PACIFIC LEGAL FOUNDATION

August 13, 2015

President Katie Rice and
The Marin County Board of Supervisors
3501 Civic Center Drive, Room 329
San Rafael, CA 94903

VIA EMAIL: c/o Kristin Drumm
kdrumm@marincounty.org

Re: Concerns with final Implementation Program for Agriculture

Dear Supervisors:

Pacific Legal Foundation, the nation's oldest public interest property rights foundation, has followed Marin County's Local Coastal Amendment process with great interest. Foundation attorneys have regularly submitted comment letters to both this Board and the Coastal Commission highlighting particular concerns. We have also occasionally appeared in person to address some of our concerns.

The California Cattlemen's Association (CCA) is the predominant organization of cattle grazers in California, with more than 1,700 producer members throughout the state. CCA members own or lease property and graze cattle on land subject to the jurisdiction of the California Coastal Commission throughout many of California's coastal counties, and the Association has established a Coastal Subcommittee with the express purpose "to help members located in this state's coastal zone with land use issues." CCA has closely followed Marin County's Local Coastal Amendment and Implementation Program at the behest of impacted Marin County members, submitting detailed comments at every phase of the process and appearing on numerous occasions before both this Board and the California Coastal Commission.

While some progress has been made throughout the Amendment process, the final Implementation Program for Agriculture contains some provisions that are alarming for Marin County property owners. Principally, we are concerned with three aspects of the Implementation Program. First, the Program significantly limits development rights on agricultural land without providing compensation. While the currently effective LCP permits property owners to maintain one housing unit per 60 acres, the Implementation Program limits them to three structures per "farm tract," severely reducing the value of large ranches. Second, the Program requires that each "agricultural dwelling unit" be "owned by a farmer" and that it be "directly engaged in agriculture on the property." Section 22.34.024(A). This provision is problematic in that it appears to require property owners to be farmers indefinitely. And finally, the program requires property owners to enter into

restrictive covenants that run with the land, permanently entrenching the restrictions on property rights.

Limitation of Development Rights

The Implementation Program's modifications would have a drastic effect on property owners' development rights. Currently, many landowners in the County enter into voluntary agreements with private entities, like the Marin Agricultural Land Trust, to dedicate voluntary conservation easements on their property in exchange for compensation. This allows them to ensure that their land is used for agricultural production while retaining the value of their development rights. But the modifications would immediately extinguish many landowners' development rights without compensation.

Such action could subject the County to legal liability under the Takings Clauses of the United States and California Constitutions. The Supreme Court of the United States has recognized that government actions which significantly reduce the value of property by curtailing development rights may be compensable takings. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Court set out a multifactor test to determine whether government regulation rises to the level of a taking. Under that test, courts consider the "economic impact of the regulation" on the property owner, the "extent to which the regulation has interfered with distinct investment-backed expectations" of property owners, and the "character of the government action." *Id*. at 124.

The Implementation Program modification in effect enacts a downzoning by permitting only three structures per farm tract. The California Court of Appeal has recognized that downzonings that significantly decrease property values may require compensation under *Penn Central*. In *Avenida San Juan Partnership v. City of San Clemente*, 201 Cal. App. 4th 1256 (2011), the City changed the zoning designation of an undeveloped 2.85 acre parcel from "residential, low" to "residential, very low." *Id*. at 1259. The downzoning changed the allowable density from four dwellings per acre to one dwelling per twenty acres. *Id*. Observing that the regulation decreased the property's value by $1.3 million and that the owners had significant investment-backed expectations in the prior zoning, the Court of Appeal found a taking and ordered compensation. *Id*. at 1273-74.

The modifications to the Implementation Program significantly affect property values. Because of the Program's definition of "farm tract" as "all contiguous legal lots under common ownership," Section 22.32.024(c), this effect will be more severe for some than others. A property owner with a large farm of several hundred acres will still be limited to just three structures and thereby lose a drastic amount of value and development rights, while the owner of a smaller tract would stand to lose less value. Both the significant uncompensated taking of development rights and the unequal application of the modifications are significant problems that will expose the County to possible liability.

