



City Council Agenda Item

City Council Meeting Date: June 2, 2020

TO: Honorable Mayor and City Councilmembers

FROM: Jim Throop, City Manager
j_throop@ci.lompoc.ca.us

Jeff Malawy, City Attorney
jmalawy@awattorneys.com

SUBJECT: Consideration of Community Benefit Agreement Proposed by Strauss Wind, LLC in Connection with a 100-Megawatt Wind Energy Project to be Located on Private Land Southwest of the City

Recommendation:

Staff recommends the City Council:

- 1) Consider the community benefit agreement proposed by Strauss Wind, LLC (Attachment 1); and
- 2) Provide direction to staff regarding the agreement terms for further negotiation with Strauss Wind.

Background:

Strauss Wind, LLC (Strauss) is in the process of developing an approximately 100-megawatt wind energy project to be located on private land southwest of the City (the Project).

The Project requires various approvals by multiple federal, state, and local government agencies, including but not limited to approval from the County of Santa Barbara of a Conditional Use Permit (No. 16CUP-00000-00031) and a variance (No. 18VAR-00000-00002) and approval by the City of Lompoc of an Encroachment Permit, Transportation Permits (Oversize Vehicle Permits), and an agreement for roadway repair.

The County is the lead agency for the Project for CEQA purposes. The County Planning Commission certified the Environmental Impact Report and approved the Project on November 20, 2019. The County Board of Supervisors rejected various appeals, and certified the EIR and approved the Project on January 28, 2020.

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Strauss proposes to transport its large wind turbines to the Project site through the City from the northern city limit at Santa Lucia Canyon Road, continuing south onto Floradale Road, then east on Ocean Avenue, then south on I Street, to the southern city limit at Willow Avenue. Transportation of the equipment will involve many periods of temporary closure of portions of these streets while each truck is passing through, over an estimated hauling duration of eight to fifteen weeks, to allow an estimated 161 to 203 extremely oversized truck trips, and will require removal of traffic signal poles, trees, street lights, signs, and other items from the City right-of-way, Caltrans right-of-way, and the City-owned property located southwest of the intersection of Ocean Avenue and I Street.

The EIR approved by the County requires Strauss to enter into an agreement with the City to ensure that any damage to City streets is mitigated through repair or reconstruction to original conditions. The EIR also requires Strauss to prepare a Traffic Management Plan to address hazards associated with project truck traffic and to address level of service impacts (delays to other traffic).

Strauss applied for its Encroachment Permit on February 4, 2020. Its application is not complete. On February 14, 2020, staff provided Strauss a detailed list of items necessary to complete its application. Staff has continued to coordinate with Strauss to provide additional clarification and discuss the necessary submittal items. Additionally, because the proposed truck turn from Ocean Avenue onto I Street begins within Caltrans' right-of-way and requires the removal of Caltrans' traffic signal poles which also serve I Street, Strauss, Caltrans, and staff continue to coordinate related items. Strauss recently engaged a consultant to assist in meeting the needs of Caltrans and the City related to temporary traffic signal operation at Ocean Avenue and I Street, and Strauss submitted its first submittal to the City from that consultant's work on May 27, 2020. Strauss has still not submitted the necessary information to complete the application, including for example, complete detailed information about the path Strauss tractor trailers will traverse over City streets, and all necessary interim modifications to accommodate the truck traffic traversing over and behind sidewalk areas, while also safely accommodating pedestrians and other City traffic during the hauling period.

Strauss submitted to the City a Traffic Management Plan during the month of March 2020, and in early April 2020 the City and Caltrans District 5 each replied that the needs of each agency which are not sufficiently addressed in the Traffic Management Plan would need to be adequately addressed through the processes of encroachment and transportation permitting.

Two transportation companies submitted transportation permit applications to the City during the month of May 2020 proposing to haul large turbine components for the Strauss Project. Because the encroachment permit work discussed above is necessary to facilitate the truck trips proposed in the transportation permits, those transportation permits will be processed concurrently as the encroachment permit issues are resolved.

Strauss submitted to the City a draft roadway repair agreement on May 21, 2020, and staff is currently preparing a detailed response to the provisions of that agreement.

