MARIN COUNTY FARM BUREAU

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What the Marin Countywide Plan Update Means to Agricultural Landowners and Operators: How to Retain Your Rights Under the New Plan*

During the years-long process to update the Marin Countywide Plan, Adopted November 6, 2007 (CWP), and available at www.future-marin.org, Marin County Farm Bureau identified several issues critical to agricultural landowners and operators. Through dozens of meetings, countless letters, position papers and e-mail messages, and diligent testimony at every public hearing, Farm Bureau volunteers achieved some decisive victories by bringing about changes to some of the CWP's policies and programs which, had they remained unchanged in the plan, would have had real, detrimental impacts on agricultural landowners and operators.

On behalf of our members and the greater agriculture community, Farm Bureau sat down in productive meetings with each member of the Marin County Board of Supervisors and received commitments from them to remove or revise some of the more onerous regulations. They each confirmed their support for the importance of agriculture in Marin and their willingness to adopt policies that would not hinder our operations or infringe on our property rights. They promised to keep an open door and to work with us going forward to implement the plan.

That said, many of their good intentions were not literally translated into actual plan language. Only three of Farm Bureau's issues with the plan were thoroughly, satisfactorily addressed. Others resulted in language modifications which, in Farm Bureau's opinion, were either inadequate, ambiguous or subject to interpretation. Some issues were never addressed by the Board of Supervisors and remain unchanged. Many would be difficult or impossible to apply, and would be susceptible to appeal or legal challenge.

Because agriculture was the only industry that was singled out in the CWP, and because Farm Bureau was denied a seat at the table of the Working Group that drafted it, it followed that there was an inordinately large number of policies and programs we needed to fight. Despite the support professed by the supervisors, this initial lack of stakeholder representation coupled with a history of attempts by special interest groups to restrict and regulate agriculture, the adopted CWP contains flaws and inconsistencies as well as potentially illegal policies and programs.

On an encouraging note, county officials insisted that because their supportive intentions were detailed in the staff reports, which were prepared for each public hearing and are part of the public record, the intent could be used during landowners' permitting processes. And since the CWP is the county's blueprint under which all other regulations including the Development Code and the Local Coastal Programs must comply, we will, with your help, try to make sure that their supportive intent is reflected in these other planning documents as they are amended and revised.

During the CWP update process, the Pacific Legal Foundation, a non-profit law firm specializing in private property rights, kept a watchful eye on Marin County and its potentially unconstitutional policies. PLF has offered to review, at the request of a landowner, any instance where the landowner is denied a permit because he refused to submit to potentially unlawful conditions. PLF will then determine if it might get involved in a lawsuit at no cost to the landowner.

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* This document is not intended to provide legal advice. Please contact a qualified land use attorney when seeking development permit approvals.

Our intentions are to inform and empower ag landowners and operators to better deal with the CWP's regulations 'on the ground.' Farm Bureau and its legal advisors recommend that this new document and its policies and programs be regarded with healthy skepticism and an eye toward challenging them. Do not let them dissuade you from getting permits to build, modify or improve your agriculture infrastructure, and don't assume you must cave in to planners and planning commissioners who may attempt to force them on you. When you prepare a permit application, whether for a barn, residence, windmill or stock pond, we advise that you:

- Consult with both a good lawyer and a land planner familiar with Marin County for more complex projects.
- Ask the county to put Marin County Farm Bureau on the list of 'interested parties' for your project so that we may review the public documents and give you the benefit of our knowledge.
- Insist that the supervisors back up their support for agriculture by making sure that planning commission and staff put their good intentions into practice.
- Read the staff reports and use the county's stated good intent to your advantage. (These reports are available at http://www.co.marin.ca.us/depts/BS/main/index.cfm on the "Live Video Broadcast" page; click "Video" on the hearing date (9/11, 10/16 or 11/6/07) then 'Jump To" the CWP item.)
- Keep in mind that the Pacific Legal Foundation may be willing to back you up.

Farm Bureau will continue to remain vigilant on your behalf, but we need your help. We welcome the input and support of others in the agriculture community who agree that Marin's agriculture operations and lands are worth protecting. The only way we are going to keep from being smothered by unfair and burdensome governmental regulations is to work together to challenge these regulations whenever and wherever they appear or are attempted to be applied – and to stand up for our rights.

