



BOARD OF SUPERVISORS
AGENDA LETTER

Agenda Number:

Clerk of the Board of Supervisors
105 East Anapamu Street, Room 407
Santa Barbara, CA 93101
(805) 568-2240

Department Name: Planning & Development
Department No.: 053
For Agenda Of: 10/07/2014
Placement: Departmental
Estimated Tme: 2 hours
Continued Item: Yes
If Yes, date from: 09/16/2104
Vote Required: Majority

TO: Board of Supervisors
FROM: Department Director Glenn Russell, Ph.D. (805) 568-2085
Contact Info: Dianne Black, Assistant Director (805) 568-2086
SUBJECT: Proposed Ordinances and General Plan Amendments to Implement Measure P2014:
Initiative to Ban “High-Intensity Petroleum Operations”

County Counsel Concurrence
As to form: Yes

Auditor-Controller Concurrence
As to form: N/A

Other Concurrences: N/A

Recommended Actions: Consider recommendations of the County and Montecito Planning Commissions and adopt amendments to County zoning codes and general plan policies as follows:

A. Case No. 14GPA-00000-00010 (Comprehensive Plan Agricultural Element Amendment):

1. Make the findings for approval, including CEQA findings, of the proposed Resolution;
2. Determine that the adoption of this Resolution is exempt from the California Environmental Quality Act in compliance with Sections 15061(b)(3) and 15378(b)(5) of the Guidelines for Implementation of CEQA;
3. Approve Case No. 14GPA-00000-00010, a Resolution amending the Agricultural Element of the Comprehensive Plan.

B. Case No. 14GPA-00000-00011 (Comprehensive Plan Conservation Element Amendment):

1. Make the findings for approval, including CEQA findings, of the proposed Resolution;
2. Determine that the adoption of this Resolution is exempt from the California Environmental Quality Act in compliance with Sections 15061(b)(3) and 15378(b)(5) of the Guidelines for Implementation of CEQA;
3. Approve Case No. 14GPA-00000-00011, a Resolution amending the Conservation Element of the Comprehensive Plan.

C. Case No. 14GPA-00000-00012 (Comprehensive Plan Land Use Element Amendment):

1. Make the findings for approval, including CEQA findings, of the proposed Resolution;

2. Determine that the adoption of this Resolution is exempt from the California Environmental Quality Act in compliance with Sections 15061(b)(3) and 15378(b)(5) of the Guidelines for Implementation of CEQA;
3. Approve Case No. 14GPA-00000-00012, a Resolution amending the Land Use Element of the Comprehensive Plan.

D. Case No. 14GPA-00000-00013 (Coastal Land Use Plan):

1. Make the findings for approval, including CEQA findings, of the proposed Resolution;
2. Determine that the adoption of this Resolution is exempt from the California Environmental Quality Act in compliance with Sections 15061(b)(3), 15265 and 15378(b)(5) of the Guidelines for Implementation of CEQA;
3. Approve Case No. 14GPA-00000-00013, a Resolution amending the Coastal Land Use Plan.

E. Case No. 14ORD-00000-00008 (County LUDC Amendment):

1. Make the findings for approval, including CEQA findings, of the proposed Ordinance;
2. Determine that the adoption of this Ordinance is exempt from the California Environmental Quality Act in compliance with Sections 15061(b)(3) and 15378(b)(5) of the Guidelines for Implementation of CEQA;
3. Approve Case No. 14ORD-00000-00008, an Ordinance amending Section 35-1, the Santa Barbara County Land Use and Development Code, of Chapter 35, Zoning, of the Santa Barbara County Code.

F. Case No. 14ORD-00000-00009 (Article II Coastal Zoning Ordinance Amendment):

1. Make the findings for approval, including CEQA findings, of the proposed Ordinance;
2. Determine that the adoption of this Ordinance is exempt from the California Environmental Quality Act in compliance with Sections 15061(b)(3), 15265 and 15378(b)(5) of the Guidelines for Implementation of CEQA;
3. Approve Case No. 14ORD-00000-00009, an Ordinance amending Article II, the Santa Barbara County Coastal Zoning Ordinance, of Chapter 35, Zoning, of the Santa Barbara County Code.

