



April 13, 2018

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

VIA EMAIL [kdrumm@marincounty.org](mailto:kdrumm@marincounty.org)

Re: Marin County Local Coastal Program Amendments

Dear Honorable Supervisors:

Willie Benedetti, Pacific Legal Foundation, and the Marin County Farm Bureau submit 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. PLF is also currently representing Willie Benedetti—a Marin County farmer for over 45 years—in pending litigation as to portions of these amendments. Compl. and Pet. for Writ of Admin. Mandate, *Benedetti v. County of Marin*, No. CIV1702572 (Super. Ct. of Marin Ctny., July 14, 2017).

The Marin County Farm Bureau is a voluntary membership organization that represents nearly 300 farm and rural families in Marin County. MCFB is committed to preserving and improving production agriculture in Marin County through responsible stewardship of natural resources. As an organization that works at the local, state, and national level to improve legislation and regulations that could be detrimental to agriculture, the MCFB has closely watched and actively participated in the Marin County Local Coastal Program amendment process, and remains committed to protecting the livelihoods of its members.

At its March 20, 2018, meeting, the Board considered various options with regard to several modifications that Coastal Commission staff had made to proposed amendments to Marin County's Local Coastal Program. Those options included accepting the

modified amendments, accepting the amendments while also passing resolutions of intent to submit further clarifying amendments, or rejecting the amendments.

Accepting the amendments—even with resolutions of intent to amend—potentially will subject Marin County coastal landowners to unconstitutional limitations on their property rights, with no certainty of when—or if—ameliorating amendments will be adopted. Marin County landowners will face tremendous uncertainty under the new amendments, and the County may face additional legal challenges in the interim. Willie Benedetti, MCFB, and PLF urge this Board to reject the amendments.

### **Limitation of Development Rights**

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 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, only agricultural dwelling units—not single-family residences—will be allowed within the C-APZ zone. Moreover, Section 22.32.024(B) of the proposed Implementing Program limits the number of total structures to three agricultural dwelling units per “farm tract.” And 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. 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 dwelling units at 27 for the entire Coastal Agricultural Zone. Once those 27 homes have been permitted, remaining farm tracts and legal lots necessarily will be deprived of all development rights. This increases the risk that Marin County will be subject to claims for *Lucas* 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) (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 twenty acres).

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 largely preserving their development rights. However, 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, MCFB, and PLF urge the Board to reconsider 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, as to several provisions of the previously adopted land use plan amendments. The Implementing Program contains additional language that exacerbates the legal deficiencies of those amendments.

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

Further, 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 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 the landowners, as well as their successors, from ever exiting the commercial agricultural market, even if the temporary fallowing of the land were necessary to prevent significant economic hardship.

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 down 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 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, because the affirmative easement condition demands far more concessions than those needed to relieve the public impact resulting from the construction of a single dwelling, it runs afoul of *Dolan*'s rough proportionality requirement. 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 that 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 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, other, constitutional, 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.

### **Definition of Ongoing Agriculture**

MCFB has previously commented on the uncertainty that the staff-modified definition of “ongoing agriculture” will create for Marin County farmers and ranchers by exempting only “existing agricultural production activities” from coastal development permit requirements. *See, e.g.*, MCFB comment letter of October 28, 2016. The definition leaves open the possibility that standard agricultural practices could be subjected to a costly and time-consuming coastal development permit process, one that could render traditional agricultural practices economically infeasible.

Commercially viable farming and ranching often requires flexibility to respond to shifting market conditions from year to year, or even season to season. The Commission staff’s modified language 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 “existing agricultural production 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.

The Commission staff’s modified language is representative of a growing trend of acknowledging no limiting principle to the agency’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 constituted 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 are “existing agricultural production activities” is likely to create confusion about when coastal development permits are required. Worse, the time and expense involved in obtaining a coastal development permit when required could substantially injure Marin County agriculture.

