MARIN COUNTY COMMUNITY DEVELOPMENT AGENCY
PLANNING DIVISION

M E M O R A N D U M

TO: Marin County Board of Supervisors

FROM: Alex Hinds, Director

RE: Supplement to the November 6, 2007 CWP Staff Report

DATE: November 6, 2007

The following supplemental information responds to several comments received since the November 6, 2007 Countywide Plan Staff Report.

A. Discussion on Agriculture Issues

In a letter dated November 1, 2007(see attachment 5) attorney Douglas Ferguson, on behalf of the Marin County Farm Bureau, listed several concerns that may warrant a response. In addition, staff wishes to confirm once again that several members of the agricultural community served on the working group that helped to identify trends, issues and strategies pertaining to agriculture – and that ranchers and farmers have attended many public meetings and hearings pertaining to the CWP.

Concern 1. Conservation Easements Are Not Required as a Condition for Development Permit Approval

Mr. Ferguson's letter expresses concern that the CWP requires dedication of conservation easements as a condition of residential development. This is not the case. Program AG-1.a does not require dedication of a conservation easement as a condition of residential development. The program states that "The primary purpose of this program is to ensure that lands designated for agricultural use do not become de facto converted to residential use, thereby losing the long-term agricultural productivity of such lands." The program goes on to identify a number of factors that may be considered to ensure that a specific residential development proposal does not de facto convert a parcel from agricultural use. One of the five factors that the program says may be considered is "How the long term agricultural use of the property will be preserved – for example, whether there is an existing or proposed dedication or sale of permanent agricultural easements or other similar protective agricultural restrictions such as Williamson Act contract or farmland security zone."

Nothing in the program requires easement dedication for all residential development. Instead, easement dedication is noted as one of many possible factors to be considered in determining whether a specific proposal would convert a parcel of agricultural land from agricultural to residential use. Other factors that could be considered include the applicant's history of production agriculture, the nature of long term capital investments in agricultural and related infrastructure on the parcel, the nature of stewardship practices on the land, and the role of the proposed residential use in facilitating the ongoing viability of agricultural use on the land. The Countywide Plan makes clear that any one or some combination of these criteria may be sufficient to allow the County to determine that the proposal will not result in the de facto conversion addressed by the program. Moreover, in addressing the long term stewardship criteria, easements are simply listed as one example of a tool that could be used to demonstrate how the long term agricultural use of the property will be preserved, not as a specific requirement.

Concern 2. Trail Plan Maps

The letter also expresses concern that the planning maps in the Countywide Plan will be used as trail maps. This is not likely to occur for two reasons. First, program TRL-1.a calls on the County to distribute trail maps. Those maps will show only trails that are open to the public. The maps will be designed to be useful guides to County trails and will be at a scale that is useful for trail users. Because Marin County will be distributing maps specifically intended for use as trail maps there will be little reason for trail users to use the CWP maps mixed inside an over 700 page document that primarily address topics unrelated to trails.

Second, the maps in the CWP are designed to discourage use for any purpose other than trail planning. The maps are at a scale that makes it difficult to identify specific trail locations for other than general planning purposes. In addition, the maps include the following admonition to trail users:

> Proposed trail routes indicated shall not be considered specific trail alignments; such alignments shall be obtained and developed pursuant to the trail implementation recommendations set forth in the Marin Countywide Plan. Trail easements may only be requested along routes as are generally shown on this map. For further information on trail alignment and general plan policies, please contact the Marin County Community Development Agency at (415) 499-6269.
>
> This map is not a trail guide. This map is a planning tool. Many of the routes or staging areas identified on the map are simply proposed and not open to the public for any purpose. This map does not convey any rights to the public to use any trail routes shown on this drawing; nor does this map exempt any person from trespassing charges. For copies of maps about existing trails that are available for public use, contact the Marin County Department of Parks and Open Space at (415) 499-6387.

The letter expresses concern that the maps may contain errors. Program TRL-1.a requires periodic map updates to correct errors. As noted in the letter, during the planning process Marin County has corrected the errors that have been brought to its attention. Finally it should be noted that future plan designations including trails maps are for planning purposes in accordance with state law, and are used throughout the state of California.

