

MEMORANDUM

TO: Marin County Planning Commission
FROM: Kristin Drumm, Senior Planner, AICP
DATE: October 11, 2018
RE: Staff Report Supplement – Local Coastal Program Amendment

The following information is provided to supplement the staff report for the October 11, 2018 hearing on the Local Coastal Program Amendment.

3.1 Definition of Ongoing Agriculture

The definition of “Agriculture, ongoing” is modified to delete the phrase “in the context of development” as follows:

Agriculture, ongoing

Agricultural production activities (including crop rotation, plowing, tilling, planting, harvesting, ~~and~~ seeding, grazing, and raising of animals,) which have not been expanded into areas never before used areas for agriculture. Determinations of such ongoing activities may be supported by Marin County Department of Agriculture, Weights and Measures information on such past activities. Examples of activities that are NOT considered ongoing include but are not limited to:

In the context of development, tThe following types of activities are not considered ongoing agriculture.

Additional information is included in the following attachments:

1. Email from Jeannine Manna to Thomas Lai dated October 9, 2018
2. Response to the Pacific Legal Foundation letter dated October 9, 2018
3. Letter from the Pacific Legal Foundation dated October 1, 2018
4. Letter from the East Shore Planning Group dated October 4, 2018

Drumm, Kristin

From: Lai, Thomas
Sent: Tuesday, October 09, 2018 12:37 PM
To: Liebster, Jack
Subject: FW: Marin County Local Coastal Program Amendments 3 and 7

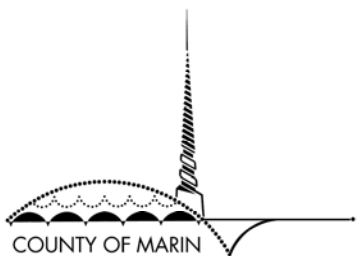
From: Manna, Jeannine@Coastal <Jeannine.Manna@coastal.ca.gov>
Sent: Tuesday, October 09, 2018 10:33 AM
To: Lai, Thomas <TLai@marincounty.org>
Subject: Marin County Local Coastal Program Amendments 3 and 7

Hi Tom,

Please convey to the Marin County Planning Commission Coastal Commission staff's support for the changes to amendments 3 and 7 of the Local Coastal Program with the slight modifications we discussed to remove "In the context of development" from the ongoing agriculture definition, and to correct the narrative findings that were associated with the changes proposed in LCP Section 22.64.140.A.1.b(3) to clarify that the impact evaluation would be for public water supply projects, private/public projects proposing the subdivision or rezoning of land that would increase the intensity of use, and private/public projects on developed lots that would increase the amount of water use by more than 50%. We look forward to our continued work with your staff on completion of the Local Coastal Program Update.

Thank you,
Jeannine

Jeannine Manna
District Manager
North Central Coast District
California Coastal Commission
(415)-904-5250
Jeannine.Manna@coastal.ca.gov



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.



PACIFIC LEGAL FOUNDATION

October 1, 2018

Marin County Planning Commission
c/o Kristin Drumm
3501 Civic Center Drive, Suite 329
San Rafael, CA 94903

VIA EMAIL kdrumm@marincounty.org

Re: Marin County Local Coastal Program Amendments

Dear Members of the Planning Commission:

Pacific Legal Foundation submits 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 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 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).

While the definition of "existing structure" has thankfully been removed from Amendment 7, both Amendments 3 and 7 contain significant constitutional and other legal infirmities. Should they be submitted to the Coastal Commission and accepted 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. PLF urges this Commission to recommend that the board refrain from submitting these amendments to the Coastal Commission until additional necessary revisions are made.

Definition of Existing Structure

PLF was pleased to see that the County has removed the problematic redefinition of "existing structure" from Amendment 7, as it would have retroactively diminished many landowners' constitutional and statutory right to shoreline protective devices. While the staff report notes that this definition may still be addressed within the Hazards Amendment, PLF continues to urge the County to avoid any definition of existing structure or development that contravenes its historical meaning of structures existing at the time a permit application is made for a seawall. *See Br. of*

Resp. Cal. Coastal Comm'n, *Surfrider Found. v. Cal. Coastal Comm'n*, No. A110033 (1st Dist. Ct. App. Jan. 2006), at 20 (“[T]he Commission has consistently interpreted section 30235 to refer to structures that exist at the time of the application.”).