### **Definition of Existing Development**

Commission staff has also included a definition of “Existing Development” that would, among other things, change the County’s application of Coastal Act section 30235 so as to deny future permits for seawalls to homeowners with homes or other structures

built after January 1, 1977, even when such permits are necessary to defend their homes against erosion. Such a definition is flatly inconsistent with longstanding practice, as well as California's constitutionally guaranteed right to protect property. Cal. Const. art. I, § 1 (stating that protecting property is an inalienable right of all people).

Historically, the term "existing structures" has been understood by both property owners and the Commission to mean 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."). Although the Commission has recently acted inconsistently with that understanding, untold numbers of permits have been granted over the years for structures built in reliance on the Commission's longstanding position. The definition pressed on Marin County by Commission staff during the review of the County's LCP amendment is a radical change that is likely to draw litigation.

PLF is unaware of any appellate decision interpreting the term "existing development" in Section 30235. There is not, therefore, available binding precedent to settle that meaning, and thus one can expect litigation by aggrieved property owners affected by the proposed changed definition. Because the changed definition will surely result in damaged structures, it will likely subject Marin County to litigation concerning the meaning of Section 30235 and, ultimately, liability for the resulting property damage.

The Commission has supported recent legislative efforts to alter the definition of existing development within the Coastal Act, but such efforts have, to date, 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 Commission staff has now sought to force this unpopular policy preference on local governments throughout the coastal zone by the device of staff modifications to coastal programs and amendments that are submitted to the Commission for certification. The County should not accede to the Commission staff's wrongheaded and illegal demands.

## **Conclusion**

MCFB has worked to preserve the livelihood of farmers and ranchers in Marin County—and all of California—since 1923. Willie Benedetti has farmed within Marin County for over 45 years. PLF has fought for the property rights of all Americans for

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over four decades. Willie Benedetti, PLF, and MCFB all request that the Board give close consideration to the objections raised in this comment letter. The proposed Local Coastal Program Amendments and Implementation Program place severe—and potentially unconstitutional—burdens on the property rights of Marin County landowners, with many of these burdens falling principally on the agricultural community.

Accepting the amendments while simultaneously passing a resolution of intention to further amend is not an adequate course of action, because it will subject Marin County residents to further uncertainty and will open the County itself up to potential legal challenges and liability. Willie Benedetti, MCFB and PLF urge the Board instead to reject the current amendments and engage in a renewed amendment process that respects the property rights all Marin County coastal landowners and acknowledges the market realities of agriculture which Marin County ranchers and farmers face.

Sincerely,



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**ENDORSED FILED**  
**SAN MATEO COUNTY**  
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Clerk of the Superior Court  
BY ~~DANIEL BHEA~~  
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10  
11 SUPERIOR COURT OF CALIFORNIA  
12 COUNTY OF SAN MATEO  
13

14 DAN STERLING and DENISE STERLING, )  
15 Plaintiffs and Petitioners, )  
16 v. )  
17 CALIFORNIA COASTAL COMMISSION, )  
18 Defendant and Respondent. )

No. CIV 482448  
Dept. 28

**[SECOND REVISED  
PROPOSED] STATEMENT  
OF DECISION**

19  
20 **INTRODUCTION**

21 This case involves the California Coastal Commission's (CCC) attempt to require  
22 applicants (Sterlings) for a coastal development permit for one home to dedicate the remainder of  
23 their land—about 140 acres—to active agricultural use, forever. This condition demands that the  
24 Sterlings deed an easement to this effect to the People of the State of California. The Sterlings seek  
25 judgment on a motion for writ of mandate, invalidating the condition under Code of Civil  
26 Procedure § 1094.5.

