



# Monterey County

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## Board Report

Legistar File Number: 17-1087

October 24, 2017

**Introduced:** 10/17/2017

**Current Status:** Agenda Ready

**Version:** 1

**Matter Type:** General Agenda Item

- a. Introduce, waive reading, and conduct a public hearing on an ordinance to add Chapter 16.58 to the Monterey County Code to establish exemption procedures for land uses in support of oil and gas operations in order to implement provisions of Measure Z, a voter-approved initiative measure; and
- b. Set a date for adoption of the ordinance.

Proposed CEQA Action: Statutorily exempt per CEQA Guidelines section 15378(b)(5).

### RECOMMENDATION:

It is recommended that the Board of Supervisors:

- a. Introduce, waive reading, and conduct a public hearing on an ordinance (Attachment A) to add Chapter 16.58 to the Monterey County Code to establish exemption procedures for land uses in support of oil and gas operations in order to implement provisions of Measure Z, a voter-approved initiative measure; and
- b. Set a date for adoption of the ordinance.

### SUMMARY:

Measure Z authorizes the Board of Supervisors, after a duly noticed public hearing, to adopt ordinances to implement Measure Z. The proposed ordinance establishes the administrative processes to implement exemptions contained within Measure Z. (Attachment A.) This ordinance returns to the Board following the Board's July 25, 2017 public workshop on a preliminary draft of the ordinance. In response to input received at the workshop, County Counsel, in consultation with Resource Management Agency staff, has modified the ordinance to address issues raised and provide clarification where necessary. Staff is now returning to the Board with a revised ordinance to consider at a public hearing and to set for adoption in its current form or with such alterations as the Board may direct.

### DISCUSSION:

Measure Z is an initiative measure adopted by the voters of Monterey County on November 8, 2016. Measure Z prohibits land uses in support of well stimulation treatments in oil and gas production or recovery including hydraulic fracturing, prohibits land uses in support of oil and gas wastewater injection and impoundment subject to a five- year phase-out period, and prohibits the drilling of new oil and gas wells in the County's unincorporated areas. Measure Z provides for exemptions from its provisions to enable persons to exercise vested rights, to ensure its provisions are applied in a manner that does not effect an unconstitutional taking, and to extend the reasonable amortization period for land uses in support of oil and gas wastewater injection and impoundment. The proposed ordinance would establish the administrative procedures to implement these exemptions.

A number of comments were received on the preliminary draft ordinance which was presented to the Board at a workshop on July 25, 2017. Accordingly, County Counsel, in consultation with staff, has modified the ordinance to address issues raised and provide clarification where necessary. The changes since the July 25 draft are shown in strikethrough and underline in Attachment B. Substantive comments on the ordinance and changes made to the ordinance are summarized below.

Hearing Officer:

Several commenters questioned the manner of selection and qualification of the hearing officer. As revised, the ordinance addresses these comments by doing the following: adds minimum qualifications, which are that the hearing officer be a retired judge and have experience in civil judicial proceedings, including land use; adds potential for disqualification due to bias, prejudice, or interest; eliminates the option of a “panel of attorneys”; and moves the selection process from the definition section to the Hearing Officer procedure section of the ordinance. (See Section 16.58.100.B.)

Role of staff and counsel:

Several commenters contended that the preliminary draft ordinance failed to separate the adjudicatory and prosecutorial functions of County staff and County Counsel. These comments misunderstand the role of County Resource Management Agency (RMA) and County Counsel as contemplated by the ordinance. The role envisioned for RMA is to process and analyze the application, as RMA does with typical land use permit applications. RMA is not meant to function as adversary, advocate, or decision-maker. To the extent that the preliminary draft gave the impression of an adversarial process, the ordinance has been revised to clarify that the process is non-adversarial and to eliminate wording that could have been misread as creating or implying an adversarial process. Similarly, the role of County Counsel is to serve as legal adviser to RMA and the Board of Supervisors, as it typically does in a land use application, not to prosecute or advocate. The courts recognize that County Counsel serving as legal adviser to both the County planning agency and the Board of Supervisors in a land use matter is not a violation of due process. (*Witt Home Ranch, Inc. v. County of Sonoma*, (2008) 165 Cal. App. 4th 543, 569.)