Concern 3. Subdivision of Agricultural Lands

Mr. Ferguson's letter states that CWP Policy AG 1.5 would require mitigation for all subdivisions creating parcels of 60 acres or more on agricultural lands. Contrary to this assertion, Policy AG-1.5 does not impose this requirement. The policy provides:

> Require that the subdivision of agricultural lands shall only be allowed upon demonstration that long-term productivity on each parcel created would be enhanced as a result of subdivision. In the City-Centered Corridor, subdivision of agricultural lands shall only be allowed upon demonstration that the overall agricultural productivity of the subdivided parcels would not be reduced as a result of the subdivision. In considering subdivisions in all corridors, the County may approve fewer parcels than the maximum number of parcels allowed by applicable Countywide Plan land use designation and by the Development Code, based on site characteristics such as topography, soil, water availability, and the capacity to sustain viable agricultural operations.

The policy requires that each proposed subdivision be evaluated on a case by case basis to ascertain the extent to which the subdivision affects the long-term productivity of the parcels to be created. Proposed agricultural parcels would be evaluated to determine their demonstrated long term viability and would be authorized if in accordance with this policy.

This section of the letter also states that the County has found that 60-acre parcels are large enough to support agricultural viability. This is certainly true in cases such as intensively farmed vegetable crops or vineyards with desirable soils, water and other favorable characteristics. However, the information available to the County to date suggests that in most cases, parcel sizes well in excess of 60 acres are required to maintain agricultural viability for the grass based animal husbandry that characterizes the vast majority of Marin County agriculture. For example, the number of Marin dairies has dropped from approximately 200 in the 1950's to about 30 in 2002. While the overall combined acreage has remained more constant, individual dairies have been consolidated and now have larger herds. According to Stacy Carlsen, Marin County Agricultural Commissioner, the average ranch size in Marin County is currently in excess of 500 acres. In addition to the crop and intensity of the agricultural operations - factors such as soil characteristics, water availability, topography, and agricultural management and expertise also are factors that affect the amount of acreage required to maintain the viability of agricultural operations.

Concern 4. House Size Limitations

The letter also expresses concern that the CWP treats agricultural parcels differently from other parcels in the County by imposing a 7,000 square foot limit on the size of residential structures in agricultural areas but not on similar structures in other parts of the County. However, design review of buildings which addresses the size of a building among other considerations has occurred in Marin County since approximately 1967. Plus, all residences over 4000 square feet regardless of their location or zoning have been subject to the design review process since 1997. Existing community type plans - specifically in the Indian Valley and Tamalpais areas have a 7000 square foot home size limitation. It should also be noted that building and home size limitations are less restrictive for agricultural areas in that they include additional exemptions and allow more housing units. Based on information obtained from the County's Geographic Information System, it was determined earlier this year that the median home size on agriculturally zoned parcels over 40 acres in size was 2,662 square feet with approximately 652 square feet of garage space.

Furthermore, CWP Program DES-4.c establishes a high priority program to review all community plans within the County to consider appropriate home size regulations. Program AG-1.a notes that most agricultural areas are outside of community plan areas and therefore properly addresses the home size issue for these parts of Marin County within the CWP. The home size limitations also take into consideration an analysis of agricultural costs and revenues prepared by Strong and Associates. This report agrees with the previous conclusions of the 1973 Baxter, McDonald and Smart Report and updates its analysis to address the more contemporary issue of estate homes on agricultural properties. Toward this end, the report by Strong and Associates documents that high-value estate development increases land ownership costs well in excess of agricultural income.

Concern 5. Residential Development on Agricultural Land and Future Agricultural Use

The letter indicates that members of the agricultural community are concerned that a provision in Program AG-1.a will be used to prohibit issuance of any residential permits on agricultural lands. The referenced provision states: "Residential development shall not be allowed to diminish current or future agricultural use of the property…". (Program AG-1.a (a).) Their concern is that this provision "will be applied to disallow any and all residential permits."

