ensure consistency with the Commission-certified LUP with respect to ensuring that certain accessory uses are meant to be understood as accessory to the use on the farm itself (and not to some other farming operation); that principal use refers to the singular principal use; and that the text refers to

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agricultural *production* facilities when it should refer to agricultural *processing* facilities in one instance. Staff concurs that the language includes some inadvertent errors, and thus makes the following corrections to the first paragraph on the top of staff report page 31 to reflect consistency with Commission-certified LUP Policy C-AG-2 with regard to other agricultural uses that are principally permitted in the C-APZ zone including certain “agricultural product sales and processing of products grown within the farmshed”:

....Further, the principal permitted use of the C-APZ is agriculture, defined to include agricultural production, and the structures that truly support agricultural production (agricultural accessory structures, agricultural dwelling units, agricultural sales and processing facilities). In order to classify development other than agricultural production itself as a principally permitted use of agricultural land, development must in fact be supporting agricultural production. LCP Policy C-AG-2 ensures that the principal uses on C-APZ land is agriculture and that any other development on such lands shall be “accessory and incidental to, in support of, and compatible with agricultural production” to even be considered such agricultural uses under the LCP. In the case of agricultural ~~production~~ processing facilities and agricultural retail sales, these facilities must also be appurtenant and necessary to the operation of agriculture per definition. Thus, the proposed language will ensure that such facilities are directly connected to the production activities occurring on site.

With respect to typographic errors in the LCP amendment submittal itself (staff report **Exhibit 1**), staff has confirmed with Marin County staff that the typos are in fact typos, and would be cleaned up during the normal course of finaling the document. For clarity’s sake, staff makes those corrections in the staff report now. Thus, the following list includes typographic errors found in **Exhibit 1** as confirmed by Marin County. These typographic errors are minor in nature and do not change the content, substance or meaning of the policy language.

- IP Section 22.62.040.B.2, there are two periods after the number 2
- IP Section 22.62.060.B.1.d, a colon separates items (1) and (2), and should be replaced with a semi-colon
- IP Section 22.64.140.A.1, no text is missing, however, “d” should instead be “c,” and “e” should be “d”
- Tables 5-3-c, 5-3-d, 5-3-e, and 5-3-f, footnote (4) lacks the words "and Commercial shall be a permitted use"
- IP Section 22.64.170.A.3, the word “and” appears distorted in the second paragraph

Clarifications to Ongoing Agriculture Findings

Based on recent conversations with Marin County staff, Commission staff recommends the following changes to the staff report findings to provide clarification on the language pertaining to ongoing agricultural production activities. These revisions will not alter the content, substance or meaning of the policy language but will provide better clarity on implementing the definition of ongoing agriculture.

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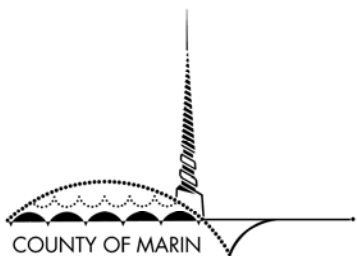
Modify the staff recommended findings starting on the fourth sentence of the third paragraph on page 25 as follows:

...As such, to the extent that rotational crop farming or grazing has been part of ongoing agricultural practices ~~a regular pattern of agricultural practices~~, rotational changes are not a change in intensity of use of the land despite the fact that the grazing and crop growing are occurring at different times on different plots of land, and thus ~~any activities meeting that specific definition~~ such activities are considered “ongoing agriculture”. The County also proposes to include in the “ongoing agriculture” list other production activities that the CDA Director determines are similar in nature and intensity if they have not expanded into areas never before used for agriculture.

It is important to note that existing agricultural production activities exempt per this definition are only considered ongoing agriculture if they qualify as one of the already allowable uses on agricultural land. The County proposed definition is not intended to allow the continuation of any ~~unauthorized-permitted~~ activity on agricultural land just because it has previously been occurring. Instead the definition removes the upfront burden of proof from an individual farmer that all activities must be shown to be permitted as part of a CDP application process in recognition of the fact that agricultural activities, including cattle grazing, have historically been occurring on properties in Marin for decades prior to adoption of the Coastal Act and CDP requirements. If the extent of agricultural production activities were to be contested, the proposed definition will serve to inform ~~acknowledges that~~ determinations of ongoing agricultural activities and such determinations may need to be supported ~~with evidentiary information such as information from~~ by information from the Marin County Department of Agriculture, Weights and Measures.

