

July 19, 2021

Rodrigo A. Castro-Silva
Elaine Lemke
Office of the County Counsel
County of Los Angeles
Kenneth Hahn Hall of Administration
500 West Temple Street #648
Los Angeles, CA 90012

Via E-mail

RE: Phase-out of Oil and Gas Production in Los Angeles County

Dear Mr. Castro-Silva and Ms. Lemke:

On behalf of the Los Angeles Neighborhood Land Trust (the “Neighborhood Land Trust”), we are writing to express our support for updating the County’s 40-year-old oil and gas production codes to include stronger protections for public health and the environment. The Frank G. Wells Environmental Law Clinic at UCLA School of Law¹ provides outside legal assistance to organizations such as the Neighborhood Land Trust on a range of legal and policy matters. Consistent with the arguments in a letter previously submitted to your office by the Center for Biological Diversity, Communities for a Better Environment, and Natural Resources Defense Council (the “July 6 Letter”),² we urge the County to prohibit new drilling and phase out existing oil and gas operations in areas within the County’s land-use authority. We believe these actions are within the County’s legal authority and are critical for protecting the health of Los Angeles’ most vulnerable residents. The Culver City Council’s recent approval of an ordinance that would begin phasing out oil and gas operations in Culver City, and recent City Council actions that indicate the City is considering phasing out operations in the City of Los Angeles, show there is a regional effort to accomplish this goal, supported by sound policy and legal considerations. Similar efforts at the County level would improve public health and environmental conditions in Los Angeles. Phasing out oil and gas operations would also help the County meet goals, strategies, and actions identified in the “OurCounty: The Los Angeles Countywide Sustainability Plan” (“County Sustainability Plan”).

¹ The Frank G. Wells Environmental Law Clinic at UCLA School of Law represents a number of community-based and environmental organizations in Los Angeles. The Clinic recently submitted a letter, on behalf of Natural Resources Defense Council, to various County Supervisor offices addressing oil and gas operations on the County portion of the Inglewood Oil Field.

² Please see attached for a copy of the July 6 Letter, dated July 6, 2021 and sent by attorneys Liz Jones (Center for Biological Diversity), Alison Hahm (Communities for a Better Environment), and Damon Nagami (Natural Resources Defense Council).

As a community-based, nonprofit park developer, the Neighborhood Land Trust builds and activates green spaces in the County and advocates for healthy, sustainable land uses. Since 2002, the Neighborhood Land Trust has built 29 parks and community gardens, adding over 13 acres of green space to the greater Los Angeles area. The impacts of these parks and gardens extend beyond the sites by improving public health outcomes for local residents, reducing environmental pollution and contamination, and supporting vibrant communities. Many of the Neighborhood Land Trust's project sites are former vacant lots and brownfields, which has allowed the Neighborhood Land Trust to develop an expertise around transforming polluted land into healthy community spaces.

Access to green space improves physical and mental health outcomes, provides key environmental functions, and builds community.³ A study by UCLA's Institute of the Environment and Sustainability found "[n]earby park space is associated with lower risk of circulatory and cardiovascular disease, lower overall risk of death, and better general health."⁴ Green space also improves environmental conditions and promotes climate resiliency by sequestering carbon, filtering air pollutants, and mitigating the urban heat island effect.⁵ Parks create public spaces for residents to gather and socialize, which supports diverse and strong communities.

Conversely, oil and gas activities are notorious for polluting the environment and negatively impacting public health.⁶ Oil and gas operations are correlated with higher rates of asthma, sinus problems, eye burning, severe headaches, loss of sense of smell, persistent cough, and nose bleeds, among other long-term health impacts.⁷ Oil and gas operations also produce volatile organic compounds that interact with other chemicals to create ground-level ozone, which contributes to climate change.⁸ These health and environmental impacts are most severe in Los Angeles' low-income communities and neighborhoods with predominantly Black, Indigenous,

³ Kathleen L. Wolf, *The Health Benefits of Small Parks and Greenspaces*, Parks & Recreation Mag. (Apr. 3, 2017), available at <https://www.nrpa.org/parks-recreation-magazine/2017/april/the-health-benefits-of-small-parksand-green-spaces/>.

⁴ Jon Christensen *et al.*, *California State Parks: A Valuable Resource for Youth Health*, UCLA Inst. of the Env't & Sustainability, at 4, <https://www.ioes.ucla.edu/wp-content/uploads/UCLA-report-on-California-State-Parks-and-Youth-Health.pdf> (last visited July 7, 2021).

⁵ See Taj Schottland, *Parks as a Climate Solution*, The Trust for Public Land (2018), available at https://www.tpl.org/sites/default/files/files_upload/Climate-Smart%20Cities%20Report_GCAS%20report%202018_R6.pdf.

⁶ See Nicole J. Wong, *Existing Scientific Literature on Setback Distances from Oil and Gas Development Sites*, STAND-L.A. (Nov. 2017), available at https://www.stand.la/uploads/5/3/9/0/53904099/2500_literature_review_report-v2-share.pdf.