27 Oral argument was held on February 25, 2010. Mr. J. David Breemer, of Pacific Legal  
28 Foundation, appeared on behalf of Petitioners Dan and Denise Sterling. Deputy Attorney General



1 Hayley Peterson appeared on behalf of Respondent California Coastal Commission. The Court has  
2 considered the pleadings and arguments, and now issues the following decision:

3 **I**

4 **BACKGROUND**

5 **A. Facts and Local Administrative Process**

6 Dan and Denise Sterling live in San Mateo County (County) with their four children. In  
7 1997, the Sterlings purchased a largely unimproved 143-acre parcel of land (the Property) in  
8 El Granada, California, in the unincorporated area of the County.

9 The Property is comprised of sloping, dry, and sparsely vegetated land. Only small pockets  
10 of flat land near a creek, amounting to 10 acres in total, are considered prime agricultural soil.  
11 Neither this area nor any other part of the Property was used for crops at the time the Sterlings  
12 acquired it. There is evidence in the record that the Property cannot be viably farmed.

13 Recent owners, including the Sterlings, have leased upland areas of the Property to nearby  
14 ranchers for grazing 10 head of cattle. This arrangement is not for profit, but merely a mutually  
15 beneficial agreement by which the cattle owners get pasture, while the owner receives grazing that  
16 reduces fire hazards on the property.

17 The Sterlings bought the Property with the intent to build a permanent family home. Soon  
18 after acquiring the land, the family moved into a small, preexisting mobile home. The mobile had  
19 been placed on the lower, flatter portions of the Property by some unknown person who owned the  
20 land prior to the Sterlings. The Sterlings planned on using the mobile home as temporary quarters  
21 as they built a larger house.

22 Under the County's land use code, the Property is zoned for Planned Agricultural  
23 Development (PAD). This zoning classification conditionally permits residential homes, the  
24 allowable number depending on amount of acreage. Due to its size, the Sterlings' Property is  
25 entitled to two density credits; *i.e.*, two homes.

26 In 2000, the Sterlings applied to the County to subdivide their land into two parcels, one  
27 large and one small, and to build a 6,456-square-foot home on the larger proposed parcel. Five

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1 years later, the Planning Commission denied the project, based primarily on objections to  
2 subdivision of the Property.

3 The Sterlings then abandoned their planned subdivision and simply sought approval of one  
4 home. They proposed the home on a flat area south of, and set back from, the creek. This area was  
5 and is not used for agriculture. As part of their application, the Sterlings submitted an agricultural  
6 management plan. Their plan stated that they desired to continue voluntarily grazing 10 head of  
7 cattle on about 1/3 of the Property, through a lease arrangement with a nearby rancher. The County  
8 unanimously approved this revised plan, finding it was consistent with the Local Coastal Program.  
9 Although approval was conditional, the County did not require the Sterlings to dedicate any kind  
10 of agricultural easement.

#### 11 **B. Coastal Commission Proceedings**

12 Soon after the County approved the Sterlings' home plans, the CCC appealed the County  
13 decision to itself. No hearing was set on the issue for two years. During this time, the Sterlings  
14 continued to live in the small, preexisting mobile home. While discussing the project with the  
15 CCC staff, the Sterlings offered two potential 9,515-square-foot sites, rather than one, for their  
16 proposed home. The Sterlings specifically proposed an alternative to the County- approved "South  
17 Site." This new "North Site" was located on the mobile home pad north of the creek, in an area  
18 characterized by prime soil.

19 When the CCC refused to hold a hearing after two years, the Sterlings threatened to file a  
20 suit to compel one. The CCC staff subsequently set a final hearing on February 5, 2009. In so  
21 doing, the staff recommended that the CCC not consider the new North Site. The CCC staff report  
22 and hearing thus focused solely on the County-approved "South Site."