Completeness determination:

Several commenters argued that the lack of timeframe and articulated standards for the application completeness determination would lead to too much discretion in the RMA Director and potential for delay. The intent of the ordinance is to establish a completeness review similar to that required by the Permit Streamlining Act (Government Code sec. 65920 et seq.). Hence, the ordinance has been clarified to add a 60 to 90 day deadline for the initial review for completeness. As was previously implicit but has been made explicit, the criterion for completeness is whether the claimant has submitted the required application materials, not a decision on the merits of the application. While the Permit Streamlining Act sets a 30-day limit on initial completeness review, the ordinance proposes a longer period because of the volume and complexity of applications that are expected to be submitted to the County nearly simultaneously.

Participation of the public:

Some commenters requested public access to the application materials and expanded notice. The ordinance has been revised to require RMA to post the application and non-exempt documents accompanying the application on RMA’s publicly accessible application database during the

completeness review period. Notice of public hearings has been expanded to property owners within 1500 feet, rather than 300 feet, of the subject property. Other suggestions for additional notice and annual reporting are not included because posting of the application on the RMA website provides for transparency without creating new obligations that County may be unable to fulfill with existing staffing.

Several commenters expressed concern that the process for Interested Persons to participate in the hearing before the Hearing Officer could be abused to add delay and expense to the process. The ordinance has been revised to add a process requiring persons who want to participate in the hearing to apply to the Hearing Officer, with opportunity for claimant response, and to authorize the Hearing Officer to determine whether and to what extent to allow Interested Persons to participate in the hearing before the Hearing Officer. (Section 16.58.080.)

#### Application Requirements

Several comments indicated that the application requirements needed correction and clarification. The definition of property owner has been corrected to make clear that it includes persons with documented interests in property other than record title interest in real property, consistent with what was stated elsewhere in the ordinance. The ordinance has also been revised to make explicit that the Claimant may choose the appropriate scope of application - for example, whether to file multiple applications or to combine them-and is not limited to filing a separate application for each affected parcel. Additionally, the preliminary draft provided that RMA would begin accepting applications no sooner than 90 days after adoption of the ordinance or January 8, 2018, whichever is later. The January date has been changed to March 1, 2018 to provide time for RMA to prepare for accepting applications.

#### OPTIONS FOR BOARD ACTION:

The ordinance requires two readings at the Board. The Board could set a regular meeting date to consider adoption of the ordinance as written. If the Board desires to modify the ordinance, Board could direct modifications to the ordinance at the hearing on October 24 and set the ordinance as modified for adoption, or the Board could request staff to make modifications and return at a future Board meeting to re-introduce the ordinance as modified.

#### CEQA:

The ordinance is not a project under the California Environmental Quality Act (CEQA). Pursuant to CEQA Guidelines section 15378(b)(5), administrative activities of government that will not result in direct or indirect physical changes in the environment are not a project under CEQA. This ordinance meets this standard because it merely establishes processes to implement exemptions that the voters already adopted as part of Measure Z.

#### OTHER AGENCY INVOLVEMENT:

County Counsel prepared the ordinance and has consulted with the Resource Management Agency. County Counsel has approved the ordinance as to form.

#### FINANCING:

Preparation of the ordinance does not have a financial impact. The ordinance authorizes the Board of Supervisors to adopt fees by resolution for applications and other costs under the ordinance. Staff

intends to bring a resolution proposing such fees to the Board of Supervisors for consideration at the same time as staff presents a final ordinance to the Board of Supervisors for consideration for adoption.

BOARD OF SUPERVISORS STRATEGIC INITIATIVES:

This ordinance facilitates the administration of policies enacted by Measure Z.

- Economic Development
- Administration
- Health & Human Services
- Infrastructure
- Public Safety

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Approved by: Carl P. Holm, AICP, RMA Director

The following attachments are on file with the Clerk of Board:

Attachment A - Ordinance adding Chapter 16.58

Attachment B - Draft ordinance showing changes since July 25, 2017 workshop