G. Case No. 14ORD-00000-00010 (Montecito LUDC Amendment):

1. Make the findings for approval, including CEQA findings, of the proposed Ordinance;
2. Determine that the adoption of this Ordinance is exempt from the California Environmental Quality Act in compliance with Sections 15061(b)(3) and 15378(b)(5) of the Guidelines for Implementation of CEQA;
3. Approve Case No. 14ORD-00000-00010, an Ordinance amending Section 35-2, the Santa Barbara County Montecito Land Use and Development Code, of Chapter 35, Zoning, of the Santa Barbara County Code.

Summary Text:

1.0 General Information.

On June 13, 2014, the Board of Supervisors considered the initiative for Measure P2014: Initiative to Ban “High-Intensity Petroleum Operations,” hereafter “the Initiative.” When the Board considered Measure P on June 13, 2014, California Elections Code § 9118 required the Board to either adopt the ordinance without alteration, or submit the ordinance without alteration to the [voters]. The Board of Supervisors on June 13, 2014 then voted to submit the proposed ordinance without alteration to the voters of the County at the November 2014 Statewide General Election. If approved by a majority of the voters, the Initiative would generally prohibit throughout the County the “development, construction, installation, or use” of any facility or above-ground equipment that supports what the Initiative labels as “High-Intensity Petroleum Operations” including:

- “Well Stimulation Treatments” which the Initiative defines as methods that are “designed to enhance oil and gas production or recovery by increasing the permeability of the formation,” including hydraulic fracturing treatments and acid well stimulation treatments; and/or,
- Operations where the flow of hydrocarbons into a well are aided or induced by the introduction or injection of water, natural gas, steam, air, carbon dioxide, nitrogen, chemicals or any other substance. Per the Initiative, examples of such operations include: “waterflood injection,” “steam flood injection” and “cyclic steam injection.”

The Initiative does not provide processes for the County to consider and apply the exemptions stated in the Measure. If approved by the voters, the Initiative would be effective within weeks of the vote. County staff believes that it is prudent to ensure that processes to consider and apply the exemptions are codified, which would be operative if and only if and immediately upon the Initiative becoming effective, to provide certainty for the community and to reduce litigation risks for the County.

The Initiative is attached to this Agenda Letter as Attachment R; also attached as Attachment S is the County Counsel’s Impartial Analysis of the Initiative.

If approved by the voters, the Initiative (1) directs the County to amend County ordinances, plans and policies as necessary to ensure consistency with the Initiative, and (2) amends the following County planning documents to add language that prohibits High-Intensity Petroleum Operations:

- Agricultural, Conservation and Land Use Elements of the Comprehensive Plan
- Coastal Land Use Plan
- Coastal Zoning Ordinance (Article II of Chapter 35 of the County Code)
- County Land Use and Development Code (Section 35-1 of Chapter 35 of the County Code)
- Petroleum Code (Chapter 25 of the County Code)

This prohibition would apply to all land uses in the unincorporated area of the County that support onshore exploration and onshore production, but would not apply to onshore facilities that support offshore exploration or production from offshore wells. Section 5 of the Initiative (shown below) does provide that certain projects may be exempt from the general prohibition of High-Intensity Petroleum Operations if they meet the criteria listed under Subsections A, B or C of Section 5:

“SECTION 5: EXEMPTIONS FOR CERTAIN PROJECTS

- A. The provisions of this Initiative shall not be applicable to the extent, but only to the extent, that they would violate the constitution or laws of the United States or the State of California.
- B. In the event a property owner contends that the application of this Initiative effects an unconstitutional taking of property, the property owner may request, and the Board may grant, an exception to application of any provision of this Initiative if the Board finds, based on substantial evidence, that both (1) the application of any aspect of this Initiative would constitute an unconstitutional taking of property, and (2) the exception will allow additional or continued land uses only to the minimum extent necessary to avoid such a taking.
- C. The provisions of this Initiative shall not be applicable to any person or entity that has obtained, as of the Effective Date of this Initiative, a vested right, pursuant to State law, to conduct a High-Intensity Petroleum Operation.”