23 The staff recommended that the CCC approve the Sterlings' proposed home on the South  
24 Site, subject to approximately 11 new conditions, and 32 conditions previously required by the  
25 County. One of the new conditions recommended by CCC staff was that the Sterlings dedicate to  
26 the public an "affirmative" agricultural use easement on all of the Property lying outside a  
27 10,000-square-foot home building area. This condition specifically provided, in part:

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1 "All areas of the Property [except for the 10,000 square foot development area and  
2 driveway] shall at all times be maintained in active agricultural use;"

3 the Sterlings must, as permittees, "either personally conduct agriculture on all their  
4 land or enter into a lease with a third party willing to engage in agricultural use on  
5 the land;"

6 "[Prior to issuance of the coastal development permit], the applicants [the Sterlings]  
7 shall dedicate an agricultural conservation easement to a public agency or private  
8 association approved by the [Commission] Executive Director:"

9 the "easement deed shall run with the land in favor of the People of the State of  
10 California . . . and shall be irrevocable."

11 After hearing and considering the staff recommendation, the CCC unanimously voted to  
12 approve the Sterlings' permit according to staff recommendation and conditions, including the  
13 foregoing affirmative agricultural condition. The CCC found that the condition was justified under  
14 the County LCP as an alternative to denying the Sterlings' permit. It also made legal conclusions  
15 that the agricultural easement condition was consistent with the constitutional standards of  
16 *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*,  
17 512 U.S. 374 (1994).

18 On March 25, 2009, the Sterlings filed a verified Petition for Writ of Administrative  
19 Mandate under Code of Civil Procedure § 1094.5 and Complaint for Declaratory Relief. The  
20 petition for mandate alleges that CCC lacks jurisdiction and authority to impose the affirmative  
21 agricultural easement condition under the LCP and that the condition is unconstitutional as a taking  
22 of private property. The parties subsequently stipulated to hearing the mandate cause of action  
23 first.

## 24 II

### 25 STANDARD OF REVIEW

26 This Court interprets regulations and ordinances on a *de novo* basis. *Schneider v. Calif.*  
27 *Coastal Comm'n*, 140 Cal. App. 4th 1339, 1343-44 (2006) ("Where jurisdiction involves the  
28 interpretation of a statute, regulation, or ordinance, the issue of whether the agency proceeded in  
excess of its jurisdiction is a question of law."); *Burke v. Cal. Coastal Comm'n*, 168 Cal. App. 4th  
1098, 1105-06 (2008).

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1 A claim that an administrative decision amounts to an unconstitutional taking of property  
2 is typically a mixed question of law and fact. *Ali v. City of Los Angeles*, 77 Cal. App. 4th 246  
3 (1999). When a constitutional issue hinges on undisputed findings, the questions are legal and  
4 reviewed de novo. *Aries Dev. Co. v. Calif. Coastal Zone Conservation Comm'n*, 48 Cal. App. 3d  
5 534, 546 (1975); *Liberty v. Cal. Coastal Comm'n*, 113 Cal. App. 3d 491, 502 (1980).

### 6 III

#### 7 THE AFFIRMATIVE AGRICULTURAL EASEMENT IS AN 8 UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY

9 The parties disagree as to whether the CCC has authority and jurisdiction under the County  
10 LCP—whose rules the CCC must apply here—to impose the agricultural easement condition on  
11 the Sterlings. The Court believes the CCC may have jurisdiction. However, the Court need not  
12 conclusively decide this issue, because even if the active agriculture easement is authorized by the  
13 LCP, the condition is invalid as an unconstitutional taking of private property.

#### 14 A. The *Nollan* and *Dolan* Takings Tests

15 In the land use permitting arena, the controlling constitutional “takings” decisions are  
16 *Nollan* and *Dolan*. Together, this Supreme Court jurisprudence requires “proof by the local  
17 permitting authority of both [1] an “*essential nexus*” or relationship between the permit condition  
18 and the public impact of the proposed development, and of [2] a “*rough proportionality*” between  
19 the magnitude of the [] exaction and the effects of the proposed development.” *Ehrlich v. City of*  
20 *Culver City*, 12 Cal. 4th 854, 860 (1996) (emphasis added). The affirmative agricultural easement  
21 condition fails both prongs.

