

# ATTACHMENT A

## DISCUSSION

### **Overview**

The 2010 General Plan requires the County to adopt guidelines necessary for cultural resource protection consistent with the goals and policies of the General Plan. A draft ordinance, updating the archaeological protection standards (Section 21.66.050 of the Monterey County Code) has been prepared to implement the 2010 General Plan in the inland area only. In addition to complying with the direction of the 2010 General Plan, this ordinance has been influenced by various State and Federal laws, most notably Assembly Bill 52 (AB 52).

This ordinance has gone through several iterations. The first draft of the ordinance predated adoption of Assembly Bill 52 (AB52). Concerns from the public and stakeholders on the first draft ordinance included the role of the Ohlone/Coastanoan, Esselen Nation (OCEN) and lack of a role of other tribes and individuals as well as concerns with the roles and membership of a technical advisory panel whose duties were to include providing recommendations to the appropriate authority for development applications. At the direction of the Planning Commission, staff held meetings with Native American representatives and archaeologists in an attempt to resolve concerns. After an initial stakeholder meeting, AB52 came into effect. AB52 is a state law that amends the California Environmental Quality Act (CEQA) and requires local governments to follow a new notification/consultation process. Based on the requirements of AB52, staff made significant changes to the ordinance to incorporate the new requirements including redefining the role of the advisory panel. Proposed revisions to the ordinance following AB52 were reviewed at a stakeholder meeting where minor changes were suggested before the newest version of the ordinance was considered by the Planning Commission. At the December 10, 2014 Planning Commission hearing, the updated draft ordinance was presented for review and comment. Stakeholders still expressed concerns with the membership of the technical advisory panel as well as exclusion of some individuals and tribes from the AB52 requirements. Staff made additional revisions, and the Planning Commission recommended adoption of the ordinance to the Board of Supervisors by a vote of 8-2 on February 25, 2015.

### **Included or excluded from the AB52 requirements**

One of the main concerns that has echoed throughout the public hearing process has been the inclusion or exclusion of specific tribes and individuals. This concern has taken different shapes as various drafts of the ordinance were circulated but it still exists with the current ordinance. As stated previously, AB52 requires the County to provide notification to California Native American tribes that have requested notification. Pursuant to AB52, the decision regarding whom to notify would be made in consultation with the Native American Heritage Commission (NAHC). It is unclear if, when, and how the NAHC may update their list of California Native American tribes but as it currently exists, the NAHC tribal government consultation list includes: the Coastanoan Rumsen Carmel Tribe, the Salinan Tribe of Monterey, San Luis Obispo, and San Benito Counties; the Ohlone/Coastanoan-Esselen Nation; the Amah Mutsun Tribal Band; the Amah Mutsun Tribal Band of Mission San Juan Bautista; Xolon-Salinan Tribe; and Indian Canyon Mutsun Band of Coastanoan. These are the tribes that would be notified of a "project" within their territory, as determined by the NAHC provided that these tribes request notification from the County. Based on geographic location, and as directed by the NAHC, the County would notify one or more of these California Native American tribes for purposes of the consultation required by AB52. Those not belonging to a tribe on the NAHC notification list would not be provided with this specific notification/offer to

consult but would receive notices of hearing on projects, if they so request, and would be able to participate in the environmental review and public hearing process as would any member of the public.

### **Native American Advisory Panel duties and members**

In the first drafts of the archaeological resources ordinance, staff was anticipating creating a Native Californian Advisory Panel (renamed “Native American Advisory Panel” in the current ordinance) pursuant to the requirement of General Plan Policy OS-8.5. Advisory Panel duties would have involved reviewing permit applications and making recommendations to the appropriate authority to approve the project. When Assembly Bill 52 was adopted at the end of September 2014, it created a new process for Native American involvement in the permit review process, which would have been redundant of and potentially in conflict with the duties of the advisory panel. Accordingly, the purpose and duties of the Advisory Panel were reconsidered. The Advisory Panel duties were redefined to remove individual project review and to include; 1) providing outreach and education; 2) advising Planning staff on updating the archaeological sensitivity map; 3) Advising Planning staff on ordinance preparation involving potential conflicts with archaeological resource standards; and 4) other duties as may be assigned by the Planning Director, the Planning Commission, or the Board of Supervisors.