Discussion:

When Strauss eventually completes its application for City approvals, City staff will process the application and either approve, conditionally approve, or deny the application, including negotiating and entering into the roadway repair agreement required by the Project's EIR. Through these approvals, the City has discretion and intends to require Strauss to cover the cost of all impacts on City infrastructure, damage and wear and tear on City streets, staff time, and City Attorney time, for the transportation of Project equipment through the City. At this time, with the application still incomplete, there is no time estimate for when these approvals may be issued. These City approvals are not the subject of this agenda item tonight.

This agenda item tonight relates to a proposed Community Benefit Agreement Strauss sent to the City on May 21, 2020 (Attachment 1). Under the proposed Community Benefit Agreement, Strauss would pay the City \$150,000, at the end of the project, in exchange for the City's agreement not to, directly or indirectly, oppose, protest, challenge, or seek mitigation measures from, the approvals Strauss needs from other government agencies. The City would also agree not to file, join, or support any lawsuit challenging any of the permits or approvals issued by any government agency for the Project. (Sections 2 and 3 of Agreement.)

The City would retain all discretion to approve, condition, or deny the City of Lompoc approvals. The \$150,000 payment would be in addition to any costs Strauss is required to cover as conditions of its Lompoc permit approvals, including the cost of all impacts of the Project on City infrastructure, damage and wear and tear on City streets, staff time, and City Attorney time. (Sections 3 and 4 of Agreement.)

However, the Community Benefit Agreement places several additional conditions on payment of the \$150,000 to the City:

1. Physical construction activities **must commence in all areas of the Project**, including transport of equipment along Ocean Ave and I Street, by June 15, 2020. (Section 1 of the Agreement). This means if Strauss does not begin construction on the Project site within 2 weeks from now, or does not start transporting equipment on Lompoc streets within 2 weeks from now, Strauss is not required to pay anything to the City. It is extremely unlikely this condition will be met. Further, Strauss has not indicated it has obtained its required permits from all other necessary government agencies, nor how long that might take.
2. All testing and commissioning of the Project must be completed and the Project must be able to start producing electricity for sale by December 31, 2021. (Sections 7.a. and 2 of the Agreement.) If that deadline is not met, Strauss is not required to pay anything to the City.
3. Assuming all conditions of the Agreement are met, the date that Strauss must make the \$150,000 payment to the City is when all testing and commissioning of

the Project is completed and the Project is able to start producing electricity for sale.

Fiscal Impact:

The proposed Community Benefit Agreement could provide \$150,000 to the City's general fund, if all conditions of the Agreement are met.

Conclusion:

Staff requests the City Council to review the Community Benefit Agreement proposed by Strauss, and provide direction regarding the agreement terms for further negotiation.

Respectfully submitted,

Jim Throop, City Manager



Jeff Malawy, City Attorney

Attachment: Community Benefit Agreement proposed by Strauss Wind, LLC

COMMUNITY BENEFITS AGREEMENT STRAUSS WIND ENERGY PROJECT

This COMMUNITY BENEFITS AGREEMENT (this “Agreement”) is made and entered into by and between the CITY OF LOMPOC, a California municipal corporation, (the “City”) and STRAUSS WIND, LLC, a California limited liability company and affiliate of BayWa r.e. Wind, LLC (“Strauss”) as of the date the second of the parties hereto executes and approves the Agreement (the “Effective Date”).

RECITALS

A. Strauss is in the process of developing an approximately 100-megawatt wind energy project to be located on private land southwest of the City (the “Project”), which process includes obtaining various federal, state and local permits, entitlements and other approvals, including but not limited to approval from the County of Santa Barbara, California (the “County”) of a Conditional Use Permit (No. 16CUP-00000-00031) and a variance (No. 18VAR-00000-00002), and approval by the City of Lompoc of a Road Use and Encroachment Permit (together, the “Governmental Agency Approvals”). For purposes of this Agreement, the term “Governmental Agency Approvals” refers to the final permits and approvals as approved by the County, the City, or other governmental agencies, including any conditions of approval adopted by an approving agency.