As shown above in Subsection 5.B, the Initiative provides that Board may grant an exemption to the provisions of the Initiative based on a claim of unconstitutional taking of property; however, it is otherwise silent in regards to any process to determine the applicability of the exemptions to specific projects. On July 29, 2014, your Board directed the Planning and Development Department to process amendments to codify a process that, if the voters approve the Initiative, will allow the County to review and, if appropriate, determine exemptions from the provisions of the Initiative. The attached amendments implement the direction of your Board and are written so that they:

- Are procedural in nature and neither enlarge nor narrow the exemptions contained in Section 5 of the Initiative; and
- Will become operative only if the Initiative is approved by the voters in November.

County staff takes no position on whether or not the voters should approve Measure P2014, and the processing and adoption by your Board of these amendments does not presuppose that Measure P2014 will pass.

2.0 Project Description.

The following provides a summary of amendments prepared by the Planning and Development Department and the recommendations by the County and Montecito Planning Commissions. Each commission suggested changes to the Department’s proposal, in particular each made recommendations regarding notice requirements for vested rights determinations by the Director. Additionally, the County Planning Commission recommended that exemption claims based on an unconstitutional taking of property be first heard by the Planning Commission for a recommendation that would be forwarded to the Board. As discussed in more detail below, the Department does not support this latter recommendation. Please refer to the County Planning Commission staff report (Attachment P) and the Montecito Planning Commission staff report (Attachment Q) for a more detailed analysis of the proposed amendments, and Attachments C through I for the specific language of the proposed amendments, and to the following sections of this Staff Report that detail the commissions’ recommendations.

2.1 Zoning Ordinance Amendments.

The County Land Use and Development Code, Montecito Land Use and Development Code, and Article II Coastal Zoning Ordinances are all proposed to be amended to add a new procedure titled “Determination of Exemption” that will provide a process whereby any person subject to the Initiative may submit an application requesting that the County determine that their particular project is exempt from the prohibitions on High-Intensity Petroleum Operations. This process is not mandatory, but is available to persons requesting a determination by the County.

As proposed, this process would only apply to requests for exemption pursuant to Sections 5.B (constitutional takings claim) or 5.C (vested rights claim) of the Initiative. The proposed amendments do not include a process for exemptions claimed under Section 5.A of the Initiative which provides that High Intensity Petroleum Operations are exempt from the prohibitions of the Initiative if the prohibition would violate the constitution or laws of the United States or the State of California. Claims of exemption based on Section 5.A of the Initiative should be addressed through a judicial proceeding.

Please refer to Attachments G, H and I for the specific language of the proposed amendments to the County Zoning Ordinances.

2.1.1 Section 5.B Exemptions. The proposed process for reviewing applications for exemption under Section 5.B (constitutional takings claims) is summarized as follows:

Review authority: The Board of Supervisors, as required by the Initiative, would approve or deny the application for a Determination of Exemption.

Public hearing: A public hearing is required prior to action by the Board.

Findings: To approve the request, the Board must find that:

- There is sufficient evidence to establish a claim of unconstitutional taking; and,
- The Determination is limited to allowing land uses only to the minimum extent necessary to avoid a taking.

Appeal: The decision of the Board is not subject to appeal except through judicial review.

Notice: Notice of (1) the submittal of the application and (2) public hearings is required to be provided consistent with other discretionary applications that require a public hearing.

Companion application: The applicant for the Determination of Exemption must also submit an application for the development project that is the subject of the exemption.

- The Director of the Planning and Development Department may waive the requirement to submit the companion application for good cause.
- If the Board determines that such an application for a development project is necessary to determine if the exemption applies, then the Board may require that the application for the development project be filed and processed before the Board takes a final action on the application for the exemption.