The Coastal Commission has supported recent legislative efforts to alter the definition of existing development within the Coastal Act, but such efforts have been unsuccessful. *See, e.g.*, AB 1129, 2017 Assemb. (Cal. 2017) (would have amended the Coastal Act to define “existing development” as development that existed as of January 1, 1977, but the bill died on the inactive file). The Coastal Commission staff has now sought to force this unpopular policy preference on local governments throughout the coastal zone via staff modifications to coastal programs and amendments submitted to the Coastal Commission for certification. Over three decades of Marin County landowners have sought building or redevelopment permits in reliance of their right to future shoreline protection, and a retroactive removal of those rights will almost certainly draw litigation. PLF supports the removal of this redefinition of existing structure in Amendment 7, and urges the County to leave such a definition out of any future draft amendments.

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 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 20 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. Willie Benedetti and PLF urge the Planning 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 Mr. 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 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 Surfrider Found. V. Martins Beach 1, LLC*, 14 Cal. App. 5th 238 (Ct. App. 2017) (holding that closing a paid access road on private property constitutes a change in intensity of access requiring a coastal development permit), *review denied* (Oct. 25, 2017), *pet. for cert. docketed* (Feb. 26, 2018).

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 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 Planning 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.

More than 25 speakers addressed the Board at the April 24th meeting making clear the contentious nature of many of the proposed amendments. Despite some positive corrections to those amendments, the amendments remain unsuitable for resubmission to the Coastal Commission. Willie Benedetti and PLF urge the Planning Commission to consider additional revisions to the provisions discussed above before any further amendments are submitted to the Coastal Commission for certification.

Sincerely

A handwritten signature in blue ink that reads "J Talcott". The signature is stylized and cursive.

JEREMY TALCOTT
Attorney

East Shore Planning Group
P. O. Box 827
Marshall, CA 94940
ESPG@eastshoreplanninggroup.org

October 4, 2018

Marin County Planning Commission Meeting, October 11, 2018
Marin County Local Coastal Plan Amendment

Marin County Planning Commission
c/o Marin County CDA, Ana Hilda Mosher
3501 Civic Center Drive, Suite 308
San Rafael, CA 94903

By email: planningcommission@marincounty.org

Dear Chair Biehle and Members of the Planning Commission,

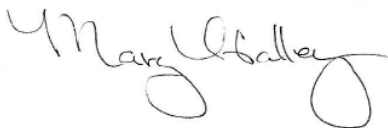
I write on behalf of the East Shore Planning Group. The East Shore Planning Group (“ESPG”) is a California not-for-profit corporation formed in 1984 that has a membership of about 90 owners and tenants of residential, commercial and agricultural properties in the unincorporated area of Marin County along the east shore of Tomales Bay, including Marshall. ESGP is the primary local organization involved with issues of development in the area. We have been active in the formulation of the amendments to the Marin County Local Coastal Plan (“LCP”) since the process began.

The proposed mapping for the “commercial core” areas on the East Shore reflects the community’s views. Kristin Drumm of the CDA came to one of our meetings this summer to discuss this issue, which was greatly appreciated. Previously, members had discussed the issue with Jack Liebster. We are gratified to see that our views have been heard, and we support the “commercial core” map as proposed. It reflects a balance between commercial visitor-serving uses and long-established residential uses, as contemplated by the C-VCR zoning that was adopted in 1987.

We also have previously expressed our concerns regarding the “ongoing agriculture” provisions proposed by the Coastal Commission staff, and we appreciate that the CDA has made proposals that reflect these concerns. We defer to the agricultural community as to any further issues they may have with the CDA’s proposed amendments.

Thank you for your consideration of these views.

Sincerely,

A handwritten signature in cursive script that reads "Mary Halley". The signature is written in black ink and is positioned above the typed name of the signatory.

Mary Halley, President, East Shore Planning Group, mhalleyvn@gmail.com