



February 1, 2019

Executive Director John Ainsworth  
Chair Dayna Bochco & Commissioners  
California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105-2219

VIA E-MAIL [John.Ainsworth@coastal.ca.gov](mailto:John.Ainsworth@coastal.ca.gov)  
AND FIRST-CLASS MAIL

Dear Executive Director Ainsworth and Honorable Commissioners:

Pacific Legal Foundation, the estate of Willie Benedetti, and Arthur and Aaron Benedetti submit these comments on the proposed Marin County Local Coastal Program amendments.

Pacific Legal Foundation is the nation's oldest public interest property rights foundation. Over the last several years, PLF has closely followed Marin County's Local Coastal Program (LCP) amendment process. PLF attorneys have submitted comment letters and appeared in person at Marin County and California Coastal Commission hearings to highlight constitutional and other legal infirmities in provisions of the Local Coastal Program Land Use Policy and Implementing Program Amendments. PLF is also currently representing the estate of Willie Benedetti—a Marin County farmer for over 45 years—in pending litigation as to portions of the previously adopted Land Use Plan amendments. Compl. and Pet. for Writ of Admin. Mandate, *Benedetti v. County of Marin*, No. CIV1802053 (Super. Ct. of Marin Cnty., July 16, 2018). This Commission is named as a real party in interest to the litigation, and Aaron and Arthur Benedetti are the successors-in-interest to the pertinent property and to the lawsuit.<sup>1</sup>

When a local government like Marin County seeks to amend its LCP, it must obtain certification from this Commission. Cal. Pub. Res. Code § 30514(a). This Commission must now decide whether to accept or reject the amendments submitted by Marin County.

But both Amendments 3 and 7 contain significant constitutional and other legal infirmities. Should they be approved by the Coastal Commission in their current form, Marin County landowners will be subjected to unconstitutional limitations on their property rights and will face tremendous uncertainty. Furthermore, Marin County may face additional legal challenges as a result. The estate of Willie Benedetti, Aaron and

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<sup>1</sup> Although Aaron and Arthur Benedetti are successors-in-interest to the lawsuit and join this letter, PLF is not currently representing them in an attorney-client capacity.

Arthur Benedetti, and PLF urge this Commission to reject these amendments and return them to the Marin County Board of Supervisors for necessary revisions.

### **Limitation of Development Rights**

Amendment 3, covering Implementing Program sections related to agriculture, contains provisions that significantly reduce the development rights of landowners. The existing certified Local Coastal Program allows landowners to seek approval through a Conditional Use Permit or Master Plan Process to build additional residential units beyond a primary dwelling unit. But Section 22.32.024(B) of the proposed Implementing Program limits the number of total structures to three agricultural dwelling units per “farm tract.” Section 22.130.030 defines “farm tract” as “all contiguous legal lots under common ownership.”

These provisions effect a substantial reduction of development rights for agricultural landowners in Marin County’s coastal zone. Because all contiguous legal lots are merged under the definition of farm tract, an owner of a large farm tract could be left with one or more legal lots deprived of all economically viable use, resulting in a *per se* taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Even for lots that retain some economically viable use, the destruction of previously held development rights may still subject Marin County and this Commission to a takings claim requiring compensation under *Penn Central Transportation Co. v. City of New York*, 438 US. 104 (1978) (establishing the multi-factor analysis for determining when regulation effects a compensable taking).

In fact, the California Court of Appeal has held that such a significant downzoning of property may effect a compensable taking. *See Avenida San Juan Partnership v. City of San Clemente*, 201 Cal. App. 4th 1256 (2011) (finding a regulatory taking where a change in zoning definition reduced development rights of a 2.85 acre parcel from four dwellings per acre to one dwelling per twenty acres).

