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October 31, 2016

Brian Crawford, Director
Community Development Agency
County of Marin
3501 Civic Center Drive, Suite 308
San Rafael, CA 94903

Re: **Marin County LCP Amendment No. LCP-2-MAR-15-0029-1 (Marin LCP Update)**

Dear Mr. Crawford:

The above LCP resubmittal is currently set for hearing before the Commission this coming Wednesday, on November 2, 2016. You have asked me to provide input on the Commission Staff's recommendations on two provisions which address "exempt" development, Sections 22.68.050, subsections B and C.

Section 22.68.050, Subsection B

Section 22.68.050, Subsection B, would require the County to maintain a list of developments exempted from coastal development permit requirements and to post them on the Community Development Agency's website. It goes further to require notice of the exemption to be transmitted to the applicant, Commission, and interested parties, and to provided the applicant's name, project description and location, reasons for supporting the exemption determination, the date of the Director's exemption determination, and the procedures for challenging the Director's determination.

Generally, under the Coastal Act (Pub. Resources Code, § 30000 *et seq.*)¹, a development that is exempt does not require any determination by the Coastal Commission or local government, and there is no process set forth in the Coastal Act for such review, with one exception – a claim of vested rights. Section 30610 of the Act provides that no coastal development permit is required for certain types of development and in certain areas. If development qualifies under the exemption and, where applicable, the regulations adopted by the Commission to implement the exemption, nothing more is required. A property owner is not required to file a claim

¹ Unless otherwise specified, all section references are to the Public Resources Code.

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of exemption or otherwise request a Director determination that the development is exempt. Section 30610, for example, generally exempts improvements to an existing single-family residence; improvements to any structure other than a single-family residence; repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities; certain developments in a categorical exclusion area; the installation, testing, and placement of in service or replacement of any necessary utility connection between an existing service facility and any development approved under the Coastal Act; and the replacement of a structure destroyed by natural disaster. (§ 30610(a)-(g).)

A claim of vested rights is treated differently under the Coastal Act. A property owner who wishes to be exempt from the permit requirements of the Act based on a vested right must pursue a “claim” of vested rights, as provided in Section 30608 of the Act, and comply with the specific procedures set forth in the Commission’s Regulations (Tit. Cal. Code Regs., § Section 13200-13207). (*South Coast Regional Com. v. Gordon* (1977) 18 Cal.3d 832, 835-836; *LT-WR, Inc. v. California Coastal Com.* (2007) 152 Cal.App.4th 770, 785-786.) Such a claim ordinarily arises in matters involving the Commission, but it is at least theoretically possible that a property owner could make a Coastal Act vested claim at the local government level.

Subsection B begins: “The County shall maintain a list of developments exempted from Coastal Permit requirements, which shall be posted on the Community Development Agency’s website.” As written, this is too broad. If a development meets the exemption requirements of Section 30610 and the Commission’s regulations, no County determination is required. As a practical matter, landowners may, from time to time, informally contact the County to inquire whether the scope of a proposed development is exempt. This ordinarily would not require a formal County determination which justifies posted notice. In fact, such a process might have the unanticipated consequence of discouraging property owners from first checking in with the County simply to ensure that an activity proposed is exempt.

If a posting requirement is included in an LCP, it should be limited to (1) where a property owner formally makes a request to the County for a Section 30610 exemption determination or a vested rights determination, or (2) the County formally initiates and makes either determination. In those two limited instances, the requirement of posting notice of an exemption on the County’s website makes sense.

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As discussed further below, it also makes sense in terms of the “claim of exemption” appeal provision in Section 30625 of the Coastal Act.

To the extent a notice requirement is provided, a better approach is the one set forth in the Malibu LCP, which by statute (§ 30166) was drafted by the Commission and its staff. Malibu LIP section 13.4.10, entitled “Record of Permit Exemption,” states:

“The Planning Manager shall maintain a record of all those developments within the Coastal Zone that have been authorized as being exempt from the requirement for a Coastal Development Permit pursuant to this Chapter. This record shall be available for review by members of the public and representatives of the California Coastal Commission. The Record of Exemption shall include the name of the applicant, the location of the project, and a brief description of the project. (Ord. 303 § 3, 2007)”

I recommend that this provision be used instead of Subsection B.

Section 22.68.050, Subsection C

Section 22.68.050, Subsection C, further states that the exemption determination can be “challenged” pursuant to another provision, Section 22.70.040, which provides an elaborate procedure for a “challenge” to the Director’s determination and, in effect, an appeal to the Commission’s Executive Director by the applicant, an interested person, the County, or the Executive Director, and potentially a dispute resolution hearing before the Commission.

This provision is inappropriate for three reasons. First, nothing in the Coastal Act authorizes the Commission to require a particular process in an LCP for addressing exemption determinations. Instead, the Act authorizes but one remedy – an appeal to the Commission. Section 30625 of the Act provides, in part:

“ . . . any appealable action on a coastal development permit or claim of exemption for any development by a local government . . . may be appealed to the commission by an applicant, any aggrieved person, or two members of the commission.” (Emphasis added.)

Thus, where the County formally grants a property owner’s claim of exemption, that determination is appealable to the Commission. The County has the discretion to be more restrictive than the Coastal Act and could, if it wished, adopt the

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“challenge,” or appeal process outlined by Commission staff. (§ 30005(a) [authorizing a city or county to adopt and impose provisions more restrictive than the Coastal Act]; *Yost v. Thomas* (1984) 36 Cal.3d 561, 572-573.) But the County is not obligated to do so.

The second reason why Subsection C is inappropriate is that it would transform at least the exemptions that the Legislature specified in Section 30610 into something more akin to a permit process, marked by County staff review, a challenge or appeal process, Executive Director review, and potential hearing before the Commission – all at significant cost and delay, thus undermining the exemption. For example, a neighbor dispute over an exempt fence could unnecessarily and improperly result in a protracted process, something the Legislature never intended in setting forth exemptions from the permit requirement.

Finally, there is a practical reason why Subsection C is inappropriate. If the fuller process for exemption review were set forth in every LCP statewide for consistency sake, and if Commission staff imposed the same requirements on itself in reviewing exemption issues (and I do not believe that it currently does so), the coastal process would grind to a halt. It is already overburdened with regulation, substantial caseloads, and delays. An extraordinary focus on “exemptions” could well detract from the more important review that is required at the Commission and local government level in terms of long-term coastal planning and actual permit matters.

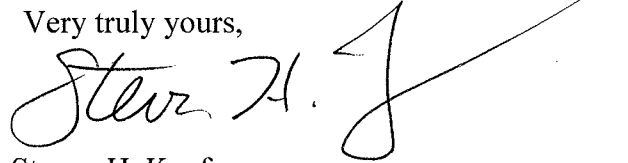
Conclusion

A provision requiring posting of a formal Director exemption determination on the County’s website, such as that drafted by the Commission and included in the Malibu LCP, would serve to put all on notice as to a County exemption determination. This may have relevance and benefit in terms of Section 30625 of the Act, which provides for an appeal in the case of a determination on a “claim of exemption.” However, in my view, the broader recommendation by Commission staff with respect to “exemptions” is neither appropriate nor required under the Coastal Act.

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Should you have any questions regarding the above, please do not hesitate to give me a call.

Very truly yours,

A handwritten signature in black ink, appearing to read "Steven H. Kaufmann". The signature is written in a cursive style with a long, sweeping horizontal line extending to the right.

Steven H. Kaufmann

cc: Thomas Lai, Assistant Director, Community Development Agency
Jack Liebster, Principal Planner