This is not the case. Marin County has long recognized the importance of maintaining the agricultural community which includes the farm families who have historically worked and resided on their agricultural holdings. Furthermore, unlike more industrialized agricultural areas, the primarily grass based animal husbandry and organic row crops of Marin have typically resulted in far fewer pesticide applications and associated hazards. That along with the recognized need for maintaining a "24/7"

presence on agricultural lands has supported continuing to authorize applicable residential uses accessory to and supportive of agriculture as a necessary part of maintaining a viable agricultural operation. Towards this end Marin County has routinely approved residential structures on agricultural lands and safe and sanitary farm employee housing is encouraged. Thus, there clearly will continue to be many circumstances in which proposed residential uses will not interfere with, and will enhance, the current and future agricultural use of the property.

Although not included in Mr. Ferguson's letter dated November 1, 2007, another concern previously raised by members of the Farm Bureau involved the CWP text pertaining to the removal of invasive plants. Specifically, the question was concerned about how the Board addressed the requirement for the removal of invasive plants on agricultural properties. Staff confirmed that Policy **BIO-1.7** was revised per the Board's direction (as reflected in the FEIR Amendment II, pg 11, and the November 6 CWP, pg 2-15) to ensure that the removal of invasive exotic species only applies to development projects unrelated to agriculture (see **BIO-1.7**, Remove Invasive Exotic Species). Please note that as previously mentioned, residential development on agricultural land is required to be related to agriculture and accordingly would not trigger the removal of invasive, exotic species.

A related concern was also expressed to reaffirm that the leasing of agricultural land to qualified agricultural producers would be considered as a factor along with the applicant's history of production agriculture. As previously mentioned during public hearings on the topic, agricultural leasing to a person with a history in production agriculture is an accepted and often desirable practice that clearly meets the intent of the CWP.

B. Discussion Regarding EIR Transportation Mitigation Measures

In response to an ongoing concern that transportation mitigation measures be consistent with the overarching theme of sustainability, staff has worked closely with the Transportation Agency of Marin (TAM), the Department of Public Works, MCBC, and others to accurately characterize these measures in the Transportation Section of the Countywide Plan. Accordingly, The CWP does not propose road widening as the principal remedy for addressing transportation concerns. Although Marin County is not expected to grow significantly in the future, most of the residential growth will occur in the City-Centered Corridor where many of the impacted roads exist. Circulation improvements are needed to support infill, affordable, workforce and mixed use housing in appropriate locations. This will require increased mobility, while mitigating traffic congestion. To fund such improvements, voters approved a sales tax measure in November 2004 to allocate funds to local transportation projects, which allowed Marin more control of its transportation future. The four key strategies of Measure A to reduce congestion and improve transportation include:

- Develop a seamless local bus system that serves community needs, including special services for seniors and those with disabilities

- Fully fund and accelerate completion of the Highway 101 HOV Gap Closure Project through San Rafael
- Improve, maintain, and manage Marin's local transportation infrastructure, including roads, bikeways, pathways and sidewalks
- Reduce school-related congestion and improve safe access to schools

Money for improvements is also available from the recent approval of Proposition 1B by voters in November 2006. Proposition 1B will provide funding over a 10 year period for vital projects to improve traffic safety, reduce congestion, repair local streets and roads, expand public transit, reduce air pollution, and facilitate the movement of goods and services. This money would provide partial funding for the Marin-Sonoma Narrows and the westbound Interstate 580 to northbound Highway 101 auxiliary lane.

To ensure that a range of transportation improvement projects are considered, revisions to Policy TR-1.1 prioritize transportation projects that will reduce fossil fuel use and reduce single occupancy vehicle trips. Policy TR-1.1 was modified as follows to address the concern that transportation improvements be consistent with the overall theme of sustainability and reducing vehicle miles traveled as follows:

> **TR-1.1 Manage Travel Demand**. Improve the operating efficiency of the transportation system by reducing vehicle travel demand and provide opportunities for other modes of travel. Before funding transportation improvements consider alternatives—such as Transportation Demand Management (TDM)—and prioritize projects that will reduce fossil fuel use and reduce single-occupancy vehicle trips.