Modify the staff recommended findings starting on the fifth sentence of the third paragraph on page 26 as follows:

As such, in Marin County, agricultural activities that convert grazing land to row crop do not categorically require a CDP, unless they would intensify the use of land or water, or require grading not already exempt or excluded, or would otherwise result in development that triggers CDP requirements pursuant to the definitions. Due to the limited prime soils, steep slopes, and water availability in Marin County, activities that convert grazing areas to row crop and increase the intensity of use of land or water often are generally captured within the other proposed enumerated categories that require development of new water sources, development of new or expansion of existing irrigation systems, or terracing of land or planting on a slope exceeding 15%, which all would require a CDP or De Minimis Waiver per the County’s proposed definition.



MEMORANDUM

TO: Marin County Planning Commission

**FROM: Kristin Drumm, Senior Planner
Jack Liebster, Planning Manager**

DATE: October 9, 2018

RE: Response to Pacific Legal Foundation letter dated October 1, 2018

Staff provides the following in response to the Pacific Legal Foundation letter addressing the Marin County Local Coastal Program Amendments.

Definition of Existing Structure

Staff proposes to delete the definition of “existing structure” from Amendment 7. However, this definition will be addressed as part of discussions regarding the Amendment to the Environmental Hazards section since it includes references to shoreline protective devices.

Farm Tract

Land Use Policy C-AG-2 was certified as part of Amendment 2 by the California Coastal Commission staff on June 6, 2018, and thus is not before the Planning Commission. This policy defines allowable land use within the Coastal Agricultural Production Zone (C-APZ) and provides for Agricultural Dwelling Units consisting of “one farmhouse or a combination of one farmhouse and one intergenerational home per farm tract, defined in this LCP as all contiguous legal lots under common ownership within a C-APZ zoning district.” Important to this policy is the implementing zoning provision in Development Code Section 22.32.024(D) (Agricultural Dwelling Units) of the proposed Implementation Plan, which allows the sale of any legal lot comprising the farm tract without the imposition of any restrictive covenants (other than a covenant for the legal lot upon which a farmhouse is permitted). Under this provision, contiguous legal lots within a farm tract may be sold and developed as separate farm tracts, of course subject to applicable LCP policies and standards. By removing regulatory barriers to the future sale and development of legal lots within a farm tract, this provision avoids de facto mergers and takings of property. Additionally, Land Use Policy C-AG-5 supports the preservation of family farms by facilitating multi-generational operation and succession through the development of agricultural dwelling units. Both policies are now certified and are not under discussion.

As mentioned by the Pacific Legal Foundation, Implementation Program Section 22.32.024(B) limits the number of agricultural dwelling units within an Agricultural Dwelling Cluster per “farm tract.” Both the current C-APZ standards and proposed LCP amendments allow one single family residence and agricultural worker housing subject to a restrictive covenant ensuring the

remainder of the land is preserved for agricultural production. However, the proposed LCP amendments include a new provision allowing for up to two additional intergeneration homes per farm tract that are primarily intended for family members (hence the term “intergenerational”) not necessarily involved in day-to-day agricultural production activities. The proposed amendments thus provide greater flexibility for farmers and ranchers both in terms of the number and types of dwelling units on their property. As pointed out above, Section 22.130.030 defines farm tract as “all contiguous legal lots under common ownership” while maintaining the ability of property owners to sell legal lots comprising the farm tract without covenants restricting future development subject to the land use regulations that would otherwise apply through the LCP and the Countywide Plan. The standards in these sections are consistent with the certified policy language in Amendment 2 and also subject to the provisions in Section 22.32.024 (D) noted above. Thus, no revisions are proposed for these sections.

Affirmative Agricultural Easements and Restrictive Covenants on the Division of Land

The certified Land Use Plan includes Program C-AG-2.b to evaluate the efficacy of permitting limited non-agricultural residential development within the C-APZ zone through permanent affirmative agricultural easements. The details of such a program would need to be fleshed out through a combination of additional community meetings and public hearings before the Planning Commission and Board of Supervisors and would have no effect until certified as an LCP Amendment by the Coastal Commission.

