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SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

WILLIE BENEDETTI,

Plaintiff and Petitioner,

v.

COUNTY OF MARIN, and BOARD OF SUPERVISORS OF THE COUNTY OF MARIN,

Defendants and Respondents,

and

CALIFORNIA COASTAL COMMISSION,

Real Party in Interest.

Case No. CIV1802053

VERIFIED COMPLAINT FOR DECLARATORY RELIEF (CCP § 1060) & PETITION FOR WRIT OF MANDATE (CCP §§ 1085, 1094.5)

INTRODUCTION

1. Plaintiff and Petitioner Willie Benedetti seeks a writ of mandate and declaration invalidating the unlawful and unconstitutional imposition of an affirmative requirement, adopted by Respondents and Defendants County of Marin, *et al.*, that landowners in Marin County be "actively and directly engaged" in agricultural use of their property in perpetuity as a condition on permitting for any dwelling units in the County's agricultural zone. This action is brought under Code of Civil Procedure (CCP) §§ 1060, 1085, and 1094.5, Public Resources Code § 30802, and Government Code § 65009. By this verified petition and complaint, Plaintiff and Petitioner alleges:

THE PARTIES

2. Plaintiff and Petitioner Willie Benedetti has a property interest in two parcels of land located in Valley Ford, California, in Marin County. Mr. Benedetti's property is located within the California Coastal Act's Coastal Zone. It also is located in an area classified as the Coastal Agricultural Production Zone (C-APZ), and is therefore subject to the provisions of the Marin County Land Use Plan (LUP) that regulates that zone. As set forth herein, the County has violated its important public duty not to approve LUP amendments that violate the federal and state constitutions. Without Mr. Benedetti's action, other persons beneficially interested in the legality of the County's LUP amendments would be unable to vindicate that interest, because of their inability to comment adequately on the amendments, as well as the burden of the litigation's time and cost. Mr. Benedetti is ably positioned to represent the public interest in this action, given his long-standing objections to the challenged LUP provisions. Finally, this lawsuit will confer a broad and important benefit on the public and will inure to the public interest by establishing important constitutional limitations on the scope of LUPs that in turn safeguard the public from regulatory overreach. For the same reasons, Mr. Benedetti is ably positioned to represent the public interest in ensuring that the County discharges its responsibilities in a constitutional manner.

3. Defendant and Respondent County of Marin is a political subdivision of the State of California, created on February 18, 1850, and organized and existing under the laws and Constitution of the State of California. The County is responsible for enforcing and defending its resolutions, ordinances, and other laws, including the policies of the Land Use Plan challenged herein.

4. Defendant and Respondent Board of Supervisors of the County of Marin is the County's executive and legislative body and is responsible for adopting resolutions, ordinances, and other laws, including the policies described herein.

5. Defendants and Respondents (hereinafter, "County") have the duty to adopt and enforce laws, including the County's LUP and the policies contained therein, consistent with federal and state statutory and constitutional requirements.

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6. Real Party in Interest California Coastal Commission (Commission) is a state administrative body operating under the California Coastal Act, Pub. Res. Code § 30000, *et seq*. The Commission is responsible for enforcing and defending the policies of the LUP challenged herein, whenever it asserts original or appellate jurisdiction over a Coastal Development Permit application for development in the County.

JURISDICTION AND VENUE

7. The Court has jurisdiction of this complaint and petition for writ of mandate under Sections 1060, 1085, and 1094.5 of the Code of Civil Procedure, Section 30802 of the Public Resources Code, and Section 65009 of the Government Code.

8. Venue lies in the Superior Court for the County of Marin under Code of Civil Procedure sections 393 through 395, in that the County is located here, and enforcement of the challenged LUP will occur in the County as well.

APPLICABLE LAW

9. The Coastal Act requires local governments with jurisdiction over Coastal Zone lands to adopt a Local Coastal Program (LCP), which in turn must be certified by the Commission. Pub. Res. Code § 30500. An LCP has two parts: an LUP and a Local Implementation Plan (LIP). The LUP is a general policy document that sets forth policies for coastal development and has the force of law. The LIP is the collection of implementing ordinances that carry out LUP policies. Both the LUP and LIP—together, the LCP—must be consistent with the Coastal Act, as well as with the California and United States Constitutions.

10. The Coastal Act provides that each local government shall prepare and determine the precise content of its own LUP. Pub. Res. Code § 30500(a), (c). The Commission must then review the proposed LUP to determine whether the plan does, or does not, conform to the requirements of Chapter 3 of the Coastal Act. *Id.* § 30512. Once the Commission certifies an LUP, the local government must then decide whether to adopt it as certified. If the local government elects to adopt the certified LUP, the Commission's Executive Director must then determine whether the local government's adoption of the LUP satisfies the Coastal Act. *See* Cal. Code Regs. tit. 14, § 13537(d).

11. Because they have the force of law, LUP policies must satisfy the constitutional requirement that a permitting entity must make an individualized determination that permit conditions bear an "essential nexus" and "rough proportionality" to the alleged impacts of a proposed project. U.S. Const. amend. V (Takings Clause); *id.* amend. XIV (incorporating the Takings Clause as against state and local governments); *see also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (applying the unconstitutional conditions doctrine in the context of the Takings Clause of the Fifth Amendment to the U.S. Constitution to require an "essential nexus"); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (applying the unconstitutional conditions doctrine in the context of the Takings Clause to require "rough proportionality" between permit conditions and a project's alleged impacts, and establishing the procedural rule that the burden is on the permitting authority to make the individualized determination that a nexus and rough proportionality exist).