#### 22 1. The *Nollan* “Nexus” Test

23 In *Nollan*, the Supreme Court held that land use agencies may not use their permitting  
24 powers as an opportunity to exploit property owners by demanding concessions from them in  
25 exchange for development permits. See *Nollan*, 483 U.S. at 836-37; *Surfside Colony, Ltd. v. Cal.*  
26 *Coastal Comm'n*, 226 Cal. App. 3d 1260, 1269 (1991). *Nollan* held that a permitting authority can  
27 require a property owner to dedicate real property to public use in exchange for a permit only when  
28 the condition serves the same purpose, and remedies the same harm, as outright denial of the

1 permit. *Ehrlich*, 12 Cal. 4th at 860. This standard requires the government to show a direct  
2 “relationship between the permit condition and the public impact of the proposed development.”  
3 *Id.* at 860.

4 *Nollan* emphasized that conditioning a permit on property owner concessions unrelated to  
5 the proposed project is problematic and unconstitutional because it suggests ““an out-and-out plan  
6 of extortion.”” *Id.* (citation omitted).

7 In *Ehrlich*, 12 Cal. 4th 854, the California Supreme Court accepted *Nollan*’s rationale and  
8 adopted the “nexus” test as a limit on permitting authorities in California. *Ehrlich*, 12 Cal. 4th  
9 at 860 (requiring a “relationship between the permit condition and the public impact of the  
10 proposed development”). *Ehrlich* emphasized that the *Nollan* “nexus” test imposes a heightened  
11 level of constitutional scrutiny. *Id.* at 866, 868, 871 n.7; *Surfside Colony*, 226 Cal. App. 3d at 378.

12 Here, the CCC imposed the affirmative agricultural easement condition on the Sterlings as  
13 an alternative to permit denial. It is not clear, however, that the easement condition substantially  
14 serves the same purpose as denial.

15 The Sterling home site is not in active agricultural use. Therefore, if a permit were denied,  
16 the homesite would remain in a raw state that would *potentially* allow future agricultural use.  
17 Permit denial would not cause any actual agricultural use to occur. On the other hand, the CCC’s  
18 affirmative agricultural easement condition does. It imposes *actual* agricultural activity, rather  
19 than simply ensuring agricultural potential. The condition therefore serves a different public  
20 purpose from permit denial; while denial might advance preservation of agriculturally suitable land,  
21 the condition institutes actual agricultural use. The disconnect between the public interests served  
22 by permit denial and those served by the affirmative agricultural easement suggests the condition  
23 unconstitutional. *Nollan*, 483 U.S. at 837, 841-42.

24 Put differently, the affirmative agricultural easement condition fails the *Nollan* test because  
25 it is not related to the impact of the Sterling home. Because the Sterlings’ home is to be built on  
26 a small area of their land that is not in active agricultural use, it will not take away any active  
27 agriculture. The affirmative easement does not mitigate the actual impact of the home, which is  
28 simply that the one acre of land would be taken out of potential, not actual, agricultural use. There

1 is no “relationship between the permit condition [requiring active agricultural activity] and the  
2 public impact of the proposed development [no loss of agricultural activity].” *Id.* at 860. Since  
3 there is insufficient evidence of a “close connection between the burden [caused by the  
4 development] and the condition,” as required by *Nollan*, the condition is therefore unconstitutional.  
5 *Surfside Colony*, 226 Cal. App. 3d at 378; *Nollan*, 583 U.S. at 838; *Rohn v. City of Visalia*,  
6 214 Cal. App. 3d 1463, 1475-76 (1989).