⁷ See Bhavna Shamasunder *et al.*, *Community-Based Health and Exposure Study around Urban Oil Developments in South Los Angeles*, 15 INT'L J. ENVTL. RES. & PUB. HEALTH 138 (2018), available at <https://www.ncbi.nlm.nih.gov/pubmed/29342985>; see also Seth B.C. Shonkoff & Lee Ann L. Hill, *Human Health and Oil and Gas Development: A Review of the Peer-Reviewed Literature and Assessment of Applicability to the City of Los Angeles*, Physicians, Scientists, & Eng'rs for Healthy Energy (May 9, 2019), available at <https://www.psehealthyenergy.org/wp-content/uploads/2019/08/Literature-Review.pdf>.

⁸ See Wong, *supra* note 5; see also *Technical Overview of Volatile Organic Compounds*, U.S. Env'tl. Prot. Agency, <https://www.epa.gov/indoor-air-quality-iaq/technical-overview-volatile-organic-compounds> (last visited July 7, 2021); *Ground-Level Ozone Basics*, U.S. Env'tl. Prot. Agency, <https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics> (last visited July 7, 2021).

and people of color (BIPOC) residents, which are subject to pollution from many sources, including oil and gas activities.⁹

Phasing out oil and gas activities in the County would significantly improve public health and environmental conditions in Los Angeles, and it is squarely within the County’s power to enact an ordinance that does so. Such an ordinance should include language that designates oil and gas wells as nonconforming uses, as well as a reasonable amortization period, based on an amortization study or similar method of analysis, for well operators to abandon and clean up well sites. As explained below, we believe that such a phase-out ordinance would not give rise to a significant risk of valid due process or takings claims from oil and gas production operators located in the County. We urge the County to adopt an ordinance phasing out oil and gas operations, along with a reasonable amortization period, to protect the public health and safety of Los Angeles residents.

I. PHASING OUT OIL AND GAS PRODUCTION OPERATIONS IS WITHIN THE COUNTY’S AUTHORITY PURSUANT TO ITS INHERENT LOCAL POLICE POWER

Enacting a phase-out ordinance is well within the County’s police power and land-use authority. Article XI, section 7 of the California Constitution reserves police power to local governments. This police power is broadly applicable, “as broad as the police power exercisable by the Legislature itself.”¹⁰ Zoning and other land use controls, reasonably related to the health, safety, and general welfare of the public, fall squarely within the local police power.¹¹ These authorities enable local governments to require the termination of nonconforming uses after a reasonable amortization period; in some cases, immediate termination may be legal if the nonconforming land use poses a public health or safety threat or constitutes a nuisance. With respect to oil and gas operations specifically, the California Supreme Court found over half a century ago that it was “well settled” that an ordinance limiting a property owner’s interest in oil-bearing lands “is not of itself an unreasonable means of accomplishing a legitimate objective within the police power of the city.”¹² Accordingly, the County maintains the authority to pass a land use ordinance that designates oil and gas operations as nonconforming uses and requires terminating operations in order to protect surrounding communities from unreasonable health impacts.

⁹ See Matthew Rodriguez & Lauren Zeise, *Update to the California Communities Environmental Health Screening Tool*, Cal. Evtl. Prot. Agency & Office of Evtl. Health Hazard Assessment (Jan. 2017), available at <https://oehha.ca.gov/media/downloads/calenviroscreen/report/ces3report.pdf>.

¹⁰ *Candid Enters., Inc. v. Grossmont Union High Sch. Dist.*, 39 Cal. 3d 878, 885 (1985).

¹¹ See, e.g., *Fonseca v. City of Gilroy*, 148 Cal. App. 4th 1174, 1181 (2007); *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1151-52 (2006) (noting the “well entrenched” local authority to zone land use and that any ordinances pursuant to that authority should be favored and presumed valid) (citation omitted).

¹² *Beverly Oil Co. v. City of Los Angeles*, 40 Cal. 2d 552, 558 (1953); see also *Pac. Palisades Ass’n v. City of Huntington Beach*, 196 Cal. 211, 216-17 (1925) (cities have the right to regulate oil well operations in a reasonable manner); *Marblehead Land Co. v. City of Los Angeles*, 47 F.2d 528, 531 (9th Cir. 1931) (zoning laws seeking to protect residents from safety hazards resulting from drilling operations are a valid exercise of local police powers); *Higgins v. City of Santa Monica*, 62 Cal. 2d 24, 28 (1964) (upholding an ordinance prohibiting oil exploration and drilling in the Santa Monica tidelands); *Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach*, 86 Cal. App. 4th 534, 555 (2001) (holding that an adopted measure banning oil drilling and production in a densely populated urban area to preserve the environment and protect public health is “presumptively a justifiable exercise of the City’s police power”).