12. Section 65009 of the Government Code allows a person to bring an action to set aside planning or land use actions taken by a public agency at a public hearing.

FACTUAL ALLEGATIONS

The County of Marin Adopts a New Land Use Plan

13. In 2008, Marin County began the process of comprehensive updates to its existing certified LCP.

14. After several years of negotiations with Commission staff, the County of Marin adopted an LUP for submission to the Commission for certification, submitted as a package of amendments to the LCP.

15. These include seven proposed Amendments, numbered Amendments 1 through 7. Amendment 1 contains the general LUP, while Amendment 2 contains the Agriculture chapter of the LUP.

16. Amendment 2 contains the agricultural policies at issue in this action.

17. At its hearing on November 2, 2016, the Commission certified a version of the County's LUP with modifications proposed by Commission staff, in addition to other amendments

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to the LCP. The deadline for the County to accept the certified amendments as modified was originally May 2, 2017. The Commission extended this deadline to May 2, 2018.

18. The Board of Supervisors of the County of Marin held a public hearing on May 16, 2017, during which it considered adoption of seven separate amendments as modified by the Commission. At the conclusion of that hearing, the Board adopted Amendments 1 and 2. That acceptance contained limiting language, stating that the acceptance was "based on the[] interpretations" of those Amendments contained within "the May 16, 2017 Board Letter and attachments."

19. In a letter to the Marin County Community Development Agency dated December 17, 2017, Coastal Commission District Manager for the North Central Coast District, Nancy Cave, stated that the Marin County action taken on May 16, 2017, was "not legally adequate because it was itself based on a series of interpretive findings that were not consistent with the Commission's action."

20. On April 24, 2018, the Board of Supervisors held another public hearing, at which the Board again adopted Amendments 1 and 2, as well as Amendment 6, without the same limiting language regarding interpretations of the Amendments.

21. Plaintiff and Petitioner Willie Benedetti participated in the April 24, 2018, hearing both by submitting written comments and by speaking during the public comment period. *See* Comment Letter of Willie Benedetti, Pacific Legal Foundation, and the Marin County Farm Bureau (April 13, 2018), a true and correct copy of which is attached as Exhibit A and incorporated herein by reference.

22. Upon information and belief, the County's April 2018 re-adoption of Amendments 1 and 2 was intended to fully supplant and supersede the County's May 2017 adoption of the same, and thus newly constitutes the County's acceptance of the Commission-certified Amendments.

23. None of the remaining Amendments were adopted before the May 2, 2018, deadline.

24. On June 6, 2018, during the Commission's monthly sitting, the Executive Director of the Commission reported that the County's April 2018 adoption of Amendments 1 and 2, as proposed by the Commission, satisfied Section 13544.5 of Title 14 of the California Code of

Regulations. The accompanying staff report states that "[u]ntil [the remaining amendments are certified], the existing Marin County LCP will continue to serve as the standard of review for development in the Marin County coastal zone."

25. At the same June 6 hearing, the Commission voted to formally concur with the Executive Director's determination.

The LUP Policy Challenged by Plaintiff & Petitioner Willie Benedetti

26. The fully adopted and certified LUP Amendment 2 contains Policy C-AG-2, which establishes permitted uses within the County's Agricultural Production Zone (C-APZ). These uses include the permitting of Agricultural Dwelling Units, which consist of Farmhouses, Intergenerational Housing, and Agricultural Worker Housing.

27. Under Policy C-AG-2(B), the County (and the Commission on appeal) "shall include all contiguous properties under the same ownership when reviewing a Coastal Permit application that includes agricultural dwelling units." Accordingly, all commonly owned and contiguous properties in the C-APZ zone are treated as one parcel for processing development applications under the LUP.

28. The LUP also contains Policy C-AG-5(A), which requires that, once permitted, any Agricultural Dwelling Unit "must be owned by a farmer or operator actively and directly engaged in agricultural use of the property" in perpetuity.

Mr. Benedetti's Future Plans for Development of a Dwelling and Eventual Retirement

29. Mr. Benedetti has a property interest in two parcels of land within Marin County, totaling 267 acres. One of the two parcels currently has one residential structure in which Mr. Benedetti resides, along with his wife.

30. Mr. Benedetti currently oversees the day-to-day operations of his companies as owner and president of Benedetti Farms and Willie Bird Turkeys.

31. Mr. Benedetti has two sons, Arthur and Arron Benedetti. Arron is involved in the daily operations of Benedetti Farms and Willie Bird Turkeys; Arthur is not.

32. Mr. Benedetti would like to build a dwelling unit on his 267 acres of property as a home for his son Arthur and his daughter-in-law.

33. Building a dwelling unit on Mr. Benedetti's property will trigger the requirement contained in Policy C-AG-5 that the property be owned by someone actively and directly engaged in agricultural use of the property.

34. Eventually, Mr. Benedetti would like to retire from his role as president of Benedetti Farms and Willie Bird Turkeys.

35. Once Mr. Benedetti finally steps down from day-to-day operations of his farm, he will want to maintain ownership of both companies and his 267 acres of property, as well as continue living on that property, which has been his home for 45 years, even though he will no longer be actively and directly engaged in agricultural use of the property.

36. Mr. Benedetti does not believe that the County can or should require that landowners within the Agricultural Production Zone, such as himself, remain "actively and directly engaged in agricultural use" of their property in perpetuity as a condition to obtaining a building permit.

FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF
(Code Civ. Proc. § 1060)

37. Under the Fourteenth Amendment to the United States Constitution, Mr. Benedetti has a federal right to be free from an irrational and illegitimate deprivation of his liberty or property. U.S. Const. amend. XIV. Under the Fifth and Fourteenth Amendments to the United States Constitution, Plaintiff Willie Benedetti has a federal right to be free from an uncompensated taking of private property for a public purpose. *Id.* amends. V, XIV.

38. Under the newly enacted LUP, the construction of Agricultural Dwelling Units are either principally permitted uses (as to the first Farmhouse and Intergenerational Housing Unit or Agricultural Worker Housing up to 36 beds or 12 units) or a conditional use (as to a second Intergenerational Housing Unit or Agricultural Worker Housing above 36 beds or 12 units). In other words, even under the LUP, landowners like Mr. Benedetti still retain the right to apply for and obtain a permit to build a new family home on their property.

39. The County has enacted, and is charged with enforcing, the LUP, an ordinance that immediately places unconstitutional burdens on any attempt to exercise this otherwise lawful use

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of property, by requiring the landowner to agree to remain "actively and directly engaged in agricultural use of the property" in perpetuity.

40. There is an actual and justiciable controversy in this case as to whether the LUP on its face violates the Fifth and Fourteenth Amendments of the U.S. Constitution and Article I, section 7, of the California Constitution. Mr. Benedetti alleges that the foregoing requirements, contained within the newly amended LUP, are unconstitutional. He is informed and believes, and on that basis alleges, that the County and the Commission consider the same requirements to be constitutional.

41. Thus, a declaratory judgment as to whether the LUP places an unconstitutional condition on Mr. Benedetti's liberty, and/or places an unconstitutional condition on the development of Agricultural Dwelling Units by requiring landowners to promise that they will remain perpetually "actively and directly engaged in agriculture," will resolve the controversy among the parties.

A. Violation of the Unconstitutional Conditions Doctrine as Applied to the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Section 1, Article I, of the California Constitution

42. Policy C-AG-5 of the LUP conditions the exercise of a state law and common law property right—a property owner's right to develop land through the lawful construction of a family home—on the requirement that the property owner remain "actively and directly engaged in agriculture in perpetuity."

43. All people have a constitutionally protected interest in their own liberty.

44. Section 1 of the Fourteenth Amendment to the United States Constitution provides that no state may "deprive any person of . . . liberty . . . without due process of law." U.S. Const. amend. XIV, § 1.

45. Section 1, Article I, of the California Constitution's Declaration of Rights establishes that "[a]ll people are by nature free and independent and have inalienable rights," including "enjoying and defending life and liberty." Section 7 of Article I states that "[a] person may not be deprived of life, liberty, or property without due process of law."

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46. This liberty interest includes the basic liberty to pursue and obtain happiness by engaging in the common occupations of the community.

47. Using state power to force an individual into a career chosen by the state similarly infringes on this basic liberty, preventing an individual from changing or choosing to refrain from engaging in the state-chosen occupation. *See Nash v. City of Santa Monica*, 37 Cal. 3d 97, 103 (1984) ("The exercise of state power to force upon an individual a career chosen by the state would surely raise substantial questions of constitutional dimension.").

48. The unconstitutional conditions doctrine prevents the government from coercing people into giving up constitutionally protected rights. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 603-05 (2013).

49. If the County had simply demanded that Mr. Benedetti engage in agriculture, it would have been liable for a deprivation of his liberty without due process of law. The unconstitutional conditions doctrine forbids the County from achieving indirectly that same impermissible end through the permitting process.

B. Violation of the Unconstitutional Conditions Doctrine as Applied to the Takings Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution

50. Under *Nollan*, 483 U.S. 825, *Dolan*, 512 U.S. 374, and *Koontz*, 570 U.S. 595, government may not exact any property interest from property owners as a condition on the exercise of a property right unless:

a. The exaction directly mitigates a public impact directly arising from the property owners' exercise of their property right; and

b. The exaction is roughly proportional in both nature and degree to the public impact arising from the property owners' exercise of the property right.

51. The requirement that property owners remain "actively and directly engaged in agriculture" on their property in perpetuity is not related to, and does not address, any impact arising from the property owners' exercise of their right to use some portion of their property for the construction of a dwelling unit, such as a family home.

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52. The requirement that the current landowner—as well as all subsequent landowners—remain "actively and directly engaged in agriculture" in perpetuity is not, and can never be, proportional in either nature or degree to any impact arising from property owners' exercise of their right to use some portion of their property for the construction of a dwelling unit, such as a family home.

53. Upon information and belief, Mr. Benedetti alleges that the foregoing requirement will be satisfied only through the granting and recording of an affirmative easement that the current landowner—and all subsequent landowners—will be actively and directly engaged in commercial agricultural use of the property in perpetuity.

54. Requiring the recording of a covenant or affirmative easement containing such language as a condition of permitting Agricultural Dwelling Units—as contemplated by the LUP—constitutes an exaction of a recognized common law property interest.

55. If the County had simply demanded that Mr. Benedetti issue a recorded covenant or affirmative easement containing such language, it would have been liable for a taking of property for a public use without payment of just compensation.

56. The County may not exact a recognized property interest as a condition on the otherwise lawful and principally permitted use of constructing a dwelling unless that requirement satisfies the nexus and proportionality requirements of *Nollan* and *Dolan*.

57. In adopting Policy C-AG-5, the County took legislative action in violation of the law and/or in excess of its authority.