B. The Project site is predominantly in the same location as the previously proposed Lompoc Wind Energy Project (the “LWEP”), which was approved by the County in 2009 but never constructed. A Final Environmental Impact Report was prepared for the LWEP and certified by the County in February 2009 (County EIR No. 06EIR-00000-00004). Strauss purchased and proposed minor modifications and improvements to the previously approved LWEP.

C. The County is the lead agency for conducting environmental review of the Project under the California Environmental Quality Act and prepared a supplemental environmental impact report (the “SEIR”) based on the Final Environmental Impact Report prepared for the LWEP. The County Planning Commission certified the SEIR and approved the Project on November 20, 2019. The County Board of Supervisors rejected various appeals, and certified the SEIR and approved the Project *de novo*, on January 28, 2020.

D. The City, through its City Manager, submitted a letter on November 18, 2019 commenting on the adequacy of the draft SEIR. Among other topics, the City’s comment letter discussed the Project’s potential to impact City public infrastructure and emergency services, and identified City permits and approvals that may be required for construction of the Project. The City’s comment letter also supported the alternative transportation route for Project construction, which was ultimately approved and adopted by the County, identifying Santa Lucia Canyon Road, Hwy 246/Ocean Avenue, and I Street as the preferred transportation route.

E. The parties acknowledge that construction and operation of the Project would cause impacts to the City in the form of increased demand on City services and streets, and

would also bring economic benefits to the City in the form of increased economic activity. The parties intend that the implementation of this Agreement will help mitigate economic or fiscal impacts that construction, transportation and operations of the Strauss Wind Project will have on the City.

NOW, THEREFORE, the parties agree as follows:

1. Commencement of Construction. This Agreement is conditioned upon Commencement of Construction of the Project. For purposes of this Agreement, Commencement of Construction means that all Governmental Agency Approvals have been obtained, physical construction activities have commenced in all areas of the project, including along the alternative transportation route as approved in the EIR within the City's boundaries (Hwy 246/ Ocean and I Street), in accordance with such Governmental Agency Approvals. If Commencement of Construction does not occur by June 15, 2020 this Agreement shall be null and void and shall have no legal or practical effect.

2. Community Benefit Payment to the City by Strauss. Within two (5) business days from the Commercial Operation Date (COD), defined as the date after which all testing and commissioning of the Project has been completed and the date on which Strauss can start producing electricity for sale, Strauss shall pay to the City one hundred and fifty thousand dollars (\$150,000) (the "Community Benefit Payment").

3. Agreement Not to File, Join or Support Judicial Challenges. The City shall not, directly or indirectly, oppose, protest, challenge, or seek other conditions or forms of mitigation in connection with the Governmental Agency Approvals, or any other permit or approval required for the Project, that is not proposed to be issued by the City itself. Further, unless the City terminates this Agreement pursuant to the provisions of Paragraph 8, below, the City shall not file, join or support any action or proceeding in any court of law that challenges the legality or legal adequacy of, or otherwise seeks to oppose, rescind or modify any of the Governmental Agency Approvals.

4. Reservation of Discretion by the City. The Parties understand, acknowledge and agree, notwithstanding the terms and conditions of this Agreement, that certain discretionary actions incidental to matters described in this Agreement (including, without limitation, the grant by the City, individually or in conjunction with another governmental agency, of Governmental Agency Approvals with respect to the Project) may require the exercise of discretion by one or more decision-making bodies at the City and such discretionary actions cannot lawfully be committed to by contract pursuant to the constitution and laws of the State of California. Nothing in this Agreement is intended or shall be interpreted to limit the City's exercise of discretion with respect to any actions needed from the City as a governmental agency nor shall anything in this Agreement be construed to (a) grant or commit the City to grant, Strauss, or any other person, any discretionary Governmental Agency Approvals with respect to the Project, or (b) limit or restrict the City's discretion with respect to (i) the approval, conditional approval or denial of any development approvals or entitlements that may be required from the City for the Project as a governmental agency, (ii) exercise of any other discretionary authority with respect to the Project possessed by the City under the police power, or (iii) any environmental approvals that may be required under federal or state environmental laws or regulations in conjunction with any

development approval required for the Project (all such decisions or actions, collectively, “Discretionary Actions”). In the event the City takes or fails to take one or more of the Discretionary Actions, any such action or inaction shall not constitute a breach of the City’s obligations under this Agreement or of any express or implied covenant herein.

