



Monterey County

Board Report

Board of Supervisors
Chambers
168 W. Alisal St., 1st Floor
Salinas, CA 93901

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Matter Type: General Agenda Item

- a. Consider Board Referral 2019.12 regarding increased penalties for non-compliance with archeological on-site monitoring requirements associated with development projects to better protect Native American and other cultural resources; and
- b. Provide direction to staff.

Project File: Board Referral 2019.12 - Archaeological On-Site Monitoring

Location: County Wide

Proposed CEQA Action: Not a Project under California Environmental Quality Act (CEQA) Guidelines Section 15378(b)(5)

RECOMMENDATION:

It is commended that the Board of Supervisors:

- a. Find that a report identifying the work required for various options is not a project pursuant to section 15378(b)(5) of the CEQA Guidelines;
- b. Receive a report in response to Board Referral 2019.12 regarding increased penalties for non-compliance with on-site archeological monitoring requirements associated with development projects to better protect Native American and other cultural resources; and
- c. Provide direction to staff regarding amending County regulations and prioritization of staff resources

SUMMARY:

On October 15, 2019 the Board of Supervisors made a Referral requesting the Resource Management Agency (RMA) explore an ordinance to strengthen Monterey County's enforcement and increase fines related to non-compliance with archeological on-site monitoring conditions. These conditions are added to development projects in areas of high archaeological sensitivity and are meant to protect Native American and other cultural resources. This report outlines the considerations and level of effort that would be required to process an ordinance to the Board.

The amount of work depends on the amount of outreach included. Staff would need to perform research of State regulations to assess the parameters for a possible ordinance. If existing regulations do not provide the level of protection desired, an alternative could be to pursue legislation.

Development of an ordinance to create new penalties will require a coordinated effort between RMA (Long Range Planning) and the Office of County Counsel. Staff estimates it would require about six months to adequately research, develop and process an ordinance to the Planning Commission. Staff is seeking direction on when this work should begin and prioritization of staff resources relevant to the

2020 Long Range Planning Workplan. The following is a summary of the RMA 2020 LRP Workplan that was recently presented to the Board, in order of priority:

- Development Evaluation System (DES): Program to implement General Plan Policy LU-1.19.
- Accessory Dwelling Units (ADU): Ordinance updating County Codes to align with State regulations
- Short Term (Vacation) Rental (STR): Ordinance to establish process and standards for vacation rentals.
- Big Sur Land Use Plan Update: Local Coastal Plan Amendment to address changes within the Big Sur Planning Area.
- Moss Landing Community Plan Update: Local Coastal Plan Amendment to address changes within the Moss Landing Community, as part of the North County Coastal Land Use Plan
- Castroville Community Plan Impact Fees: Nexus Study to consider new impact fees based on changes to the Castroville Community Plan.
- Chualar Community Plan: Initiate drafting a Community Plan in accordance with GP Policies LU-2.21 and LU-2.22,
- Mixed Use: Ordinance establishing the MU zoning designation and development standards to implement GP Policy LU-2.33.c
- Landscape Ordinance: Ordinance and associated manual updating County Codes to align with State regulations.

Since this will be a joint effort, priorities currently assigned to the Office of County could be affected as well. This would include various ordinances not associated with the LRP Workplan and other legal documents in process.

If the Board chooses to prioritize an ordinance amending penalties for non-compliance with on-site monitoring requirements, staff requests direction regarding level of priority for RMA and County Counsel, and if items from the 2020 LRP Workplan and Counsel priorities should be set aside in its place. It is estimated that once this becomes a top priority with staff assigned, an ordinance could be presented to the Planning Commission and/or stakeholder groups within about six months. An ordinance would be subject to CEQA.

DISCUSSION:

County Code Section 1.22 allows the RMA to assess financial penalties for non-compliance with project conditions of approval on a daily basis for each day that a violation exists. Pursuant to section 1.22.100, for all violations except those pertaining to local building and safety codes, an Administrative Citation may be levied to impose the following fines:

- First day: A fine not exceeding one hundred dollars (\$100.00)
- Second day: A fine not exceeding two hundred dollars (\$200.00)
- Third day and beyond: A fine not exceeding five hundred dollars per day (\$500.00)

Since these amounts are codified, they cannot be exceeded, and therefore create somewhat of a “one size fits all” penalty structure.

Limitations arise in certain cases where the County may want to impose more severe penalties based on the nature of the violation. For example, in 2019 a project on Carmel Point was found to be in violation of their Conditions of Approval requiring on-site archaeological monitoring during ground disturbing activities. In this example, staff was able to document a total of 10 days where there was a violation. The RMA was limited to levying a total penalty of \$4,300 based on the existing code, which upon payment cleared the violation and allowed the project to resume work.