58. As noted above, an actual and justiciable controversy exists among the parties concerning the legality of Policy C-AG-5. Mr. Benedetti contends that the policy is unconstitutional, as specified above. He is informed and believes, and on that basis alleges, that the County and the Commission dispute his contention. A judicial determination of the parties' rights and responsibilities arising from this actual controversy is necessary and appropriate at this time.

SECOND CAUSE OF ACTION FOR WRIT OF MANDATE
(Code Civ. Proc. § 1085)

59. All of the preceding paragraphs are reincorporated as if set forth fully herein.

60. The County's adoption of an LUP is a quasi-legislative action.

61. Section 65009 of the Government Code allows a person to bring a lawsuit to set aside an action taken by a public agency at a public hearing.

62. All issues raised within this verified pleading were raised in public hearings before the County, or were raised in written correspondence delivered to the County at or prior to the public hearing of April 24, 2018.

63. Mr. Benedetti has no plain, speedy, or adequate remedy at law. Pecuniary compensation to Mr. Benedetti would not afford adequate relief, or would otherwise be unavailable if the County's action were not first tested by writ, or would be extremely difficult to ascertain.

64. For the reasons set forth in the First Cause of Action, the County's adoption of the LUP violates the United States and California Constitutions, and is therefore arbitrary and capricious.

THIRD CAUSE OF ACTION FOR WRIT OF MANDATE
(Code Civ. Proc. § 1094.5)

65. All of the preceding paragraphs are reincorporated as if set forth fully herein.

66. The Coastal Act provides that any person aggrieved by the decision or action of a local government not appealable to the Commission may file a petition for writ of mandate under Section 1094.5 of the Code of Civil Procedure. Pub. Res. Code § 30802.

67. The County's approval of the Commission-certified LUP Amendment 2 is not appealable to the Commission, but rather is reviewed only by the Commission and its Executive Director for conformity with the Commission's conditional certification. *See* Cal. Code Regs. tit. 14, §§ 13537, 13544.5.

68. Mr. Benedetti has no plain, speedy, or adequate remedy at law. Pecuniary compensation to Mr. Benedetti would not afford adequate relief, or would otherwise be unavailable if the County's action were not first tested by writ, or would be extremely difficult to ascertain.

69. For the reasons set forth in the First Cause of Action, the County's adoption of the LUP violates the United States and California Constitutions, and is therefore in excess of the County's jurisdiction.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and Petitioner requests relief as follows:

1. A peremptory writ of mandate commanding the Defendants and Respondents to invalidate, set aside, and not enforce Policy C-AG-5, in whole or in part, as described above;

2. A declaration pursuant to Code of Civil Procedure section 1060 that:

   a. Policy C-AG-5 violates the unconstitutional conditions doctrine under the Fourteenth Amendment of the U.S. Constitution and Section 7 of Article I of the California Constitution on its face by requiring coastal agricultural landowners to waive their constitutional right not to be deprived of liberty without due process of law;

   b. Policy C-AG-5 violates the unconstitutional conditions doctrine under the Fifth and Fourteenth Amendments of the U.S. Constitution on its face by placing burdensome requirements on coastal agricultural landowners that do not have sufficient nexus to any harm caused by the development of dwelling units;

   c. Policy C-AG-5 violates the unconstitutional conditions doctrine under the Fifth and Fourteenth Amendments of the U.S. Constitution on its face by placing burdensome requirements on coastal agricultural landowners that are not roughly proportional to any harm caused by the development of dwelling units; and

3. For costs of suit, including reasonable attorney fees; and for such other and further relief as the Court may deem proper.

DATED: June 12, 2018.

Respectfully submitted,

DAMIEN M. SCHIFF
JOSHUA P. THOMPSON
JEREMY TALCOTT
Pacific Legal Foundation

By _____
JEREMY TALCOTT

Attorneys for Plaintiff and Petitioner
Willie Benedetti

VERIFICATION

I, Willie Benedetti, declare:

I have read the foregoing VERIFIED COMPLAINT FOR DECLARATORY RELIEF (CCP § 1060) & PETITION FOR WRIT OF MANDATE (CCP §§ 1085, 1094.5) and, except for matters stated on information and belief, the facts stated therein are true on my own knowledge, and as to those matters stated on information and belief, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed this 8 day of June, 2018, at Santa Rosa, California.

Willie Benedetti

WILLIE BENEDETTI

EXHIBIT A

PACIFIC LEGAL FOUNDATION

April 13, 2018

Marin County Board of Supervisors
c/o Kristin Drumm
3501 Civic Center Drive, Suite 329
San Rafael, CA 94903

VIA EMAIL kdrumm@marincounty.org

Re: Marin County Local Coastal Program Amendments

Dear Honorable Supervisors:

Willie Benedetti, Pacific Legal Foundation, and the Marin County Farm Bureau 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 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 Amendments and the Implementing Program. PLF is also currently representing Willie Benedetti—a Marin County farmer for over 45 years—in pending litigation as to portions of these amendments. Compl. and Pet. for Writ of Admin. Mandate, *Benedetti v. County of Marin*, No. CIV1702572 (Super. Ct. of Marin Ctny., July 14, 2017).

The Marin County Farm Bureau is a voluntary membership organization that represents nearly 300 farm and rural families in Marin County. MCFB is committed to preserving and improving production agriculture in Marin County through responsible stewardship of natural resources. As an organization that works at the local, state, and national level to improve legislation and regulations that could be detrimental to agriculture, the MCFB has closely watched and actively participated in the Marin County Local Coastal Program amendment process, and remains committed to protecting the livelihoods of its members.

