MARIN COUNTY FARM BUREAU

P.O. Box 219, Pt. Reyes, CA 94956

February 19, 2013
Attachment #1 - "Constitutionality Clause"

Recommended new "Constitutionality of Conditions" Clauses in LUP and Development Code

Recommended Revisions to Applicable Development Code Sections and Analysis

Arguments in Support of Its Inclusion

Issue: There are a number of proposed policies and Development Code sections in the Local Coastal Program Proposed Amendments dealing with permits conditioned upon the exaction of easements and other impacts on private property rights. The Planning Commission Recommended Drafts contain language that is often internally inconsistent, and which does not adequately lay out the requirement for consistency with state and federal law.

Intent: To incorporate language that is internally consistent by creating a new clause that would be incorporated as both a LUP Policy and a Development Code Section entitled the "Constitutionality of Conditions" and then reference that clause in all policies and codes related to it (i.e. "…consistent with Policy/Section XX…"). This approach would also simplify and clarify much of the LCP language by preventing redundancy. Specificity of the new clause will bring transparency necessary for applicants, the public, and government agencies, thereby reducing ill-advised and expensive appeals and lawsuits.

Analysis and Discussion:
The Fifth Amendment of the Federal Constitution limits the extent to which the County may demand that property owners comply with certain requirements in exchange for a County-issued permit. These requirements include but are not limited to: public access easements; non-agricultural development in C-APZ and C-ARP zones; open space easements; agricultural conservation easements and subdivision. For the County to legally condition the grant of a permit upon a property owner's acceptance of an easement condition or other limitation on land use, it must comply with the U.S. Supreme Court's holdings in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. *Nollan*, 438 U.S. 825 (1987); *Dolan*, 512 U.S. 374 (1994). Under these cases, the burden falls on the County to make an individualized determination that a proposed land use will adversely impact public access, public infrastructure or other public good. The County must then also demonstrate (1) a nexus between the impact of the proposed land use and the condition; and (2) proportionality between the impact of the proposed land use and the condition, such that the condition directly mitigates for the adverse impacts of the proposed land use.

Recommendation: In order to ensure such consistency, clarity and transparency, we propose an additional clause in both the Development Code and the Land Use Plan that sets forth the circumstances under which the County may impose requirements on property owners as a condition of obtaining a permit. We urge that this statement of the law be incorporated by reference into all the applicable sections of the Development Code and also into the corresponding policies in the Land Use Plan. Our recommended additions are in **bold and underlined** and recommended deletions in ~~strikethrough~~.

Policy XX & Development Code Section XX - Constitutionality of Conditions

Where the County seeks to impose conditions on a property owner's proposed land use, the County bears the burden of demonstrating—on an individualized, case-by-case basis—that the proposed use will create an adverse impact on public access, public infrastructure or other public good. The County must then also demonstrate: (1) a nexus between the impact of the proposed land use and the condition; and (2) proportionality between the impact of the proposed land use and the condition, such that the condition directly mitigates for the adverse impacts of the proposed land use.

Recommended Revisions to Applicable Development Code Sections and Analysis

The following proposed amendments to the Development Code, with reference to corresponding LUPA Policies, directly impact private property rights and therefore require consistency with state and federal law.

Conservation Easement and other land exactions and takings

22.65.030 - Planned District General Development Standards (Policy C-AG-7)

D. Building location:

> 1. Clustering requirement. Structures shall be clustered in a geologically stable, accessible location on the site where their visual prominence is minimized, consistent with needs for privacy. Clustering is especially important on open grassy hillsides; however, a greater scattering of buildings may be preferable on wooded hillsides to save trees. The prominence of construction shall be minimized by placing buildings so that they will be screened by existing vegetation, rock outcroppings or depressions in topography.
>
> In the C-APZ and C-ARP agricultural zones, non-agricultural development shall also be clustered or sited to retain the maximum amount of agricultural land and minimize possible conflicts with existing or possible future agricultural use. **Consistent with Policy/Section XX**, non-agricultural development, including division of agricultural

lands, shall only be allowed upon demonstration that long-term productivity of agricultural lands would be maintained and enhanced as a result of such development. **Consistent with Policy/Section XX**, non-agricultural development shall be placed in one or more groups on a total of no more than five percent of the gross acreage, to the extent feasible with the remaining acreage retained in or available for agricultural production or open space. Proposed development shall be located close to existing roads, and shall not require new road construction or improvements resulting in significant impacts on agriculture, significant vegetation, significant scenic resources, or natural topography of the site. Proposed development shall be sited to minimize impacts on scenic resources, wildlife habitat and streams, and adjacent agricultural operations. Any new parcels created shall have building envelopes outside any designated scenic protection area.