A permanent conservation easement is required per Land Use Policy C-AG-7 for permissible land divisions and other non-agricultural conditional uses, where consistent with state and federal laws. Only agricultural and compatible uses are allowed under the easement, and the policy requires the execution of a covenant not to divide for the parcels created under this division so that each will be retained as a single unit and will not be further subdivided.

PLF also contends that LCP Amendment provisions that “each ‘agricultural dwelling unit’ be ‘owned by a farmer or operator ’who is ‘actively and directly engaged in agricultural use on the property’” will force property owners to remain in a commercial agricultural market permanently, even if such agricultural use becomes impracticable. The County disagrees with PLF’s legal argument that the subject provisions represent “unconstitutional conditions.” PLF, representing the estate of Willie Benedetti, has a pending lawsuit against the County and the Coastal Commission advancing these arguments of unconstitutionality. If that lawsuit should move forward, the County and the Commission will more specifically address PLF’s legal arguments in the course of the litigation.

Definition of Ongoing Agriculture

PLF contends that the provision for the Director of the Community Development Agency to require a CDP for any activity that he determines “will have significant impacts to coastal resources” constitutes unlimited discretion that invites arbitrary enforcement and creates the potential for future abuse.

On the contrary, the LCP overall is committed to the protection of agriculture as required by the Coastal Act. The clear intent of the Ongoing Agriculture is to allow ranchers and farmers to undertake routine agricultural production activities and to respond to market

requirements in a timely manner without the delay and expense of obtaining a coastal permit. The Director of CDA will act consistent with that context and intent, and will only require a permit when truly unusual circumstances arise that will have *significant impacts* to coastal resources.



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Environmental Action Committee of West Marin

Support Agenda Item W11a

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Ashley Eagle-Gibbs, Esq.
Conservation Director

Jessica Reynolds Taylor
Development Director

Catherine Caufield
Tomales Dunes Consultant

February 1, 2019

California Coastal Commissioners
Jack Ainsworth, Executive Director
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105
Via Electronic Mail: NorthCentralCoast@coastal.ca.gov

Re: Comments re: Marin County Local Coastal Program Amendment
Number LCP-2-MAR-19-0003-1, Support Agenda Item W11a

Dear Mr. Ainsworth and Commissioners,

The Environmental Action Committee of West Marin (“EAC”) respectfully submits the following comments on Marin County Local Coastal Program (“LCP”) Amendment Number LCP-2-MAR-19-0003-1 (Marin IP Partial Update), Agenda Item W11a. With a few revisions, EAC fully supports the California Coastal Commission (“Commission”) staff’s recommendation regarding Agenda Item W11a, as we are in favor of moving the LCP update forward as soon as possible so that Marin County (“County”) can benefit from an LCP that addresses environmental hazards.

We begin this letter by thanking the Commission staff for their efforts to diligently, persistently, and collaboratively work with EAC and with

County staff to come to this point. We also want to thank County staff for their hardworking, untiring, and collaborative work with the Commission staff. In particular, we want to thank Marin County Supervisor Dennis Rodoni for moving the LCP update process forward. Since 2008, EAC has been actively involved in the County's LCP amendment process, and we are gratified that for the first time in the Marin LCP update's long history, the Commission staff has recommended approval as submitted.

Suggested Revisions to the Staff Report

We do have a few minor suggested revisions to the *Staff Report re: Marin County Local Coastal Program Amendment Number LCP-2-MAR-19-0003-1 (Marin Implementation Plan Partial Update)* ("Staff Report") including some substantive changes, as well as corrections to a few typographical errors.

