

CALIFORNIA COASTAL COMMISSION

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May 9, 2017

Judy Arnold, President
Marin County Board of Supervisors
3501 Civic Center Drive
San Rafael, CA 94903

SUBJECT: Marin County Board of Supervisors' Consideration of the Coastal Commission's Conditional Certification of the Marin County Local Coastal Program Update with Suggested Modifications

Dear Board President Arnold and Honorable Supervisors:

At the November 2, 2016 Coastal Commission meeting in Half Moon Bay, the Commission acted on proposed Marin County Local Coastal Program (LCP) Amendment Number LCP-2-MAR-15-0029-1 (Marin County's proposed LCP Update, made up of County numbered amendments 1 through 7). As discussed and agreed to at the hearing with the County's Director of Community Development, Brian Crawford, and at the request of then Commissioner/County Supervisor Steve Kinsey, the Commission continued the hearing on the portion of the proposed LCP Update relating to environmental hazards (i.e., amendments 4 and 5), then first denied and then conditionally certified with suggested modifications the remainder of the LCP Update (i.e., amendments 1,2,3,6 and 7). The current deadline for the Commission to act on the County-submitted environmental hazards portion of the LCP Update is September 29, 2017, and we are working with your staff on resolving the issues relating to hazards.

Pursuant to the Commission's regulations, the County has until May 2, 2018¹ to accept the Commission's conditional certification of the non-hazard portions of the LCP Update. If the County has not accepted and agreed to the Commission's suggested modifications by that time, then the modifications expire, and only the Commission's denial stands. Since the November 2, 2016 Coastal Commission hearing on the proposed LCP Update, Commission and Marin County staffs have continued to work closely together on all aspects of the County's Update, including both in terms of the November 2, 2016 Commission's conditional certification as well as the hazards components that were continued to a future Commission hearing. In terms of the former, we have had multiple discussions with your staff about the Commission's November 2, 2016 action. Your staff has presented their take on those discussions in their published staff report to you. Commission and County staffs have also discussed potential future implementation issues

¹ The original deadline was May 2, 2017, but the County requested, and the Commission granted, a one-year extension of that deadline to May 2, 2018 on March 8, 2017.

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and potential future LCP improvements to address issues that could be pursued by the County through future LCP amendment requests to improve the ease of implementation. Finally, Commission and County staffs have also discussed the pending County environmental hazards amendments. On this last point, we have also acknowledged how future Commission action on the County hazard amendments could result in new suggested modifications to related provisions in the non-hazard LCP amendments in order to ensure that all portions of the LCP Update are internally consistent at the time the County LCP Update in its entirety goes into effect.

Unfortunately, even though Commission and County staffs have identified possible additional LCP changes that the County could pursue through future LCP amendments, and even though both staffs have discussed the potential to address any other internal inconsistency issues when the LCP hazards amendments are acted on by the Commission, County staff is recommending that the Board accept only the Commission's conditional certification of the non-hazard portions of the Land Use Plan (LUP) (i.e., amendments 1 and 2), and defer action on the remaining non-hazards portion of the LCP Update (i.e., the Implementation Plan (IP) amendments (i.e., amendments 3, 6 and 7)). We are not in agreement with your staff on this point.

We strongly believe that all of the concerns expressed by County staff in their proposed findings to you have already been addressed through our discussions over the last five months, and/or can be addressed through County submittal of future LCP amendments, and/or through future action by the Commission and the Board on the remaining hazards amendments. As such, we recommend that the Board of Supervisors take action on *all* of the non-hazard amendments as acted upon by the Commission at this hearing. We have collectively spent many years on these topics, and the Commission has already acted. If the County does not accept the non-hazard IP sections as acted upon by the Commission in November 2016, then if the County resubmits these IP sections again to the Commission, this will mean that *all* of those IP amendments will be before the Commission for yet *another* action, which would be the third time this has occurred (the County withdrew their submitted IP amendments in total right before the April 16, 2015 Commission hearing, and the decision by the Commission this past November was on the *resubmitted* IP amendments as a result of the County 2015 withdrawal). This is on top of the County also resubmitting the LUP amendments at the same time as the resubmitted IP amendments even after the Commission had already acted on them on May 15, 2014. We simply cannot continue to focus our limited staffing resources on additional Marin County resubmittals when the Commission has already acted, in this case multiple times. We respectfully request that we all close this chapter of the LCP Update so we can all focus our efforts on moving forward toward actually using the updated LCP as opposed to rehashing old issues over and over again.