Furthermore, by defining the "farm tract" as all the contiguous legal lots under common ownership (and making it quite difficult for property owners to subdivide the lots), the modifications threaten to cause a deprivation of all economically viable use of many of the legal parcels. Under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), such deprivation is a per se taking and requires the payment of just compensation. Combining of several legal parcels owned by the same owner into one parcel for the purposes of the modifications will inject the County into the ongoing debate over what is the "relevant parcel" for the purposes of *Lucas* takings law. *See, e.g.*, John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1545 (1994) ("Not only has the Court never decided a case involving the horizontal division of land, but it has failed to define 'parcel as a whole.' Until this issue is resolved, lower courts will continue to face the crucial question: economically viable use of what land?"). The Ninth Circuit has refused to adopt a rule that commonly-owned contiguous property should be treated as one parcel for the purposes of takings claims. *Am. Sav. & Loan Ass'n v. Marin Cnty.*, 653 F.3d 364, 369-71 (9th Cir. 1981). As a result, defining these legal parcels to be one parcel may subject the County to takings liability.

Finally, as PLF mentioned in its last letter to the Coastal Commission, it is problematic that both the County and the Commission are effecting zoning changes through this Implementation Program. Because the Program still relies on a 60-acre baseline to be able to build any house at all, Section 22.32.024(G), it is opaque about the relationship between the existing zoning and the Program's regulations. The Coastal Commission's modifications and the final Implementation Program do not alert the public that, if adopted, they will effect a significant change in zoning.

Requirement That Farmers Own Property and That It Be Used for Agriculture

The Implementation Program provides that each "agricultural dwelling unit" must be "owned by a farmer" and be "directly engaged in agriculture on the property." Section 22.34.024(A). Government regulations of property generally prohibit certain uses. Governments may also encourage agricultural use with tax incentives. *See Williamson v. Comm'r of Internal Revenue Serv.*, 974 F.2d 1525, 1531-33 (9th Cir. 1992) (discussing the "qualified use" provision of estate tax law giving special benefits to property used as a family farm). But it is quite another thing to require property to be used as a farm. This would render owners in violation of the law if they eventually retire and decide to stop farming the land, even if they simply use the property as a family residence.

In effect, this provision prohibits many uses which would generally be acceptable under the currently-effective Local Coastal Plan and Land Use Plan. Under the *Penn Central* multifactor test, courts may still require compensation "if the regulation precludes uses of property that the property owner reasonably could have expected to enjoy because the uses were not prohibited under the background principles of the State's law of property and nuisance." Jerome M. Organ,

Understanding State and Federal Property Rights Legislation, 48 Okla. L. Rev. 191, 196 (1995) (internal quotation marks omitted). And even if the limitation is not considered a taking, it is unduly restrictive of a property owner's right to make reasonable use of his property, a right that has been recognized by the California courts. *See Carlin v. City of Palm Springs*, 14 Cal. App. 3d 706, 712-13 (1971) ("Counterbalancing the government's right to regulate signs is the right of a property owner to make a reasonable use of his land or the right of a businessman to conduct a business."). In order to respect the property rights of County property owners, the Board should reconsider this portion of the Implementation Program.

Requirement to Enter Into Restrictive Covenants

Finally, we are concerned with the requirement that property owners enter into restrictive covenants. Section 22.32.024(J)(4). These covenants have the effect of recording the potentially unlawful restrictions in the Implementation Program, preserving them in perpetuity. Even if a later Board of Supervisors decides on a different scheme to regulate coastal property (and the Coastal Commission certifies it), these restrictions will live on in covenants running with the land, binding all future property owners. This Board should reconsider imposing these restrictions on the County's property owners.

Conclusion

PLF and CCA hope that this Board will consider our perspective and decide against approving these provisions that are unduly restrictive of property rights. We thank the Board for the opportunity to present this comment letter.

Sincerely,

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