Analysis and Discussion

The imposition of an affirmative agricultural easement is subject to the requirements of *Nollan* and *Dolan* as outlined in Policy/Section XX. Recently, a trial court struck down a similar requirement because there was no nexus or proportionality between the easement requirement and the impact of the proposed development. *See Sterling v. California Coastal Commission*, No. CIV 482448 (Cal. Sup. Ct., Jul. 22, 2011).

2. Development near ridgelines. **Consistent with Policy/Section XX,** no construction shall occur-on top of, or within 300 feet horizontally, or within 100 feet vertically, of visually prominent ridgelines, whichever is more restrictive, unless no other suitable locations are available on the site or the lot is located substantially within the ridgeline area as defined herein. If structures must be placed within this restricted area because of site constraints or because siting the development outside of the ridgeline area will result in greater visual or environmental impacts, they shall be in locations that are the least visible from public viewing areas.

E. Land Division of Agricultural Lands. Land divisions affecting agricultural lands shall be designed consistent with the requirements of this Article. In considering divisions of agricultural lands in the Coastal Zone **and consistent with Policy/Section XX**, the County may approve fewer parcels than the maximum number of parcels allowed by the Development Code based on site characteristics such as topography, soil, water availability, environmental constraints and the capacity to sustain viable agricultural operations.

G. Open space areas:

1. Dedication required. Land to be preserved as open space, **consistent with Policy/Section XX** may be dedicated by fee title to the County or an agency or organization designated by the County before issuance of any construction permit or may remain in private ownership with appropriate scenic and/or open space easements or other encumbrances acceptable to the County. The County may require **consistent with Policy/Section XX** the reasonable public access across lands remaining in private ownership, consistent with federal and state law.

3. Open space uses. Uses in open space areas shall be in compliance with policies of the Marin County Open Space District. Generally, uses shall have no or minimal impact on

the natural environment. **Consistent with Policy/Section XX,** Pedestrian and equestrian access shall be provided where possible, and reasonable. The intent is to serve the people in adjacent communities, but not attract large numbers of visitors from other areas.

22.65.040 - C-APZ Zoning District Standards (Policy C-AG-2)

A. Purpose. This Section provides additional development standards for the C-APZ zoning district that are to preserve productive lands for agricultural use, and ensure that development is accessory and incidental to, in support of, and compatible with agricultural uses.

B. Applicability. The requirements of this Section apply to proposed development in addition to the standards established by Section 22.65.030 (Planned District General Development Standards) and Chapter 22.64 (Coastal Zone Development and Resource Management Standards), and all other applicable provisions of this Development Code.

C. Development standards. Development permits in the C-APZ district shall also be subject to the following standards and requirements in addition to section 22.65.030:

1. Standards for agricultural uses:

a. **Consistent with Policy/Section XX,** permitted development shall protect and maintain continued agricultural use, and contribute to agricultural viability.

b. Development shall be permitted only where adequate water supply, sewage disposal, road access and capacity and other public services are available to support the proposed development after provision has been made for existing and continued agricultural operations. Water diversions or use for a proposed development shall not adversely impact stream or wetland habitats, have significant effects on groundwater resources, or significantly reduce freshwater inflows to water bodies including Tomales Bay, either individually or cumulatively.

c. Permitted development shall have no significant adverse impacts on **environmentally sensitive habitat areas as delineated in the LCP maps,** ~~environmental quality or natural habitats,~~ and shall meet all other applicable policies, consistent with the LCP **and with Policy/Section XX.**

2. Standards for Non-Agricultural Uses

Consistent with Policy/Section XX, non-agricultural uses, including division of agricultural lands or construction ~~of two or more dwelling units~~ (excluding agricultural worker ~~or~~ **and** intergenerational housing) shall meet the requirements of Section 22.65.040C above and the following additional requirements:

a. Conservation easements. Consistent with state and federal laws **and Policy/Section XX,** the approval of nonagricultural uses, a subdivision, or construction of two or more dwelling units, excluding agricultural worker and intergenerational housing, shall include

measures for the long-term preservation of lands proposed or required to remain undeveloped. Preservation shall be accomplished by permanent conservation easements or other encumbrances acceptable to the County. Only agricultural uses shall be allowed under these encumbrances. In addition, the County shall require the execution of a covenant prohibiting further subdivision of parcels created in compliance with this Section and Article VI (Subdivisions), so that each is retained as a single unit.

See analysis following D1.

Public Access

22.64.180 - Public Coastal Access (Policy C-PA-2)

A. Application requirements.

1. Site Plan. Coastal permit applications for development on property located between the shoreline and the first public road shall include a site plan showing the location of the property and proposed development in relation to the shoreline, tidelands, submerged lands or public trust lands. ~~Any evidence of historic public use should also be indicated.~~ **It is the County's burden to demonstrate evidence of prescriptive rights in favor of the public. Only a court may declare the existence of prescriptive rights.**

Analysis and Discussion

While the County may consider evidence of historic public use, it is improper to ask a permit applicant to produce that evidence. The burden falls on the County to establish a prescriptive right; it may not coerce a permit applicant into assisting in that process. Moreover, only a court may declare prescriptive rights in favor of the public. *See LT-WR, LLC v. Cal. Coastal Comm'n*, 152 Cal. App. 4th 770 (2007).