In any case, if the Board accepts the Commission's November 2, 2016 action on the LCP Update, then we will report that acceptance to the Commission. At that point, the conditionally certified non-hazard portions of the LCP Update accepted by the Board would typically become certified and the County would be clear to start issuing CDPs under the updated LCP. However, as stated by the Commission's Chief Counsel to the Commission before their November 2, 2016 action, and based on the resolutions submitted to the Commission by the County, the certified amendments will not go into effect in this case until after there is "a total amendment to the

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Implementation Plan which supersedes the existing certified Implementation Plan.” As such, certification of the hazards portion of the LCP Update is required to put the LCP Update in its entirety into effect once the non-hazard portion of the LCP Update is accepted by the County. We strongly recommend that you accept all of the non-hazard components of the LCP Update as acted upon by the Commission so we can focus our limited time and resources on finaling the submitted hazards update components and allowing for the LCP Update to finally be implemented.

As detailed below, this letter serves to acknowledge: 1) the portions of the Commission’s November 2, 2016 action discussed by County and Commission staffs; 2) your staff’s further interest in, and Commission staff’s support of, working together on future LCP amendment packages related to certain specific issues; and 3) that once the Board accepts the Commission’s suggested modifications to the non-hazard LCP update amendments and once those amendments are certified, the Commission can adopt additional suggested modifications if there is a need to in order to avoid the creation of any hazard-related inconsistencies at the same time the hazard amendments are acted on by the Commission. Of course, any newly suggested hazard-related modifications, to any portion of the Update, will need to be acted on and approved by the County Board of Supervisors in order to take effect.

1. The Commission’s November 2, 2016 action

a) Fire maintenance and environmentally sensitive habitat areas

County staff expressed concern that the Commission approved modifications to LCP Policy C-BIO-4 may conflict with future implementation of LCP Program C-BIO-4(b) insofar as the Program calls for creating an expedited review process for removal of major vegetation to address risks to life and property, and this removal program may be therefore limited in areas where environmentally sensitive habitat areas (ESHA) exist.

As stated on page 64 of Exhibit 3² of the Coastal Commission staff report dated October 21, 2017:

Fire safety is an important consideration for both existing and proposed new development. Generally, difficulties arise when fire safety requirements impinge on ESHA areas. For new development, the policies need to clearly state that development, including its fire safety requirements, needs to be sited and designed in such a way as to avoid ESHA, per the Coastal Act’s ESHA requirements. For existing development, it must be clear that fuel modification and brush clearance techniques are required in accordance with applicable fire safety regulations and are being carried out in a manner which reduces impacts to the maximum feasible extent. In addition, removal of vegetation that constitutes ESHA, or is in an ESHA, or is in an ESHA buffer, for fire safety purposes may only be allowed if there are no other

² Marin Land Use Plan Update staff report prepared May 2, 2014.

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feasible alternatives for achieving compliance with required fire safety regulations and all ESHA and related impacts are appropriately mitigated, preferably as near as possible to the impact area and in a manner that leads to no net loss of ESHA resource value.

As such, the Commission's suggested modifications to C-BIO-4 would not limit the implementation of Program C-BIO-4(b) in ESHAs for either existing development safety needs or for future new development safety needs as these situations are already provided for in the Commission's adopted findings above. In addition, we continue to recommend similar language for these situations, including the not yet certified environmental hazards LUP Policy C-EH-9.³

b) Implementation of "necessary for" agriculture language

County staff raised concern that use of the term "necessary" in various LUP policies and development code provisions creates uncertainty by implying that various agricultural uses or facilities may, in some cases, not be necessary, or that the "necessity" of various uses or facilities may need to be demonstrated on a case by case basis. County staff findings in Attachment 1 state that use of the phrase "appurtenant and necessary to" will be interpreted as a declarative statement that such uses are "appurtenant and necessary to the operation of agriculture," and therefore principally permitted, if a proposal for such uses meets the definition of "agriculture" in addition to the operational standards. Commission staff would like to clarify this interpretation consistent with the Commission's November 2, 2016 action.

