



December 7, 2018

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

Re: Marin County Local Coastal Program Amendments 3 & 7

Dear President Connolly and Honorable Supervisors:

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 also represents the estate of Willie Benedetti in pending litigation as to portions of the previously adopted Land Use Plan amendments. Compl. and Pet. for Writ of Admin. Mandate, *Benedetti v. County of Marin*, Nos. CIV 1702572 & 1802053 (Super. Ct. of Marin Cnty.).

In October of this year, PLF submitted a comment letter to the Marin County Planning Commission concerning the LCP amendments now before the Board. County staff responded to that letter, and provided its answer as part of the Board's addendum to its December 4, 2018, hearing. PLF's original comment letter, however, does not appear to have been included in the addendum. Therefore, PLF resubmits the enclosed original comment for the Board's consideration. PLF also provides herein a reply to the County staff's response.

Farm Tract

County staff is correct that the covenants required by the pertinent LCP amendment provisions are limited to the legal lot on which the permitted farmhouse is located. Development Code Section 22.32.024(D). Although this limitation preserves the right of alienation for the current owner and potential development rights for a future owner,

the limitations on development effected by the farm tract provision remove substantial development rights as to contiguous lots held by the current landowner—rights that are extinguished entirely and will not return unless the owner alienates that property to a third party. An owner wholly deprived of development rights for a period of time may be compensated for the period of that deprivation, even if it is temporary. *See Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 34 (2012) (“[A] taking need not be permanent to be compensable . . .”). And as PLF has previously noted, the farm tract provision enacts such a significant downzoning for some landowners that even an analysis under the *Penn Central* takings inquiry may require compensation. *See Avenida San Juan P'ship v. City of San Clemente*, 201 Cal. App. 4th 1256, 1273 (2011) (finding a compensable taking under the *Penn Central* factors when a city substantially reduced development rights of a 2.85 acre lot).

Affirmative Agricultural Easements and Restrictive Covenants on the Division of Land

To date, the Supreme Court has not found any exceptions to the requirement that all land-use exactions must both bear an essential nexus, and be roughly proportional, to some harm caused by the activity to be permitted. Because the construction of a small dwelling unit on a legal lot has no nexus to a need for an affirmative agricultural easement or a restriction on the further division of land, those requirements may be facially unconstitutional. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Even if a court were to find such a nexus, the large size of many legal lots within the agricultural zone make it likely that the requirements would be unconstitutionally disproportionate as applied to many landowners in Marin County. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994). For these and other reasons, the agricultural easement and restrictive covenant provisions of the LCP amendments violate the unconstitutional conditions doctrine, as applied to the rights of coastal landowners.

Definition of “Ongoing Agriculture”

Assurances that an agency official will act consistently with the context and intent of the LCP does not cure vagueness issues in the written LCP. The inquiry is not whether officials will act appropriately, but whether a law as written is so vague that it provides insufficient guidance to the public as to what behavior is prohibited, and whether it grants so much discretion to officials that the law creates “attendant dangers of arbitrary and discriminatory application.” *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

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Conclusion

PLF stands by its earlier comments, and therefore requests that the Board carefully consider the legal implications raised by PLF's prior comment letter and delay approval of LCP Amendment 3 until the above-discussed provisions have been revised.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Talcott". The signature is stylized and written in a cursive-like font.

JEREMY TALCOTT
Attorney

Attachments



PACIFIC LEGAL FOUNDATION

October 1, 2018

Marin County Planning Commission
c/o Kristin Drumm
3501 Civic Center Drive, Suite 329
San Rafael, CA 94903

VIA EMAIL kdrumm@marincounty.org

Re: Marin County Local Coastal Program Amendments

Dear Members of the Planning Commission:

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 and Implementing Program Amendments. PLF is also currently representing the estate of Willie Benedetti in pending litigation as to portions of the previously adopted Land Use Plan amendments. Compl. and Pet. for Writ of Admin. Mandate, *Benedetti v. County of Marin*, No. CIV1802053 (Super. Ct. of Marin Cnty., July 16, 2018).

While the definition of "existing structure" has thankfully been removed from Amendment 7, both Amendments 3 and 7 contain significant constitutional and other legal infirmities. Should they be submitted to the Coastal Commission and accepted in their current form, Marin County landowners will be subjected to unconstitutional limitations on their property rights and will face tremendous uncertainty. Furthermore, Marin County may face additional legal challenges as a result. PLF urges this Commission to recommend that the board refrain from submitting these amendments to the Coastal Commission until additional necessary revisions are made.

