

Comment Letter P



December 22, 2011

Via U.S. Mail & E-mail

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Re: Proposed Revisions to San Diego County's Wind Energy Ordinance

Dear Supervisors and Director Gibson:

I write to exhort your rejection of certain aspects of the Wind Energy Zoning Ordinance as currently proposed. If the Ordinance is adopted as currently drafted, it will effectively eliminate all large-scale wind energy projects in San Diego County. Rather than accomplish its purported goal¹ of encouraging renewable energy development, the Ordinance will be a de facto prohibition on large-scale projects.

Our 8,000-plus acre property near Boulevard, California in East County San Diego is the only viable wind energy resource in all of San Diego County. Our analysis reveals that if the Ordinance is adopted, only approximately 57 of our 8,000-plus acres would be able to be developed due to the proposed setback requirements and the inappropriate inclusion of a low frequency C-weighted sound level limit. There are numerous other problems with the ordinance and I would direct your attention to the enclosed letter that you also received from Enel Green Energy for a more fulsome discussion of those issues.

As you are all aware, with the recent adoption of the update to San Diego County's General Plan, our property in the east county has already been down-zoned to the point where there is not economically viable for residential development. If the Ordinance is adopted as currently written and we are not able to develop a large-scale wind project on

¹ "The purpose of the [Ordinance] is to facilitate the development of wind turbines in an effort to help meet the current and future federal and state goals for renewable energy production." Draft EIR, § 5.2.2.

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Response to Comment Letter P

Lansing Companies
Benjamin M. Weiss, Esq.
December 22, 2011

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This comment does not raise a significant environmental issue for which a response is required. However, the County does not agree with this comment and wishes to provide the following clarifications:

The current County Zoning Ordinance limits the height of large turbines to 80 feet with a cumulative blade swept area of not more than 6400 square feet for all turbines. As such, the current ordinance does not allow for "large scale wind energy projects." The commenter's suggestion that the proposed ordinance would "effectively eliminate all large scale wind energy projects" is therefore misleading in that it suggests that large-scale wind turbine energy projects would otherwise be allowed under the current ordinance.

The proposed ordinance amendment eliminates the height and blade sweep area restrictions for large turbines. The proposed ordinance would permit development of larger turbines both in terms of height and rated capacity. Therefore the proposed ordinance would increase opportunities for renewable energy

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	<p>development, rather than eliminating these opportunities as suggested by the commenter.</p> <p>The County Board of Supervisors specifically directed staff to develop a two tiered wind energy ordinance which would allow small turbine(s) up to 50 kW in size through a ministerial permit process and large turbine(s) greater than 50kW through the Major Use Permit process. The proposed ordinance reflects this two tier system. And while the minimum rated capacity threshold for a large turbine is 50 kW, there is no maximum rated capacity threshold or restriction on overall height. The primary restriction on the size and overall scale of large scale wind energy projects will be derived from the low frequency noise provisions of the proposed ordinance, which will ultimately dictate setback requirements based on acoustical analysis. While a number of variables (turbine manufacturer, turbine size, topography, atmospheric conditions, existing ambient noise conditions, etc.) must be considered when establishing low frequency setbacks, the County has conducted an analysis (see Appendix A to these responses to comments) to estimate the setbacks that would be required by various size turbines (50kW, 500kW, 1MW). The county's analysis concluded that large turbines, both utility scale and non utility scale, are viable development options under the proposed ordinance. The commenter's suggestion that "the ordinance will be a</p>
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	<p>de facto prohibition on large-scale projects” is not supported by the County’s analysis.</p> <p>P-2 This comment does not raise a significant environmental issue for which a response is required. However, the County does not concur that the referenced property is "the only viable wind energy resource in all of San Diego County." Approximately 807,984 acres of land in the unincorporated area of the County have been identified as having wind resources capable of supporting large turbine development (See Figure 1-4).</p> <p>P-3 This comment does not raise a significant environmental issue for which a response is required. In addition, the comment lacks the data and analysis to support its conclusion. Finally, while the County has concluded through its analysis that utility scale turbine development is viable under the proposed ordinance, it readily acknowledges that some large turbine projects, by virtue of their size, location or availability of land, may not be permissible under the proposed ordinance. This does not, however, mean that the site is undevelopable.</p> <p>P-4 This comment does not raise a significant environmental issue for which a response is required. In addition, the comment lacks the data and analysis to support its conclusion. Finally, while the County has concluded through its analysis that utility scale wind</p>
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	<p>turbine development is viable under the proposed ordinance (See Appendix A), it readily acknowledges that some large turbine projects by virtue of their size, location or availability of land may not be permissible under the proposed ordinance. This fact does not, however, mean that if a wind turbine project of a certain size and manufacturer would not be permissible under the proposed ordinance that turbines of all sizes and manufacturers would, likewise, be impermissible. It simply means that the selection of the size and type of turbine is important and must be balanced against the size and location of the proposed project site.</p> <p>P-5 This comment does not raise a significant environmental issue for which a response is required.</p> <p>P-6 This comment does not raise a significant environmental issue for which a response is required.</p>
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our Property because of it, government actions will have completely eliminated all viable economic uses for our property. This is a textbook taking under California and Federal law.

