

May 11, 2017

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Board of Supervisors  
Marin County  
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By email: [marinLCP@Marincounty.org](mailto:marinLCP@Marincounty.org)

Re: May 16, 2017 Board of Supervisors hearing on Marin County LCP Amendments

Dear Supervisors,

I am submitting these comments with respect to the Biological Resources sections in the LCP. The provisions designed to protect ESHAs and wetlands are like an Easter egg hunt: the egg is there but you have to look everywhere to find it.

### Identifying the Problem

The *existing* LCP for Unit I (after specifically discussing two particular habitat resource areas,) emphatically states that “Similarly, other resources and habitat areas exist within the Unit 1 area which must be protected in order to assure consistency with section 30240(a) and (b) of the Coastal act.” LUP for Unit 1, p. 31.

Section 30240 of the Coastal Act makes clear that development in ESHAs is limited to “resource- dependent uses.”<sup>1</sup> Resource- dependent uses are non-intrusive uses such as trails, nature study or aquaculture. Residential development is not permitted in ESHAs. *Sierra Club v. California Coastal Commission* (1993) 12 Cal.App.4<sup>th</sup> 602, 611,617; *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4<sup>th</sup> 493, 507, 514. Similarly, residential development is not permitted in wetlands. *Bolsa Chica*, 71 Cal.App.4<sup>th</sup> at 511, 514-515.<sup>2</sup> Developers cannot evade the prohibition by offering on-site or off-site mitigation. *Id.* 507-508.

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<sup>1</sup> Section 30240 states “(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, *and* only uses dependent on those resources shall be allowed within those areas.” The ‘dependent use’ requirement is separate and in addition to the ‘significant disruption’ requirement. *Sierra Club*, 12 Cal.App.4<sup>th</sup> at 617; *Bolsa Chica*, 71 Cal.App.4<sup>th</sup> at 506-507.

<sup>2</sup> “Although Section 30233, subdivision (a), permits development of wetland areas when needed as a means of accommodating a whole host of varied uses, residential development is not a use permitted in wetlands.” *Bolsa Chica*, 71 Cal.App.4<sup>th</sup> at 511. Notably, one of the permitted uses is “Nature study, aquaculture, or similar resource-dependent activities.” Sec. 30233, subdiv. (a)(8).

What is missing from the LCPA is a clear statement in either the LUP or the IP that the LCP provisions are designed to assure consistency with section 30240 and 30233 of the Coastal Act and that residential development is prohibited in ESHAs and wetlands because it is not a “resource dependent use”.

This is important because after the LCP is certified, it is the LCP and not the Coastal Act that governs implementation of the protections for ESHAs and wetlands. Inclusion of a definition of “resource- dependent uses” would make clear that residential development is not allowed in ESHAs. Furthermore, as the LUP recognizes, approximately 92 per cent of California wetlands have been lost. LUP p.23. The Coastal Act seeks to preserve what is left.

As stated at the outset, by connecting all the dots in the LUP and the IP, the LCP technically covers the bases. It provides that “Only land uses that are dependent on the habitat resources are allowable within ESHAs.” LUP p. 23. ESHAs consist of three categories including wetlands, streams and riparian vegetation and terrestrial ESHAs, and the ESHA policies of C-BIO-2 apply to all three categories “except where modified by the more specific policies of the LCP.” C-BIO-1(2). Under LUP Section C-BIO-2 (1) only uses that are dependent on [ESHA] resources are allowed unless specifically provided in C-BIO-14 (Wetlands), C-BIO-15 (Diking, Filling, Draining and Dredging) or C-BIO-234 (Coastal Streams and Riparian vegetation). But the term “resource-dependent uses” is nowhere defined.

Under the heading “Biological Resource standards”, the IP provides:

“Development shall be consistent with the Biological Resources Policies of the LUP, including, but not limited to: 1. **Environmentally Sensitive Habitat Areas (ESHAs)**. The resource values of ESHAs shall be protected by limiting development per Land use Plan Policies C-BIO-1, C-BIO-2, and C-BIO-3.”

Notwithstanding, various sections of the LCP unfortunately imply that residential development could be permitted *within* ESHAs and wetlands and that the destructive effects of allowing such development could be mitigated by on-site or off-site measures or in-lieu payments. See, e.g., LUP Section C-BIO-2(4); IP Section 22.64.050(A)(1)(b); 22.64.050(B)(2); 22.68.060(A). The Coastal Act prohibits such development or mitigation.

Especially alarming is LUP Section C-BIO-14, which states:

“Wetlands. Preserve and maintain wetlands in the Coastal Zone as productive wildlife habitats and water filtering and storage areas, and protect wetlands against significant disruption of habitat values. Prohibit grazing or other agricultural uses in a wetland, except for ongoing agricultural activities.”

Could this language, together with C-BIO-2(1), be read to permit residential development in a wetland if it did not amount to a “significant disruption of habitat values”? Development in wetlands is strictly limited to uses set forth in Section 30233, subdiv. (a) of the Coastal Act. Residential development is not a use permitted in wetlands. *Bolsa Chica*, *supra*, 71 Cal.App.4<sup>th</sup> at 511. As the LUP recognizes, most wetlands are also ESHAs. LUP Section C-BIO—1(2). In such cases, the “resource dependent uses” limitation of Section 30240(a) would also apply. As the court held in *Bolsa Chica*, the “resource-dependent use” standard is separate and in addition to the “significant disruption” standard. The bottom line is that under either Section 30240 (ESHAs) or Section 30233(a) (wetlands) of the Coastal Act, residential development in wetlands is not a permitted use. Since Section C-BIO-14 is an exception to ESHA protection under Section C-BIO-1(2), it could easily be misinterpreted.<sup>3</sup>

Both planners who are expected to apply these provisions and the public who are affected by their decisions, have the right to a clear statement of the law. Why can’t the LCP plainly state the law so that inadvertent misapplications may be avoided? In the absence of a clear statement that residential development in ESHAs and wetlands is not permitted, the foregoing statements are in conflict with *Sierra Club*, and *Bolsa Chica*.

## **The Remedy**

The standard for whether the LCP provisions are valid is whether they carry out the intent of the Coastal Act. These provisions fail that standard and constitute an invitation to allow prohibited development. In order to clarify the intent of the LCP there is an easy fix: Add a definition of “resource-dependent use” and/or make clear that residential development is not permitted in ESHAs and wetlands and cannot be mitigated by on-site or off-site measures or in lieu payments as the courts of appeal have held. A definition of “resource- dependent use” might state:

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<sup>3</sup> Section 30233, subdiv.(a) does not authorize agricultural uses in wetlands. There is no statutory authority to authorize “ongoing” agricultural activities in wetlands.

“The term “resource dependent use” limits development in ESHA to uses dependent upon those resources such as nature study, aquaculture, and trails, and excludes residential development. Similarly, residential development is not a use permitted in wetlands.”

Respectfully submitted,

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cc. Kristin Drumm, Senior Planner, CDA  
Shannon Fiala, California Coastal Commission