Any allowable use needs to meet the definition and development standards for that use outlined in the LCP. In cases where the term "necessary" falls within the definition or development standard, it is important to read the term "necessary" within the context of the entire specific definition and/or development standard within which it lies. The language within the entire definition and/or development standard will assist the County in its determination that the use meets the definition as "necessary" for agriculture. For example, while the definition of agricultural processing facilities in LCP Section 22.130.030 includes the term "necessary" it also defines these facilities as those which process harvested crops or other agricultural products, and provides examples. This language and the enumerated examples will enable the County to make a factual determination of whether or not the use meets the applicable definition.

c) Defining reimbursement costs for educational tours

County staff expressed the need for further clarifications on how reimbursement costs will be interpreted for the purposes of determining whether a farm educational tour is a permitted or principally permitted use in the C-APZ zone and has provided some examples including payments to the operator or staff for their time (e.g., hourly rate charges), charges for the use

³ County staff findings in Attachment 1 incorrectly note that C-EH-9 has been adopted by the Coastal Commission. Please note that these modifications were part of the environmental hazards portion of the County's submittal that was continued at the November 2, 2016 hearing and are not yet certified.

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of the farm or its facilities for the educational tours, and revenues generated for non-profit organizations through the educational tours.

First, and to be clear, the question is not about whether educational tours are allowed on agricultural land under the LCP, because they are allowed in all cases per the Commission's action. Rather, the question raised by your staff pertains to whether such tours are principally permitted or simply permitted (i.e., the question is essentially related to how such tours are considered and processed). As conditionally certified by the Commission, whether or not a tour generates revenue beyond reimbursement costs provides an objective threshold for such a determination. As stated in LCP Section 22.32.062 "educational tours operated by non-profit organizations or the owner/operator of the agricultural operation are a principal permitted use if no revenue is generated in excess of reimbursement costs related to the educational tour." As also noted on page 54 of the November 2, 2016 Commission staff report findings, "if the owner/operator or third parties charge a fee that generates revenue, then the use is permitted because a tour that operates *for profit* [emphasis added] is a commercial use and does not qualify as principally permitted when the principally permitted use is agriculture in the C-APZ zoning district." As long as the fees that are received are solely for reimbursement, the County will be able to make a factual determination that the revenue being generated is not for profit. That factual determination is to be made on a case-by-case basis, however, because there are circumstances in which the same type of charge would exceed reimbursement costs and circumstances in which it would not exceed reimbursement costs.

d) Agricultural development categorically excluded from CDP requirements

The County requested clarity on agriculturally-related development that is excluded from CDP requirements consistent with the language in the existing County categorical exclusion orders. As detailed in the Commission's adopted staff report addendum findings dated November 1, 2016:

*These exclusions apply to specified parcels zoned Agriculture at the time of the exclusion orders' adoption that are located outside the areas prohibited by Coastal Act section 30610.5(b) as well as outside of the area between the sea and the first public road or a half-mile inland, whichever is less. Also, such excludable development must still be found consistent with the zoning in effect at the time of the orders' adoption (meaning the approved April 1981 zoning). For example, the Commission issued the County Categorical Exclusion Orders E-81-2 and E-81-6, **which exclude from coastal permit requirements agriculturally-related development, including production activities, barns and other necessary buildings, fencing, storage tanks and water distribution lines, and water impoundment projects.** Per Categorical Exclusion Order E-81-2[and E-81-6], agriculturally related development is defined to include barns, storage, equipment and other necessary buildings; dairy pollution project including collection, holding and disposal facilities; storage tanks and water distribution lines utilized for on-site, agriculturally-related activities; water impoundment projects not to exceed 10 acre*

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feet; electric utility lines; new fencing for farm or ranch purposes, provided no solid fence designs are used. (emphasis added)

Thus, and as specified in more detail in the exclusion orders themselves, agricultural production and related activities, including agriculture as defined in both of the specified categorical exclusion orders as “*tilling of the soil, the raising of crops, horticulture, viticulture, livestock, farming, dairying, and animal husbandry, including all uses customarily incidental and necessary thereto*”, that meet the terms and conditions of the exclusion orders do not require a CDP.

e) Identifying grading thresholds for CDPs

County staff expressed concern that, per the Commission conditionally certified definition of grading, any form of excavation, cutting, filling or stockpiling of soil material will require a CDP, even that below 50 yards. Commission staff would like to clarify County staff’s statement regarding grading in Attachment 1 consistent with the Commission’s action.

