



AGENDA MATERIAL
DATE 9-6-16 ITEM NO. PA20

September 6, 2016

The Honorable Sharon Bronson
Chair, Pima County Board of Supervisors
130 W. Congress St.
Tucson, AZ 85701

RE: *September 6th Board of Supervisors Meeting, Agenda Item #20, Implementing Agreement for the Multi-Species Conservation Plan*

Dear Madame Chair,

Thank you for the opportunity to provide comment on Pima County's Multi-Species Conservation Plan (MSCP)/Section 10 Permit and Implementing Agreement. As you know, SAHBA has been an active stakeholder and commenter since the initial discussions many, many years ago. It is likely that no other group (landowners, developers and home builders) has a larger stake or more at risk in the outcome of this effort. SAHBA would like to thank the Board and commends staff for their passion, commitment and pro-active efforts to listen to and consider industry input. We would also be remiss not to recognize the outstanding work of Maeveen Behan on the MSCP, CLS and SDCP.

It's no secret that for nearly a decade, the Home Building industry – once a \$2 billion contributor to our local economy – has been decimated. The funds used for parks, roads, libraries and to fill the coffers of local government have dried up. The results are visible to anyone. Fortunately, this year permits have finally started to tick upward and the industry has taken on cautious optimism about the future.

Inherent to our industry's – and in turn our community's – future success is the certainty, predictability and ease of navigating the regulatory process. While the County's environmental programs are seen by many as visionary they are also seen as restrictive by the development industry. The intent behind these comments is not to re-hash old battles between "builders and enviros" but to recognize the careful balancing act that must be done to ensure our communities environmental assets are protected while also facilitating development and economic progress.

With that said, there are reasons to celebrate the Section 10 permit. It is the culmination of 15+ years of hard-work and determination by dozens of County employees and hundreds of other stakeholders. It is the "third leg of the stool" in Pima County's environmental protection program. Not the least of which, we now have a localized mechanism for private sector to seek ESA protection instead of dealing directly with USFWS on a project specific basis. There are also reasons for SAHBA to continue to seek answers, request clarification and remain measured in our opinion especially given the unknowns of how everything will function in reality.

The MSCP has evolved over the years and iterations. Many elements of this evolution have been favorable to the industry: automatic coverage for single lot owners; opt-in provision for subdivisions;

reducing burdens of Section 7 consultations plus the fees appear to be reasonable. While changes have occurred, the foundational elements – the county's family of environmental policies and ordinances - remain the same. On one-hand we appreciate that there are require no new development related requirements. On the other hand the industry still seeks relief from outdated or unnecessarily cumbersome requirements. We see the finalization of the MSCP as an opportunity to streamline and tailor other County environmental policies. In fact, Pima Prospers references doing this very same thing (3.31 – Policy 13, Goal 1, k) and we look to County leadership to initiate a process for such a review.

Additionally, there are several issues we had previously raised in our comments to the U.S. Fish and Wildlife Service which we continue to provide comment on and seek clarification. We ask for the County's continued assistance in addressing these matters to ensure successful implementation of the MSCP and participation by the private sector. You will find an attached letter from Fennemore Craig highlighting the areas we seek to focus on.

In conclusion, SAHBA looks forward to working with Pima County on the next phase of this process. We see opportunity for future collaboration to the benefit of our economy and environment.

Regards,



David Godlewski
President
SAHBA

FENNEMORE CRAIG, P.C.

2394 East Camelback Road, Suite 600
Phoenix, Arizona 85016-3429
(602) 916-5000

Robert D. Anderson
Direct Phone: (602) 916-5455
Direct Fax: (602) 916-5655
randerson@fcclaw.com

Law Offices

Denver	(303) 291-3200
Las Vegas	(702) 692-8000
Nogales	(520) 281-3480
Phoenix	(602) 916-5000
Reno	(775) 788-2200
Tucson	(520) 879-6800

September 5, 2016

VIA ELECTRONIC MAIL

David Godlewski, President
Southern Arizona Home Builders Association
2840 North Country Club Road, Suite 100
Tucson AZ 85716

Re: Pima County Multi-Species Conservation Plan and Section 10 Permit

Dear David:

You have asked as to review the Pima County Multi-Species Conservation Plan ("MSCP") which was recently approved by the U.S. Fish & Wildlife Service ("USFWS") in conjunction with issuance of an incidental take permit ("ITP") to the County pursuant to Section 10 of the Endangered Species Act ("ESA"). You have asked us to compare the final MSCP/ITP with comments filed by Sedgwick, LLP on behalf of an industry group which included the Southern Arizona Home Builders Association ("SAHBA")¹ and assess whether your major concerns have been addressed. There a number of issues identified in the Sedgwick comments that have not in fact been addressed, but for purposes of efficiency, you have asked that we focus on certain major issues that of concern for SAHBA members. Our analysis follows.²

1. Covered activities

The MSCP generally covers "ground disturbance" and SAHBA has previously raised the question of whether this fully covers construction activity.³ We understand that SAHBA met with the County on September 1st and received assurances that construction activities occurring on construction sites were generally covered by the take protection offered by the MSCP/ITP. This is an important assurance for SAHBA members who choose to opt-in.

¹ Letter to Steve Spangle, USFWS from Alan Glenn, Sedgwick, on behalf of SAHBA, Tucson Association of Realtors, and Metropolitan Pima Alliance regarding the Draft MSCP and related documents (March 15, 2013).

² Because of the voluminous nature of the draft and final documentation for the MSCP and related documents, we have not fully reviewed all documents but rather have focused on the specific issues raised by Sedgwick and identified by your members.

³ Sedgwick, at p.13.

FENNEMORE CRAIG, P.C.

VIA ELECTRONIC MAIL

David Godlewski, President

September 5, 2016

Page 2

2. Opt-in criteria

SAHBA had requested that the opt-in provisions of the MSCP under which private landowners would obtain permit coverage be clarified and that certain opt in criteria be eliminated. Sedgwick at p. 2. One of the most important was to resolve whether projects that either are outside the Conservation Lands System ("CLS") or received approvals prior to adoption of the CLS will be permitted to opt-in. We will discuss grandfathering in Section 2 below in more detail, but it appears from the text of the MSCP and ITP that all undeveloped private land in the County that requires a site construction permit is eligible (with certain exceptions not pertinent here), regardless of whether it is or contains lands included in the CLS, or was approved by the County prior to adoption of the Sonoran Desert Conservation Plan ("SDCP"), CLS, Riparian Ordinance or any of the other County ordinances that form the backbone of the MSCP.⁴ MSCP at p. 18-19.

The final MSCP does not address SAHBA's concerns that projects which have been issued grading permits⁵ should still be able to seek coverage. Sedgwick at p. 4. Under the MSCP, in order to secure coverage for a residential subdivision, a site construction permit must have been applied for but not yet issued. MSCP at p. 19. You noted that many of the same landowners with properties that currently hold site construction permits have already been subjected to the CLS and have had to set aside large portions of their property to meet those requirements. To quote from the comments: "Why, then, would those who were required to set aside the majority of their properties for preservation in order to support the County's Permit then be denied the very benefit provided by it?" The County has not adequately responded to this concern. We would recommend discussing this provision with the County to see if some additional clarification could be provided. For example, could a landowner seeking to opt in have his permit cancelled and re-apply in order to qualify for coverage? Could a landowner who had commenced but not completed grading do the same thing?

3. Grandfathering of existing projects/possibility of new mitigation obligations

There is a persistent concern among SAHBA members that additional mitigation obligations – beyond current County imposed natural open space requirements such as the SDCP, CLS or Riparian Ordinance - will be placed on them in the process of "opting in" to coverage under the ITP. A related concern is that projects approved by the County prior to adoption and implementation of the SDCP/CLS/Riparian regulatory structure by the County will be required to conform to these requirements as a condition for coverage.

⁴ See discussion below regarding the inclusion of these ordinances and protocols in the MSCP and are concerns related to that inclusion.

⁵ We understand that "grading permit" and "site construction permit" are synonymous.

FENNEMORE CRAIG, P.C.

