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TO: Board of Supervisors
FROM: Douglas L. Losak, Acting County Counsel
RE: Fracking Initiative

Opinion No. 14-0016

QUESTION:

Is the Proposed Fracking Initiative legally sound?

ANSWER:

No.

DISCUSSION:

An initiative petition titled "A Community Bill of Rights Ordinance - Establishing A Community Bill of Rights For the People of Mendocino County Which Prohibits Fracking, and Which Provides for Enforcement of This Bill of Rights and Its Prohibitions" was filed with the Mendocino County Clerk Recorder's Office on June 25, 2014. It was certified by the Registrar of Voters on July 24, 2014.

This opinion is a surface look at the initiative in question – focusing on whether it would likely pass a legal challenge in Court. The short answer is no. The initiative appears to violate the single subject rule. It also appears to violate the interstate commerce clause of the federal constitution. Furthermore, it attempts to place itself over any federal or state law that is in conflict with it. Finally, the penalty provision, which appears to require life in prison without parole in cases where someone "fracks" for more than thirty minutes, is likely to violate the prohibition against cruel and unusual punishment. There is also likely an issue with the fact that the initiative appears to permit citizens of the county to prosecute alleged violations, and seek jail time if the person/corporation is found to have violated the ordinance.

The purpose of the initiative appears to be two-fold. First, is to establish "community rights" that are superior to and cannot be impinged on by state or federal laws. Second, is to ban hydraulic fracturing when it is used to extract hydrocarbons.

ANALYSIS:

Section 1 - definitions.

Section 2 - Establishes a "Local Bill of Rights" – and amounts to subject one.

Section 3 – Likely second subject.

subsection (c) imposes a County ordinance outside of the County's jurisdictional boundaries and appears to override state and federal laws. Specifically, it sets the standard of liability for acts/actions - and standards of liability are generally set by state legislature or courts.

subsection (e) – this section invalidates state, federal and international law that is in conflict with this ordinance – again raising the issue of supremacy and/or pre-emption.

Section 4 - subsection (a) - Makes the parking of "fracking equipment" anywhere in the County unlawful. This could violate the interstate commerce clause of the Federal Constitution, and could be considered a taking as it essentially makes it illegal for anyone in the County to own any "fracturing infrastructure equipment". It is also likely to be unconstitutionally vague as it is unclear what this section is prohibiting – i.e. "fracturing infrastructure equipment".

Subsection (b) - Provides for attorney fees and costs – including expert fees, etc. for a plaintiff, regardless of outcome of lawsuit.

Section 5 - Although entitled Enforcement, this is really a third subject in that subsection (a) prohibits corporations from using certain legal defenses provided under state and federal law.

Subsection (b) attempts to nullify state and federal law that is contrary to this ordinance – which raises an issue of supremacy and pre-emption.

Section 8 - Calls for Amendments to the State and Federal Constitution regarding "the right to local self-government free from governmental preemption and or nullification by corporate rights." This amounts to a third subject.

Based on the above, it is likely that a Court would find at least some of the sections of the initiative in violation of state and/or federal laws or constitutions.

Although Section 9 of the initiative is a "Severability" provision, which states that the provisions of the Ordinance are severable and that a decision that one

section/provision is invalid shall not affect any other section/provision; it is unlikely that this section will save the initiative. To begin with, such a clause will not likely be of any assistance if the initiative is found to violate the single subject rule. Furthermore, the fact that so many of the sections are likely to be determined to be unconstitutional/illegal will make the initiative unworkable if all such provisions are removed/severed.

DLL/jc