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# CEQA Memo

Renewable Energy Ordinance
Board of Supervisors December 18, 2019

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**Planning, Building & Environmental Services**

1195 Third Street, Suite 210
Napa, CA 94559
www.countyofnapa.org

**David Morrison**
Director

# MEMORANDUM

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| To: | Napa County Board of Supervisors | From: | David Morrison, PBES Director<br>John McDowell, Supervising |

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| Date: | December 12, 2019 |
| Re: | CEQA Memorandum for Renewable Energy Systems Zoning Ordinance Text Amendment |

## I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

The County is considering Zoning Ordinance updates to repeal the expired Small Wind Energy Systems Chapter (Chapter 18.117 of the Napa County Code) and replace it with a Renewable Energy Systems Chapter. This update implements Action Item 9.C of the Napa County Strategic Plan (2019-2022).

After careful review, the PBES Department has concluded that the County of Napa's proposed Zoning Ordinance updates are exempt from environmental review under the California Environmental Quality Act ("CEQA;" Pub. Res. Code, § 21000 et seq) and the CEQA Guidelines (14 CCR, § 15000 et seq). Given that these updates consist of ordinances that assure the maintenance, restoration, or enhancement of natural resources and the environment, their adoption falls within categorical exemptions under the CEQA Guidelines, as well as the general rule exempting activities where it can be seen with certainty the activities in question will not have a significant effect on the environment.

In particular, the ordinance updates are exempt as falling within Class 7 and Class 8 Exemptions, and some of the updates, in addition, fall within Class 4 and Class 5 Exemptions, as codified at Title 14, California Code of Regulations, sections 15304, 15305, 15307 and 15308. Further, no exception to these exemptions would apply.

The available evidence shows the proposed regulations are also exempt under the "Common Sense" Exemption set forth in Title 14, California Code of Regulations, Section 15061(b)(3).

## II. APPLICABLE EXEMPTIONS AND POTENTIAL EXCEPTIONS, GENERALLY

**Requirements of Class 4, Class 5, Class 7, Class 8, and Common Sense Exemptions.** The language of the pertinent exemptions are included below:

- **Class 4 Exemption.** This exemption covers "minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees except for forestry or agricultural purposes." (14 CCR, § 15304.) A non-exclusive list of examples includes certain grading activities, filling activities, alterations that improve habitat for fish or wildlife, and fuel management to reduce fire risks. (*Id*.)

- **Class 5 Exemption.** This exemption covers "minor alterations in land use limitations in areas with an average slope of less than 20%, which do not result in any changes in land use or density." (14 CCR, § 15305.)

- **Class 7 Exemption.** This exemption covers "actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include, but are not limited to, wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption." (14 CCR, § 15307.)

- **Class 8 Exemption.** This exemption covers "actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption." (14 CCR, § 15308.)

- **Common Sense Exemption.** The CEQA Guidelines include an exemption based on "the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment." (14 CCR, § 15061(b)(3); see *Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n* (2007) 41 Cal.4th 372.) Under this exemption, an agency can find a project is exempt from environmental review if "it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." (14 CCR, § 15061(b)(3).)

The Class 4, Class 5, Class 7 and Class 8 Exemptions are premised on a finding by the California Secretary for Natural Resources that the classes of projects covered by them do not have a significant effect on the environment. The exemptions, however, are not absolute. Although a project might otherwise be eligible for a categorical exemption, these exemptions must be denied if (1) significant cumulative impacts from projects of the same type will result; and (2) there is a reasonable possibility of a significant impact on the environment due to unusual circumstances. (14 CCR, § 15300.2(b)&(c).) In addition, the Class 4 and Class 5 Exemptions cannot apply if the activity in question falls within a particularly sensitive environment, meaning an environment where there exists an "environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies." (14 CCR, § 15300.2(a).)

