



**CITY COUNCIL AGENDA ITEM NO. G.2  
10/10/2023**

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**SUBJECT:** Informational update on an Ordinance amending provisions of the Brentwood Municipal Code related to oil and gas development

**DEPARTMENT:** Community Development

**STAFF:** Alexis Morris, Community Development Director

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### **TITLE/RECOMMENDATION**

Based on the revisions to the proposed ordinance that have occurred since it was reviewed by the Planning Commission, it will be returned to that body for review and recommendation prior to final City Council action. Staff will therefore present the City Council with an update and next steps on the Ordinance that amends Brentwood Municipal Code Chapters 17.467 and 17.505 to remove oil and gas development uses as conditionally permitted uses in PD's 17 and 55; amends Chapter 17.450 to require oil and gas development uses to be specifically listed as conditionally permitted uses in planned development districts to be eligible for conditional use permits; and amends Chapter 17.680 to update oil and gas production regulations.

Pursuant to the California Environmental Quality Act (CEQA) and the CEQA Guidelines, it has been determined that the Ordinance is exempt from CEQA, including without limitation, requirements for CEQA review, pursuant to: the "common sense" exemption under CEQA Guidelines Section 15061(b)(3), and the following categorical exemption classes under CEQA Guidelines Section 15061(b)(2): Class 4 - Alterations to Land (CEQA Guidelines Section 15304) and Class 8 - Actions by Regulatory Agencies for the Protection of the Environment (CEQA Guidelines Section 15308).

### **FISCAL IMPACT**

There will be some staff time associated with oversight of the revised regulatory framework, and potentially in advising members of the public regarding the applicability and effect of the updated regulations. Staff time and the services of special counsel was also spent to study the issues and prepare the materials associated with this ordinance. Costs related to this process are funded by the General Fund.



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### BACKGROUND

The Brentwood Municipal Code presently authorizes oil and gas drilling, production, and exploratory operations in certain areas of Brentwood, subject to permitting obligations and imposition of site conditions, per Chapter 17.680. For instance, under the current regulations, an applicant for an oil and gas permit or land use entitlement must comply with all development standards applicable to drilling or production operations, including a minimum production site size, fencing, screening and landscaping restrictions, setbacks, soundproofing, signs, storage tanks and equipment size and locations, and safety restrictions, among other things.

Oil and gas production activities can have significant and prolonged environmental and health effects. For example, oil and gas production can substantially increase air pollution in the areas where permitted, and fossil fuel extraction contributes to emissions that create long-term climate change effects.<sup>1</sup> There are also risks specifically associated with residential proximity to oil and gas drilling, including adverse effects on reproductive health and birth weights.<sup>2</sup> According to the U.S. Occupational Safety and Health Administration, other safety hazards associated with oil and gas drilling uses include vehicle collisions, explosions and fires, and other related and indirect risks.<sup>3</sup>

Brentwood prides itself on caring for the health and wellbeing of its residents, workers, and visitors; precluding new development of oil and gas operations within those districts of the City where such operations are no longer appropriate given the current mix of development and uses in those locations will protect the continued ability of the Brentwood community to enjoy clean air and water, and live and work in a healthy and thriving city.

Originally, the Planning Commission considered a proposed ordinance that would prohibit new oil and gas land uses within the City, and a second proposed ordinance

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<sup>1</sup> See, e.g., Gonzalez, David J.X. et al. "Upstream Oil and Gas Production and Ambient Air Pollution in California." *Science of the Total Environment* vol. 806, part 1 (Feb. 2022) available at <https://www.sciencedirect.com/science/article/pii/S0048969721053754>.

<sup>2</sup> Willis, Mary D et al. "Associations between Residential Proximity to Oil and Gas Drilling and Term Birth Weight and Small-for-Gestational-Age Infants in Texas: A Difference-in-Differences Analysis." *Environmental Health Perspectives* vol. 129,7 (2021) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8293911/>. See also Apergis, N., Hayat, T., & Saeed, T., "Fracking and infant mortality: Fresh evidence from Oklahoma" *Environmental Science and Pollution Research*, 26(31), 32360–32367 (2019) available at <https://doi.org/10.1007/s11356-019-06478-z>; Shonkoff et al. "Response to CalGEM Questions for the California Oil and Gas Public Health Rulemaking Scientific Advisory Panel" (Oct. 2021) available at [https://www.conservation.ca.gov/calgem/Documents/public-health/Public%20Health%20Panel%20Responses\\_FINAL%20ADA.pdf](https://www.conservation.ca.gov/calgem/Documents/public-health/Public%20Health%20Panel%20Responses_FINAL%20ADA.pdf).