Please note that in limited circumstances targeted road widening can be used effectively for congestion relief, and road widening may also allow the development of "complete streets," which also address the needs of pedestrians, bicyclists, and transit users.

Errata Changes

See the attached Errata to the CWP for minor corrections to the Final Draft of the Countywide Plan. Other changes to the FEIR Amendment II are referenced below. Attachment 2 to this Supplemental Staff Report is page 3 of the draft resolution approving the CWP revised to adopt the CWP as modified by the Errata page.

ATTACHMENT 3. Amendment II to the FEIR (changes to pg. 22)

A minor change in the mixed use policy was inadvertently excluded from the Summary of Board of Supervisors Revisions for the CWP Update as part of the Amendment II to the FEIR. The change constitutes a technical clarification, explaining that the 100 unit cap in the Tamalpais Area Community Plan refers to units constructed following the

adoption of the Countywide Plan and clarifies the exception for renovation projects that do not result in additional square footage. These clarifications do not change the substantive effect of the policy in a way that would change any analysis in the EIR. Therefore the effect of change on analysis in EIR from the Amendment II document would not change.

ATTACHMENTS

1. Errata to the Final Draft of the CWP
2. Revised Page 3 of CWP Approval Resolution
3. Corrected page 22 of *Amendment II to the FEIR*
4. Corrected page 30 of the Direction *from the BOS Hearing on October 16, 2007*
5. Letter from Douglas P. Ferguson, dated November 1, 2007

Final Draft of the Countywide Plan Errata
November 6, 2007

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1. Title page: insert "President" and Vice President" to appropriate Board of Supervisors
2. Page 1-16: add "all" after "adapting to" to 2nd bullet, first line at top of page
3. Page 3-40: change "may" to "will" in the first sentence of the final paragraph.

I. Countywide Plan Update Draft Environmental Impact Report – Appendix 1 Background Reports (January 2007); (3) Marin Countywide Plan Update Draft Environmental Impact Report – Appendix 2 (January 2007); (4) Draft EIR for Countywide Plan Errata Sheet (1/23/07); (5) Marin Countywide Plan Update Response to Comments on the Draft Environmental Impact Report (June 2007), (6) Marin Countywide Plan Update Final Environmental Impact Report Response to Comments Amendment (July 2007), and (7) Marin Countywide Plan Update Final Environmental Impact Report Response to Comments Amendment II (October 2007).

II. WHEREAS, the County complied with the requirements of the California Environmental Quality Act (CEQA Public Resources Code Sections 21000-211178.1) in the manner described in the resolution adopted November 6, 2007 certifying the CWP Update Final EIR.

III. WHEREAS, the Marin County Board of Supervisors has reviewed and considered the information in the Final EIR described above, Final EIR administrative record, Staff Reports, and all oral and written testimony presented to the Board.

NOW, THEREFORE, BE IT RESOLVED, that the Marin County Board of Supervisors hereby:

1. Finds that the recitals above are a true and accurate and reflect the independent judgment of the Board of Supervisors.

2. Finds that notice of the Planning Commission and Board of Supervisors hearings on the Countywide Plan Update, DEIR and Final EIR was given as required by law and the actions were conducted pursuant to the Planning and Zoning Law, CEQA, and the State CEQA Guidelines.

3. Finds that all individuals, groups and agencies desiring to comment were given adequate opportunity to submit oral and written comments on the Countywide Plan Update and environmental review documents. These opportunities for comment meet or exceed the requirements of the Planning and Zoning law, CEQA, and the County Environmental Review procedures.

4. Finds that it was presented with all of the information described in the recitals and has considered this information including the environmental review documents prepared pursuant to CEQA in adopting this resolution.

5. Finds that adoption of the 2007 Countywide Plan, including the mitigation measures designated for adoption in Attachment 1, is in the public interest.

