PACIFIC LEGAL FOUNDATION

July 29, 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
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Re: Comments for July 30, 2013, Public Hearing on Local Coastal Program Amendments

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 filed comment letters highlighting particular concerns,[1] and Principal Attorney Paul Beard recently addressed some of these concerns in person at your February 26th hearing. While we very much appreciate some of the changes that your Board, the Marin County Planning Commission, and the staff of the Community Development Agency have adopted to address property owners' concerns, we remain alarmed about a number of issues.

Primarily, we believe that the LCPA, as drafted, does not sufficiently advise permitting authorities, the public, or Marin County property owners of the limits on the County's ability to demand dedications of private property in exchange for building permits. Throughout the LCPA, there are requirements that property owners dedicate public access easements, conservation easements, or open space easements in order to put their property to particular uses.[2] We fully agree with the Marin County Farm Bureau's Attachment #1 to its letter of 2/19/2013, that the LCPA should contain more detailed, clear and consistent language setting forth the circumstances under which the County may require such dedications.

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[1] *See*, *e.g.*, Pacific Legal Foundation's Letters to the Planning Commission: 11/3/2008, 6/19/2009, 6/22/2009, 7/22/2009, and 11/19/2009; and those to the Board of Supervisors: 10/1/2012, and 3/18/2013.

[2] *See*, *e.g.*, Development Code Sections: 22.64.180 *Public Coastal Access Standards*, 22.65.040 *C-APZ Zoning District Standards*, 22.64.180 *Public Coastal Access*, and Policies: C-AG-7 *Development Standards for the Agricultural Production Zone* (C-APZ), C-AG-7.B.3 *Conservation Easements*, C-PA-2 *Public Coastal Access in New Development*.

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Incorporating the following "constitutionality clause" into the LCPA, both in the Land Use Plan and Development Code, and including brief references to the clause in applicable policy and code sections, would solve this problem. To date, we have not seen your board specifically address this issue, even though it has been raised numerous times by the Farm Bureau, and Pacific Legal Foundation. We again request that you consider incorporating the following language into C-INT-1, Consistency with Other Law:

Proposed Constitutionality Clause

> 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.

It is settled law that the County may only require property owners to dedicate easements—whether for public access, open space, or conservation—as a condition of obtaining a development permit, where there is a close connection between the easement and the mitigation of harm that will be caused by the proposed development. As we have explained before, under the United States Supreme Court's decision in *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987), the burden falls on the government to demonstrate that close connection or "essential nexus" between the impact of the development and harm mitigation. The Court's subsequent decision in *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), further requires government to undertake an "individualized determination" to show that there is "rough proportionality" between the condition and the harm. Where those connections are missing, dedication requirements are illegal.

Last month, the Court reaffirmed the continuing importance of these limitations on government permitting conditions in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). In that case, the Court reiterated the holdings of *Nollan* and *Dolan*, noting, that "government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz*, 133 S. Ct. at 2591. The Court also described these cases as a special application of the unconstitutional conditions doctrine which "protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Id*. at 2594. It noted that:

> [Given the] realities of the permitting process, . . . land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than the property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation.

Id. The Marin County Draft LCPA does not go far enough to counter this dynamic or to incorporate the federal Constitution's limit on government permitting power. The following examples are particularly troubling and we urge you to address them:

Section 22.64.180.B.1 Public Coastal Access Standards

Section 22.64.180.B.1 provides:

> 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, the dedication of a lateral, vertical and/or bluff top accessway shall be required . . .

While we appreciate that this code section is premised on "impacts" to public access—and the reference to "a nexus" seems to imply that the County will fulfill its constitutional obligations, the reference to Land Use Plan Policy C-PA-2 is troubling. That policy provides in relevant part:

> Impacts of public access include, but are not limited to, intensification of land use resulting in overuse of existing public accessways, creation of physical obstructions or perceived deterrence to public access, and creation of conflicts between private land uses and public access.

These conditions setting forth what may constitute "impacts," say nothing about their proportionality. Neither is it clear how a "perceived deterrence to public access" could possibly be a cognizable harmful impact for which mitigation could legally be required. This language gives the distinct impression that the County will always be able to come up with "evidence of impacts" to satisfy the LCP, anytime property owners along the coast apply for permits.

Of course, that is not what the Constitution, as interpreted by *Nollan*, *Dolan*, and *Koontz* requires. Adding the constitutionality clause, as proposed above, would ensure that the County acts within the scope of its lawful authority when demanding easement dedications.