5. **Dispute Resolution.**

a. **Intent.** The parties desire and intend to resolve any dispute, claim or controversy arising out of or relating to this Agreement, or the breach, termination, enforcement, interpretation or validity thereof, through reasonable business-like dispute resolution procedures. Accordingly, any disputes regarding the matters addressed by this Agreement which arise between the parties shall be resolved in accordance with this Paragraph 6 (and its sub-paragraphs).

b. **Opportunity to Cure.** As a first step, if either party to this Agreement determines that the other party has failed to perform or breached one or more terms of this Agreement (“Violation”), such party shall provide written notice to the other party describing such apparent violation or breach (the “Violation Notice”), which shall include reasonably detailed written or documentary evidence of the apparent violation. In the event a party receives a Violation Notice from the other party, the receiving party shall have the following periods of time, as applicable, to cure the violation specified in the Violation Notice:

1) **Cure Period.** The receiving party shall have thirty (30) days from the date of receipt of the Violation Notice (the “Cure Period”) to cure the violation specified in the Violation Notice.

2) **Extended Cure Period.** If, prior to the close of the Cure Period, the receiving party provides reasonably detailed written or documentary evidence of the need for more than thirty (30) days to cure the violation, and provides reasonably detailed written or documentary evidence of reasonable efforts by the receiving party to cure the violation within the Cure Period and of continuing diligent prosecution by the receiving party of that cure, then the receiving party shall be afforded such additional time as may be reasonably necessary to cure the violation, not to exceed one (1) year absent the parties’ mutual agreement to a later date (the “Extended Cure Period”).

c. **Mediation.** If the dispute has not been resolved within the applicable Cure Period or Extended Cure Period, any party may, at its option, initiate mediation by delivering written notice to the other party (“Mediation Notice”). Both parties shall attend and participate in the mediation, which shall be non-binding and without prejudice to any other rights or remedies which any party may have. Unless all parties to the dispute agree otherwise, within 30 days after the Mediation Notice is received, the mediation proceeding shall be conducted by JAMS, in accordance with its procedures, at the offices of, JAMS in San Francisco, California or a mutually-agreed upon location. The costs of the first day of mediation shall be borne by the party claiming a violation of the Agreement has occurred; thereafter if both parties elect to continue with mediation the costs shall be borne in the manner agreed upon by the parties. Any voluntary settlement reached as a result of the mediation proceeding shall be reduced to writing.

All proceedings under subsections b and c of this Paragraph 6 shall be subject to California Evidence Code Sections 1115 *et seq.*

d. Arbitration. If the dispute is not resolved within thirty (30) days after conclusion of the mediation proceeding, either party may, at its option, initiate binding arbitration by delivering written notice to the other party. The parties agree that any dispute, claim or controversy arising out of or relating to this Agreement, or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this mutual agreement to arbitrate, shall be determined by arbitration conducted by a neutral evaluator from, and at the offices of, JAMS in San Francisco, California or a mutually-agreed upon location, in accordance with the JAMS Arbitration Rules and Procedures most appropriate for the underlying dispute. Judgment may be entered on the arbitrator's decision in any court having jurisdiction. The parties agree that, regardless of the rules and procedures that govern the arbitration, the non-prevailing party shall bear the costs and expenses of the arbitration, and the parties shall separately pay their respective attorneys' fees and expenses, if any. The parties agree that the enforceability of this Agreement shall be governed by the Federal Arbitration Act. The parties each expressly waive the right to a jury trial and any other civil court proceeding and agree that the arbitrator's award shall be final, conclusive and binding on the parties. Should any provision of this arbitration agreement be deemed unenforceable or invalid, such provision shall be severed and the remainder shall be enforceable to the fullest extent of the law.