Commission staff is concerned with using a ‘numerical threshold’ to determine what does and does not need a CDP. The Coastal Act (Section 30106) determines when a CDP must be obtained for development, and unless exempted or categorically excluded, defines development to include any amount of grading without reference to a specific numerical threshold. If the County wishes to adopt a specific threshold for purposes of determining when a CDP will be required, as we have informed County staff for many years, the appropriate mechanism is to propose such a threshold through a new categorical exclusion. Absent an exclusion, the LCP that was conditionally certified by the Commission addresses grading in the same way as the Coastal Act. That being said, Commission staff acknowledges that the County will evaluate project circumstances on a case-by-case basis, given specific site characteristics and unique project elements, to make a factual determination if an activity meets the definition of grading (i.e., is it really excavation, cutting, filling or stockpiling of soil) for purposes of LCP implementation.

f) CDP exemptions

County staff has inquired whether or not there would be a deadline to challenge County determinations on County-issued CDP exemptions. This has been a topic of much discussion with your staff over the past four years, was discussed at length before the Commission took action in November 2016 and we continue to question how imposing a deadline would be appropriate if the exemption determination made by the County was not subject to appropriate noticing requirements so that all concerned public receives notice and can voice any concerns to the County or the Commission. As we have previously discussed with your staff, we are open to identifying deadlines for challenges in the LCP if the exemption determinations can be effectively noticed, but to date, such notice action has not been supported by County staff. Thus, the language conditionally certified by the Commission does not include challenge deadlines.

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In any event, we believe that effective noticing can help to better provide transparency in the County permitting process, and providing early notice to the Commission allows for early review and collaboration to help resolve any potential disputes that may arise. Our experience in similar LCP situations with other LCP entities without such deadlines indicates that it is a very, very small number of cases where determinations have been challenged, and these cases are generally resolved quickly when there is effective County and Commission staff coordination early in the process.

Further, the Coastal Commission staff report addendum dated November 1, 2016, previously responded to County staff claims that exemptions are not regulated under the Coastal Act as put forth in Attachment 3 of the County staff report (Memorandum by Steven H. Kaufmann, dated October 31, 2016) as follows:

The County has expressed concern over the Commission staff suggested process for exemption noticing and challenges and goes as far as to assert that exemptions are not regulated under the Coastal Act. Commission staff disagrees. As explained in the staff report, the provision of public notice for exemption decisions is especially critical because Section 30625 of the Coastal Act grants the Commission appellate jurisdiction to hear an appeal of a decision rendered by a local government on either a coastal development permit or a claim of exemption from Coastal Act permitting requirements. Further, public comments received by the Commission have repeatedly asserted the critical importance of adequate and effective noticing of CDP exemption determinations made by the County. Section 30006 of the Coastal Act provides that “the public has a right to fully participate in decisions affecting coastal planning, conservation and development; that achievement of sound coastal conservation and development is dependent upon public understanding and support; and that the continuing planning and implementation of programs for coastal conservation and development should include the widest opportunity for public participation.”

g) Legal lot definitions

County staff have raised concerns that the way ‘legal lot’ and ‘legal lot of record’ are defined could imply that lots are not considered legal unless they have a CDP. In the Coastal Zone, a lot is only legal if it was lawfully created under both the Coastal Act and the Subdivision Map Act (SMA). A “legal lot of record” is a SMA term connoting that a lot has affirmatively been determined to be legal under the SMA through the issuance of a certificate of compliance. As conditionally certified by the Commission in the definition of legal lot, a CDP is only required where *necessary*. This definition is also consistent with LCP Section 22.70.190(A) which states that “A conditional certificate of compliance issued pursuant to Government Code section 66499.35 shall include a condition that requires *any necessary* [emphasis added] Coastal Permit.”

In summary, Commission staff believes that the Commission’s action on the LCP update already addresses and takes care of County staff expressed concerns regarding fire safety and ESHA requirements, ‘necessary for’ agriculture language, educational tours, categorical exemptions,

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legal lot definitions, grading, and exemption noticing and deadline requirements. We do not agree that the County should postpone action on acceptance of Commission action on LCP amendments 3, 6 and 7 with regard to the above concerns. In fact, we again note that if the IP amendments conditionally certified by the Commission last November are not accepted by the County, then we will find ourselves in an endless resubmittal loop that is not a good use of our collective time and resources. We again strongly recommend the Board's acceptance of the Commission's November action.