6. Finds that the mitigation measures are fully enforceable as policies and/or implementation measures of the Plan, and are binding upon the County and all affected parties

NOW, THEN LET IT BE FURTHER RESOLVED that the Marin County Board of Supervisors hereby:

1. Adopts the findings set forth in Attachment 1 to this resolution, which attachment is incorporated by this reference;

2. Adopts the statement of overriding considerations included in Attachment 1 to this resolution; and

3. Adopts the Mitigation Monitoring and Reporting Program set forth in Attachment 2 to this resolution.

NOW, THEN LET IT BE FINALLY RESOLVED that the Marin County Board of Supervisors hereby adopts the 2007 Countywide Plan including the mitigation measures designated for adoption in Attachment 1 and as revised by the Errata sheet included in this Resolution as Attachment 3.

PASSED AND ADOPTED at the regular meeting of the Board of Supervisors of the County of Marin, State of California, on the 6th day of November, 2007, by the following vote to-wit:

AYES:

NOES:

ABSENT:

_____

STEVE KINSEY, PRESIDENT
MARIN COUNTY BOARD OF SUPERVISORS

Attest:

_____

Matthew H. Hymel
Clerk of the Board

Summary of Board of Supervisors Revisions for the CWP Update	
Board of Supervisors Revisions	***Effect of Change in Analysis in EIR***
(continued from previous page) 2. Projected peak-hour traffic impacts of the proposed mixed-use development are no greater than that for the maximum commercial development permissible on the site under the specific land use category; 3. Priority shall be given to the retention of existing neighborhood serving ~~retail~~ commercial uses; and 4. The site design fits with the surrounding neighborhood and incorporates design elements such as podium parking, usable common/open space areas, and vertical mix of uses, where appropriate. In most instances, residential uses should be considered above the ground floor or located in a manner to provide the continuity of store frontages while maintaining visual interest and a pedestrian orientation. 5. For projects consisting of low income and very low income affordable units, the FAR may be exceeded to accommodate additional units for those affordable categories. For projects consisting of moderate income housing, the FAR may only be exceeded in areas with acceptable traffic levels of service - but not to an amount sufficient to cause an LOS standard to be exceeded. 6. Residential units on mixed-use sites ~~along Shoreline Highway west of Highway 101~~ in the Tamalpais Area Community Plan area shall be restricted to 100 ~~additional~~ residential units, excluding units with valid building permits issued prior to the date of adoption of the Countywide Plan update. The 100 unit cap includes ~~(including~~ any applicable density bonus and such units are not subject to the FAR exceptions listed in #5 above due to the area's highly constrained (week and weekend) traffic conditions, flooding and other hazards. ~~Minor~~ renovations not resulting in additional square footage ~~may~~ will be exempt from the above requirements if consistent with the requirements of the Marin County Jobs-Housing Linkage Ordinance, Chapter 22.22 of the Development Code.	development of affordable housing projects. These Policy revisions do not affect any analysis or alter any conclusions in the EIR, nor do they trigger the thresholds for recirculation as identified in Section 15088.5 of the CEQA Guidelines.

TOPIC	ACTION
	pedestrian orientation. 5. For projects consisting of low income and very low income affordable units, the FAR may be exceeded to accommodate additional units for those affordable categories. For projects consisting of moderate income housing, the FAR may only be exceeded in areas with acceptable traffic levels of service - but not to an amount sufficient to cause an LOS standard to be exceeded. 6. Residential units on mixed-use sites ~~along Shoreline Highway west of Highway 101~~ in the Tamalpais Area Community Plan area shall be restricted to 100 ~~additional~~ residential units, excluding units with valid building permits issued prior to the date of adoption of the Countywide Plan update. The 100 unit cap includes ~~(including~~ any applicable density bonus and such units are not subject to the FAR exceptions listed in #5 above due to the area's highly constrained (week and weekend) traffic conditions, flooding and other hazards. ~~Minor~~ Renovations not resulting in additional square footage ~~may~~ will be exempt from the above requirements if consistent with the requirements of the Marin County Jobs-Housing Linkage Ordinance, Chapter 22.22 of the Development Code.
7. Climate Change **7.a. Transportation and Climate Change**	**Accepted (revisions from 10-16-07 included)** Transportation Section Background "The transportation system and land use pattern are inextricably linked: any major change to one triggers the need to modify the other (as evidenced by the common practice of using computer models to balance future transportation capacity with growth projections). ~~Although it appears likely that private cars will remain the dominant form of transportation for the foreseeable future~~ Energy consumption is responsible for an estimated 33 percent of Marin County's greenhouse gas emissions. But an even larger share –62 percent – comes from transportation. Traditional solutions to maintaining