VIA ELECTRONIC MAIL

David Godlewski, President

September 5, 2016

Page 3

We could not locate a specific response to this concern by the County and recommend that you continue to seek confirmation that the opt-in is not an opportunity for imposing new mitigation obligations of your members. That said, we reviewed the MSCP, ITP and opt-in provisions and, with the exception of requiring permanent protection for natural open space set aside under the CLS or Riparian regulatory requirements, we do not see a legal basis for requiring additional mitigation at the opt in stage. Coverage is available provided that the property is within the “permit area” and subject to the County’s site construction permit requirements, with a few additional specific criteria that must be met. MSCP at 18-19. With one exception, none of these involve dedication of additional mitigation lands. The MSCP does allow the County to require a landowner to record some sort of protective instrument over lands protected under either the CLS or Riparian at the time of opt in:

The County will also require those natural open-space areas *created for compliance with* the CLS conservation guidelines and those under Chapter 16.30 – Watercourse and Riparian Habitat Protection and Mitigation Requirements as applied to Important Riparian Areas to be used as Section 10 mitigation lands unless there are site-specific circumstances that render the set-aside unsuitable for use as mitigation. *When the property owner elects to opt-in, the County will require suitable natural open space set aside areas to be permanently protected through the recordation of a legally enforceable instrument acceptable to Pima County.*

MSCP at p. 19 (emphasis added). The critical operative language is that this obligation applies to lands “created for compliance with” the CLS and Riparian Ordinance. If a particular project was not subject to either at the time of County approval, it would have no CLS/Riparian protected natural open space and as such, would not be subject to the perpetual protection requirement. We encourage you to confirm this conclusion with the County.

A caveat to this conclusion is that County ordinances could be amended in the future to impose additional mitigation obligations. Short of doing so, we do not believe that a substantive obligation of this sort – requiring dedication of additional natural open space as a condition of permit coverage – could be accomplished in any other manner.⁶ For example, Chapter 7 of the MSCP discusses “changed circumstances” and identifies steps it will take under the MSCP to address those circumstances. One identified changed circumstance is “Mitigation lands are compromised and can no longer be used for mitigation. Lands could include condemnation for a

⁶ We discuss in the next section the possibility that new obligations could be imposed through Section 7 consultation occurring for projects requiring federal authorization. There is a distinct possibility that that could occur, as discussed below. But that would be because of federal consultation requirements occurring outside of the MSCP, not because of the MSCP itself.

FENNEMORE CRAIG, P.C.

VIA ELECTRONIC MAIL

David Godlewski, President

September 5, 2016

Page 4

utility right-of-way, or unauthorized impacts within privately owned Mitigation Land.” MSCP, p. 90, Table 7.1. The County’s “potential response” is:

Pima County will first attempt to rectify the cause or source of the changed circumstance. If the source or cause of the problem is not identifiable or if the County determines that the remedy is not feasible or practicable, *Pima County will substitute these acres with land that has a CLS value that meets or exceeds that of the compromised Mitigation Land*, as necessary, to maintain the appropriate ratio of Mitigation Land to lands impacted by Covered Activities. When such circumstances are encountered, the County will coordinate a resolution with the USFWS on whether it is retained or replaced as mitigation.

Id. This provision clearly contemplates the County, not private landowners seeking permit coverage, to substitute additional mitigation lands. This does not provide a basis for imposing new requirements on private landowners. In our view, requiring dedication of additional mitigation lands could only be accomplished through new or modified County ordinances.⁷ We encourage you to confirm this conclusion with the County.

4. Incentives for opting-in

We believe that the County has missed an opportunity here to incentivize opting-in through regulatory relief. For example, SAHBA members report that survey requirements for Pima pineapple cactus (“PPC”) are extremely onerous and in some cases can exceed the value of the land being surveyed. Given the mapping and impact analysis done as part of securing the MSCP approval, is there an opportunity to forgo survey if the landowner opts-in? Similarly, given the large open space set asides required under the Riparian Ordinance, shouldn’t there have been an opportunity through consultation with the Army Corps of Engineers to obtain Section 404 mitigation credit for preservation of riparian corridors? This would have provided a significant incentive to opting-in.