2. The Potential for future LCP amendments

a) Implementation of Land Use Plan Policy C-PK-3 in the Coastal Villages

County and Commission staff discussed the suggested modifications adopted by the Commission for LUP Policy C-PK-3, and requested confirmation that Commission staff will support a future LCP amendment to include maps that specifically depict a village commercial core area and add a corresponding overlay zone. As your staff is aware, we have long supported implementation of Policy C-PK-3 in this manner, but the County was not able to develop this as part of the LCP Update submitted to the Commission. As a result, and based upon discussion on this point with your staff before the Commission's November hearing, the Commission's modifications to LUP Policy C-PK-3 instead implement the policy by defining the village commercial core area as "the central portion of each village that is predominantly commercial." As described in the Coastal Commission staff report findings dated October 21, 2016 on page 94 and 95,

In addition, proposed Policy C-PK-3 must be modified to define the core commercial areas within the C-APZ zone wherein residential uses will only be allowed on the ground floor of a new or existing structure on the road-facing side of the property and where a finding must be made that the development maintains and/or enhances the established character of village commercial areas. Unless application of the proposed policy is limited to a defined commercial core area, it would apply to all areas designated C-VCR in the commercial areas of Stinson Beach, Bolinas, Olema, Point Reyes Station, Marshall/East Shore, and Tomales. Since the intent is to govern the commercial core of the villages, which does not necessarily include all areas designated C-VCR, it is appropriate to limit the required finding that ground-floor residential uses enhance the established character of village commercial areas to development within the village commercial core.

As conditionally certified by the Commission, the restrictions to residential development in C-PK-3 will apply to the village core commercial areas defined as "the central portion of each village that is predominantly commercial" not the entire VCR zoning district as stated in County staff report findings in Attachment 1. In addition, Commission staff supports the County's desire to work together on a future LCP amendment package to include maps that specifically depict the village core commercial areas and add a corresponding overlay as an alternative method of implementing this LUP Policy.

b) Regulation of private wells

County staff has raised concern with potential implementation difficulties associated with analyzing the coastal resource impacts of new or expanded private water wells, including that it may be burdensome and expensive for applicants. They have also put forth the position in County staff report findings in Attachment 1 that LCP Policy C-PFS-4 will only be interpreted to apply to public services as distinguished from individual water and wastewater disposal facilities. This interpretation is not consistent with the Commission's action. However, Commission and County staff have discussed alternative ways that associated LUP policies and IP standards could be drafted, and Commission staff supports the County's desire to work together on a future LCP amendment package designed to implement the relevant LCP policies and standards in another Coastal Act consistent manner.

3. Potential environmental hazard related issues

County staff expressed concern that the definitions of "existing" and "existing structure," including references to being "extant on or after February 1, 1973" affects and is affected by the environmental hazards portion of the LCP Update that is awaiting action because of its relevance to policies for shoreline protective devices. In addition, County staff believes that the definition of shoreline protective device should be addressed through the environmental hazards amendment action, and requests that piers and caissons not be considered as shoreline protective devices. Finally, County staff continues to suggest that given the wide range and broad extent of potential environmental hazards existing in the coastal zone, Commission modifications which identified "all hazardous areas and hazard setbacks" as a criteria for applying the "lowest allowable" density/floor area restrictions and the further requirement that "all hazardous areas and hazard setbacks" be avoided will have the effect of significantly restricting opportunities for new affordable housing development as well as commercial development (including visitor-serving uses) within the coastal zone.

As we have discussed with your staff, Commission staff cannot make changes to Commission-approved language that was conditionally certified on November 2, 2016. However, while changes cannot be made to the conditionally certified language approved by the Commission, if the amendments are accepted by the Board and become certified, when the Commission considers the remaining LCP hazards amendments, the Commission can adopt new suggested modifications to related provisions in those already acted upon and certified amendments at the same time it acts upon the postponed environmental hazards portions of the LCP update. This will ensure that all portions of the LCP Update are internally consistent at the time the LCP Update in its entirety goes into effect. We would be happy to work through the identified issues – and any others – that arise during the Commission's consideration of the hazards component of the LCP Update.

In conclusion, thank you again for the opportunity to provide our input as you consider your staff's recommendation on the Coastal Commission's conditional certification of the non-hazard components of the County's LCP Update. We have worked diligently with your staff for many, many years on your update, including considerable effort over the past five months, and look

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forward to resolving remaining issues so that the County has a fully certified LCP Update that can take effect as soon as possible. We do not believe the existing County staff concerns should delay Board action on the Commission's conditional certification. We hope that you will accept the entirety of the Commission's November 2016 action so that we can focus our collective efforts on finaling the hazards component of the Update so that the County can finally start using the updated LCP. Your action today is an important step and milestone in that process, and we urge your acceptance of the Commission's conditional certification.

Please feel free to contact me at (415) 904-5290 or by email at nancy.cave@coastal.ca.gov if you have any questions or would like to discuss these matters further.

Sincerely,

A handwritten signature in cursive script that reads "Nancy Cave".

Nancy Cave
District Manager, North Central Coast District
California Coastal Commission