The Fifth Amendment to the United States Constitution states that "...nor shall private property be taken for public use, without just compensation." The fundamental concept that underlies this "just compensation" clause of the Fifth Amendment is that government cannot force some people alone to bear public burdens which, in fairness and justice, should be borne by the public as a whole.² An undue restriction on the use of private property is as much a taking for constitutional purposes as appropriation or invasion of the property.³

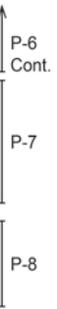
A regulation goes too far when it: (i) deprives the owner of all economically viable use of the property⁴; or (ii) constitutes a substantial interference with the ability of a property owner to make economically viable use of, derive income from, or satisfy reasonable, investment-backed profit expectations with respect to the property.⁵

² *Pennell v. City of San Jose*, 485 U.S. 1, 108 S. Ct. 849, 849-856, 99 L. Ed. 2d 1 (1988); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 318, 319, 107 S. Ct. 2378, 96 L. Ed. 2d 250, 26 Env't. Rep. Cas. (BNA) 1001, 17 Env't. L. Rep. 20787 (1987); *Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S. Ct. 3141, 3147, 97 L. Ed. 2d 677, 26 Env't. Rep. Cas. (BNA) 1073, 17 Env't. L. Rep. 20918 (1987); *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960).

³ *Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com.*, 11 Cal. App. 3d 557, 572 (1st Dist. 1970); *Kemp v. U.S.*, 65 Fed. Cl. 818, 821 (2005).

⁴ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798, 34 Env't. Rep. Cas. (BNA) 1897, 22 Env't. L. Rep. 21104 (1992); *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952, 81 Cal. Rptr. 2d 93, 968 P.2d 993 (1999); *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 66 Cal. Rptr. 2d 672, 941 P.2d 851 (1997); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 484, 485, 107 S. Ct. 1232, 94 L. Ed. 2d 472, 25 Env't. Rep. Cas. (BNA) 1649, 17 Env't. L. Rep. 20440 (1987); *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126, 106 S. Ct. 455, 88 L. Ed. 2d 419, 23 Env't. Rep. Cas. (BNA) 1561, 16 Env't. L. Rep. 20086 (1985).

⁵ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 484, 485, 107 S. Ct. 1232, 94 L. Ed. 2d 472, 25 Env't. Rep. Cas. (BNA) 1649, 17 Env't. L. Rep. 20440 (1987); *Hodel v. Irving*, 481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987); *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126, 106 S. Ct. 455, 88 L. Ed. 2d 419, 23 Env't. Rep. Cas. (BNA) 1561, 16 Env't. L. Rep. 20086 (1985); *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 199, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985); *Kirby Forest Industries, Inc. v. U.S.*, 467 U.S. 1, 14, 104 S. Ct. 2187, 81 L. Ed. 2d 1, 39, 39 Fed. R. Serv. 2d 929 (1984); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 8 Media L. Rep. (BNA) 1849 (1982); *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1, 16 Env't. Rep. Cas. (BNA) 1027, 11 Env't. L. Rep. 20569 (1981); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S. Ct. 2035, 64 L. Ed. 2d 741, 6 Media L. Rep. (BNA) 1311 (1980); *Andrus v. Allard*, 444 U.S. 51, 66, 100 S. Ct. 318, 62 L. Ed. 2d 210, 13 Env't. Rep. Cas. (BNA) 2057, 9 Env't. L. Rep. 20791 (1979); *Kaiser Aetna v. U.S.*, 444 U.S. 164, 175, 100 S. Ct. 383, 62 L. Ed. 2d 332, 13 Env't. Rep. Cas. (BNA) 1929, 2000 A.M.C. 2495, 10 Env't. L. Rep. 20042 (1979); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631, 11 Env't. Rep. Cas. (BNA) 1801, 8 Env't. L. Rep. 20528 (1978); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Env't. L. Rep. 20106 (2005); *Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S. Ct. 3141, 3145-3146, 97 L. Ed. 2d 677, 26 Env't. Rep. Cas. (BNA) 1073, 17 Env't. L. Rep. 20918 (1987); *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 66 Cal. Rptr. 2d 672, 941 P.2d 851 (1997); *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952,



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This comment does not raise a significant environmental issue for which a response is required. However, the County does not concur with this statement and provides the following clarification regarding the project:

It is generally recognized that the County's current wind ordinance would not allow large scale wind development projects. This is evident by the fact that the only large scale wind energy project approved (Tule Wind Project) in the County required multiple Zoning Ordinance and General Plan amendments. Currently, the County Zoning Ordinance limits large turbine(s) to a maximum height of 80 feet and restricts the cumulative blade sweep area for all turbine(s) in a project to 6400 square feet.