Definition of Existing Structure

PLF was pleased to see that the County has removed the problematic redefinition of "existing structure" from Amendment 7, as it would have retroactively diminished many landowners' constitutional and statutory right to shoreline protective devices. While the staff report notes that this definition may still be addressed within the Hazards Amendment, PLF continues to urge the County to avoid any definition of existing structure or development that contravenes its historical meaning of 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.”).

The Coastal Commission has supported recent legislative efforts to alter the definition of existing development within the Coastal Act, but such efforts have 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 Coastal Commission staff has now sought to force this unpopular policy preference on local governments throughout the coastal zone via staff modifications to coastal programs and amendments submitted to the Coastal Commission for certification. Over three decades of Marin County landowners have sought building or redevelopment permits in reliance of their right to future shoreline protection, and a retroactive removal of those rights will almost certainly draw litigation. PLF supports the removal of this redefinition of existing structure in Amendment 7, and urges the County to leave such a definition out of any future draft amendments.

Limitation of Development Rights

Amendment 3, covering Implementing Program sections related to agriculture, contains provisions that significantly reduce the development rights of landowners. 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. But 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 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. Because all contiguous legal lots are merged under the definition of farm tract, an owner of a large farm tract could be left with one or more legal lots deprived of all economically viable use, resulting in a *per se* taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Even for lots that retain some economically viable use, the destruction of previously held development rights may still subject Marin County to a takings claim requiring compensation under *Penn Central Transportation Co. v. City of New York*, 438 US. 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 20 acres).

Not only is this county-wide diminution of development rights 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. But 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 and PLF urge the Planning Commission to prevent 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, regarding several provisions of the previously adopted LUP amendments. The previously submitted Implementing Program amendments contain additional language that exacerbates the legal deficiencies of those amendments.

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

Further, the Program defines "actively and directly engaged" as "making day-to-day management decisions for the agricultural operation 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 landowners and their successors from ever exiting the commercial agricultural market. This requirement ignores commonplace and legitimate reasons that a landowner might necessarily be temporarily prohibited from running day-to-day agricultural operations, such as medical hardship or changing market conditions that require the temporary fallowing of land to avoid economic losses.

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 out 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 a 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 the requirement of 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 a far greater concession than necessary to relieve the public impact of constructing a single dwelling, it runs afoul of *Dolan*'s rough proportionality test. 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 which will be required as a condition of development. *See* Sections 22.32.02x (D)(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 then it should do so through constitutional means, 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 diminish the rights of law-abiding, productive landowners, while opening Marin County to potential litigation for takings claims.

Definition of Ongoing Agriculture

The definition of ongoing agriculture in Section 22.130.030 of the proposed Implementing Program will create significant uncertainty for Marin County farmers and ranchers. Ongoing agriculture is defined largely by a list of activities that purportedly do not fall under that category, but leaves open unlimited discretion for the Director of the Community Development Agency to require a CDP for any activity that he determines “will have significant impacts to coastal resources.” This nearly unlimited discretion invites arbitrary enforcement and creates the potential for future abuse.

Commercially viable farming and ranching often requires flexibility to respond to shifting market conditions from year to year, or even from season to season. The definition 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 ongoing 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. Even where a rancher or farmer may be able to establish that an agricultural activity should be exempt from a CDP, the time and expense of establishing the historical practice for a given area in the face of a Commission cease and desist order could prove financially disastrous.

The definition is representative of a growing trend of acknowledging no limiting principle to the Coastal Commission'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 constitutes 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 constitute ongoing activities under this definition is likely to create confusion about when coastal development permits are required. Given that obtaining a coastal development permit can already be a serious drain on time and resources, the uncertainty created by this definition could substantially injure Marin County agriculture.

Conclusion

PLF has fought for the property rights of all Americans for over 45 years, and has consistently acted as a watchdog against unconstitutional actions by the Coastal Commission. PLF requests that the Planning Commission give close consideration to the objections raised in this comment letter. The proposed Local Implementing Program places severe—and potentially unconstitutional—burdens on the property rights of Marin County landowners, with many of these burdens falling principally on the agricultural community.

More than 25 speakers addressed the Board at the April 24th meeting making clear the contentious nature of many of the proposed amendments. Despite some positive corrections to those amendments, the amendments remain unsuitable for resubmission to the Coastal Commission. Willie Benedetti and PLF urge the Planning Commission to consider additional revisions to the provisions discussed above before any further amendments are submitted to the Coastal Commission for certification.

Sincerely

A handwritten signature in blue ink that reads "J Talcott". The signature is stylized and cursive.

JEREMY TALCOTT
Attorney