Agency's finding that a particular proposed project falls within one of the exempt classes necessarily includes an implied finding that the project has no significant effect on the environment and that no exception to the exemption applies. (*Save the Plastic Bag Coal. v. City & Cty. of San Francisco* (2013) 222 Cal. App. 4th 863, 873–74; *Association for Protection of Envt'l Values v. City of Ukiah* (1991) 2 Cal.App. 4th 720, 731.) However, where an agency does not make express findings, and relies on implied findings

regarding the inapplicability of exceptions, and project opponents file a legal challenge, a court's ability to affirm the agency's decision is constrained with respect to the "unusual circumstances" exception. With implied determinations, a court cannot discern whether (1) the agency determined no unusual circumstances existed, or (2) whether the agency determined unusual circumstances existed, but there was no reasonable possibility of a significant impact due to those circumstances. (*Respect Life South San Francisco v. City of South San Francisco (Planned Parenthood Mar Monte, Inc., Real Party In Interest)* (2017) 15 Cal.App.5th 449.) This makes a difference because the determination of whether unusual circumstances exist is subject to the highly deferential "substantial evidence standard," under which a court will defer to the agency's decision if it is supported by substantial evidence, whereas the determination about whether there exists a reasonable possibility of a significant impact is subject to the non-deferential "fair argument" test, under which a court will find for project opponents if they show there is a fair argument of a reasonable possibility the activity will have a significant environmental impact. (*Id*.) In the absence of direction, a court must analyze the implied finding as if made on the narrowest possible grounds, and can uphold the categorical exemption against the unusual circumstances challenge only if (1) it finds the record contains no substantial evidence that could support a finding of unusual circumstances – a determination courts will likely be reluctant to make due to the broad discretion vested in the local agency to determine this "essentially factual" issue – *or* (2) it *assumes* the existence of unusual circumstances, but finds the record is devoid of substantial evidence supporting a fair argument of a reasonable possibility that any purported unusual circumstances identified by the challenger will have a significant environmental effect.

Simply, an agency's decision rejecting the existence of an exception to a categorical exemption is much more defensible if the agency makes explicit findings that no unusual circumstances exist and that, regardless, there exists no reasonable possibility the activity in question will have a significant impact. Accordingly, we have set forth below evidence the County can consider in finding the proposed ordinance updates have no significant effect on the environment, and are exempt from CEQA.

Findings are also of significant benefit when an agency seeks to apply the Common Sense Exemption to a project. In essence, the application of this exemption is to be decided based on whether record evidence supports the exemption, and the agency has the burden of demonstrating the exemption applies. (*Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n* (2007) 41 Cal.4th 372, 386, 388.) The agency need not engage in detailed or extensive fact-finding to make this determination, but there must be substantial evidence in the record to support it. (*Id*. at 388, quoting *Napa County Bd. of Supervisors* (2001) 91 Cal. App.4th 342, 369.) What must comprise this evidence may vary, and depends on a multitude of factors, including the nature of the project, the directness or indirectness of the contemplated impact, and the ability to forecast the actual effects the project will have on the physical environment. (*Id*.) To this end, we have included findings below that can assist the County in supporting use of the Common Sense Exemption.

## III. EVIDENCE SUPPORTING APPLICABILITY OF EXEMPTIONS

**Qualification of ordinance updates for Class 4, Class 5, Class 7, Class 8, and Common Sense Exemptions.** The prohibition of an activity that creates "environmental problems" constitutes an action 4 to assure "protection of the environment." (*Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 476.) Each of the proposed ordinance updates, as explained below, confers the benefit of additional protections

for natural resources and the environment, and it can be seen with certainty that there is no possibility the regulations in question may have a significant effect on the environment. A full description of these ordinance updates is included in the December 17, 2019 Board of Supervisors Agenda Report, and the complete text of the proposed ordinance updates is included in the proposed ordinance included as an attachment to this Agenda Report. These and other materials accompanying the proposed ordinance updates are incorporated herein by reference.

What follows are general summaries of each of the proposed updates contained in the Renewable Energy Systems Ordinance; the full details are incorporated herein by reference, and each of the analyses below extend to the full breadth of the proposed amendments.