Minor Substantive Revision & Typographical Error to *Other Agricultural Uses*

As the Commission's Staff Report states, "[t]he standard of review for the IP amendments is that they must conform [to] with and be adequate to carry out the policies of the 2016 certified LUP (and any changes to it approved by the Commission here)...."¹ Taking this into consideration, it is important for the proposed Implementation Plan ("IP") amendment to be consistent with the already adopted sections of the Land Use Plan ("LUP"). In pages 30-31 of the Commission's Staff Report, *Other Agricultural Uses* are addressed under the Consistency Analysis. We suggest the following revisions (shown in underline) to the bottom of the first paragraph on page 31:

LCP Policy C-AG-2 ensures that the principal use on C-APZ land is agriculture and that any development on such lands shall be "accessory and incidental to, in support of, and compatible with agricultural production" on the same site to even be considered such agricultural use under the LCP. In the case of agricultural processing facilities and agricultural retail sales, these facilities must also be appurtenant and necessary to the operation of agriculture per definition. Thus, the proposed language will ensure that such facilities are directly connected to the production activities occurring on site.

The additional language "on the same site" will make it clear that in order to be a principally permitted use, development shall be "accessory and incidental to, in support of, and compatible with agricultural production" on that particular farm or ranch, not just "accessory and incidental to, in support of, and compatible with agricultural production" generally. As is pointed out in the Staff Report, the added language will further clarify that the IP language is

¹ California Coastal Commission, *Staff Report re: Marin County Local Coastal Program Amendment Number LCP-2-MAR-19- 0003-1 (Marin Implementation Plan Partial Update)* ("Staff Report"), January 25, 2019, page 17.

consistent with LUP Policy C-AG-2(A)(5), already certified by the Commission and accepted by Marin County, as well as with the Commission's July 2017 Revised Findings,² which are incorporated by reference into the current Staff Report.³ The changes from "principle uses" to "principal use" and from "production" to "processing" are needed to correct apparent typographical errors.

Typographical Errors in Exhibit 1

EAC notes below typographical errors found in Exhibit 1 to the Staff Report ("Exhibit 1") (the Proposed LCP Amendment: Implementation Program Update).

- IP Section 22.62.040.B.2., page 36 of Exhibit 1, there are two periods after the number 2.
- IP Section 22.62.060.B.1.d., pages 37-38 of Exhibit 1, there is has a colon separating items (1) and (2). We believe this should be a semi-colon.
- IP Section 22.64.140.A.1., page 87 of Exhibit 1, (c) appears to be missing. A reordering appears to be needed.
- Tables 5-3-c, 5-3-d, 5-3-e, and 5-3-f, pages 52-57, footnote (4) lacks the final words: "and Commercial shall be a permitted use." This is an important revision. *See also* page 93 of Exhibit 1, IP Section 22.64.170.A.3. and Exhibit 4 of the Staff Report at page 7.
- IP Section 22.64.170.A.3. page 92. Note the word "and" looks all distorted in the second paragraph.

Advance the LCP Update for Sea Level Rise Planning

The County undertook an enormous task in 2008 when it decided to revise the entire LCP rather than specific LCP sections. With such a comprehensive overhaul, there will undoubtedly be imperfections that might require future amendments. This would be a natural progression to

² See California Coastal Commission, *Staff Report re: Marin County Local Coastal Program Amendment Number LCP-2-MAR-15- 0029-1 Revised Findings (Marin LCP Update Revised Findings)*, June 23, 2017, page 25: "In order to classify development other than agricultural production itself as a principally permitted use of agricultural land, development must in fact be supporting agricultural production. Further, suggested modifications in the proposed LCP's Implementation Plan (IP) definitions section (discussed below) ensure that these permitted agricultural uses must meet all the following criteria 'accessory and incidental to, in support of, compatible with agricultural production' to even be considered such agricultural uses under the LCP. *These suggested modifications together will ensure that a cattle rancher, for example, cannot lease a portion of their land to a wine producer who could then turn an existing barn on the property into a wine processing facility because that use is not accessory and incidental to, in support of, compatible with the cattle ranching operation.*" (emphasis added)

³ Staff Report, page 17.

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ensure the LCP continues to fit within the local vision of, and planning for, our coastal communities.

The LCP amendments do not satisfy each individual or each group in every respect. In short, the LCP amendments are not perfect for the agricultural community, the environmental community, the residential community, or many of the other community sub-sets; but they are the result of a decade of work balancing the needs for community development and land-use with the protection of our coastal resources, as mandated by the California Coastal Act. As a result of this decade-long public process, many compromises have been made by all interested parties and agencies.