Not only is this county-wide diminution of development rights constitutionally questionable, it is unnecessary. Many ranchers and farmers in Marin County have voluntarily transferred conservation easements that protect agriculture and restrict development while largely preserving their development rights. But the Program’s definition of “farm tract,” combined with its unit cap on development, will extinguish these rights for many landowners without providing them any compensation. The estate of Willie Benedetti, Aaron and Arthur Benedetti, and PLF urge the Coastal

Commission to prevent this radical unsettling of the reasonable investment-backed expectations of ranchers and farmers in Marin County.

### **Affirmative Agricultural Easements and Restrictive Covenants on the Division of Land**

As noted above, PLF is involved in pending litigation on behalf of the estate of Mr. Willie Benedetti, a longtime Marin County farmer, regarding several provisions of the previously adopted LUP amendments. The previously submitted Implementing Program amendments contain additional language that exacerbates the legal deficiencies of those amendments.

For example, Section 22.32.024(A) of the previously submitted Implementing Program for agriculture requires that each “agricultural dwelling unit” be “owned by a farmer or operator” who is “actively and directly engaged in agricultural use on the property.” This mandate will force property owners to remain in a commercial agricultural market permanently, even if continued commercial agricultural use becomes impracticable.

Further, the Program defines “actively and directly engaged” as “making day-to-day management decisions for the agricultural operation and being directly engaged in production . . . for commercial purposes,” or “maintaining a lease to a bona fide commercial agricultural producer.” Section 22.130.030(A). This provision therefore requires landowners to participate in commercial agricultural markets in perpetuity—either personally or by forced association with a commercial agricultural producer. The requirement prevents landowners and their successors from ever exiting the commercial agricultural market. This requirement ignores commonplace and legitimate reasons that a landowner might necessarily be temporarily prohibited from running day to day agricultural operations, such as medical hardship or changing market conditions that require the temporary fallowing of land to avoid economic losses.

PLF has already successfully challenged a less onerous affirmative easement permit condition, one that did not even require commercial use. *See Sterling v. California Coastal Commission*, No. CIV 482448 (Cal. Sup. Ct. June 18, 2010). In *Sterling*, Judge George A. Miram of the San Mateo County Superior Court held that an affirmative agricultural easement on 142 acres, imposed as a permit condition for the development of a single acre, amounted to an unconstitutional land-use exaction in violation of the rules laid out by the U.S. Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

*Nollan* and *Dolan* require an essential nexus and a rough proportionality between the permitting condition and the public impact of a proposed development. Conditioning a permit for a single dwelling on the perpetual use of the property for commercial agricultural purposes fails the essential nexus test because the requirement of perpetual commercial agricultural use is not closely related to the impact of building a single dwelling. This is especially true where potential dwellings might be desired on sites that are not currently in agricultural use, or that may not even be suitable for such use. Similarly, because the affirmative easement condition demands a far greater concession than necessary to relieve the public impact of constructing a single dwelling, it runs afoul of *Dolan*'s rough proportionality test. Thus, the proposed agricultural easement requirement will not survive the heightened scrutiny of permitting conditions applied under *Nollan* and *Dolan*.

The same result will obtain with respect to the restrictive covenants against further division of legal lots which will be required as a condition of development. *See* Sections 22.32.02x(D)(4), 22.32.025(B)(4). A permanent restrictive covenant against the subdivision of land placed on a large legal lot as a condition for construction of a single dwelling will fail the same nexus and proportionality standards of *Nollan* and *Dolan*. Much like the affirmative agricultural easement—and especially in conjunction with it—this requirement likely constitutes an unconstitutional exaction.

If Marin County wants to encourage agricultural use then it should do so through constitutional means, such as the use of tax incentives. *See, e.g., Williamson v. Commissioner*, 974 F.2d 1525, 1531–33 (9th Cir. 1992) (discussing provisions of estate tax law providing special benefits to property used as a family farm). Placing unconstitutional conditions on the ranchers and farmers of Marin County only serves to diminish the rights of law-abiding, productive landowners, while opening Marin County and this Commission to potential litigation for takings claims.