Section C-AG-7 Development Standards for the Agricultural Production Zone (C-APZ) Lands

In addition, we are concerned that other provisions of the LCPA unlawfully restrict the right of property owners to make productive use of their land and hence leave the County vulnerable to legal challenge. Section C-AG-7 is particularly egregious. Its requirement that property owners with land zoned C-APZ must place 95% of their property into a permanent agricultural conservation easement in order to use 5% of the land for non-agricultural uses, is precisely the type of "one-size fits all" provision that *Nollan*, *Dolan*, and now *Koontz* disallow.

Even more troubling, however, is the fact that by its own terms, this section only allows proposed development for non-agricultural uses if "the development is necessary because agricultural use of the property would no longer be feasible" and "the proposed development will not conflict with the continuation or initiation of agricultural uses on that portion of the property that is not proposed for development." C-AG-7(B)(4)(a)-(b). If both of these conditions are met—agricultural uses are no longer feasible on that particular 5% of the property and the proposed development will not inhibit agricultural production on the remaining 95% of the property—the County will never be able to satisfy the individualized assessment required by *Nollan*. How could the County ever demonstrate that there is an essential nexus between the impact of the proposed development of 5% of the property, and the condition that 95% of the property be put into an agricultural easement when the County will only allow non-agricultural development *if it does not impact agricultural uses*?

Since the LCPA concedes that the County will only approve development if there is no adverse impact on agricultural uses, this requirement fails both the "essential nexus" and "rough proportionality" standards. A property owner may only be required to dedicate land for an agricultural easement where such an easement mitigates—both in nature and extent—specific harmful impacts of proposed development.

In addition, the requirement in Policy C-AG-7.B.3, that a property owner execute an unconditional covenant not to divide his or her property in exchange for a permit to use land for non-agricultural uses has takings implications. Unless the County meets its burden of establishing that the proposed use will create harmful impacts that are proportional—both in nature and extent—to the surrender of the owner's right to divide his or her property, the requirement fails the constitutional standard. Reference to the constitutionality clause should be included as a part of this policy and in the corresponding Development Code section 22.65.040.C.2.a.

CDA staff has opined that a single constitutionality clause and references to it were unnecessary and would render the document cumbersome. We disagree. Eliminating the unclear and sometimes internally-inconsistent language and replacing it with a simple reference to the clause wherever it is applicable, would result in a more transparent, clear, and consistent document.

Some additional examples of where existing language is unclear, internally inconsistent, or does not go far enough to ensure that the LCPA complies with the "essential nexus" and "rough proportionality" constitutional standards, include:

Conservation Easement Requirement

22.65.040 - C-APZ Zoning District Standards: "*Where consistent with state and federal laws* . . . Preservation shall be accomplished by permanent conservation easements or other encumbrances acceptable to the County . . ." (emphasis ours).

Policy C-AG-7.B.3. Conservation easements: "*Where consistent with state and federal laws*, a permanent agricultural conservation easement . . . shall be required . . . " (emphasis ours).

Prescriptive Rights

Policy C-PA-6.4. Protection of prescriptive rights. New development shall be evaluated to ensure that it does not interfere with the public's right of access to the sea where acquired through historic use per Land Use Plan Policy C-PA-7.

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.

Notably, the LCPA Appendices, Appendix 1 - List of Recommended Public Coastal Accessways, recommend that on APN #100-040-33 and -57 "Public pedestrian access shall be maintained to Estero day San Antonio on dirt road north of Oceana Marin . . ." and that "Lateral and/or blufftop access shall be required on all parcels north of 100-100-46/north of Oceana Marin . . ."

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. 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. Please see Attachment #1 of MCFB's 2/19/2013 letter for additional Policies and Codes where reference to a constitutionality clause would satisfy existing law.

We also support the positions set forth in the 7/26/2013 letter submitted jointly by the California Cattlemen's Association and the Marin County Farm Bureau dealing with CDA's July 2, 2013, Staff Report, in particular the issues with constitutional Fifth Amendment takings implications including:

- the proposed aggregate cap on residential square footage;
- the proposed allowance of one farmhouse per "farm" rather than per "legal lot;"
- the proposed 5% clustering provision;
- the proposed expansion of ESHA and ESHA buffers; and
- the proposed building limitations for the "protection of Ridgeline views."

Further, we concur with CCA's and MCFB's assertion that the Coastal Act gives you, the local government, the authority over and autonomy from the Coastal Commission when determining the precise content of your Local Coastal Program. *See* Pub. Res. Code §§ 30500, 30512.2.

In closing, we urge you to carefully consider these highlighted concerns. Bringing the LCPA into closer conformity with constitutional norms for land use will help to insulate the County from future litigation. It will put applicants and County employees alike on notice of their respective rights and obligations, and it will ensure respect for the constitutional rights of Marin County property owners.

Sincerely,

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