- **Repeal of Small Wind Energy Systems Regulations** – In 2002, the State passed legislation mandating that "small wind energy systems" be allowed within all cities and counties. These systems consisted of a wind turbine mounted on a single tower, and were intended to supply power to onsite land uses (as opposed to utility-scale windfarms). Napa County incorporated these requirements into zoning under Chapter 18.117. Consistent with State law, the ordinance included a 2017 sunset provision. The currently proposed action will repeal this antiquated code language, which automatically expired on January 1, 2017, and replace it with the new renewable energy systems standards. Repeal of expired ordinance requirements has no potential to result in a change to the environment, and in itself does not meet the definition of a project pursuant CEQA Guidelines (14 CCR, § 15378).

- **Accessory Use Renewable Energy Systems** – This ordinance codifies current administrative practices allowing homes, businesses, and agricultural uses to install solar systems to offset the power needs of the onsite uses. For many years, the County has issued building permits for solar systems under existing regulations allowing for accessory uses (Definitions Chapter 18.08, and Additional Development Standards Chapter 18.104), and under Article III of Chapter 15.14 (Small Residential Rooftop Solar Energy Systems) of the Building Code which applies to small residential rooftop applications (Government Code section 65850.5 commonly known as the Solar Rights Act). The proposed ordinance will set ministerial design criteria for accessory solar systems that do not qualify for processing under Article III of Chapter 15.14 , and will define the extent of use that qualifies as an accessory use including:

    - Allows accessory renewable energy systems by right, requiring only a building permit for projects that meet prescribed standards.
    - Limits accessory renewable energy systems to not exceed 125% of the onsite power needs.
    - Differentiates accessory renewable energy systems from commercial energy facilities, by precluding by-right accessory systems from being oversized to sell power into the grid.
    - Subjects accessory systems to the requirements of the Conservation Regulations (Chapter 18.108), floodway protection requirements, and avoids conflicts with septic systems.
    - Presently, the ordinance only establishes solar systems as allowed accessory renewable energy systems, but new or emerging technologies can be included in future updates.

Codifying existing administrative practices will not result in a direct or indirect change to the environment. Under the provisions of County Code Section 18.08.020, Accessory Uses, the County has allowed and will continue to allow solar power generation as an accessory use in conjunction with the primary land uses allowed by general zoning regulations. A key element of an accessory use is that it clearly subordinate to the primary land use. Examples of other accessory uses include outbuildings, utility connections, driveways, recreation structures (i.e. – swimming pool, playground equipment for a residence), trash enclosures, mechanical equipment areas, etc.

The purpose of codifying existing practices for accessory solar systems is to apply a set of clear, uniform and objective standards to ensure that solar systems function in a manner that is clearly subordinate to the primary use, and otherwise limited in scope. The objective standards identify that solar systems must comply with existing County Code requirements including conservation regulations, flood protection, and public health. The new regulations also ensure that systems are not over built exceeding the onsite power generation needs of the existing primary use. The object standards of these regulations will ensure that future accessory solar regulations do not impact sensitive environments, avoid protected species and habitat, comply with water course protection requirements, and comply with the terms of approval of the primary land use.

- **Commercial Renewable Energy Facilities** – The ordinance defines and establishes design criteria for commercial renewable energy facilities, which are power generating facilities that sell power to a utility provider through a PPA. These uses can be a standalone facility, or they can occur in concert with other development such as a large solar array on an industrial warehouse property that produces more energy that is required for on-site needs. These uses are not considered public utilities or governmental uses, and such projects would be subject to discretionary use permit approval through the Planning Commission, and include the following:

    - Commercial facilities are excluded from residential and agricultural zoning districts. Facilities are directed to industrial, commercial, public facility zoning districts.
    - Applies comprehensive development criteria including Conservation Regulations (Chapter 18.108), flood protection, setbacks from existing residential uses, viewshed protection.
    - Commercial facilities include solar and bioenergy, and other new or emerging technologies can be included in future updates.
    - Allows commercial facilities to collocate on developed industrial sites without a use permit provided the commercial solar proposal is consistent with the use permit for the existing development.