<sup>3</sup> U.S. Department of Labor, Occupational Safety and Health Administration, "Oil and Gas Extraction" (accessed April 2023) available at <https://www.osha.gov/oil-and-gas-extraction/hazards>.



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setting new regulatory requirements for existing oil and gas operations in the City (that would not take effect unless the Ordinance prohibiting all oil and gas land uses within the City was repealed or became ineffective for any reason). These proposals were consistent with concerns raised by Council Members and community members at prior Council meetings.

There are no active or pending permit or entitlement applications relating to proposed oil and gas development within the City. Further, City staff's research indicates that there are no active wells – including idle wells that may be re-engaged in the future – within City limits, meaning there are no vested rights to continue drilling or any related oil and gas operations that would be affected by a permanent ban.

Staff did confirm with Contra Costa County that there is one pending land use entitlement on behalf of Sunset Exploration to drill in an unincorporated area outside of Brentwood's City limits (APN 019-120-002) and, to the best of staff's knowledge, after consulting with the County's permitting division, five existing land use entitlements in unincorporated areas held by Sunset Exploration.<sup>4</sup> These entitlements would not have been affected by the City's originally proposed action to ban oil and gas land uses within its boundaries and are not affected by the current proposed action.

***Chevron U.S.A., Inc., et al. v. County of Monterey (2023)***

In the midst of staff's work on this matter, on August 3, 2023, the Supreme Court of California issued a ruling in the case *Chevron U.S.A., Inc., et al. v. County of Monterey* (2023) 15 Cal.5th 135. There, the Court considered a County ballot measure that would have imposed severe restrictions on oil and gas development by banning the drilling of new oil and gas wells in the County, and phasing out the use of wastewater injection and impoundment for new and existing wells in the County. The Court determined the measure was invalid because it conflicted with state law. Specifically, the Court held that Public Resources Code section 3106, granting the state Geologic Energy Management Division broad authority to permit, regulate, and condition oil and gas development in the state, preempted the County's measure, as the local measure conflicted with state authority to approve "methods and practices" of oil extraction that the state agency deemed suitable.

While the Court held that state law preempted the Monterey County measure as it pertained to the method and practices of oil extraction, it did not necessarily preclude a city's ability to regulate **where** oil extraction could occur. The Court stated:

Regarding [one portion of the County ballot measure], its ban on the drilling of all new wells, at first glance, appears to regulate *where* oil production can take place, i.e., nowhere in the County. But the language

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<sup>4</sup> Per correspondence with the County, there is a current land use permit for active drilling on APN 057-060-008, and between 2001 and 2009, four other land use permits were approved on sites in Knightsen, and unincorporated land outside of Brentwood, Concord, and Antioch.



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[of that portion of the ballot measure] broadly defines 'oil and gas wells' to include any type of well 'drilled for the purpose of...aiding in the recovery of oil and gas.' Thus, the language...sweeps broadly and extends its ban to any oil production method that requires the drilling of new wells—such as wastewater and steam injection wells—in order to continue extracting oil from existing oil fields [and] therefore constitutes a ban on certain oil production methods in existing oil fields.

In other words, the Court explicitly rejected the County's attempt to characterize the ballot measure as a zoning measure focused on restricting the location of oil production, concluding instead that the measure actually regulated oil production **methods and practices**, which is preempted by state law. However, the Court did not address whether or how a jurisdiction-wide prohibition could be framed to ensure it only regulated the **locations** at which oil could be extracted, which would arguably be a permissible zoning regulation that would not run afoul of preemption issues.

**REVISED ORDINANCE**

To address the Court's decision, and mitigate legal risk, the two ordinances that were previously considered by the Planning have now been combined into one. Given this, a redline document of the revisions was not prepared. The revised ordinance focuses narrowly on specific locations in the City in which oil and gas development is no longer appropriate as a permitted or conditionally permitted use. Specifically, the revised ordinance takes a number of steps:

1. PD-17 and PD-55. The ordinance eliminates oil and gas production as conditionally permitted uses in PD-17 and PD-55;
2. All Planned Development districts. The ordinance excludes oil and gas development from uses that may be permitted with a conditional use permit in any Planned Development district, *unless* oil and gas uses are expressly listed as conditionally permitted uses in a specific Planned Development district; and
3. Citywide. To take into account the *Chevron* decision's Public Resources Code Section 3106 preemption concerns about specific drilling methods and practices, and to address concerns related to the local health effects of oil and gas activities, the proposed ordinance further revises Chapter 17.680 in case a future city council decides to allow drilling as a conditionally permitted use in some districts. Additional revisions to the ordinance's regulatory provisions from the previously proposed version now include the following:
  - a. Recognizing that the State regulatory agency for oil and gas operations is the California Geologic Energy Management Division (CalGEM);



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- b. No longer requiring the abandonment of a well that is capable of producing oil and gas, even if it is no longer economically viable;
- c. Retaining the appeal procedures for suspended or revoked permits, in order to protect a permittee's due process rights; and
- d. Keeping the ordinance's amended regulatory provisions, instead of having them become effective only upon a judicial ruling.