At its March 20, 2018, meeting, the Board considered various options with regard to several modifications that Coastal Commission staff had made to proposed amendments to Marin County's Local Coastal Program. Those options included accepting the

modified amendments, accepting the amendments while also passing resolutions of intent to submit further clarifying amendments, or rejecting the amendments.

Accepting the amendments—even with resolutions of intent to amend—potentially will subject Marin County coastal landowners to unconstitutional limitations on their property rights, with no certainty of when—or if—ameliorating amendments will be adopted. Marin County landowners will face tremendous uncertainty under the new amendments, and the County may face additional legal challenges in the interim. Willie Benedetti, MCFB, and PLF urge this Board to reject the amendments.

Limitation of Development Rights

The final Implementing Program contains provisions that significantly reduce landowners' development rights. 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. The currently established C-APZ-60 zoning allows for the development of one additional residential house per 60 acres. Under the new Land Use Plan, only agricultural dwelling units—not single-family residences—will be allowed within the C-APZ zone. Moreover, Section 22.32.024(B) of the proposed Implementing Program limits the number of total structures to three agricultural dwelling units per "farm tract." And 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. For example, within a single large farm tract, an owner could be left with one or more legal lots deprived of all economically viable use. Regulations that deprive property owners of all economically viable use are a per se taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Worse, Section C-AG-5(A) of the Local Coastal Program Land Use Plan caps additional permissible intergenerational dwelling units at 27 for the entire Coastal Agricultural Zone. Once those 27 homes have been permitted, remaining farm tracts and legal lots necessarily will be deprived of all development rights. This increases the risk that Marin County will be subject to claims for *Lucas* takings.

Even for lots that retain some economically viable use, the destruction of previously held development rights may require compensation under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 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).

This county-wide diminution of development rights is not only 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. However, 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. Willie Benedetti, MCFB, and PLF urge the Board to reconsider 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 Mr. Benedetti, a longtime Marin County farmer, as to several provisions of the previously adopted land use plan amendments. The Implementing Program contains additional language that exacerbates the legal deficiencies of those amendments.

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

Further, the Program defines "actively and directly engaged" as "making day-to-day management decisions 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 the landowners, as well as their successors, from ever exiting the commercial agricultural market, even if the temporary fallowing of the land were necessary to prevent significant economic hardship.

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 down 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 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 a requirement for 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 far more concessions than those needed to relieve the public impact resulting from the construction of a single dwelling, it runs afoul of *Dolan*'s rough proportionality requirement. 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 that will be required as a condition of development. *See* Sections 22.32.024(J)(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, other, constitutional, means are available, 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 open Marin County to potential litigation for takings claims.

Definition of Ongoing Agriculture

MCFB has previously commented on the uncertainty that the staff-modified definition of "ongoing agriculture" will create for Marin County farmers and ranchers by exempting only "existing agricultural production activities" from coastal development permit requirements. *See*, *e.g.*, MCFB comment letter of October 28, 2016. The definition leaves open the possibility that standard agricultural practices could be subjected to a costly and time-consuming coastal development permit process, one that could render traditional agricultural practices economically infeasible.

Commercially viable farming and ranching often requires flexibility to respond to shifting market conditions from year to year, or even season to season. The Commission staff's modified language 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 "existing agricultural production 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.

The Commission staff's modified language is representative of a growing trend of acknowledging no limiting principle to the agency'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 Surfrider Found. v. Martins Beach 1, LLC*, 14 Cal. App. 5th 238 (Ct. App. 2017) (holding that closing a paid access road on private property constituted a change in intensity of access requiring a coastal development permit), *review denied* (Oct. 25, 2017), *pet. for cert. docketed* (Feb. 26, 2018).

The difficulty of establishing which uses are "existing agricultural production activities" is likely to create confusion about when coastal development permits are required. Worse, the time and expense involved in obtaining a coastal development permit when required could substantially injure Marin County agriculture.

Definition of Existing Development

Commission staff has also included a definition of "Existing Development" that would, among other things, change the County's application of Coastal Act section 30235 so as to deny future permits for seawalls to homeowners with homes or other structures

built after January 1, 1977, even when such permits are necessary to defend their homes against erosion. Such a definition is flatly inconsistent with longstanding practice, as well as California's constitutionally guaranteed right to protect property. Cal. Const. art. I, § 1 (stating that protecting property is an inalienable right of all people).

Historically, the term "existing structures" has been understood by both property owners and the Commission to mean structures existing at the time a permit application is made for a seawall. *See* Br. of Resp. Cal. Coastal Comm'n, *Surfrider Found. v. Cal. Coastal Comm'n*, No. A110033 (1st. Dist. Ct. App. Jan. 2006), at 20 ("[T]he Commission has consistently interpreted section 30235 to refer to structures that exist at the time of the application."). Although the Commission has recently acted inconsistently with that understanding, untold numbers of permits have been granted over the years for structures built in reliance on the Commission's longstanding position. The definition pressed on Marin County by Commission staff during the review of the County's LCP amendment is a radical change that is likely to draw litigation.

PLF is unaware of any appellate decision interpreting the term "existing development" in Section 30235. There is not, therefore, available binding precedent to settle that meaning, and thus one can expect litigation by aggrieved property owners affected by the proposed changed definition. Because the changed definition will surely result in damaged structures, it will likely subject Marin County to litigation concerning the meaning of Section 30235 and, ultimately, liability for the resulting property damage.