If an application for the development project is submitted along with the application for the determination, then the two applications will be processed in conjunction with each other, meaning that the Department will review both applications concurrently. However, in this

circumstance:

- The review authority that would normally approve or deny the application for the development project would instead only make a recommendation on the application to the Board.
- The review authority would not review or provide a recommendation to the Board on the application for the exemption.

Timeline:

- **Companion application:** If a companion application is processed, then the timeline for processing the exemption would be the same as the companion application.
- **No companion application:** If there is no companion application, then the Board hearing would be held within 180 days after the application is determined to be complete for processing; however, the Director may extend the period for an additional 180 days for good cause.

As noted above, pursuant to Section 5.B of the Initiative, the Board is the designated review authority for all exemption determinations that are based on a claim of an unconstitutional taking of property. Based on that provision, the Department recommended that applications for such determinations be reviewed and decided by the Board only. The County Planning Commission, at their hearing on September 3, 2014, recommended that the ordinances be revised to require that exemption determinations based on an unconstitutional taking of property be heard first by the Planning Commission, who would make a recommendation to the Board.

County Counsel has advised that the law on determining whether a constitutionally protected property right exists requires the property owner be given a full and fair opportunity to present all evidence relevant to the taking issue, including potentially the swearing in of witnesses for the purpose of testimony by direct and cross examination. Since the Board’s review of the Planning Commission’s determinations is *de novo*, this process would need to be repeated in some form or fashion before the Board. Implementing the County Planning Commission’s recommendation could lead to unnecessary dual hearings before the Planning Commission and the Board, each of which could be extremely long and expensive.

In light of County Counsel’s advice, the Department recommends that your Board not follow the County Planning Commission recommendation, and not revise the ordinances to require that exemption determinations based on an unconstitutional taking of property be heard first by the Planning Commission.

2.1.2 Section 5.C Exemptions. The proposed process for reviewing applications for exemption under Section 5.C (vested rights claims) is summarized as follows:

Review authority: The Director of the Planning and Development Department.

Public hearing: A public hearing is not required.

Findings: To approve the application the Director must find that sufficient evidence exists to establish that the applicant has obtained a vested right prior to the effective date of the Initiative.

Appeal: The decision of the Director may be appealed to the Planning Commission; the decision of the Planning Commission may be appealed to the Board.

Notice: Notice of the decision of the Director is required to be provided as follows:

- Published in a local newspaper of general circulation
- Mailed to all persons who have requested notice.
- The listed on the Department’s website.

Timeline: The decision of the Director shall be made within 60 days after the application is determined to be complete for processing; however, the Director may extend this time period to allow for and/or require the submittal of additional information or legal analysis, or for other good cause.

The ordinances as originally proposed by the Planning and Development Department did not include any noticing requirements for decisions on exemptions by the Director. However, at their hearing on August 25, 2014, the Montecito Planning Commission recommended that the ordinances be revised to require that the action of the Director be noticed (1) through publication in a local newspaper and (2) by mail to any interested party who has requested that they be sent notice. The County Planning Commission included this revision in their recommendation, and added an additional requirement that notice of the action of the Director be provided on the Planning and Development Department’s website. The ordinances recommended for approval by your Board have been revised to incorporate these recommendations regarding notice of the Director’s decision.

2.2 Comprehensive Plan and Coastal Land Use Plan Amendments.

If approved, the Initiative would amend the Agricultural, Conservation and Land Use Elements of the Comprehensive Plan, and the Coastal Land Use Plan, to add language that generally prohibits High-Intensity Petroleum Operations, including adding a new Policy 14 to the Land Use Element and a new Policy 6-5D to the Coastal Land Use Plan (see pages 6 and 7 of Attachment R). However, this language does not include any reference to Section 5 of the Initiative that allows that certain projects may be exempt from the prohibitions on High-Intensity Petroleum Operations. Therefore, in order to provide vertical consistency between the Comprehensive Plan and the Coastal Land Use Plan, and the zoning ordinances that would contain the actual procedures regarding exemptions, the attached proposed amendments to the Agricultural, Conservation and Land Use Elements of the Comprehensive Plan, and Coastal Land Use Plan, would add the following language that addresses Policy 14 and Policy 6-5D:

However, land uses in support of High-Intensive Petroleum Operations that are prohibited in accordance with Policy 6-5D of the Coastal Land Use Plan of the Local Coastal Program or Policy 14 of the Land Use Element of the Comprehensive Plan may be allowed provided an Exemption from Measure P2014: Initiative to Ban “High-Intensity Petroleum Operations” allowing said uses applies as provided in compliance with either the Article II Coastal Zoning Ordinance, or the County Land Use and Development Code, or the Montecito Land Use and Development, all of Chapter 35, Zoning, of the Santa Barbara County Code, as applicable.

Please refer to Attachments C, D, E and F for the specific sections of the Comprehensive Plan and Coastal Land Use Plan that are proposed to be amended.

2.3 Enforcement. The amendments to the County zoning ordinances includes language that provides that the Director shall not take any action to enforce the Initiative against any owner or operator of an existing facility if an application for a Determination of Exemption has been filed with the Department and the application has not expired or final action to deny the application has not occurred.

2.4 Application materials. Following submittal of the application, the Director would review the application to determine if it contains sufficient information to allow the applicable review authority to determine whether the granting of an exemption is appropriate based on the required findings. The Director may request that additional information be submitted if necessary. See Attachment T for a list of materials that may be required to be submitted with the application.

3.0 Petroleum Code (Chapter 25 of the County Code).

The purpose of the Petroleum Code is to regulate onshore petroleum operations including operations, abandonment and site restoration. The Petroleum Code is a regulatory tool for well and facility operational compliance that the County implements for all above-ground operations; all underground operations are under the authority of the State Division of Oil, Gas and Geothermal Resources (DOGGR). Any permit issued pursuant to Chapter 25 is contingent upon the permittee first obtaining the requisite planning land use permit. This procedural safeguard ensures that wells are permitted in a manner that is consistent with the provisions of the Coastal Land Use Plan, Comprehensive Plan and County zoning ordinances.

The Petroleum Code does address secondary and enhanced operations that are subject to the Initiative, sets standards for these types of operations, and allows the County to impose reasonable conditions upon such operations as deemed necessary to reduce the potential for impacts to public safety and the environment, primarily fresh water. The definition of these processes in the Petroleum Code is identical to those included in the Initiative.

The Initiative would add language similar to the language that would be added to the Coastal Land Use Plan, Comprehensive Plan and County zoning ordinances, and would require that all County actions taken under Chapter 25 shall be consistent and in compliance with the provisions of the Initiative. However, there are no sections of the Petroleum Code that conflict with the Initiative, and the provisions of the Petroleum Code do not allow the County to issue permits that would conflict with the language of the Initiative. Therefore, the County does not need to amend the Petroleum Code to add a process to grant exemptions from the prohibitions of the Initiative.

4.0 Processing Costs.

The Department’s current application fee resolution does not include a specific category for Determinations of Exemption since this would be a new type of application. However, the fee resolution does allow that in situations where a project does not fall within any of the listed categories, the Director may determine the appropriate application fee or deposit based on similarity of processing requirements with other types of projects. Should the Initiative be adopted by the voters in November, then the Department will request that your Board amend the fee resolution to add an appropriate fee or deposit to cover the cost of application processing. Until amended, the Department proposes to use the existing Energy and Minerals Division category for Pre-Applications that requires an initial deposit of \$5,000 and processing on a cost reimbursement basis.

5.0 Planning Commission Review.

5.1 Montecito Planning Commission. The Montecito Planning Commission reviewed these amendments at their hearing on August 25, 2014, and, by a unanimous vote, adopted resolutions (Attachments M, N and O) recommending that the amendments to the Coastal Land Use Plan, the Comprehensive Plan, and the County zoning ordinances be approved. As discussed above, their recommendation included requiring that decisions of the Director on exemption determinations based on vested rights claims be published in a local newspaper and mailed to interested parties. The attached ordinances recommended for approval include this noticing requirement.

