PACIFIC LEGAL FOUNDATION

March 18, 2013

President Judy Arnold, 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: Marin County's LCP Update, Categorical Exclusions & Constitutionality Clause

Dear President Arnold and Honorable Supervisors:

At the request of concerned farmers and ranchers, and on behalf of Pacific Legal Foundation and California Cattlemen's Association, I submit this legal opinion on two outstanding issues that the Board must address as it updates the County's LCP.

Categorical Exclusion for Agricultural Properties

The Coastal Act authorizes the County to seek certification of a categorical exclusion even for *coastal* agricultural properties.

Section 30610(e) recognizes that development "within a specifically defined geographic area" may be exempted from Coastal Act permitting requirements. In essence, the proponent of such an exclusion—for example, a municipality like Marin County—need only show that such an exclusion would present "no potential for any significant adverse effect, either individually or cumulatively on coastal resources or on public access to, or along, the coast." Pub. Res. Code. § 30610(e). Of course, the decision to certify a categorical exclusion for a particular geographic area lies with the Coastal Commission. *Id.* But there is nothing in the Coastal Act preventing the County from making a request for a categorical exclusion for an area within its jurisdiction. And there is nothing in the Coastal Act that disallows an exclusion for agricultural areas along the coast.

Existing Marin County policies suggest that the Coastal Act forbids *coastal* agricultural lands from being categorically excluded. This may be based on a misapplication of Section 30610.5(b) to agricultural properties. That section provides that no categorical exclusion for "urban land" is allowed where such land constitutes "[t]ide and submerged land, beaches, and lots immediately adjacent to the inland extent of any beach, or of the mean high tide line of the sea where there is no beach, and all lands and waters subject to the public trust." But Section 30610.5(b) speaks only to

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urban—not agricultural—land. Nowhere in the Coastal Act does it say that coastal agricultural properties are deprived of the benefit of categorical exclusion.

It is telling that the Coastal Act imposes special requirements for urban land exclusions that are not imposed for agricultural exclusions. This is consistent with many other provisions of the Coastal Act that acknowledge agriculture as a uniquely valuable resource, and perhaps more importantly, recognize that putting land to agricultural use advances the Act's policies. Indeed, the Coastal Act already exempts many agricultural activities from its permitting requirements. Pub. Res. Code § 30106 (exempting from the term "development," and therefore the requirement of obtaining a Coastal Development Permit, "the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations"); *see also id.* § 30212(a) (requiring vertical public access in new development projects, "except where . . . agriculture would be adversely affected"); *id.* § 30222 ("The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry."); *id.* § 30241 (pro-agriculture provision intended to "assure the protection of the areas' agricultural economy").

In sum, there is nothing in the Coastal Act to suggest that a request by the County to exclude coastal agricultural properties would be opposed by the Commission. If anything, the Coastal Act would authorize such an exclusion, and would look favorably upon policies and actions benefitting agriculture.

Constitutionality Clause

The Farm Bureau recently submitted proposed language (underlined below) to be added to C-INT-1 of the County's Interpretation Policies:

> C-INT-1, Consistency with Other Law. The policies of the Local Coastal Program are bound by all applicable local, state and federal laws, and none of the provisions of the LCP will be interpreted by the County in a manner which violates those laws. In particular, as required by the Coastal Act, Public Resources Code section 30010, Marin County shall not grant or deny a permit in a manner that would take or damage private property for public use, without the payment of just compensation therefore. 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. This policy is not intended to increase or decrease the rights of any property owner under the Constitutions of the State of California or the United States.

The proposal is consistent with the takings jurisprudence of the United States Supreme Court. It clearly articulates that the burden is on the government to demonstrate that a permit condition bears an essential nexus and rough proportionality to a proposed project. And it puts applicants and County employees alike on notice of their respective rights and obligations. Such transparency can only inure to the County's benefit.

Sincerely,

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