6. Attorneys' Fees and Costs. Each party shall bear its own attorneys' fees and costs incurred prior to the mutual execution of this Agreement. Each party shall bear its own attorneys' fees and costs incurred in connection with the notice and cure process described in Paragraph 6 of this Agreement (and its sub-paragraphs), with the exception of the costs associated with retention of a mediator as described in Paragraph 6, subsection c, above and costs of arbitration identified in Paragraph 6, subsection d. Each party shall bear its own attorneys' fees and costs incurred in connection with any mediation or arbitration arising under or in connection with this Agreement.

7. Term of Agreement.

a. Termination of Obligations and Restrictions. This Agreement shall terminate automatically in the event the project does not achieve COD by December 31st, 2021. In addition, this Agreement shall be terminable: (1) by mutual written consent of the parties; (2) unilaterally by any party following an uncured Violation by the other party, subject to the cure procedures set forth in Paragraph 6 (and its subparagraphs); (3) unilaterally by Strauss upon notice to the City that Strauss has terminated the Project; or (4) unilaterally by Strauss in the event litigation is commenced seeking to rescind any of the Governmental Agency Approvals and such litigation results in the rescission of any of the Governmental Agency Approvals. For the avoidance of doubt, the parties agree and acknowledge that Paragraph 6 of this Agreement shall survive any termination of this Agreement pursuant to the preceding clauses (1) through (4).

b. If this Agreement is not terminated pursuant to Paragraph 8(a), above, all obligations and restrictions arising from this Agreement shall remain in effect until the City's

receipt of the Community Benefit Payment, as described in Paragraph 2 of this Agreement. Following the City's receipt of the Community Benefit Payment, this Agreement shall automatically expire and shall have no further effect.

8. Entire Agreement. This Agreement constitutes the entire agreement and understanding between the parties in relation to the matters addressed by this Agreement and the Dispute. There are no oral understandings, terms, or conditions, and neither party has relied upon any representations, express or implied, not contained in this Agreement. All prior versions and draft of this Agreement and all negotiations or previous agreements, understandings, terms or conditions between the parties with respect to the subject matter hereof are deemed merged into this Agreement and its exhibits.

9. Amendments. This Agreement cannot be changed or supplemented orally, and may be modified or superseded only by written instrument executed by both parties.

10. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

11. No Admission of Liability. This Agreement is entered into by the parties for the purposes of compromising and settling the Dispute. This Agreement does not constitute, nor shall it be construed as, an admission of liability by any party for any purpose.

12. Voluntary Agreement. The parties represent that they have read this Agreement in full and understand and voluntarily agree to all provisions hereof. The parties further declare that prior to signing this Agreement, they apprised themselves of relevant data, through sources of their own selection, including review by their own respective counsel, in deciding whether to execute this Agreement.

13. Binding Effect. This Agreement is for the benefit of and shall be binding on the parties and their respective successors and assigns.

14. Execution in Counterparts. This Agreement may be executed in counterparts such that the signatures may appear on separate signature pages. Signatures transmitted electronically shall be deemed original signatures.

15. Interpretation. The language and all parts of this Agreement shall, in all cases, be construed as a whole, according to its fair meaning, and not strictly for or against either party. Both parties have participated in the negotiation of this Agreement, and any rule of construction in favor of one party or another party shall not apply to interpretation of this Agreement.

16. Notices. All notices pursuant to this Agreement shall be in writing and sent either by overnight delivery or personal delivery, properly addressed to the addresses set forth below, in which case all such notices shall be deemed effective upon receipt:

For the City of Lompoc:

[TBD]

with a copy to:

[TBD]

For Strauss Wind, LLC:

[TBD]

with a copy to:

[TBD]

2. Approval Authority. Each signatory to this Agreement attests that he or she has received the necessary authority to execute this Agreement from its governing board.

Dated: _____

[TBD]
City of Lompoc

Approved as to Form:

Dated: _____

[TBD]
Counsel for City of Lompoc

Signatures continued on next page.

Dated: _____

[TBD]
Strauss Wind, LLC

Approved as to Form:

Dated: _____

[TBD]

Perkins Coie LLP
Counsel for Strauss Wind, LLC