

Marin County Board of Supervisors  
Via email: [BOS@marincounty.org](mailto:BOS@marincounty.org)

Re. 4/19/16 Hearing on LCP Amendments, Attachment 6, IP Sec. 22.68.040 B, Noticing for CatEx Projects

Dear Board of Supervisors:

In this letter, I comment only on Attachment 6, sec. 22.68.040. I comment on other LCP amendment policies and code provisions in separate letters.

I am a retired professor of land use planning from UC Davis. I have been a local planning commissioner for two California towns.

Conclusion: Your staff recommends a narrower requirement for public notice of a County determination that an applicant's project is Categorically Exempt than that requested by the Coastal Commission staff. I believe that your staff's recommended amendment probably does not meet the letter of the law (Coastal Act) and certainly does not further the intent of the Act. It is also likely that the Commission's adoption of your LCP could be found to violate the CEQA requirement to mitigate environmental impacts where feasible, in that an LCP is a functional equivalent to an EIR. Your staff's narrow notice provision also reduces the democratic value of the planning process in Marin's coastal zone.

Your Staff's Proposal: Your staff requires public notice by passive "posting" on the agency website and that such notices be "transmitted" only to "...known interested parties (including those who have specifically requested such notice)." This wording generally comes from the Commission Order amending CatEx Order E-81-6, but is unclear in that it probably does not include citizens who have signed up for your automated notice on the CDA website. This website describes the notification process in this way: "A list of discretionary planning applications is provided for various geographical areas... the latest information regarding a particular project." Since CatEx applications are not discretionary, most such applications will not be noticed to the public on the website. Your staff also states this in the Staff Report for this hearing, in which notice will "include mailed notice" and posting to the CDA website. But, these actions seem to not include the use of the automated (push email) project notification system to send notice to parties signed up for certain geographic areas and/or project types, because the Staff is limiting such public notice to "discretionary projects." The Coastal Commission staff wording added known interested parties or ones that "...have requested to be kept informed regarding the type of development subject to the categorical exclusion and/or development at the location..." This wording seems to include the County's automated notification service and doesn't limit notice only to discretionary projects. So, re. CatEx determinations and permits, your Staff, in effect, is only offering to notice the Commission, which is required by Cal Code Reg 14 CCR 13248 and to notice "known interested parties" undefined.

Discussion: Your staff recommends this narrow concept of public notice based on two arguments:

#### 1. Not Required by Law

Your staff bases their narrow interpretation of the Coastal Act by stating that the "... administrative procedures regarding exempt activities...are not regulated by the Coastal Act." (Staff Rept., p. 6). This is not correct, as only after the local Planning Director's determination that an activity is categorically exempt is a project not regulated by the Coastal Act permit requirements (Coastal Act, Ch. 7) and

subject to local ministerial determination. The whole authorization for the CatEx process comes from Cal Pub Res Code 30610(e) (Coastal Act). Sec. 30610.5 provides more-specific conditions and states that "...an order granting an exclusion... may be revoked at any time by the Commission, if the conditions for the exclusion are violated." This statutory provision is clear that the CatEx delegation of authority to local governments is conditional and, by inference, that the procedure is subject to the whole Coastal Act, because this section does not state otherwise. The Commission adoption of a CatEx Order for a local government may be conditioned on various local findings. The Commission's rules at 14 CCR 13243 restate that the CatEx Order may be conditioned by the Commission and, specifically, that the provisions authorizing the normal Commission review of local government permit decisions (at 14 CCR 13318-13323) may be applied to certain categories of development in a CatEx Order.

Looking at CatEx Order E-81-6 -- allowing ag accessory buildings and signs on roadways and buildings to be excluded by County action in Unit II (N. Marin Coast) -- we see that the reasoning for allowing some types of exclusions, such as ag accessory buildings, is based on an argument that such activities are also exempted by CEQA and the State CEQA regulations. CEQA requires that Notices of Exemption (different term, similar concept) be publically noticed and provides for an appeal period. Consequently, the legal precedent for many Coastal planning exceptions is the most important environmental law in California, one with abundant public notice requirements at each stage of analysis, including early findings of project exemption. CEQA clearly established that public notice is an integral part of environmental protection in California.

CatEx Order E-81-6 and the amendment to it require that exclusions not apply to several types of lands, such as lands within 100 feet of tidal, beach, riparian, lake, or wetland lands, and also prohibit projects on "potential public trust lands." Environmentally sensitive habitats must be mapped. The form sent by local government to the Commission as notice shall include "all terms and conditions... imposed by local government..." The CatEx Order requires that the County make findings with regard to all conditions in the Order, so as to demonstrate to the Commission staff that the conditions have been met. The local determination that a proposed activity is exempt under a CatEx Order is not a simple local ministerial decision. It is a delegated decision, subject to the County meeting the conditions in the Order and demonstrating this.

The LCP adoption process is a "functional equivalent" of CEQA and the CEQA requirement to mitigate adverse impacts "where feasible" applies to LCPs. The Commission has a duty to require in all LCPs all mitigation policies that will reduce such impacts. By extension, the County has a similar duty, as the preparer of the LCP amendments. CEQA considers public notice to be an integral part of reducing impacts, through improved commenting and decisionmaking. Therefore, the County should follow the Commission staff's recommendations wherever the policy is feasible.

As an example of why full public notice is needed, consider the CatEx determination made by your CDA for the Doughty barn on 5/20/13 (APN 119-020-29). The form used does not include all conditions that need to be fulfilled. The barn was allowed to be built in an area mapped by the County as Non-Excludable, meaning no exception may be applied in that area. Several other conditions in the CatEx Order are not addressed in the project permit documents. If full public notice had been provided, these clear mistakes would likely have been discovered by NGOs and citizens.

So, reading the Coastal Act, CEQA and guidelines, Commission rules, and the Marin CatEx orders shows that the intent of these laws is for full public notice of the local determination of whether a proposed activity falls under the relevant CatEx order. After the Commission approves the CatEx decision, the

process becomes a local ministerial one. So, it seems prudent to add a full public notice to the first step of the process, the determination of exemption.

## 2. Too Costly

Your Staff also states that increased public notice as recommended by the Commission staff "... is excessive in terms of staff capacity..." (p. 5). This assertion is incorrect, certainly with respect to the automatic email notification system that could easily be altered to include CatEx applications.

Summary: It seems that the Coastal Act and CEQA require full public notice of CatEx determinations by the County. Please restore the language recommended by the Commission staff and perform public notice using the existing email system. Since improved public notice of CatEx determinations by the County are very inexpensive to implement, this policy is feasible.

Thank you for considering my comments.

Robert A. Johnston  
PO Box 579  
Pt. Reyes Stn.  
CA 94956