Overall, the LCP Update provides critical updates to our 1981 planning policies and implementation measures, and most importantly – once the environmental hazards sections are completed – critical planning tools for our communities to adapt to the impending threats of sea-level rise. There is an urgent need to complete the amendments to the environmental hazards sections of the LCP. The County’s coastal communities cannot adequately plan for sea-level rise without the environmental hazards amendments. For this reason, we support the the LCP Update moving forward so that we can turn again to the challenging and contentious task of updating the environmental hazards sections.

We again thank the Coastal Commission and Marin County staffs for their hard work to arrive at this juncture and for your consideration of our comments.

Sincerely,



Morgan Patton
Executive Director



Ashley Eagle-Gibbs
Conservation Director

cc: Jeannine Manna, California Coastal Commission
Dan Carl, California Coastal Commission
Brian Crawford, Marin County
Dennis Rodoni, Marin County

Agenda Item W11a
EAC Comments re: Marin County LCP



February 1, 2019

Executive Director John Ainsworth
Chair Dayna Bochco & Commissioners
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

VIA E-MAIL John.Ainsworth@coastal.ca.gov
AND FIRST-CLASS MAIL

Dear Executive Director Ainsworth and Honorable Commissioners:

Pacific Legal Foundation, the estate of Willie Benedetti, and Arthur and Aaron Benedetti submit these comments on the proposed Marin County Local Coastal Program amendments.

Pacific Legal Foundation is the nation's oldest public interest property rights foundation. Over the last several years, PLF has closely followed Marin County's Local Coastal Program (LCP) amendment process. PLF attorneys have submitted comment letters and appeared in person at Marin County and California Coastal Commission hearings to highlight constitutional and other legal infirmities in provisions of the Local Coastal Program Land Use Policy and Implementing Program Amendments. PLF is also currently representing the estate of Willie Benedetti—a Marin County farmer for over 45 years—in pending litigation as to portions of the previously adopted Land Use Plan amendments. Compl. and Pet. for Writ of Admin. Mandate, *Benedetti v. County of Marin*, No. CIV1802053 (Super. Ct. of Marin Cnty., July 16, 2018). This Commission is named as a real party in interest to the litigation, and Aaron and Arthur Benedetti are the successors-in-interest to the pertinent property and to the lawsuit.¹

When a local government like Marin County seeks to amend its LCP, it must obtain certification from this Commission. Cal. Pub. Res. Code § 30514(a). This Commission must now decide whether to accept or reject the amendments submitted by Marin County.

But both Amendments 3 and 7 contain significant constitutional and other legal infirmities. Should they be approved by the Coastal Commission in their current form, Marin County landowners will be subjected to unconstitutional limitations on their property rights and will face tremendous uncertainty. Furthermore, Marin County may face additional legal challenges as a result. The estate of Willie Benedetti, Aaron and

¹ Although Aaron and Arthur Benedetti are successors-in-interest to the lawsuit and join this letter, PLF is not currently representing them in an attorney-client capacity.

Arthur Benedetti, and PLF urge this Commission to reject these amendments and return them to the Marin County Board of Supervisors for necessary revisions.

Limitation of Development Rights

Amendment 3, covering Implementing Program sections related to agriculture, contains provisions that significantly reduce the development rights of landowners. The existing certified Local Coastal Program allows landowners to seek approval through a Conditional Use Permit or Master Plan Process to build additional residential units beyond a primary dwelling unit. But Section 22.32.024(B) of the proposed Implementing Program limits the number of total structures to three agricultural dwelling units per “farm tract.” Section 22.130.030 defines “farm tract” as “all contiguous legal lots under common ownership.”

These provisions effect a substantial reduction of development rights for agricultural landowners in Marin County’s coastal zone. Because all contiguous legal lots are merged under the definition of farm tract, an owner of a large farm tract could be left with one or more legal lots deprived of all economically viable use, resulting in a *per se* taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Even for lots that retain some economically viable use, the destruction of previously held development rights may still subject Marin County and this Commission to a takings claim requiring compensation under *Penn Central Transportation Co. v. City of New York*, 438 US. 104 (1978) (establishing the multi-factor analysis for determining when regulation effects a compensable taking).