Altogether, Farm Bureau raised at least 24 issues. Following is a recap of some of the more important ones:

TRAILS ON AGRICULTURAL LANDS

Extracting Trail Easements is No Longer Required as a Condition for Permit Approval
Landowners no longer need to concede to requests or pressure to dedicate easements in exchange for any type of development permit! The Draft CWP had contained language that would have allowed the county to attempt to extract trail easement dedications as a condition of permit approvals (*Key Trends and Issues, TRL-1.g and TRL-1.h).* Farm Bureau and its attorneys strongly and repeatedly reminded county officials that such exaction was an illegal taking and presented case law to that effect, including a U.S. Supreme Court decision against the California Coastal Commission (Nollan v. Coastal Commission, 1987) showing that it violates the Fifth Amendment to the Constitution. The Board of Supervisors recognized this, adding language indicating that dedication or sale of easements would be "voluntary" and would involve "willing" landowners. If this policy is followed in practice, it will represent one of Farm Bureau's two big successes in the CWP update by maintaining our right to privacy and security on our ranches and farms.

Proposed trails not removed from ag lands in trails Plan Maps and maps not removed from CWP
The CWP contains a series of maps (*Maps 2-19a through 2-19j)* showing a network of existing and proposed trails drawn through agriculture properties. Farm Bureau strongly objected to having trails proposed on agricultural lands and requested that maps showing proposed trails be taken out of the CWP altogether, or that proposed trails on agricultural lands be removed from the maps. We maintained that their existence encumbers and devalues the affected properties on the basis that public access is disruptive and damaging to agricultural operations and results in liability, trespassing, poaching, theft, vandalism, fire, litter, damage to fencing, crops and animals, increased risk of bioterrorism and the potential for the introduction of disease such as foot and mouth, among others.

We received support for the elimination of proposed trails on private agricultural lands from a number of diverse state and local organizations including the Marin County Agriculture Commissioner, Marin Agricultural Land Trust (MALT), California Farm Bureau Federation, California Cattlemen's Association, Sonoma-Marin Cattlemen's Association, North Bay Dairy Women, North Bay Woolgrowers Association, Marin Organic, Marin Farmers' Market Association, Marin Association of Realtors, Marin Convention & Visitors Bureau, AgriCap Financial Corporation, Pacific Legal Foundation and environmental groups including the Sierra Club and the Environmental Action Committee. Despite this universal support, the county refused to remove the maps or the proposed trails, but added language to the maps to indicate that they are not to be used as trail guides.

Farm Bureau identified several illicitly proposed trails that had no justifiable basis. The county removed most of those that we had identified. Farm Bureau also asked the county to directly notify all landowners whose properties were encumbered with a proposed trail, or to provide us with the addresses so that we could notify the landowners. The county refused on both counts. Therefore, *there may still be proposed trails* shown on lands whose owners remain unaware of their existence. Final CWP Trails Plan Maps can be found at http://www.co.marin.ca.us/depts/CD/main/fm/cwpdocs/webmaps/wMap2_19a-j_Trails_Maps_All.pdf. Landowners who discover proposed trails on their property should contact Farm Bureau at once.

The county retained all proposed trails on ag lands if they 1) had been shown in the 1994 general plan, and/or 2) were part of a state or regional trail system including the California Coastal Trail, the Bay Area Ridge Trail, or the San Francisco Bay Trail *(TRL-1.d and Map 2-18).* The proposed alignment of the California Coastal Trail "and other new trail connections in the Coastal Zone" will be "considered" in the process to update the Local Coastal Program next year, a process which they say will involve collaboration with property owners and representatives from the ag community. Farm Bureau is currently seeking agricultural landowners to work with us in the 2008 LCP update process, and welcomes all volunteers. Please call or e-mail us.

Trails will be Designed and Located to Protect Private Property Rights
The CWP now contains additional language in Program TRL-2.d to site any new proposed trails located in agricultural areas in the public right-of-way where feasible, and avoid running through active agricultural lands or operations. Where no alternatives exist in order to complete a gap in a regionally significant route, the county will collaborate with the landowner to site the trail in a mutually acceptable location as far as possible from sensitive ag operations. Remember, though, that they cannot force you to dedicate any trail as a condition for permit approval.

NEW RESIDENTIAL BUILDING RESTRICTIONS

Permit Applicants to Show that Residential Building will Not Impact Agricultural Viability
Program AG-1.a.i of the CWP states that "Residential development shall not be allowed to diminish current or future agricultural use of the property…" Farm Bureau's concern is that this may be applied to disallow residential permits, including a simple room addition. An applicant cannot reasonably be expected to demonstrate that residential floor area will maintain or increase business profits to the extent that the business is or will become "viable." If the county uses such untenable policies to deny residential development applications, they can be challenged.

The basis for this program, cited in the "Key Trends and Issues" introductory section, and reflected in policies AG-1.1 and AG-1.7, is the faulty 2003 Marin Agricultural Economic Analysis by Strong Associates, which fails to differentiate between business expenditures and personal expenses, and illogically concludes that residential development will increase land ownership costs to the extent that it renders the agricultural operation unviable. By this unsound line of reasoning, unless an ag operation is or can be shown to be profitable (a great many cannot), any residential development – even a new small house or the addition of a

room – should be denied. We requested that AG-1.a.i be reworded instead to simply read: "Agricultural property cannot be converted to primarily residential use," but our suggestion was ignored.