The proposed ordinance amendment eliminates the height and blade sweep area restrictions for large turbines. The proposed ordinance would allow for the development of larger turbines, both in terms of height and rated capacity. Therefore, the proposed ordinance would increasing the opportunities for renewable energy development, rather than eliminate these opportunities as suggested by the commenter.

The County analysis concluded (see Appendix A) that large scale wind energy projects (utility scale projects) are viable under the proposed ordinance.

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	<p>Given that the current ordinance does not allow large scale wind energy projects and that the County's analysis concludes that appropriately sited/scaled large wind energy projects are viable under the proposed ordinance, the proposed ordinance meets the objectives of the project.</p> <p>The County does not agree that the project eliminates all viable economic uses for the commenter's property. The comment lacks any analysis to support such a claim.</p> <p>P-8 This comment does not raise a significant environmental issue for which a response is required. Please see response to comment P7.</p>
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Given that: (i) our property is the *only* property that will be affected by the Ordinance because it is the only property in the County with the wind resources that make a large-scale wind project possible; and (ii) we have already been deprived of the ability to develop more traditional forms of residential, commercial and retail development due to the General Plan Update, we alone will bear the full brunt of what will effectively be the government's asphyxiation of this desperately needed industry and the deprivation of the last remaining economically viable use of our property. This is the very meaning of unconstitutional.

Even setting aside the grave constitutional issues reference above, the Ordinance, as written, is entirely contradictory and fails to approach the standards California's Legislature and Executive branches have established. Senate Bill 1078 established California's Renewable Portfolio Standard (RPS) as one of the most ambitious renewable energy standards in the country. As amended and supplemented, it now requires California's utilities to increase procurement from renewable energy sources to 33% of total procurement by 2020.⁵ With these bold goals, California is blazing the trail that the rest of the United State will follow in terms of increasing our utilization of clean, renewable energy sources and weaning us from our addiction to fossil fuels and foreign oil.

Given that the Ordinance, as written, would completely prevent the development of large-scale wind energy projects, it would not only defeat its own stated purpose, but it would actively work against the renewable energy goals set forth by California's Legislature and Governor. With its vast renewable energy resources for solar and wind, San Diego should be leading this effort, not fighting it.

In light of the above, we urge you to reject the Ordinance as currently proposed and work with the scientific experts in the field, including Enel and Iberdrola, to adopt a comprehensive wind energy ordinance that will actually facilitate the development of wind energy projects.

Sincerely,
LANSING COMPANIES



Benjamin M. Weiss, Esq.
General Counsel

⁵ 1 Cal. Rptr. 2d 93, 968 P.2d 993 (1999); *Herzberg v. County of Plumas*, 133 Cal. App. 4th 1, 13-15, 34 Cal. Rptr. 3d 588 (3d Dist. 2005).

⁶ See California Public Utilities Commission RPS Program Overview:
<http://www.cpuc.ca.gov/PUC/energy/Renewables/overview>

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P-9 This comment does not raise a significant environmental issue for which a response is required. Please see response to comment P7.

P-10 This comment does not raise a significant environmental issue for which a response is required. However, the County does not concur that the referenced property is the "only property that will be affected by the Ordinance because it is the only property in the County with wind resources that make a large scale wind project possible." Approximately 807,984 acres of land in the unincorporated area of the County have been identified as having wind resources capable of supporting large turbine development (See Figure 1-4).

P-11 This comment does not raise a significant environmental issue for which a response is required. Please see response to comment P7.

P-12 This comment does not raise a significant environmental issue for which a response is required. However, the County does not agree with this comment. The County's proposed ordinance amendment supports the State's Renewable Portfolio Standard (RPS) by removing height and blade sweep area restrictions for large turbines. In addition, the County's analysis has concluded that utility scale wind turbine development is viable under the proposed ordinance. State and Federal law do not require local jurisdictions to allow wind turbines.

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	<p>Moreover, the State’s RPS is not solely limited to wind energy. In addition to supporting wind energy development, the County actively promotes solar energy development. On September 15, 2010, the Board of Supervisors adopted the County’s updated Solar Energy Ordinance which simplified the review process for solar energy projects and streamlined permitting requirements. In summary, the County does not agree that ”the ordinance, as written, is entirely contradictory and fails to approach the standards California’s Legislature and Executive branches have established.”</p> <p>P-13 This comment does not raise a significant environmental issue for which a response is required.</p> <p>P-14 This comment does not raise a significant environmental issue for which a response is required. Please also see responses P7 and P 12.</p> <p>P-15 This comment does not raise a significant environmental issue for which a response is required.</p> <p>P-16 The County acknowledges and appreciates this comment. Ultimately, the Board of Supervisors must determine how the County can best meet its objectives. The information in this comment will be in the Final EIR for review and consideration by the County Board of Supervisors.</p>
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