Finally, it should be noted that if the ordinance is adopted, future revisions may be warranted, depending on CalGEM regulations and/or subsequent judicial decisions.

As this ordinance pertains to Title 17 (Zoning), the Planning Commission must review it and make a recommendation on its passage prior to Council action. Though on May 2, 2023, the Commission saw earlier drafts of the ordinances, this revised version will be returned to the Commission for its official consideration and recommendation in order to comply with the requirements of Government Code section 65857, which provide:

*The legislative body may approve, modify or disapprove the recommendation of the planning commission; provided that any modification of the proposed ordinance or amendment by the legislative body not previously considered by the planning commission during its hearing, shall first be referred to the planning commission for report and recommendation, but the planning commission shall not be required to hold a public hearing thereon. ... (Emphasis added.)*

Following tonight's meeting, staff will schedule this for return to the Planning Commission. In the meantime, the interim moratorium on oil and gas drilling adopted by the City Council on April 12, 2022, and most recently extended on March 28, 2023, remains in effect until March 27, 2024.

**CITY COUNCIL STRATEGIC INITIATIVE**

Focus Area 4 (Community Development): Develop Brentwood as a high quality, diverse and balanced community while protecting natural and agricultural resources.

**PREVIOUS ACTION**

Previous Action by the City Council is included on Attachment 1.

**DATE OF NOTICE**

The City of Brentwood published a public hearing notice in the Brentwood Press on July 28, 2023.



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**ENVIRONMENTAL DETERMINATION**

The adoption of the proposed Ordinance is a discretionary action by the City Council, and therefore, subject to consideration under the California Environmental Quality Act (CEQA). The proposed Ordinance has been analyzed in accordance with the authority and criteria contained in CEQA, the State CEQA Guidelines, and the environmental regulations of the City. Pursuant to CEQA and the CEQA Guidelines, it has been determined that the Ordinance establishing new regulations and requirements for existing operations is exempt from CEQA, including without limitation, requirements for CEQA review, pursuant to the following exemptions: the “common sense” exemption under CEQA Guidelines Section 15061(b)(3), and the following categorical exemption classes under CEQA Guidelines Section 15061(b)(2): Class 4 - Alterations to Land (CEQA Guidelines Section 15304) and Class 8 - Actions by Regulatory Agencies for the Protection of the Environment (CEQA Guidelines Section 15308).

In determining whether the proposed Ordinance is exempt from CEQA, City staff evaluated the potential for environmental effects associated with new regulations and requirements applicable to oil and gas uses, and evaluated the applicability of certain exemptions to this proposed Ordinance.

Ultimately, due to the imposition of enhanced regulatory requirements on oil and gas operators in the City, the proposed Ordinance will result in beneficial effects that would promote protection of the environment. Such benefits include, but are not limited to:

- Improved land use consistency and compatibility between oil production areas and other surrounding community uses;
- As to air quality, incremental reductions in air pollutants locally and assisting the region in meeting clean air goals, and as to climate change, incremental reductions in the State’s contribution to GHG emissions;
- Improved visual character and aesthetics by restoration of the areas affected by oil and gas land use activities to as near a natural state as practicable; and
- Enhanced public health, welfare, and safety, and protection of the environment by prohibiting new uses and regulating aged and outdated infrastructure that is vulnerable to failure and poses a threat to public safety and to the environment.



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**ATTACHMENT(S)**

1. Previous Actions
2. Ordinance amending the City of Brentwood Municipal Code to remove oil and gas development uses as conditionally permitted uses in Planned Development Districts 17 and 55, require oil and gas development uses to be specifically listed as conditionally permitted uses in planned development districts to be eligible for conditional use permits, amend oil and gas production regulations, and find the actions exempt from CEQA
3. *Chevron U.S.A., Inc., et al. v. County of Monterey* (2003) 15 Cal.5th 135
4. Public Resources Code § 3106
5. Government Code § 65857