County officials insist that they encourage the influx of new agriculturalists, and will welcome the establishment of family farms on properties where none now exist. These applicants should be encouraged by the county's intent.

Farm Bureau's additional concern is that if the regulation is not applied and permits are granted, the county will risk liability from third-party lawsuits. The flawed Strong report should not be used as the basis for the policies and programs on residential building, and any attempt to justify a permit denial based on its premises can be challenged.

Aggregate Cap Not Adopted

The Draft CWP allowed up to only 6,000 square feet of combined residential square footage for an entire property. This would have effectively wiped the potential for future ranch homes on large ranches and essentially downzoned every A-60 zoned property greater than 60 acres. It would have prevented or inhibited intergenerational transfer. Farm Bureau and its attorneys raised constitutional takings arguments here too, and the county removed the aggregate cap. This outrageous regulation should never have been proposed in the first place, but by removing it, the county was able to claim it supported agriculture. Averting an aggregate cap on residential square footage is the other big accomplishment for protecting the value of our ag lands and operations.

Individual House Size Limits

Program AG-1.a.iv allows up to a 4,000 square foot residence without design review (if it won't "diminish current or future agricultural use of the property") and up to 7,000 if certain criteria are met. Farm Bureau argued that much larger houses are allowed in other parts of the unincorporated county, and that to limit the size of our homes was discriminatory, especially on large ranches where lot-line setbacks and obstruction of neighbors' views and light are not an issue. In response, the county raised the limit to 8,500 square feet during the hearing process, but subsequently lowered it to 7,000 plus garage space up to 540 square feet and home office space up to 500 square feet.

Conservation Easements Cannot Be Required as a Condition of Permit Approval for a Larger House

The county added language to Policy AG-1.2 stipulating that conservation easements should be encouraged between "willing" owners;" however other policies and programs are inconsistent with this. One of these, Program AG-1.a.iii, sets forth a list of criteria and states that "the County shall exercise its discretion in light of some *or all*" of them (emphasis added) when determining an application for a new house or a remodel that would result in a house larger than 4,000 square feet. "Whether there is an existing or proposed dedication or sale of permanent agricultural easements or other similar protective agricultural restrictions such as a Williamson Act contract…" is one of those criteria. Another, Policy OS-2.f also contains language regarding "development dedication" as a tool to acquire conservation easements. Just as with trail easement extractions, a conservation easement extraction as a condition for permit approval would be unlawful. Although our request for language revisions was denied, the county has acknowledged that, just as with trails easements, it cannot require a conservation easement as a condition for permit approval. Farm Bureau and its attorneys continue to object to all regulations that encourage extraction on the grounds that they are unconstitutional. These regulations would not likely stand up to a legal challenge.

Production and Stewardship Plans Not Required of Bona Fide Ag Producers

Program AG-1.b still requires Agricultural Production and Stewardship Plans, but in response to Farm Bureau's input, waives the requirement for dwelling units used by owners or lessees who are directly engaged in ag production, for non-ag uses that are determined to be ancillary to and compatible with ag production, or when evidence of bona fide ag production is established on the land, such as the use of leasing, fencing, processing, or other agricultural infrastructure. For other, new agriculturalists, Farm Bureau continues to maintain that an applicant cannot be legally compelled to provide plans containing confidential business information such as competitive marketing and economic strategies in exchange for permits.

Subjecting Applicants to Arbitrary, Non-Specific Discretionary Review
Program AG-1.a.iii allows for discretionary review of all proposals to build a larger home. The problem with this regulation, and a basis to invalidate its application, is the fact that the criteria for review are vague and ambiguous, and the government has the ability to apply "some or all" of them. Applying regulations based on "discretion" opens the door to legal challenges that might arise when such discretion is applied arbitrarily, capriciously, or inconsistently. Such discretion may also be legally challenged as discriminatory or a violation of civil rights as it relates to applying conditions that favor long-term agriculturists over new ones, or those that seem to favor certain people based on age, vocation, physical ability, or the existence of heirs and successors.

OTHER AGRICULTURE RESTRICTIONS AND REQUIREMENTS

Ag Lands in the Inland Rural Corridor To Be Subjected to More Restrictive Regulations Similar to the APZ
Program AG-1.g applies the restrictive Agricultural Production Zoning (APZ) regulations to agricultural lands in the Inland Rural Corridor, *essentially downzoning virtually all agriculture land* that wasn't already in the Coastal Zone.

County officials had previously insisted that they never intended to apply the same, stringent regulations that are currently imposed on ag properties in the Coastal Zone (C-APZ) to other areas, but then made some non-substantive changes to the language, which left the entire effect of the program intact. This has a tremendous detrimental impact on the property rights and values of all the ranchers in the Inland Rural Corridor. (Map: http://www.co.marin.ca.us/depts/CD/main/fm/cwpdocs/Maps/Map1_2_Environmental_Corridors.pdf.)

