



County of Monterey

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

Board Report

File #: ORD 20-021, **Version:** 1

a. Find that adoption of this ordinance is categorically exempt from the California Environmental Quality Act as an action to preserve and protect the environment pursuant to Title 14 California Code of Regulations Section 15308 and as the establishment of additional enforcement actions by a regulatory agency pursuant to Section 15321; and

b. Adopt an ordinance adding new Section 1.22.105 to Chapter 1.22 of the Monterey County Code relating to administrative remedies for violations of requirements to monitor and protect archeological and cultural resources in the unincorporated area of Monterey County.

RECOMMENDATION:

It is recommended that the Board of Supervisors:

- a. Find that adoption of this ordinance is categorically exempt from the California Environmental Quality Act as an action to preserve and protect the environment pursuant to Title 14 California Code of Regulations Section 15308, and as the establishment of additional enforcement actions by a regulatory agency pursuant to Section 15321; and
- b. Adopt an ordinance adding new Section 1.22.105 to Chapter 1.22 of the Monterey County Code relating to administrative remedies for violations of requirements to monitor and protect archeological and cultural resources in the unincorporated area of Monterey County.

SUMMARY:

Standard conditions of approval are added to development projects in areas of the county with high archaeological sensitivity that are meant to protect tribal and other cultural resources. On June 16, 2020, the Board of Supervisors provided direction for staff to prepare an ordinance that strengthens Monterey County's enforcement and increase fines related to non-compliance with conditions to protect cultural resources. On July 7, 2020, the Board introduced, waived reading and set July 28th as the date to adopt the ordinance on the consent calendar. RMA and the Office of County Counsel collaborated, and on July 28th came before the Board for a second reading and adoption of an ordinance which increased fines for non-compliance. At the hearing, the Board directed staff to further increase fines proposed in the ordinance, and continued the item to August 18th, 2020, and then once more to September 1st, 2020 to allow staff adequate time to revise the draft ordinance given the importance of the issue. Staff has completed the revisions to include larger penalties and is now seeking approval of the Board. The proposed ordinance would become effective the 31st day after adoption (October 2, 2020).

DISCUSSION:

County Code Section 1.22 currently allows staff to assess financial penalties for non-compliance with any 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)

Limitations arise in certain cases where the County may want to impose more severe penalties based on the

nature of the violation. The draft ordinance adds a section specifically establishing the amount which the County can impose to penalize those who violate requirements (i.e.: conditions of approval) to monitor and protect archeological and cultural resources.

RMA and the Office of the County Counsel have collaborated to determine that an ordinance may be adopted to increase the current fine beyond the amounts included in Monterey County Code Chapter 1.22, as a civil penalty rather than an infraction or misdemeanor. Under Chapter 1.22, this penalty can be levied administratively, meaning it does not immediately involve the District Attorney. In determining the extent to which administrative penalties can be increased or added staff considered various factors, including how to create equity in the amount of fines where the value of property could result in a takings if a penalty above the value of the property were to be assessed.

The draft ordinance would allow a County Enforcement Official to issue an administrative citation that imposes the following fines in the event that that a requirement to monitor and protect archeological and cultural resources is violated:

- A fine of twenty-five thousand dollars (\$25,000) for each day of the violation beginning from day 1.

A key component of the proposed ordinance is that the cumulative amount of fines imposed shall not exceed 25 percent (25%) of the subject property's fair market value. This cap on the maximum amount of penalties is necessary to ensure that the ordinance complies with the requirements of the U.S. Constitution. A fine is unconstitutionally excessive under the 8th Amendment if it is grossly disproportional to the underlying offense. Further, a fine that renders a property valueless is considered a taking under the 4th Amendment. Based on comments received from the Board, staff understands the desire to impose a high penalty for this type of violation as much for its deterrent value as for its punitive effect. However, property values vary greatly throughout the County. There are properties in the County that would be required to have an archeological monitor assessed at tens of millions of dollars, and other properties assessed at less than \$100,000. Therefore, in order to ensure that the ordinance complies with the requirements of the U.S. Constitution the proposed ordinance would prohibit the accumulation of fines beyond one quarter of the assessed value of the property. The justification for the significance of the penalty is the damage to sensitive archeological resources that could result if a monitor is not in place to observe grading operations when one is required by a condition of approval. The damage could be irreparable to archeological resources that have significant historical and cultural value, especially to the indigenous peoples of the area.

For example, if a property was appraised at \$250,000, the total penalty could not exceed \$62,500. For a violation shown to have taken place over 4 days:

- Penalty for Day 1 = \$25,000
- Penalty for Day 2 = \$25,000
- Penalty for Day 3 = \$12,500
- Penalty for Day 4 = \$0
- Total \$62,500

On July 6, and August 31, 2020, staff received correspondence from Stamp Erickson, attorneys at law, regarding the draft ordinance (Attachment B). In summary, the letters express concern that the draft ordinance is vague and is not exempt from CEQA. Both the draft ordinance at that time of Ms. Erickson's letter, and this current draft with the proposed updates are not vague as they clearly specify the prohibited conduct and the associated penalty amounts. As to CEQA, the draft ordinance is categorically exempt from review pursuant to

Title 14 California Code of Regulations CEQA Section 15308 as it is designed to enhance the protection of resources. The draft ordinance is also exempt under CEQA Section 15321 as it establishes additional enforcement mechanisms for a regulatory agency. Further, there is no evidence of unusual circumstances which would require exceptions to these exemptions under CEQA Guidelines Section 15300.2. Ms. Erickson's correspondence mistakenly states that the proposed ordinance would not allow for the imposition of fines beyond one day; however, the plain language of the ordinance states that the fine may be imposed for "each day" of violation. This language is also sufficient to allow for the imposition of a fine even if the violation only occurs for a portion of a day. Additionally, if the ordinance is adopted it would not replace mitigation requirements under CEQA or the requirements of the LCP, rather it would provide another tool for County Enforcement Officials to utilize in situations where conditions of approval are violated, thereby strengthening the County's ability to protect archeological and cultural resources.

CEQA:

As previously stated, consideration of an ordinance is a project subject to CEQA. This ordinance would add regulations to help preserve and protect the environment (cultural resources) and establish additional enforcement mechanisms for a regulatory agency. Therefore, adoption of this ordinance is categorically exempt from the California Environmental Quality Act pursuant to Title 14 California Code of Regulations CEQA Sections 15308 and 15321 respectively.

OTHER AGENCY INVOLVEMENT:

Office of County Counsel has approved the draft ordinance as to form.

FINANCING:

Funding for staff time associated with bringing this Ordinance to the Board is included in the FY2020-21 Adopted Budget for RMA. 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).

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

Attachments on file with the Clerk of the Board:

Attachment A - Updated Draft Ordinance Cultural Resource Monitoring Penalties

Attachment B - Correspondences dated July 6 and August 31, 2020, from Stamp Erickson

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

cc: Front Counter Copy; The Open Monterey Project (Molly Erickson); LandWatch (Executive Director); John H. Farrow; Janet Brennan; OCEN Tribe