Conditions like these are placed on projects to protect archaeological and tribal cultural resources, both of which cannot be replaced if destroyed. The issue at hand is whether the level of financial penalty which can be placed on violators is sufficient to ensure adherence to conditions which prevent valuable resources from being disturbed and/or destroyed. In some cases, the owner may not be deterred by the maximum allowable penalty.

Increasing the amount which the County can impose to penalize those who violate certain Conditions of Approval could be accomplished through adoption of an Ordinance by the Board of Supervisors. RMA has consulted the Office of the County Counsel and determined that an ordinance may be adopted to increase the amount of fine beyond the amounts included in Monterey County Code Chapter 1.22, as a civil penalty rather than an infraction or misdemeanor. However, further research is needed in order to determine the appropriate amount for a new penalty. Staff recalls legislation that may place limits on penalties, which would require research and legal analysis. Project conditions require a reasonable nexus related to the scope of the project, which would require research and legal analysis for what could be applied. This research is necessary to assess any parameters to what a local agency can apply. Another option could be to pursue State legislation.

Depending on which section of County Code the ordinance resides in, a recommendation from the Planning Commission and/or certification by the Coastal Commission (CCC) may also be required. Amendments to Title 20 require certification by the CCC.

The process for drafting and adopting an ordinance may also include meetings with stakeholder groups, or County sanctioned advisory groups. The following is a summarized list of some considerations staff will need to make as part of the process:

- Title 1 (General Enforcement) vs. Titles 20/21 (Zoning)
 - Title 1; Requires two readings at the Board of Supervisors.
 - Titles 20/21; Planning Commission hearing for recommendation. Board hearing for adoption. Coastal Commission for certification (Title 20 only).
- New Code Section vs. Amending Existing Code Section
 - New Code: Allows for more tailored approach. Potentially longer process
 - Amend Existing: Will need to conform to existing section. Could be faster.
- Coordination with other jurisdictions around the State for best practices
 - May be able to build of experience of others
 - Would add time to the process
- Stakeholder outreach
 - Better informs the ordinance

- Adds time to the process
- Possible Stakeholder groups include:
 - Native American Heritage Commission
 - Local Tribes
 - Public Interest Groups
 - Development Industry
 - Archeologists
- Recommendation from newly created Native American and Archaeological Resource Technical Advisory Panel (NAARTAP)
 - Established pursuant to Chapter 2.95 of County Code
 - Consists of Professional Archaeologists and Tribal Representatives
 - Makes recommendations on policies to protect archaeological and tribal cultural resources

The extent to which administrative penalties can be increased or added will require consideration of various factors. Research will need to be done on past court cases regarding the proportionality of penalties relative to the violation. Since there are areas of high archaeological sensitivity Countywide, staff will also need to explore how to create equity in the amount of fines where the value of property can vary greatly. The following is a summarized list of some considerations to be made as part of increasing the penalty:

- Consider Proportionality of fines
 - Research previous court cases - Determine legal Nexus
 - Research Takings claims
- Countywide Equity
 - Resources exist in Coastal and Inland Zones
 - Explore relationship to property value (eg: % of assessed value)
- Alternative and additional forms of penalties
 - Addition to monetary fines which may not deter some
 - Could include revocation of permits
- Additional enforcement and monitoring?
 - Performed by County or contracted 3rd party
- Other types of conditions of approval that may need enhanced penalties
 - Explore other violations that may not be deterred by the current penalty structure
 - Examples include: Impact to protected trees, unpermitted development on slopes, destruction of ESHA, etc.

CEQA:

Response to this referral and direction from the Board does not constitute a project under CEQA. Per CEQA Guidelines Section 15378(b)(5) “projects” do not include “Organizational or administrative activities of governments that will not result in direct or indirect physical changes in the environment”. This report identifies options for the Board to provide direction. If an ordinance is pursued, that would become a project subject to CEQA.

OTHER AGENCY INVOLVEMENT:

Office of County Counsel was consulted in the preparation of this staff report.

FINANCING:

Funding for staff time associated with bringing this Referral to the Board is included in the FY2019-20 Adopted Budget for RMA-Planning. County Counsel does not charge their time directly to County General Fund Units as these costs are accumulated and allocated through the Countywide Cost Allocation Plan (COWCAP). If the Board directs staff to prioritize work on an ordinance to amend administrative penalties, RMA staff time associated with the ordinance amendment will be included in the Adopted Budget for RMA-Planning.

BOARD OF SUPERVISORS STRATEGIC INITIATIVES:

This Referral is intended to ensure proper management of our land resources, including archaeological and Tribal cultural resources.

Check the related Board of Supervisors Strategic Initiatives:

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

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cc: Front Counter Copy; California Coastal Commission; The Open Monterey Project (Molly Erickson); LandWatch (Executive Director); John H. Farrow; Janet Brennan; Project File