7 **2. The *Dolan* “Rough Proportionality” Test**

8 Even if the affirmative agricultural easement condition could satisfy *Nollan*, it fails the  
9 *Dolan* test. Under *Dolan*, the government must show its condition bears “rough proportionality”  
10 in both “*nature and extent* to the impact of the proposed development.” *Dolan*, 512 U.S. at, 391  
11 (emphasis added); *Ehrlich*, 12 Cal. 4th at 879-80.

12 A permit condition fails *Dolan*’s “roughly proportionality” standard if it demands more  
13 concessions (in nature or extent) from a property owner than needed to alleviate the public impact  
14 emanating from a project. *Dolan*, 512 U.S. at 393; *Liberty*, 113 Cal. App. 3d at 502. Here, the  
15 easement runs afoul of *Dolan* because it imposes demands that go beyond addressing the only  
16 arguable impact of the Sterlings’ home—taking away a small area of idle land that could be  
17 potentially used for agriculture. The CCC demanded permanent institution of actual agricultural  
18 uses to mitigate a purported loss of potential agricultural land. The easement is not proportional  
19 in nature. *Dolan*, 512 U.S. at 393; *Liberty*, 113 Cal. App. 3d at 502.

20 The affirmative agricultural easement also fails *Dolan*’s rough proportionality test in scope  
21 and extent. The Sterlings’ home takes up less than an acre. The CCC’s easement condition takes  
22 142 acres, requiring agricultural activity forever on behalf of the public, and transferring all the  
23 Sterlings’ development rights to the public. It is flat out unconstitutional to require 142 acres to  
24 mitigate a perceived loss of one acre.

25 The CCC nevertheless argues that the agricultural easement condition is constitutionally  
26 justified because the Sterlings already engage in voluntary and limited cattle grazing. This  
27 contention is off point.

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1 The Sterlings' current grazing plan—allowing 10 head of cattle on 1/3 their land—is  
2 entirely voluntary and could be terminated at any time by either the Sterlings or the rancher to  
3 whom they lease the grazing rights. The CCC cites no authority holding that a property owner's  
4 decision to *voluntarily* engage in an activity allows the government to impose a permit condition  
5 making the use mandatory, especially when the mandatory use is unrelated to the proposed  
6 development. There is a major difference between a voluntary use of land and one that is made  
7 mandatory by the government for a public purpose, forever. The added burden on the Sterlings is  
8 irreconcilable with *Nollan* and *Dolan*.

9 Further, CCC affirmative agricultural easement condition is much more burdensome in  
10 substantive scope than the Sterlings' voluntary grazing plan. The CCC condition grants an interest  
11 in the Sterlings' real property<sup>1</sup> to the People of the State of California; one that wipes out the  
12 Sterlings' development right. Conversely, the Sterlings' voluntary grazing plan leaves their  
13 development rights—including the possibility of another home for the Sterlings' children—in the  
14 Sterlings' hands. And because the CCC easement grants an interest in the Sterlings' real property  
15 to another—a public or quasi-public entity—that outside entity acquires the right to “monitor” the  
16 Sterlings and their property. Under the voluntary plan, they keep their privacy. The CCC's  
17 permanent affirmative agricultural easement condition is not a proxy for, or related to the Sterlings'  
18 voluntary grazing of 10 head of cattle.

19 The CCC repeatedly suggests that the easement condition is justifiable as a means to protect  
20 agriculture. This misses the point of *Nollan* and *Dolan*. When a condition is not properly tailored  
21 to the development, the general interest it purportedly advances cannot preserve it. *Dolan*,  
22 512 U.S. at 387; *Ehrlich*, 12 Cal. 4th at 868; *Surfside Colony, Ltd. v. California Coastal Comm'n*,  
23 226 Cal. App. 3d 1260 (“While general studies may be sufficient to establish a mere rational  
24 relationship between [a legitimate interest and condition], *Nollan* requires a ‘close connection’  
25 between the burden and the condition.”).

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28 <sup>1</sup> An easement is a real property interest. 12 Witkin, Summary 10th Real Property, § 382, at 446 (2005).