In fact, the California Court of Appeal has held that such a significant downzoning of property may effect a compensable taking. *See Avenida San Juan Partnership v. City of San Clemente*, 201 Cal. App. 4th 1256 (2011) (finding a regulatory taking where a change in zoning definition reduced development rights of a 2.85 acre parcel from four dwellings per acre to one dwelling per twenty acres).

Not only is this county-wide diminution of development rights constitutionally questionable, it is unnecessary. Many ranchers and farmers in Marin County have voluntarily transferred conservation easements that protect agriculture and restrict development while largely preserving their development rights. But the Program’s definition of “farm tract,” combined with its unit cap on development, will extinguish these rights for many landowners without providing them any compensation. The estate of Willie Benedetti, Aaron and Arthur Benedetti, and PLF urge the Coastal

Commission to prevent this radical unsettling of the reasonable investment-backed expectations of ranchers and farmers in Marin County.

Affirmative Agricultural Easements and Restrictive Covenants on the Division of Land

As noted above, PLF is involved in pending litigation on behalf of the estate of Mr. Willie Benedetti, a longtime Marin County farmer, regarding several provisions of the previously adopted LUP amendments. The previously submitted Implementing Program amendments contain additional language that exacerbates the legal deficiencies of those amendments.

For example, Section 22.32.024(A) of the previously submitted Implementing Program for agriculture requires that each “agricultural dwelling unit” be “owned by a farmer or operator” who is “actively and directly engaged in agricultural use on the property.” This mandate will force property owners to remain in a commercial agricultural market permanently, even if continued commercial agricultural use becomes impracticable.

Further, the Program defines “actively and directly engaged” as “making day-to-day management decisions for the agricultural operation and being directly engaged in production . . . for commercial purposes,” or “maintaining a lease to a bona fide commercial agricultural producer.” Section 22.130.030(A). This provision therefore requires landowners to participate in commercial agricultural markets in perpetuity—either personally or by forced association with a commercial agricultural producer. The requirement prevents landowners and their successors from ever exiting the commercial agricultural market. This requirement ignores commonplace and legitimate reasons that a landowner might necessarily be temporarily prohibited from running day to day agricultural operations, such as medical hardship or changing market conditions that require the temporary fallowing of land to avoid economic losses.

PLF has already successfully challenged a less onerous affirmative easement permit condition, one that did not even require commercial use. *See Sterling v. California Coastal Commission*, No. CIV 482448 (Cal. Sup. Ct. June 18, 2010). In *Sterling*, Judge George A. Miram of the San Mateo County Superior Court held that an affirmative agricultural easement on 142 acres, imposed as a permit condition for the development of a single acre, amounted to an unconstitutional land-use exaction in violation of the rules laid out by the U.S. Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Nollan and *Dolan* require an essential nexus and a rough proportionality between the permitting condition and the public impact of a proposed development. Conditioning a permit for a single dwelling on the perpetual use of the property for commercial agricultural purposes fails the essential nexus test because the requirement of perpetual commercial agricultural use is not closely related to the impact of building a single dwelling. This is especially true where potential dwellings might be desired on sites that are not currently in agricultural use, or that may not even be suitable for such use. Similarly, because the affirmative easement condition demands a far greater concession than necessary to relieve the public impact of constructing a single dwelling, it runs afoul of *Dolan's* rough proportionality test. Thus, the proposed agricultural easement requirement will not survive the heightened scrutiny of permitting conditions applied under *Nollan* and *Dolan*.

The same result will obtain with respect to the restrictive covenants against further division of legal lots which will be required as a condition of development. *See* Sections 22.32.02x(D)(4), 22.32.025(B)(4). A permanent restrictive covenant against the subdivision of land placed on a large legal lot as a condition for construction of a single dwelling will fail the same nexus and proportionality standards of *Nollan* and *Dolan*. Much like the affirmative agricultural easement—and especially in conjunction with it—this requirement likely constitutes an unconstitutional exaction.

