PACIFIC LEGAL FOUNDATION

May 8, 2017

Marin County Board of Supervisors
c/o Ms. Kristin Drumm
3501 Civic Center Drive
Suite 329
San Rafael, CA 94903

VIA E-MAIL kdrumm@marincounty.org
AND FIRST-CLASS MAIL

Re: Marin County Local Coastal Program Amendments

Dear Honorable Supervisors:

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 Amendments and the Implementing Program.

Several provisions remain within the final Implementing Program that are especially concerning to PLF. These provisions could have substantial negative consequences for ranchers and farmers in Marin County. First, the Program's mandatory merger of legal lots into larger "farm tracts" would significantly limit—and potentially eliminate—landowners' development rights on agricultural land without providing just compensation as required by the Takings Clauses of the United States and California Constitutions. Second, the Program requirements imposing affirmative agricultural easements and restrictive covenants on the division of land as conditions to development permits would likely constitute unconstitutional exactions.

Limitation of Development Rights

As we have previously pointed out, the final Implementing Program contains provisions that significantly reduce landowners' development rights. The existing certified Local Coastal Program

allows landowners to seek approval through a Conditional Use Permit or Master Plan process in order to build additional residential units beyond a primary dwelling unit. The currently established C-APZ-60 zoning allows for the development of one additional residential house per 60 acres. Under the new Land Use Plan, no single-family residential use will be allowed within the C-APZ zone, only agricultural dwelling units. 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 in turn defines "farm tract" as "all contiguous legal lots under common ownership."

This merger of legal lots will result in a substantial reduction in the development rights for landowners in the coastal agricultural zone of Marin County. For example, within a single large farm tract, an owner could be left with one or more legal lots deprived of all economically viable use. Regulations that deprive property owners of all economically viable use are a per se taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Worse, Section C-AG-5(A) of the Local Coastal Program Land Use Plan caps additional permissible intergenerational homes at 27 for the entire Coastal Agricultural Zone. Once those 27 homes have been permitted, remaining farm tracts and legal lots will necessarily be deprived of all development rights. This increases the risk that Marin County will be subject to future claims of *Lucas*-type takings.

Even for lots that retain some economically viable use, the destruction of previously held development rights may require compensation under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The California Court of Appeal has recognized that such a significant downzoning of property rights 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 twenty acres).

The act of merging legal lots into farm tracts for the purposes of determining development rights is itself constitutionally suspect. The issue of what constitutes the "parcel as a whole" within a takings analysis is docketed for review before the United States Supreme Court in the case of *Murr v. Wisconsin*, 859 N.W.2d 628, *review denied*, 862 N.W.2d 899, *cert. granted*, 136 S. Ct. 890 (2016) (determining whether two legally distinct but commonly owned and contiguous parcels must be taken as a whole for the purposes of takings analysis). The outcome of *Murr* could potentially render this provision of the Program unconstitutional before it is even enacted.

This county-wide diminution of development rights is not only constitutionally questionable, it is unnecessary. Many ranchers and farmers in Marin County have voluntarily transferred conservation easements that protect agriculture and restrict development while preserving the value of their development rights. However, the Program's definition of farm tract, combined with its unit cap on development, will extinguish these rights for other landowners without providing compensation.

PLF urges the Board to reconsider this wholesale unsettling of the property rights expectations of ranchers and farmers in Marin County.

Affirmative Agricultural Easements and Restrictive Covenants on Division of Land

Section 22.32.024(A) of the final Implementing Program also contains a requirement that each "agricultural dwelling unit" be "owned by a farmer or operator" that is "directly engaged in agriculture on the property." This will require property owners to remain in a commercial agricultural market forever, even if continued commercial agricultural use becomes impracticable.

The Program defines "actively and directly engaged" as "making day-to-day management decisions 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 affirmatively requires landowners to participate in commercial agricultural markets in perpetuity—either personally or by forced association with a commercial agricultural producer. The requirement prevents the landowners, as well as their successors, from ever exiting the commercial agricultural market, even if temporarily fallowing the land was necessary to prevent significant economic hardship.

PLF has already successfully challenged a less onerous affirmative easement permit condition. *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, violated *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The proposed Marin County affirmative easement requirement goes even further than that in Sterling, requiring perpetual *commercial* agricultural use.

Nollan and *Dolan* require an essential nexus and 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 a requirement for 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, the affirmative easement condition demands far more concessions than those needed to relieve the public impact emanating from the construction of a single dwelling, falling afoul of *Dolan*'s rough proportionality test. The proposed agricultural easement requirement will not survive the heightened scrutiny of permitting conditions applied under *Nollan* and *Dolan*.

Restrictive covenants against further division of legal lots also will be required as a condition of development. *See* Sections 22.32.024(J)(4) & 22.32.025(B)(4). A permanent restrictive covenant against subdivision of land placed on a large legal lot as a condition for construction of a single

dwelling will run afoul of the same nexus and proportionality requirements 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, other means are available, 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 open Marin County to potential litigation for takings claims.

Conclusion

PLF has fought for the property rights of all Americans for over four decades. PLF requests that the Board give close consideration to the objections raised in this comment letter. The proposed Coastal Program amendments and Implementation Program amendments place severe—and potentially unconstitutional—burdens on the property rights of Marin County landowners, with many of these burdens acutely directed towards the agricultural community. PLF urges the Board to consider these burdens while considering action on the proposed LCP amendments.

Sincerely,

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Attorney