5.2 County Planning Commission. The County Planning Commission reviewed these amendments and the recommendation of the Montecito Planning Commission at their hearing on September 3, 2014, and, by a vote of three in favor to two opposed, also adopted resolutions (Attachments J, K and L) recommending that the amendments to the Coastal Land Use Plan, the Comprehensive Plan, and the County zoning ordinances be approved. As discussed above, their recommendation included (1) requiring that decision of the Director on exemption determinations based on vested rights claims be published in a local newspaper, mailed to interested parties, and posted on the Department's website, and (2) requiring that exemption determinations based on an unconstitutional taking of property be heard first by the Planning Commission, who would make a recommendation to your Board. The attached ordinances recommended for approval include the first but not the second recommendation.

The Commissioners who voted against adopting these Resolutions were concerned about the proposed costs to the applicant to process an application for an exemption, and that the proposed ordinances did not provide sufficient certainty to individual applicants regarding their specific projects.

Environmental Review:

The County and Montecito Planning Commissions recommended that your Board determine that the proposed project is exempt from the California Environmental Quality Act pursuant to CEQA Guidelines Section 15061(b)(3), and, for those amendments to the Coastal Land Use Plan and the Coastal Zoning Ordinance, CEQA Guidelines Section 15265. Section 15061(b)(3), the general rule exemption, states that where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment that the activity is not subject to CEQA. Section 15265, the exemption for the adoption of coastal plans and programs, including amendments thereto, provides that compliance with CEQA is the responsibility of the California Coastal Commission.

Subsequent to the Planning Commission hearings the County Counsel is recommending that the CEQA Notice of Exemption be augmented by referencing CEQA Guidelines Section 15378(b)(5). Section 15378(b)(5) provides that organizational or administrative activities of governments that will not result in direct or indirect physical changes in the environment are not a project as that term is used in CEQA, and therefore are not subject to CEQA. Attachment B, the CEQA Notice of Exemption, has been revised to also include Section 15378(b)(5).

Special Instructions:

- A. The Planning and Development Department will satisfy all noticing requirements.
- B. The Clerk of the Board will provide copies of all Minute Orders, signed Ordinances and Resolutions, and published Ordinances to the Planning and Development Department, attention Noel Langle, Senior Planner.

Authored by:

Noel Langle, Planner (805) 568-2067

Attachments:

- A. Findings
- B. CEQA Notice of Exemption
- C. Case No. 14GPA-00000-00010 Comprehensive Plan Agricultural Element Amendment Resolution
- D. Case No. 14GPA-00000-00011 Comprehensive Plan Conservation Element Amendment Resolution
- E. Case No. 14GPA-00000-00012 Comprehensive Plan Land Use Element Amendment Resolution
- F. Case No. 14GPA-00000-00013 Coastal Land Use Plan Amendment Resolution
- G. Case No. 14ORD-00000-00008 County LUDC Ordinance Amendment
- H. Case No. 14ORD-00000-00009 Article II Coastal Zoning Ordinance Amendment
- I. Case No. 14ORD-00000-00010 Montecito LUDC Ordinance Amendment
- J. County Planning Commission Resolution 14-24
- K. County Planning Commission Resolution 14-25
- L. County Planning Commission Resolution 14-26
- M. Montecito Planning Commission Resolution 14-21
- N. Montecito Planning Commission Resolution 14-22
- O. Montecito Planning Commission Resolution 14-23
- P. County Planning Commission Staff Report (w/o attachments)
- Q. Montecito Planning Commission Staff Report (w/o attachments)
- R. Measure P2014 Initiative to Ban “High-Intensity Petroleum Operations”
- S. County Counsel’s Impartial Analysis of Measure P2014
- T. Proposed Application Materials for Determinations of Exemption