The Commission has supported recent legislative efforts to alter the definition of existing development within the Coastal Act, but such efforts have, to date, been unsuccessful. *See*, *e.g.*, AB 1129, 2017 Assemb. (Cal. 2017) (would have amended the Coastal Act to define "existing development" as development that existed as of January 1, 1977, but the bill died on the inactive file). The Commission staff has now sought to force this unpopular policy preference on local governments throughout the coastal zone by the device of staff modifications to coastal programs and amendments that are submitted to the Commission for certification. The County should not accede to the Commission staff's wrongheaded and illegal demands.

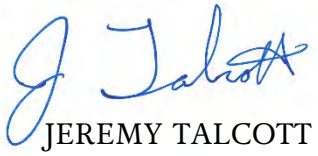
Conclusion

MCFB has worked to preserve the livelihood of farmers and ranchers in Marin County—and all of California—since 1923. Willie Benedetti has farmed within Marin County for over 45 years. PLF has fought for the property rights of all Americans for

over four decades. Willie Benedetti, PLF, and MCFB all request that the Board give close consideration to the objections raised in this comment letter. The proposed Local Coastal Program Amendments and Implementation Program place severe—and potentially unconstitutional—burdens on the property rights of Marin County landowners, with many of these burdens falling principally on the agricultural community.

Accepting the amendments while simultaneously passing a resolution of intention to further amend is not an adequate course of action, because it will subject Marin County residents to further uncertainty and will open the County itself up to potential legal challenges and liability. Willie Benedetti, MCFB and PLF urge the Board instead to reject the current amendments and engage in a renewed amendment process that respects the property rights all Marin County coastal landowners and acknowledges the market realities of agriculture which Marin County ranchers and farmers face.

Sincerely,



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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

DAN STERLING and DENISE STERLING, Plaintiffs and Petitioners, v. CALIFORNIA COASTAL COMMISSION, Defendant and Respondent.	No. CIV 482448 Dept. 28 **[SECOND REVISED PROPOSED] STATEMENT OF DECISION**

INTRODUCTION

This case involves the California Coastal Commission's (CCC) attempt to require applicants (Sterlings) for a coastal development permit for one home to dedicate the remainder of their land—about 140 acres—to active agricultural use, forever. This condition demands that the Sterlings deed an easement to this effect to the People of the State of California. The Sterlings seek judgment on a motion for writ of mandate, invalidating the condition under Code of Civil Procedure § 1094.5.

Oral argument was held on February 25, 2010. Mr. J. David Breemer, of Pacific Legal Foundation, appeared on behalf of Petitioners Dan and Denise Sterling. Deputy Attorney General

Hayley Peterson appeared on behalf of Respondent California Coastal Commission. The Court has considered the pleadings and arguments, and now issues the following decision:

I

BACKGROUND

A. Facts and Local Administrative Process

Dan and Denise Sterling live in San Mateo County (County) with their four children. In 1997, the Sterlings purchased a largely unimproved 143-acre parcel of land (the Property) in El Granada, California, in the unincorporated area of the County.

The Property is comprised of sloping, dry, and sparsely vegetated land. Only small pockets of flat land near a creek, amounting to 10 acres in total, are considered prime agricultural soil. Neither this area nor any other part of the Property was used for crops at the time the Sterlings acquired it. There is evidence in the record that the Property cannot be viably farmed.

Recent owners, including the Sterlings, have leased upland areas of the Property to nearby ranchers for grazing 10 head of cattle. This arrangement is not for profit, but merely a mutually beneficial agreement by which the cattle owners get pasture, while the owner receives grazing that reduces fire hazards on the property.

The Sterlings bought the Property with the intent to build a permanent family home. Soon after acquiring the land, the family moved into a small, preexisting mobile home. The mobile had been placed on the lower, flatter portions of the Property by some unknown person who owned the land prior to the Sterlings. The Sterlings planned on using the mobile home as temporary quarters as they built a larger house.

Under the County's land use code, the Property is zoned for Planned Agricultural Development (PAD). This zoning classification conditionally permits residential homes, the allowable number depending on amount of acreage. Due to its size, the Sterlings' Property is entitled to two density credits; *i.e.*, two homes.

In 2000, the Sterlings applied to the County to subdivide their land into two parcels, one large and one small, and to build a 6,456-square-foot home on the larger proposed parcel. Five

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years later, the Planning Commission denied the project, based primarily on objections to subdivision of the Property.

The Sterlings then abandoned their planned subdivision and simply sought approval of one home. They proposed the home on a flat area south of, and set back from, the creek. This area was and is not used for agriculture. As part of their application, the Sterlings submitted an agricultural management plan. Their plan stated that they desired to continue voluntarily grazing 10 head of cattle on about 1/3 of the Property, through a lease arrangement with a nearby rancher. The County unanimously approved this revised plan, finding it was consistent with the Local Coastal Program. Although approval was conditional, the County did not require the Sterlings to dedicate any kind of agricultural easement.

B. Coastal Commission Proceedings

Soon after the County approved the Sterlings' home plans, the CCC appealed the County decision to itself. No hearing was set on the issue for two years. During this time, the Sterlings continued to live in the small, preexisting mobile home. While discussing the project with the CCC staff, the Sterlings offered two potential 9,515-square-foot sites, rather than one, for their proposed home. The Sterlings specifically proposed an alternative to the County- approved "South Site." This new "North Site" was located on the mobile home pad north of the creek, in an area characterized by prime soil.