B. Public Coastal Access standards.

1. Public coastal access in new developments. New development located between the shoreline and the first public road shall be evaluated for impacts on public access to the coast per Land Use Plan Policy C-PA-2. Where a nexus exists **and consistent with Policy/Section XX**, the dedication of a lateral, vertical and/or bluff top accessway ~~shall~~ **may** be required per Land Use Plan Policy C-PA-9, unless Land Use Plan Policy C-PA-3 provides an exemption.

2. Direct dedication of public coastal access. **Consistent with Policy/Section XX and** if feasible, direct dedication of an easement or fee title interest for a required coastal accessway is preferred per Land Use Plan Policy C-PA-4.

3. Acquisition of new public coastal accessways. The acquisition of additional public coastal accessways shall be pursued through available means per Land Use Plan Policy CPA-6 **and consistent with Policy/Section XX**.

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4. Protection of prescriptive rights. New development shall be evaluated to ensure that it does not interfere with **the public's prescriptive rights that have been adjudicated and confirmed by a court of law.** ~~the public's right of access to the sea where acquired through historic use per Land Use Plan Policy C-PA-7.~~

Analysis and Discussion

It is unacceptable to base permitting decisions on potential public prescriptive rights that have not been adjudicated and confirmed by a court of law. *See LT-WR, LLC v. Cal. Coastal Comm'n*, 152 Cal. App. 4th 770 (2007). To burden a landowner with a public access easement condition because of "any evidence of historic public use" impermissibly usurps the role of the judiciary in adjudicating interests in real property. Only courts are competent to declare prescriptive rights. They are bound by procedural safeguards that are designed to assess the credibility of evidence and to ensure fairness. Those same safeguards are absent from County proceedings which therefore do not adequately protect property owners.

Arguments Supporting Inclusion of the "Constitutionality Clause"

First, the County is obligated to follow the law as it exists today, not as it *might* exist in the future. Citizens of the County have a right to know what the existing law is—and, in particular, what their *rights* under existing law are. Just as importantly, by being open and transparent about its legal obligations under local, state, and federal law, the County substantially reduces the risk that its employees will violate the law and needlessly expose the County to liability.

Second, the premise of the County's argument is flawed. By all indications, *Nollan* and *Dolan*'s protections for property owners are here to stay. *Nollan v. California Coastal Commission* itself was decided over a quarter century ago, in 1987. The Supreme Court reaffirmed—and even extended—the principles articulated in *Nollan* seven years later, in *Dolan v. City of Tigard*. Then, in 2005, the Supreme Court in *Lingle v. Chevron USA Inc.* again reaffirmed *Nollan* and *Dolan*'s continued vitality, making it absolutely clear they are well-established precedents of the Court's takings jurisprudence. By contrast, the Court has never even remotely indicated a retreat from *Nollan* and *Dolan*. Given their pedigree, and the Court's repeated affirmance of the principles contained in *Nollan*, it is unreasonably speculative at best to suppose that *Nollan* and *Dolan* might be altered or overturned.

But even if they were, the principles of *Nollan* and *Dolan* have been incorporated into California law. In *Ehrlich v. City of Culver City*, the California Supreme Court said that the nexus and rough proportionality principles of those precedents are the standards that the state's Mitigation Fee Act imposes on cities and counties with respect to permit exactions. Thus, even absent the federal-law tests articulated in *Nollan* and *Dolan*, California municipalities still would be subject to state-law tests that are substantively identical. For the County's argument to be valid, it would have to see *both* a reversal of *Nollan* and *Dolan* by the U.S. Supreme Court *and* a reversal of *Ehrlich* by the California Supreme Court.

Of course, the odds of the U.S. Supreme Court and/or the California Supreme Court reversing itself are very low. A basic principle of American law is *stare decisis*—the idea that a precedent

will be respected unless the most convincing of reasons requires a change. The central case—*Nollan*—has been the law of the land for over 25 years. When it has spoken on *Nollan*, the Court has only reaffirmed it. Given *Nolla*n's well-established place in takings jurisprudence, and the fact that property owners and planners have relied upon it for so long, it is unlikely that the Court would overturn the case. The same can be said of *Ehrlich*, which has been the law of California for almost 20 years—with no indication of any alteration or reversal by the California Supreme Court.

Finally, the County's LCP is not set in stone and, in fact, is periodically revisited and revised. If, in the unlikely event that federal or state law changes, the County can amend its LCP to reflect that change.