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As I think we can agree, the best way to preserve the maximum amount of farmland in agriculture production is to support farm profitability. Unfortunately, some of the CWP's policies and programs actually hinder profitability, thus increasing the likelihood of farmland loss due to insolvency. Some of the restrictions essentially constitute dramatic downzonings without any compensation to affected landowners. The remaining key issues are:

1. Conservation Easement Requirement as a Condition of Development Permit Approval

The draft CWP update assigns "High Priority" to preserving acres with agricultural easements, targeting an increase of 12,500 acres by 2015. The County intends to use its discretion in applying the criterion in Program AG-1.a.iii (2) of "whether there is an existing or proposed dedication or sale of a permanent agricultural easement or other similar protective agricultural restrictions such as Williamson Act contract or farmland security zone" for a permit to build a house larger than 4,000 square feet. This is clearly a regulatory taking and a constitutionally problematic method of preserving agricultural land. The exaction lacks sufficient nexus between the impact and the mitigation requirement, and it is disproportionate to any conceivable adverse impact that could be caused by the permitted activity.

The exaction of a conservation easement dedication in exchange for permit approval can be viewed in the same legal context as the exaction of a public access easement. In order to substantially advance the state interest, there must be a "nexus" between the dedication and the impact the land use will have upon the community. An example of the application of this analysis is the United States Supreme Court's decision in Nollan v. California Coastal Commission, where the court found an unconstitutional taking to have occurred when the California Coastal Commission required a dedication of a public access easement across Nollan's private beach to mitigate the visual impacts of the construction of his house. The United States Supreme Court used strong language and stated the absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement "through gimmickry" thus an otherwise valid regulation became an "out-and-out plan of extortion."[1]

The California Supreme Court has held that the impact of the Nollan decision is not limited to demands for actual public access on private property, as was at issue in Nollan, since it establishes a general rule against demanding conditions not directly connected to a project's impact.[2]

In Dolan v. City of Tigard the Supreme Court further held that an exaction must be proportional, as well as related to, the impact of a development.[3] The Court further clarified the nexus requirement by stating, "A city [or county] must demonstrate a 'reasonable relationship' between the conditions imposed on a development permit and the development's impact."[4] The court went on to say that the intensity of the mitigation requirement must be at least "roughly proportional" to the

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1 Nollan v. California Coastal Commission, 483 U.S. 825 (1987)
2 Ehrlich v. City of Culver City, 12 Cal.4th 854 (1996)
3. Dolan v. City of Tigard, 512 U.S. 374, 390 (1994)
4. Ibid.

impact of the project.[5] The minimal adverse impact on the community – if any at all exists – of a home exceeding 4,000 square feet, particularly on a large ranch property, is disproportionately small compared to the burden on the agricultural landowner of forfeiting an easement over 95% of a farm or ranch, resulting in substantial negative economic impact on the appraised value of a private property.

The second part of the "taking" test is whether the regulation denies an owner "economically viable use of his land."[6] Actually, the standard is "all or substantially all" of the economic value of the land. Judicial estimates of how much value must be taken to constitute "substantially all" range from 90 to 98%. The County's easement language would have to be reviewed to establish the residual value of the property, but it is difficult to conceive how an exaction consuming up to 95% of the base property is anything but all or substantially all of the economic value of the property.