When the CCC refused to hold a hearing after two years, the Sterlings threatened to file a suit to compel one. The CCC staff subsequently set a final hearing on February 5, 2009. In so doing, the staff recommended that the CCC not consider the new North Site. The CCC staff report and hearing thus focused solely on the County-approved "South Site."

The staff recommended that the CCC approve the Sterlings' proposed home on the South Site, subject to approximately 11 new conditions, and 32 conditions previously required by the County. One of the new conditions recommended by CCC staff was that the Sterlings dedicate to the public an "affirmative" agricultural use easement on all of the Property lying outside a 10,000-square-foot home building area. This condition specifically provided, in part:

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"All areas of the Property [except for the 10,000 square foot development area and driveway] shall at all times be maintained in active agricultural use;"

the Sterlings must, as permittees, "either personally conduct agriculture on all their land or enter into a lease with a third party willing to engage in agricultural use on the land;"

"[Prior to issuance of the coastal development permit], the applicants [the Sterlings] shall dedicate an agricultural conservation easement to a public agency or private association approved by the [Commission] Executive Director:"

the "easement deed shall run with the land in favor of the People of the State of California . . . and shall be irrevocable."

After hearing and considering the staff recommendation, the CCC unanimously voted to approve the Sterlings' permit according to staff recommendation and conditions, including the foregoing affirmative agricultural condition. The CCC found that the condition was justified under the County LCP as an alternative to denying the Sterlings' permit. It also made legal conclusions that the agricultural easement condition was consistent with the constitutional standards of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

On March 25, 2009, the Sterlings filed a verified Petition for Writ of Administrative Mandate under Code of Civil Procedure § 1094.5 and Complaint for Declaratory Relief. The petition for mandate alleges that CCC lacks jurisdiction and authority to impose the affirmative agricultural easement condition under the LCP and that the condition is unconstitutional as a taking of private property. The parties subsequently stipulated to hearing the mandate cause of action first.

II

STANDARD OF REVIEW

This Court interprets regulations and ordinances on a *de novo* basis. *Schneider v. Calif. Coastal Comm'n*, 140 Cal. App. 4th 1339, 1343-44 (2006) ("Where jurisdiction involves the interpretation of a statute, regulation, or ordinance, the issue of whether the agency proceeded in excess of its jurisdiction is a question of law."); *Burke v. Cal. Coastal Comm'n*, 168 Cal. App. 4th 1098, 1105-06 (2008).

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A claim that an administrative decision amounts to an unconstitutional taking of property is typically a mixed question of law and fact. *Ali v. City of Los Angeles*, 77 Cal. App. 4th 246 (1999). When a constitutional issue hinges on undisputed findings, the questions are legal and reviewed de novo. *Aries Dev. Co. v. Calif. Coastal Zone Conservation Comm'n*, 48 Cal. App. 3d 534, 546 (1975); *Liberty v. Cal. Coastal Comm'n*, 113 Cal. App. 3d 491, 502 (1980).

III

THE AFFIRMATIVE AGRICULTURAL EASEMENT IS AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY

The parties disagree as to whether the CCC has authority and jurisdiction under the County LCP—whose rules the CCC must apply here—to impose the agricultural easement condition on the Sterlings. The Court believes the CCC may have jurisdiction. However, the Court need not conclusively decide this issue, because even if the active agriculture easement is authorized by the LCP, the condition is invalid as an unconstitutional taking of private property.

A. The *Nollan* and *Dolan* Takings Tests

In the land use permitting arena, the controlling constitutional "takings" decisions are *Nollan* and *Dolan*. Together, this Supreme Court jurisprudence requires "proof by the local permitting authority of both [1] an "*essential nexus*" or relationship between the permit condition and the public impact of the proposed development, and of [2] a "*rough proportionality*" between the magnitude of the [] exaction and the effects of the proposed development.'" *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 860 (1996) (emphasis added). The affirmative agricultural easement condition fails both prongs.

1. The *Nollan* "Nexus" Test

In *Nollan*, the Supreme Court held that land use agencies may not use their permitting powers as an opportunity to exploit property owners by demanding concessions from them in exchange for development permits. *See Nollan*, 483 U.S. at 836-37; *Surfside Colony, Ltd. v. Cal. Coastal Comm'n*, 226 Cal. App. 3d 1260, 1269 (1991). *Nollan* held that a permitting authority can require a property owner to dedicate real property to public use in exchange for a permit only when the condition serves the same purpose, and remedies the same harm, as outright denial of the

permit. *Ehrlich*, 12 Cal. 4th at 860. This standard requires the government to show a direct "relationship between the permit condition and the public impact of the proposed development." *Id.* at 860.

Nollan emphasized that conditioning a permit on property owner concessions unrelated to the proposed project is problematic and unconstitutional because it suggests "'an out-and-out plan of extortion.'" *Id.* (citation omitted).

In *Ehrlich*, 12 Cal. 4th 854, the California Supreme Court accepted *Nollan*'s rationale and adopted the "nexus" test as a limit on permitting authorities in California. *Ehrlich*, 12 Cal. 4th at 860 (requiring a "relationship between the permit condition and the public impact of the proposed development"). *Ehrlich* emphasized that the *Nollan* "nexus" test imposes a heightened level of constitutional scrutiny. *Id.* at 866, 868, 871 n.7; *Surfside Colony*, 226 Cal. App. 3d at 378.

Here, the CCC imposed the affirmative agricultural easement condition on the Sterlings as an alternative to permit denial. It is not clear, however, that the easement condition substantially serves the same purpose as denial.