### **Definition of Ongoing Agriculture**

The definition of ongoing agriculture in Section 22.130.030 of the proposed Implementing Program will create significant uncertainty for Marin County farmers and ranchers. Ongoing agriculture is defined largely by a list of activities that purportedly do not fall under that category, but leaves open unlimited discretion for the Director of the Community Development Agency to require a CDP for any activity that he determines “will have significant impacts to coastal resources.” This nearly unlimited discretion invites arbitrary enforcement and creates the potential for future abuse.

Commercially viable farming and ranching often requires flexibility to respond to shifting market conditions from year to year, or even from season to season. The definition will likely leave farmers and ranchers unsure of which practices may require a coastal development permit, and could shift the burden onto agricultural landowners to show which uses constitute ongoing activities within Marin County. Such a course would conflict with the Coastal Act's policy to preserve coastal agriculture. *See* Pub. Res. Code §§ 30241, 30242. Even where a rancher or farmer may be able to establish that an agricultural activity should be exempt from a CDP, the time and expense of establishing the historical practice for a given area in the face of a Commission cease and desist order could prove financially disastrous.

The definition is representative of a growing trend of acknowledging no limiting principle to the Coastal Commission's jurisdiction over "development" when a project is alleged to result in a "change in intensity of use and access" of land within the coastal zone. *See, e.g., Greenfield v. Mandalay Shores Cmty. Ass'n*, No. 2D CIV. B281089, 2018 WL 1477525 (Cal. Ct. App. Mar. 27, 2018) (holding that a ban on short term rentals in a coastal community could constitute a change in intensity of access justifying issuance of a preliminary injunction); *and Surf Rider Found. v. Martins Beach 1, LLC*, 14 Cal. App. 5th 238 (Ct. App. 2017) (holding that closing a paid access road on private property constitute a change in intensity of access requiring a coastal development permit), *cert. denied*, 139 S. Ct. 54 (2018).

The Marin County staff report asserts that the Director of the Community Development Agency "will act consistent with" the goals of the Coastal Act in interpreting the phrase "ongoing agriculture" and determining when a CDP is required. Marin Cty. Comty. Dev. Agency, Planning Div. *Memorandum Re: Response to Pacific Legal Foundation Letter dated Oct. 1, 2018*.<sup>2</sup> This assurance does not cure vagueness issues in the written LCP. The inquiry is not whether officials will act appropriately, but whether a law as written is so vague that it provides insufficient guidance to the public as to what behavior is prohibited, and whether it grants so much discretion to officials that the law creates "attendant dangers of arbitrary and discriminatory application." *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

The difficulty of establishing which uses constitute ongoing activities under this definition is likely to create confusion about when coastal development permits are required. Given that obtaining a coastal development permit can already be a serious

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<sup>2</sup> Available at [https://www.marincounty.org/-/media/files/departments/cd/planning/local-coastal/2018/pc\\_supplement\\_10112018.pdf?la=en](https://www.marincounty.org/-/media/files/departments/cd/planning/local-coastal/2018/pc_supplement_10112018.pdf?la=en) (last visited Feb. 1, 2019).

drain on time and resources, the uncertainty created by this definition could substantially injure Marin County agriculture.

### **Conclusion**

PLF has fought for the property rights of all Americans for over 45 years, and has consistently acted as a watchdog against unconstitutional actions by the Coastal Commission. PLF requests that the Coastal Commission give close consideration to the objections raised in this comment letter. The proposed Local Implementing Program places severe—and potentially unconstitutional—burdens on the property rights of Marin County landowners, with many of these burdens falling principally on the agricultural community.

The estate of Willie Benedetti, Aaron and Arthur Benedetti, and PLF urge the Coastal Commission to reject the amendments in their present form and return them to the Marin County Board of Supervisors to address the concerns outlined above.

Sincerely,



JEREMY TALCOTT

cc: Effie Turnbull-Sanders, Vice Chair  
Dayna Bochco, Chair  
Mary Luévano, Commissioner  
Donne Brownsey, Commissioner  
Sara Aminzadeh, Commissioner  
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