At the Planning Commission hearing on December 10, 2014, comments were made regarding the membership of the advisory panel, which at that time included Native American descendants, archaeologists, and anyone with a demonstrated interest in archaeological preservation (an inclusive panel). In response to testimony received in the hearing, staff revised the membership requirements to limit membership to: individuals appointed by a California Native American Tribe, A Most Likely Descendant for Monterey County on the list maintained by the Native American Heritage Commission, or professional archaeologist familiar with Central Coast archaeology. The membership will not be limited only to tribes designated by NAHC, so it does not raise the same issues as arose in respect to the AB 52 consultation process. Membership on the advisory panel will be subject to approval by the Planning Commission. The panel makeup implements Policy OS-8.7 of the General Plan while opening the process beyond the Ohlone/Coastanoan/Esselen Nation (OCEN); although OCEN is specifically identified in the General Plan policy, the hearings and stakeholder meetings resulted in a more inclusive approach that ensuring opportunity for participation by all tribes and individual descendants with interest in participation. Because the Advisory Panel is being established pursuant to the 2010 Monterey County General Plan which explicitly applies only outside of the coastal zone, the Native American Advisory Panel’s work will apply only in the non-coastal area. The Board could in the future, by ordinance, expand the Panel’s jurisdiction to include the coastal zone. Clarifying language has been added to this effect. The ordinance also establishes the basic framework for membership and meetings of the Advisory Panel.

### **Archaeological Report waiver criteria**

The draft ordinance establishes a requirement for applicants for a project to submit a “Phase I” archaeological survey if their project lies within a “high” archaeological sensitivity. The ordinance also establishes criteria under which the archaeological report may be waived. Concerns have been raised regarding the archaeological report waiver criteria. Comments on this subject vary from a desire to see no projects exempt from archaeological reports to specific concerns surrounding the routine and ongoing agricultural exemption. In addressing these concerns, staff has considered a

number of related factors. To begin, the proposed ordinance updates an existing zoning code section (section 21.66.050 of Title 21). That existing code section contains report requirements and waiver criteria. This draft ordinance contains similar report waiver criteria but is intended to build on and clarify those criteria. The proposed archaeological report waiver criteria include the following:

“Report Waiver Criteria: The Phase I Inventory may be waived by the Director of Planning under the following circumstances:

- a. The development involves routine and on-going agricultural activities only.
- b. A previous report was prepared for the site by a qualified archaeologist, and the report clearly and adequately included the proposed development site within the scope of its survey and the results of that survey were negative;
- c. The development is located within a previously disturbed area where substantial evidence is provided that the previous ground disturbance affected depths equal to or greater than the project being considered; or
- d. The development involves minimal soil disturbance, except as provided in subsection e, such as:
  - i. Replacement of post holes for fences, decks and similar improvements;
  - ii. Repair and maintenance of underground utilities;
  - iii. Well drilling, not including excavation for discharge pits;
  - iv. Small ground-mounted photovoltaic systems; and
  - v. Other development of a similar character to those listed above;
- e. Waivers pursuant to this subsection shall not be granted in circumstances where a project is located within 250 feet of known tribal cultural resources, or where evidence exists that archaeological resources may be present on the site.
- f. In all cases, whether the Phase I report is waived or not, all state and federal laws and regulations protecting burial sites and Native American resources shall be followed. In addition, nothing in this section is intended to supersede or in any way alter or lessen the effect of the California Native American Tribe notification and consultation process required in subsection F.”

Each one of these subcategories has specific concerns and reasoning for their inclusion. In general, report waivers are intended to provide flexibility to the Director of Planning to waive report requirements, thus saving an applicant time and money by avoiding the need for an archaeological report when there is a valid reason to do so. It is important to note that archaeological report waivers do not make a project exempt from the AB52 notification/consultation process, which is separately required by state law.

**Routine and Ongoing Agricultural Activities (a):** The concern here is that agricultural activities can, and in some cases have, resulted in disturbance of archaeological resources. Furthermore, there is a belief that farmers are unlikely to report such disturbances. The waiver criteria is inserted based on Policy OS-6.3 of the 2010 General Plan which states “*Routine and Ongoing Agricultural Activities shall be exempted from [completing a Phase I archaeological report] in so far as allowed by state or federal law.*” Routine and Ongoing agriculture activities are addressed in Policy AG-3.3 of the 2010 General Plan. This policy requires the County to establish by ordinance a list of “Routine and Ongoing Agricultural Activities”. The policy goes on to list 10 activities that may be considered for inclusion. Those include:

- a. Pasture and rangeland management;
- b. Conversion of agricultural land to other agricultural uses;
- c. Preparation of product for market, and delivery of product to market; fallowing, and all soil preparation activities;
- d. Planting, harvesting, cultivation, tillage, selection, rotation, irrigation, fallowing, and all soil preparation activities;
- e. Raising of livestock, poultry, fur bearing animals, dairying, or fish;
- f. Maintenance of sediment basins, stock ponds, irrigation and tail water return systems, stream bank and grade stabilization, water retention and pumping facilities, erosion control and surface drainage activities;
- g. Maintenance of farm access roads, trails, and parking facilities;
- h. Fencing, corrals, animal handling facilities;
- i. Greenhouses, sheds, storage and outbuildings; and
- j. Emergency activity that protects the health and safety of the general public.