The Sterling home site is not in active agricultural use. Therefore, if a permit were denied, the homesite would remain in a raw state that would *potentially* allow future agricultural use. Permit denial would not cause any actual agricultural use to occur. On the other hand, the CCC's affirmative agricultural easement condition does. It imposes *actual* agricultural activity, rather than simply ensuring agricultural potential. The condition therefore serves a different public purpose from permit denial; while denial might advance preservation of agriculturally suitable land, the condition institutes actual agricultural use. The disconnect between the public interests served by permit denial and those served by the affirmative agricultural easement suggests the condition unconstitutional. *Nollan*, 483 U.S. at 837, 841-42.

Put differently, the affirmative agricultural easement condition fails the Nollan test because it is not related to the impact of the Sterling home. Because the Sterlings' home is to be built on a small area of their land that is not in active agricultural use, it will not take away any active agriculture. The affirmative easement does not mitigate the actual impact of the home, which is simply that the one acre of land would be taken out of potential, not actual, agricultural use. There

is no "relationship between the permit condition [requiring active agricultural activity] and the public impact of the proposed development [no loss of agricultural activity]." *Id.* at 860. Since there is insufficient evidence of a "close connection between the burden [caused by the development] and the condition," as required by *Nollan*, the condition is therefore unconstitutional. *Surfside Colony*, 226 Cal. App. 3d at 378; *Nollan*, 583 U.S. at 838; *Rohn v. City of Visalia*, 214 Cal. App. 3d 1463, 1475-76 (1989).

2. The *Dolan* "Rough Proportionality" Test

Even if the affirmative agricultural easement condition could satisfy *Nollan*, it fails the *Dolan* test. Under *Dolan*, the government must show its condition bears "rough proportionality" in both "*nature and extent* to the impact of the proposed development." *Dolan*, 512 U.S. at, 391 (emphasis added); *Ehrlich*, 12 Cal. 4th at 879-80.

A permit condition fails *Dolan*'s "roughly proportionality" standard if it demands more concessions (in nature or extent) from a property owner than needed to alleviate the public impact emanating from a project. *Dolan*, 512 U.S. at 393; *Liberty*, 113 Cal. App. 3d at 502. Here, the easement runs afoul of *Dolan* because it imposes demands that go beyond addressing the only arguable impact of the Sterlings' home—taking away a small area of idle land that could be potentially used for agriculture. The CCC demanded permanent institution of actual agricultural uses to mitigate a purported loss of potential agricultural land. The easement is not proportional in nature. *Dolan*, 512 U.S. at 393; *Liberty*, 113 Cal. App. 3d at 502.

The affirmative agricultural easement also fails *Dolan*'s rough proportionality test in scope and extent. The Sterlings' home takes up less than an acre. The CCC's easement condition takes 142 acres, requiring agricultural activity forever on behalf of the public, and transferring all the Sterlings' development rights to the public. It is flat out unconstitutional to require 142 acres to mitigate a perceived loss of one acre.

The CCC nevertheless argues that the agricultural easement condition is constitutionally justified because the Sterlings already engage in voluntary and limited cattle grazing. This contention is off point.

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The Sterlings' current grazing plan—allowing 10 head of cattle on 1/3 their land—is entirely voluntary and could be terminated at any time by either the Sterlings or the rancher to whom they lease the grazing rights. The CCC cites no authority holding that a property owner's decision to *voluntarily* engage in an activity allows the government to impose a permit condition making the use mandatory, especially when the mandatory use is unrelated to the proposed development. There is a major difference between a voluntary use of land and one that is made mandatory by the government for a public purpose, forever. The added burden on the Sterlings is irreconcilable with *Nollan* and *Dolan*.

Further, CCC affirmative agricultural easement condition is much more burdensome in substantive scope than the Sterlings' voluntary grazing plan. The CCC condition grants an interest in the Sterlings' real property[1] to the People of the State of California; one that wipes out the Sterlings' development right. Conversely, the Sterlings' voluntary grazing plan leaves their development rights—including the possibility of another home for the Sterlings' children—in the Sterlings' hands. And because the CCC easement grants an interest in the Sterlings' real property to another—a public or quasi-public entity—that outside entity acquires the right to "monitor" the Sterlings and their property. Under the voluntary plan, they keep their privacy. The CCC's permanent affirmative agricultural easement condition is not a proxy for, or related to the Sterlings' voluntary grazing of 10 head of cattle.

The CCC repeatedly suggests that the easement condition is justifiable as a means to protect agriculture. This misses the point of *Nollan* and *Dolan*. When a condition is not properly tailored to the development, the general interest it purportedly advances cannot preserve it. *Dolan*, 512 U.S. at 387; *Ehrlich*, 12 Cal. 4th at 868; *Surfside Colony, Ltd. v. California Coastal Comm'n*, 226 Cal. App. 3d 1260 ("While general studies may be sufficient to establish a mere rational relationship between [a legitimate interest and condition], Nollan requires a 'close connection' between the burden and the condition.").

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[1] An easement is a real property interest. 12 Witkin, Summary 10th Real Property, § 382, at 446 (2005).

Protecting agriculture is a valid governmental goal. But the means chosen here by the CCC to achieve that goal—imposing the affirmative agricultural easement on the Sterlings—cannot pass constitutional muster because they are neither (1) clearly nor (2) proportionately connected to the impact of the Sterlings' home. The easement condition is irreconcilable with *Nollan, Dolan* and the Constitution, and must be set aside. The petition for writ of mandate is granted.

DATED: 6/17/10.

GEORGE A. MIRAM

HONORABLE GEORGE A. MIRAM