Corps regulations specifically allow for mitigation credit through preservation of both waters of the U.S. and adjacent riparian buffers. 33 C.F.R. §332.3(h) and (i). The importance that Pima County has placed on preservation of riparian corridors dovetails well with the Section 404 regulatory rationale for allowing preservation as a form of mitigation. (For example, to allow use of preservation, the Corps must find that the “resources to be preserved provide

⁷ Another area that we do not believe provides a basis for imposing new mitigation requirements is the “Adaptive Management” provisions found in Chapter 6.6 of the MSCP and in the draft Implementing Agreement (Appendix D). While changing conditions might indicate a need for changes in management and habitat protection, requiring additional set asides would require County ordinance changes.

FENNEMORE CRAIG, P.C.

VIA ELECTRONIC MAIL

David Godlewski, President

September 5, 2016

Page 5

important physical, chemical, or biological functions for the watershed” and “contribute significantly to the ecological sustainability of the watershed” and that the resources will be “permanently protected through an appropriate real estate or other legal instrument” *Id.*, §332.3(h)(i)(ii) and (v). There are undoubtedly other forms of regulatory relief that the County could offer either in partnership with other agencies such as the Corps or on its own as a way of encouraging landowners to participate.

5. Implementation/Funding details

While the County has provided additional details on how the program will be implemented, substantial uncertainty remains, particularly for larger, phased projects. As noted above, when opting-in, a landowner with CLS or Riparian open space on its property will be asked to record a protective instrument providing an additional level of protection for this category of open space. For a large, multi-phase project, what portion of the open space will require this additional protective instrument? How can future site development occur consistent with these additional protections? For example, development of future phases may require crossing designated riparian areas with utility lines or roads, and the precise location of those crossings may not be known when earlier stages of development occur. SAHBA members need to have development flexibility and the use of additional protective instruments restricting land uses have the potential for directly interfering with future development.

SAHBA has also generally sought details on the program costs and funding. Additional detail on this aspect of the program would be helpful in the context of adopting the fee ordinance.

6. Mitigation ratios

There is considerable confusion among SAHBA members on how the mitigation ratios set forth in the MSCP relate to the mitigation ratios currently used in the County’s SDCP, CLS and Riparian regulatory schemes. The mitigation credit claimed for mitigation lands preserved under the CLS are different from the mitigation ratios used to calculate the mitigation obligation or land set aside within the CLS and Riparian Ordinance themselves. *Cf.* MSCP p. 47, Table 4.2, and C. The concern expressed by SAHBA members is that this could somehow be construed as a requirement that additional mitigation be provided. As discussed above, we do not see a legal mechanism to impose additional mitigation obligations in the form of land set asides beyond what is already required under the County-administered CLS and Riparian programs.

The simple explanation of the difference in mitigation, is that in the MSCP, it is the County providing the mitigation required under the ITP, subject to mitigation ratios set forth in

FENNEMORE CRAIG, P.C.

VIA ELECTRONIC MAIL

David Godlewski, President

September 5, 2016

Page 6

the MSCP. A portion of this mitigation is being provided by CLS/Riparian lands that have been preserved by private landowners through County regulation. The mitigation ratios and obligations contained within the CLS and Riparian Ordinance to which the private landowners are subject are not changing. We encourage you to confirm this conclusion with the County. It would be particularly helpful, for example, if the County could prepare some examples that could be shared with SAHBA and the private sector generally so they can see how the credits and debits of impacts and mitigation operate in the real world.

7. Streamlining Section 7 consultations

One of SAHBA's main concerns with the Draft MSCP was the exclusion of federally-permitted projects from permit coverage. The language of concern has been deleted⁸ and so it appears that projects which are otherwise eligible for coverage but that require some federal permit (and therefore will go through Section 7 consultation with that federal agency) can still qualify for coverage under the ITP. In addition, the U.S. Army Corps of Engineers consulted programmatically on future projects authorized by Section 404 nationwide permits within the permit area covered by the MSCP. MSCP at pp 30-33. As a result, there should be no additional ESA-related mitigation for those projects. As discussed above, we think an opportunity was missed in failing to secure mitigation credit (or at least an avenue to claim mitigation credit) for CLS/Riparian land set asides for impacts to waters of the U.S.