Because a conservation easement includes a right of physical entry, it is clearly arguable that requiring the easement dedication is a physical taking and as such is *per se* unconstitutional. The courts take a particularly dim view of land regulations that permit physical entry. A court will be even more likely to find an unconstitutional taking if the mitigation requirement permits entry upon private property to monitor management activities, especially if that right is incorporated into a perpetual easement. The physical entry requirements included in the monitoring provisions of the County's model easements, if imposed without the landowner's truly voluntary consent constitute just such a physical invasion, in which cases the unconstitutionality of such an easement requirement becomes clear since the forced physical entry is a *per se* taking. These rules logically restrain the ability of a county to demand that a building applicant perpetually grant an agricultural easement over their land in return for a permit.

2. Proposed Trails and the Trails Plan Maps

The draft CWP Update contains maps of trails throughout the county. The map legends designate some of the trails as "proposed trails," some of which traverse private property. Owners are concerned about user trespass on their land and would like the proposed trails that cross private property to be omitted from the maps. Marin's agriculture community, through dozens of letters and public testimony, has provided numerous valid reasons why public access on agriculture property will harm their operations.

It is true that the maps have disclaimers entitled "IMPORTANT NOTICE" that state only the trails shown as "existing trails" are available for public use and that the public has no right to enter private property on proposed trails without the owner's permission. The maps and other sections of the CWP explain that the maps are for planning purposes only. However, this may not be enough to protect the County from liability if a would-be hiker relies on the map to trespass on private land.

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5. Id. at p. 391.
6. Agins v. City of Tiburon, 447 U.S. 255 (1990).

In Presley v. City of Charlottesville, 464 F.3d 480 (2006), the United States Court of Appeals held that a property owner may bring an unreasonable seizure claim against a local government in the federal courts based on erroneous trail mapping and resulting trespass. The court ruled that public mapping and general publication of trails on private property may constitute a Fourth Amendment unreasonable seizure. As an essential part of the court's opinion, the court found that trail users' trespasses could be attributed to the city. *Id.*, at 488. Several factors demonstrated that the city did more than adopt a passive attitude toward the private underlying conduct. The primary factors were stated as follows:

1. The map in that case was erroneous and the city knew it was erroneous;
2. The city knew or should have known the map would encourage public use of the trail over private property;
3. The city had reason to know that its involvement with the map would signal that there were no legal barriers to use of the entire trail; and
4. The city did nothing to correct the erroneous map;

Applying these factors to the draft CWP Update, adversely affected Marin County property owners potentially have a claim similar to the plaintiff's claim in Presley:

* First, the Trails Plan Maps in the first two CWP public review drafts included both existing and proposed trails that were erroneous. Following objections by affected landowners who were able to identify these trails, Marin relented and removed some of the trails from subsequent drafts. It is impossible to discern how many of the remaining trails in the latest draft are erroneous. The maps contain no reference to or overlays of parcel boundaries, making it impossible to verify their accuracy.

* Second, despite Marin County's claims that the maps are for planning purposes only and expressly disclaims public use of the trails over private land, Marin is aware that the maps are indeed used as trail guides because landowners have reported, through public testimony, increased trespassing and vandalism since their initial publication.

* Third, A landowner recently reported to the Board of Supervisors his having intercepted a trespasser who had a CWP Trail Map in hand showing a Proposed Trail on his property.

* The fourth Presley factor will be established if such trespassing is shown to have occurred but the County turns a blind eye and/or fails to do more to correct the maps.

Simply by alerting the public to the existence of trails on private property or to areas where no trail has been established but where it may be possible to traverse across private property encourages the public to use trails that they otherwise may not have known existed. Marin County appears to understand that trail publications will facilitate location and use of the trails by would-be-trespassers, and that, in fact, seems to explain why Marin has publicly posted the map rather than keeping the location of the private trails private. Marin apparently intends to further distribute materials disclosing

the locations of trails on private property, evinced by high priority designation of implementing program TRL-2.o of the Natural Systems and Agriculture Element of the CWP. That section calls for Marin County to provide clear signs and maps about the trail network in multiple languages and formats. If the real purpose of including the "proposed trails" on the maps is for planning, the County could publish maps showing only "established trails," and show the locations of "proposed trails" *only to planning officials* for "planning purposes".