  Under current zoning regulations, granting of a discretionary use permit is possible for power generation facilities as "other public utilities" pursuant to County Code Section 18.120.010(b)(8). There are no development standards for other public utility uses, and there is no definition of that use within existing County Code. This ordinance will define, clarify and limit the types of uses that can qualify for processing of a use permit for power

generation. The ordinance will define and limit power generation facilities to renewable energy facilities only, and subject those uses to development requirements that protect the environment, ensure public health, safety and welfare. Presently, other public utility uses are allowed with a use permit within any zoning district. This ordinance will limit the use to renewable energy production with grant of a use permit, and exclude the use for all residential and agricultural zoning district. As such, the ordinance reduces the areas where power generation facilities can be located, and establishes that power generation facilities must comply with certain development standards for protection of the public and environment. Projects occurring as a result of the ordinance will be subject to discretionary use permit review, and thus are subject to CEQA.

- **Public Utility Exception Revision** –The ordinance updates Exceptions Chapter 18.120 clarifying that public utilities are only those uses which are exempted from local zoning regulations under State Law, and therefore not subject to a use permit. Presently the Exceptions Chapter lists "other public utility uses" as a use requiring a use permit in any zoning district.

  This component of the ordinance directly relates to the previous provisions noted above. The term "other public utilities" will be eliminated from the County Code. Consequently, power generation facilities will only be permissible if they meet the requirements for commercial renewable power generations facilities, or if they are exempt from County review under State Law as a bona fide public utility or government agency (in which case CEQA compliance would be the responsibility of the State agency overseeing the project, or the government entity conducting the project).

- **Emergency Power Generators** – Since the 2017 wildfires there has been a significant increase in the number of property owners seeking building permits for permanent emergency power generators at their homes, businesses, or agricultural uses. The County has issued these permits under existing code provisions for accessory uses (Definitions Chapter 18.08, and Additional Zoning Regulations Chapter 18.104), but has otherwise relied on uncodified administrative practices in absence specific language in the Zoning Code. This ordinance identifies that emergency power generators are allowed as an accessory use in all zoning districts provided that they are designed to meet onsite power needs (not sell power into the grid), and are subject to County Code requirements for noise, setbacks and environmental compliance.

  In the same manner as applicable to accessory renewable energy systems, the purpose of codifying existing practices for emergency power generators is to apply a set clear of uniform and objective standards to ensure that emergency generators function in a manner that is clearly subordinate to the primary use, and otherwise limited in scope.

## IV. NO EXCEPTIONS TO EXEMPTIONS WOULD APPLY

**The ordinance updates would not have any significant, adverse effects on the environment, and none of the CEQA Guidelines' exceptions apply.** The Class 4, Class 5, Class 7, Class 8 have exceptions, and do not apply, where (1) significant cumulative impacts from projects of the same type will result; or (2)

there is a reasonable possibility of a significant impact on the environment due to unusual circumstances. (14 CCR, § 15300.2(b) & (c).) In addition, Class 4 and Class 5 Exemptions cannot apply where the activity in question is ordinarily insignificant, but would be located in a particularly sensitive environment and thus have the potential for a significant impact. (14 CCR, § 15300.2(a).)

With respect to cumulative impacts, the ordinance updates are Countywide regulations that govern all unincorporated lands. There are no similar regulations being proposed in the County, including within its five incorporated municipalities that would cumulate with the proposed project. With respect to possible significant environmental impacts due to unusual circumstances, substantial evidence exists to support a finding that no unusual circumstances exist, and such a finding would be given deference if challenged.

## V. FACTS SUPPORTING USE OF THE COMMON SENSE EXEMPTION

In support of the Common Sense Exemption's applicability, and to address concerns by various stakeholders in the community, we have considered impacts of the ordinance updates on agricultural and residential lands. Again, the Common Sense Exemption applies if "it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." (14 CCR, § 15061(b)(3).)