Normal Agricultural Activities Included in the Glossary Definition of "Development"
The "change in intensity of use of land," something that regularly occurs with agriculture activities, remains in the definition of Development. County officials insist that they do not intend to hamstring normal ag activities with any sort of permit requirements, but the fact that this language remains codified leaves ranchers, farmers and the county itself now exposed to liability from potential third-party lawsuits that can be brought if permits are not obtained for normal ag activities.

Subdivision *Restricted* on All Ag Properties and *Prohibited* in Future Williamson Act Contracts
Both Policy AG-1.5, restricting subdivision on agricultural lands beyond what is allowable under the designated zoning, and Program AG-1.e that would "strengthen future Williamson Act contracts by prohibiting subdivision of the land for the duration of these contracts" in effect downzone property without compensation, will discourage landowners from entering into farmland protection contracts, and will make it difficult for farm family offspring and siblings to inherit, live on, and maintain agriculture operations on family farms. Because it limits the ability for intergenerational transfer, and because of the potential loss of property value, this regulation should be challenged.

Removal of Invasive Exotic Plants
Policy BIO-1.7 requires the removal of all invasive, exotic plants for projects "unrelated to agriculture." This leaves open the interpretation of whether new residential square footage is considered related to agriculture and may trigger this requirement. On large ranches, this requirement would be prohibitively onerous and costly, and virtually impossible in many cases. County officials claim that they did not intend for this requirement to apply to ag lands, and language to that effect can be found in the staff reports.

Organic Production Tied to Economic Viability
Farm Bureau objected to the CWP's emphasis on organic production over conventional practices, given that the majority of Marin's ag production is currently non-organic beef, sheep and dairy products. The Board of Supervisors agreed that this was inappropriate and removed related language. But the final CWP inexplicably reinserts "organic certification" into the criteria to build a larger home in Program AG-1.a.iii(4), which

should be challenged if it's ever used against an applicant. Other inappropriate language in Program AG-1.n equates increases in organic practices to protecting ag land and promoting economic viability – a flawed concept at best.

Streamside Setbacks Required for Areas of Historic Use
Farm Bureau requested that a change be made to streamside setback regulations in Policy BIO-4.1 to allow for appropriate and environmentally sensitive improvements, planting of crops and modification to existing ag structures in areas of historic agriculture use, or where highly productive soils can be utilized for ag production. The change was not granted, so now many of Marin's leading farmers could be prohibited from upgrading or expanding their operations. It also means that potentially productive soils will lay fallow.

Special Status Species
Farm Bureau objected to the inclusion of Map 2-2 which contained information from an outdated, inaccurate database, and of species protection as a means to limit or prohibit ag activities and structures. The map was retained with a disclaimer, and policies and programs remain that could be applied to prevent or hinder normal agriculture activities.

Sales and Processing Facilities Limited by Noise, Traffic and View Impacts
Program AG-2.c requires that agricultural processing and sales-related uses not result in any "significant" traffic, noise and view impacts. This ill-defined regulation will limit our ability to be viable and sustainable and will leave ranchers and farmers vulnerable to nuisance claims and lawsuits.

The Merger of Continuously Owned Parcels Under Easements will be Voluntary
Farm Bureau objected to Draft CWP language requiring the mandatory merger of parcels on lands with conservation easements. The county softened the language of Program AG-1.c so that mergers would be voluntary, and that it would consider incentives for such mergers. This is Farm Bureau's third and final "win" among all our issues.

Ag Structures and Homes Must Conform to Surrounding Design Character
Farm Bureau objected to Program DES-1.c requiring that all new structures be consistent and compatible with the surrounding environment, requesting that ag structures and residences not be subjected to further regulation. The county didn't agree and left the restriction intact.

Placement of Agriculture Structures Out of the Public "Viewshed"
Farm Bureau has long maintained that the public's views of our lands are not a public right, and that our buildings and their locations should not be restricted by so-called "viewshed" impacts, but should be sited according to best management practices for our ag operations. The county did not respond to our concerns.

Directional Signs
Program AG-2.m calls for drawing attention to agricultural areas with placement of directional signs. Farm Bureau objected to such signs as they would lead to increased trespassing, vandalism and reduced privacy. The program remains.

TDRs to be Identified and Administered by MALT
Program AG-1.f proposes that the county collaborate with the Marin Agricultural Land Trust to seek funding and prepare a feasibility study on the Transfer of Development Rights that would, among other things, evaluate the feasibility of MALT administering an expanded TDR program. Farm Bureau contends that giving MALT the authority to administer the TDR program would represent a serious conflict of interest.