3. Restricting Subdivision and Prohibiting Subdivision in New Williamson Act Contracts

The County has found that 60-acre parcels are large enough to support agricultural viability, thus it is illogical for the County to require mitigation in all cases for dividing large parcels into units of 60 acres or more as it does in CWP Policy AG-1.5, which restricts subdivision and prohibits subdivision in future Williamson Act contracts. In certain cases, these restrictions might so devalue private property that the owner would have a claim against the County for a regulatory taking under Penn Central Transportation Company v. City of New York, 438 U.S. 124 (1978). The Penn Central decision stands for the proposition that a taking may occur, even if some use of private property is allowed, when a land use restriction severely depreciates property value and interferes with the owner's investment backed expectations (generally understood to include allowable uses at the time of property acquisition). Courts have found a taking under this test when a government agency prevents most development, singling out a landowner to shoulder the costs of general public desire for open space.[7] Here, if the County prevents an established landowner from building more than one house, and the parcel is relatively large, it may run afoul of the Penn Central test.

It is the County's stated intent to enable the intergenerational transfer of agricultural property, but such restrictions and prohibitions against subdivision are inconsistent with this goal. Agricultural landowners have pointed out in public testimony that when parents pass away, many families will be unable to pay inheritance taxes without the ability to subdivide and sell off a portion of the property, leaving the heirs with no option other than to sell the entire property, forcing them off their lands and out of business.

Also, since one of the CWP's goals is to promote agricultural diversification, it should be recognized that in some circumstances, parcel splits actually protect and enhance agricultural viability by allowing the entry of additional agriculturalists and the establishment of new agricultural operations, including enabling additional smaller operators with the potential to increase Marin's overall production.

4. House size limitations

In response to landowners' stated concerns, the County has appropriately recognized the legal implications of setting an aggregate cap on residential square footage in agricultural areas and has

7. See Florida Rock Industries, Inc. v. U.S., 45 Fed.Cl. 21 (Fed.Cl. 1999); Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623 (Minn. 2007)

removed such a cap. At the Board of Supervisors' October 16th hearing, however, it reduced the maximum permitted size of a single house to 7,000 square feet, plus space for a home office and garage. Any restriction on house size on these large farm and ranch parcels that is the same or less than restrictions on other, small-lot areas of unincorporated Marin is patently discriminatory, given that landowners with much smaller lots elsewhere in Marin are allowed to build larger houses, and does not afford equal protection under the law. Here, too, Penn Central may apply.

5. Tying Any Residential Building Permit to "Current or Future Agricultural Use" of a Property

CWP policy AG-1.a.i provides that "Residential development shall not be allowed to diminish current or future agricultural use of the property..." A legitimate concern of Marin's agricultural community is that this will be applied to disallow any and all residential permits. The basis for this policy, cited in the "Key Trends and Issues" introductory section, is the faulty 2003 Marin Agricultural Economic Analysis by Strong Associates, which analysis fails to differentiate between business expenditures and personal expenses, and illogically concludes that residential development will increase land ownership costs to the extent that it renders the agricultural operation unviable. By this unsound line of reasoning, unless an agriculture operation can be shown to be profitable (a great many cannot), any residential development – even a new small house or the addition of a room – would be denied. The affected landowners' additional concern is that if the regulation is not applied and permits are granted, the applicant and the County could then risk liability from third-party lawsuits, as has happened in the Warren Weber case.[8] Similar language has been used in the Agricultural Production Zone, which, since its inception decades ago, has had the de facto effect of preventing virtually all building. The flawed Strong report should not be used as the basis for the policies and programs on residential building.

Given the County's stated goal of preserving agriculture, I hope that you agree that modifying the policies and programs dealing with these issues will benefit Marin's agriculturalists and the County as a whole.

Yours very truly,

Douglas P. Ferguson

cc: Marin County Farm Bureau
Marin County Counsel

[8] Tomales Bay Association v. County of Marin County, et al., Marin County Superior Court