If Marin County wants to encourage agricultural use then it should do so through constitutional means, such as the use of tax incentives. *See, e.g., Williamson v. Commissioner*, 974 F.2d 1525, 1531–33 (9th Cir. 1992) (discussing provisions of estate tax law providing special benefits to property used as a family farm). Placing unconstitutional conditions on the ranchers and farmers of Marin County only serves to diminish the rights of law-abiding, productive landowners, while opening Marin County and this Commission to potential litigation for takings claims.

Definition of Ongoing Agriculture

The definition of ongoing agriculture in Section 22.130.030 of the proposed Implementing Program will create significant uncertainty for Marin County farmers and ranchers. Ongoing agriculture is defined largely by a list of activities that purportedly do not fall under that category, but leaves open unlimited discretion for the Director of the Community Development Agency to require a CDP for any activity that he determines “will have significant impacts to coastal resources.” This nearly unlimited discretion invites arbitrary enforcement and creates the potential for future abuse.

Commercially viable farming and ranching often requires flexibility to respond to shifting market conditions from year to year, or even from season to season. The definition will likely leave farmers and ranchers unsure of which practices may require a coastal development permit, and could shift the burden onto agricultural landowners to show which uses constitute ongoing activities within Marin County. Such a course would conflict with the Coastal Act's policy to preserve coastal agriculture. *See* Pub. Res. Code §§ 30241, 30242. Even where a rancher or farmer may be able to establish that an agricultural activity should be exempt from a CDP, the time and expense of establishing the historical practice for a given area in the face of a Commission cease and desist order could prove financially disastrous.

The definition is representative of a growing trend of acknowledging no limiting principle to the Coastal Commission's jurisdiction over "development" when a project is alleged to result in a "change in intensity of use and access" of land within the coastal zone. *See, e.g., Greenfield v. Mandalay Shores Cmty. Ass'n*, No. 2D CIV. B281089, 2018 WL 1477525 (Cal. Ct. App. Mar. 27, 2018) (holding that a ban on short term rentals in a coastal community could constitute a change in intensity of access justifying issuance of a preliminary injunction); *and Surf Rider Found. v. Martins Beach 1, LLC*, 14 Cal. App. 5th 238 (Ct. App. 2017) (holding that closing a paid access road on private property constitute a change in intensity of access requiring a coastal development permit), *cert. denied*, 139 S. Ct. 54 (2018).

The Marin County staff report asserts that the Director of the Community Development Agency "will act consistent with" the goals of the Coastal Act in interpreting the phrase "ongoing agriculture" and determining when a CDP is required. Marin Cty. Comty. Dev. Agency, Planning Div. *Memorandum Re: Response to Pacific Legal Foundation Letter dated Oct. 1, 2018*.² This assurance does not cure vagueness issues in the written LCP. The inquiry is not whether officials will act appropriately, but whether a law as written is so vague that it provides insufficient guidance to the public as to what behavior is prohibited, and whether it grants so much discretion to officials that the law creates "attendant dangers of arbitrary and discriminatory application." *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

The difficulty of establishing which uses constitute ongoing activities under this definition is likely to create confusion about when coastal development permits are required. Given that obtaining a coastal development permit can already be a serious

² Available at https://www.marincounty.org/-/media/files/departments/cd/planning/local-coastal/2018/pc_supplement_10112018.pdf?la=en (last visited Feb. 1, 2019).

drain on time and resources, the uncertainty created by this definition could substantially injure Marin County agriculture.

Conclusion

PLF has fought for the property rights of all Americans for over 45 years, and has consistently acted as a watchdog against unconstitutional actions by the Coastal Commission. PLF requests that the Coastal Commission give close consideration to the objections raised in this comment letter. The proposed Local Implementing Program places severe—and potentially unconstitutional—burdens on the property rights of Marin County landowners, with many of these burdens falling principally on the agricultural community.

The estate of Willie Benedetti, Aaron and Arthur Benedetti, and PLF urge the Coastal Commission to reject the amendments in their present form and return them to the Marin County Board of Supervisors to address the concerns outlined above.

Sincerely,



JEREMY TALCOTT

cc: Effie Turnbull-Sanders, Vice Chair
Dayna Bochco, Chair
Mary Luévano, Commissioner
Donne Brownsey, Commissioner
Sara Aminzadeh, Commissioner
Mark Vargas, Commissioner
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