Programmatic consultation did not extend to individual Section 404 permits. A very good argument can be made that participation in the MSCP should streamline Section 7 consultation for an individual permit, and no additional ESA-related mitigation obligations should be imposed. Whether that is the case is of course up to the Corps and USFWS, which would address the issue in the context of a specific project. While Pima County could shed some light on the issue, the decision is with the federal agencies.

The County should continue to pursue additional Section 7 streamlining opportunities with other federal agencies. SAHBA had argued for greater streamlining than this, but no other federal agencies with oversight on land development projects (such as FEMA, which regulates floodplain map revisions, or BLM or the Forest Service, which can have authority to approve access to private lands) programmatically consulted. Thus there remains the risk that land development projects requiring some other federal authorizations would be required to do additional mitigation. Creating a path for streamlined Section 7 consultation with these other agencies would provide another incentive for landowners to seek coverage under the MSCP.

⁸ See memorandum from C.H Huckelberry, County Administrator to Pima County Board of Supervisors regarding Changes from the Public Draft Multi-Species Conservation Plan to the Final (may 20, 2016) at p. 1.

FENNEMORE CRAIG, P.C.

VIA ELECTRONIC MAIL

David Godlewski, President

September 5, 2016

Page 7

8. "Federalization" of Pima County ordinances

A persistent concern of SAHBA members is the potential influence of USFWS on the County's administration of its "regulations and protocols" that the County asserts avoid and minimize impacts to scenic, cultural and wildlife resources, particularly the SDCP, the CLS, the Riparian Ordinance, and Native Plant Preservation Ordinance. *See* MSCP, Chapter 4, Table 4.1 (listing regulations and protocols). These same requirements place significant regulatory burdens on SAHBA members, and have the potential to significantly interfere with SAHBA members' goal of providing affordable and diverse housing options for County residents. How they are interpreted and applied are of critical concern for SAHBA members.

SAHBA previously expressed concern that by including these regulations and protocols in the MSCP, the County will make itself less flexible to amending them in the future for fear of jeopardizing the ITP. By incorporating the local laws directly into the MSCP, there is a risk that future Commissioners would be forced to refrain from altering the local laws for fear of violating the ITP, a condition that runs contrary to sound governance policy and possible state legislative and constitutional principles.

This concern remains valid with issuance of the final MSCP and ITP. The MSCP specifically states the County's intention to rely on continued implementation of these programs "to avoid and minimize future impacts to Covered Species." MSCP at p. 34. The MSCP goes on to note that modifications to these programs and policies will have to be coordinated with USFWS before changes are made so as to allow USFWS to evaluate "the potential of the proposed changes to adversely affect specific Section 10 permit provisions that provide for species' protection prior to Pima County's final decision about whether to execute the proposed modification." MSCP at p. 45.

County regulations and their implementation obviously are crucial to the success of the MSCP, but it is important that they be administered fairly, avoiding as much as possible inordinate burdens on the regulated community. The County, therefore, needs to maintain its independence in interpreting its own regulations and protocols, and in amending those requirements as needs change over time. Your members report that currently, although at times difficult and challenging, interpretations of the SDCP/CLS and other County regulations involve negotiations with Staff and in some instances involvement of the Board of Supervisors. This should not appreciably change with the issuance of the ITP. We recognize that having included these regulations and protocols in the MSCP, USFWS has a role going forward in evaluating whether changes made undermine the success of the MSCP, but this role should not be interpreted as giving USFWS veto power over future changes to these requirements. We encourage you to raise this concern with the County and seek assurances that it, not USFWS,

FENNEMORE CRAIG, P.C.

VIA ELECTRONIC MAIL

David Godlewski, President
September 5, 2016
Page 8

will continue to be responsible for interpreting and implementing County regulatory requirements and that the County will continue to exercise independence in making necessary changes to local requirements in the future.

9. Conclusion

The final MSCP and ITP do in fact resolve some of SAHBA's major concerns, but we recommend that the conclusions we drew from review of the MSCP and related documents be reviewed with Pima County to ensure that these interpretations are correct. There are also a number of issues raised in the Sedgwick comment letter that have not been addressed by the County but which we did not raise here and that remain outstanding.

We appreciate the opportunity to assist you and are available should you have any questions.

Sincerely,

FENNEMORE CRAIG, P.C.



Robert D. Anderson

RDA