The policy goes on to reinforce the exemption from archaeological survey requirements provided in OS-6.3. These activities generally include continuing operations and regular maintenance of agricultural lands. Conversion of uncultivated lands to cultivated lands would not fall in the routine and ongoing category. Most routine and ongoing agricultural activities do not require approval from the County; thus the County will not be notified of such activities and therefore could not apply our zoning standards unless otherwise specifically noted. However, human remains and burial sites are protected by state and federal laws. Policy AG-3.3's exemption for Routine and Ongoing Activities is qualified by the phrase "in so far as allowed by state or federal law" and does not exempt those activities from state and federal law. It is illegal to disturb these burial sites, and the law requires that when remains are discovered, that the corner be notified. Subsection (f) of the waiver criteria in the ordinance notes this law. To address the concern that the agricultural community may ignore disturbances to archaeological resources, it was suggested that outreach and education occur. Outreach and education has been included as a duty of the Native American Advisory Panel, and the Agricultural Commissioner's office is receptive to providing a forum to such outreach efforts.

**Previously surveyed (b):** Comments have been made that older archaeological surveys could be stale or inadequate for a number of reasons including a general mistrust of archaeologists and changes to knowledge and practices in the field. This exemption has been carried through from the existing zoning code section and updated for clarification. If information is presented during any permit review process contradicting the findings from a previous survey, the Director of Planning could request updated peer review to address the conflicting information.

**Previously disturbed (c):** There are no specific objections to this exemption that staff is aware of. This exemption is included in the existing zoning code and has been clarified in this ordinance.

**Minimal disturbance (d):** This exemption is similar to the routine and ongoing agricultural activities in the sense that the listed types of projects still may have the potential to affect archaeological resources. Like routine and ongoing agricultural activities, the likelihood that these activities would disturb resources are very low and human remains are always protected by state law. Replacement and repair activities are likely to include mostly previously disturbed

areas, and ground mounted photovoltaic systems involve installation of small post holes and utility trenching. Photovoltaic systems are afforded permitting limitations under the Solar Rights Act including limiting considerations to health and safety requirements and encouraging the installation of solar energy systems by removing obstacles to and minimizing costs of permitting such systems.

**Exception to the exemptions (e):** This section is generally supported with the exception of the 250 foot distance requirement. Subsection e of the ordinance would not allow for the waiver of an archaeological report where a development would be located within 250 feet of known archaeological resources. This exception to the exemption further decreases the likelihood that a project qualifying for an exemption to an archaeological report requirement would result in impacts to archaeological resources. General Plan Policy OS-6.3 requires an archaeological report for any development within 150 feet from known resources. That distance has been increased to 250 feet at the recommendation of stakeholders.

### **Planning Commission Recommendation**

On February 25, 2015, the Planning Commission recommended approval of the ordinance to the Board of Supervisors by a vote of 8-2. There were two different reasons for the no votes. Those reasons included:

1. A desire to remove the words “Replacement of...” from the report waiver criteria for postholes for fences and decks (Section 21.66.050.C.2.d.i). This change would have made all postholes exempt from archaeological report requirements unless they were within 250 feet of known archaeological resources.
2. A desire to include all interested tribes in the project notification process. As drafted the ordinance requires notification to be provided to “California Native American Tribes” which are tribes on the list maintained by the Native American Heritage Commission (NAHC) for notification/consultation purposes. The desire was to expand the notification criteria to include other Native American Tribes that are interested but are not on the NAHC list.

Eight of the ten commissioners voted to recommend approval of the ordinance as it was drafted.

### **California Environmental Quality Act**

This ordinance is categorically exempt pursuant to Section 15308 of the California Environmental Quality Act (CEQA), which exempts actions taken by regulatory agencies to assure the maintenance, restoration, or enhancement of the environment where the regulatory process involves procedures for protection of the environment. All future development projects will continue to be evaluated pursuant to the requirements of CEQA irrespective of this ordinance.

### **Conclusion**

This ordinance has been reviewed and edited in a number of public hearings including two workshops at the Planning Commission in addition to several stakeholder meetings with local Native American representatives and archaeologists. The ordinance is intended to implement the 2010 General Plan in the inland area only and to implement the requirements of AB52 for the protection of archaeological/tribal cultural resources. The ordinance is not intended to include or exclude any tribe or individual. The intent is to rely on the Native American Heritage Commission for AB52 notification requirements. The ordinance brings together a number of regulations as well

as an attempt to address issues raised thus far. Based on the reasoning and analysis provided above, staff is recommending that the Board of Supervisors as adopt the ordinance as presented. Because the ordinance includes both amendments to zoning (Title 21) which requires a noticed public hearing and to Title 2 of the County Code which requires two readings of the ordinance at the Board, staff is recommending that the Board introduce, waive reading, and conduct the public hearing on April 7 and then set the ordinance for adoption on April 21.