II. A PHASE-OUT ORDINANCE WOULD NOT EXPOSE THE COUNTY TO SIGNIFICANT LIABILITY FROM VESTED RIGHTS CLAIMS

Oil and gas producers contend that they possess vested rights that impair the County’s ability to phase out their operations. But it is extraordinarily unlikely that many, if any, producers will be able to make valid vested rights claims against a County phase-out—even less so against a phase-out that allows a reasonable amortization period. Establishing the existence of vested rights requires a showing that the operator obtained all necessary permits for its oil and gas production operations, expended substantial hard costs in good faith in reliance on those permits, and has actually performed substantial work to further those operations.¹³ Importantly, where an operator can establish the existence of vested rights, those rights may be “impaired or revoked” if the activities subject to the vested rights “constitute [] a menace to the public health and safety or a public nuisance.”¹⁴ The negative public health and safety impacts from oil and gas operations in the County are well documented, providing justification for revoking vested rights where appropriate and necessary. Moreover, vested rights do not grant an operator the authority to continue those operations indefinitely. Rather, vested rights may be lawfully terminated following a reasonable amortization period that would allow the operator to recover a reasonable return on its investment before phasing out operations entirely.¹⁵ Many oil and gas development operators in the County may have already recovered a reasonable return on their investments into their industrial activities. Nevertheless, a phase-out ordinance that includes a reasonable amortization period would sharply limit the County’s liability for vested rights claims.

In summary, there is no basis to assume broadly that vested rights claims from oil and gas operators in the County would be successful in response to a phase-out ordinance that includes a reasonable amortization period.

III. AN ORDINANCE PHASING OUT OIL AND GAS ACTIVITIES THAT INCLUDES A REASONABLE AMORTIZATION PERIOD WOULD NOT EFFECT A REGULATORY TAKING

Similarly, the inclusion of a reasonable amortization period would help safeguard the County against claims that a phase-out ordinance would be subject to takings challenges by oil and gas operators, under both the United States Constitution and the California Constitution. Courts assess the impact of a regulation on a case-by-case basis, and a per se regulatory taking occurs where a regulation deprives a property owner of all economic use of its land.¹⁶ It has been “long

¹³ *Avco Cmty. Devs., Inc. v. S. Coast Reg’l Comm’n*, 17 Cal. 3d 785, 791 (1976).

¹⁴ *Davidson v. County of San Diego*, 49 Cal. App. 4th 639, 649 (1996) (internal quotation marks and citation omitted).

¹⁵ *Metromedia, Inc. v. San Diego*, 26 Cal.3d 848, 882 (1980). See also *National Advertising Co. v. County of Monterey*, 1 Cal.3d 875, 879 (1970); *City of Los Angeles v. Gage*, 127 Cal.App.2d 442, 460 (1954); *United Bus. Com. v. City of San Diego*, 91 Cal.App.3d 156, 180 (1979) (reasonable amortization period satisfies due process requirements); *Livingston Rock and Gravel Co. v. Los Angeles*, 43 Cal.2d 121, 126-28 (1954).

¹⁶ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992); *Tahoe-Sierra Preservation Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 330 (2002) (emphasizing that the rule applies only in the rare case where a regulation leaves a property with no use or value at all); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978) (explaining that courts faced with a regulatory taking challenge should consider “[t]he economic impact of the regulation on the claimant,” “the extent to which the regulation has interfered with distinct investment

established” that there is no per se taking as a result of a “mere diminution in the value of property, however serious.”¹⁷ Accordingly, landowners have an “uphill battle” when bringing a takings claim in response to a regulation or ordinance restricting a portion of the allowable uses of that land.¹⁸

Takings claims brought by oil and gas production operators in the County would generally not be successful if the operators merely assert that a phase-out ordinance severely diminishes the value of their land. To the extent that operators would argue that a phase-out ordinance interferes with their reasonable investment-backed expectations, such an argument would rest upon the assumption that the operators should be guaranteed to continue their extractive activities to collect future profits. But as the Supreme Court has explained, “loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.”¹⁹ Furthermore, oil and gas activities are already subject to numerous and stringent regulations, which are amended frequently as new information is uncovered about the negative impacts and consequences of those activities. As a result, operators cannot reasonably expect to recover guaranteed profits from indefinitely continuing their current activities. And as noted above, an amortization period would address any remaining claims of investment-backed expectations. Lastly, given the strong evidence that oil and gas development operations produce substantial negative impacts, the County would be able to demonstrate that wells constitute a public nuisance. Courts have declined to find a taking when the nonconforming use constitutes a nuisance.²⁰ State property and nuisance law remains applicable even in the face of a takings claim, including the doctrine that there is no property right in maintaining a nuisance.²¹

IV. PHASING OUT OIL AND GAS OPERATIONS ALIGNS WITH THE GOALS, STRATEGIES, AND ACTIONS SET FORTH IN THE COUNTY SUSTAINABILITY PLAN

The County Sustainability Plan includes several goals, strategies, and actions related to reducing environmental and health harms from oil and gas operations and creating a fossil fuel-free Los Angeles County. These actions include:

- “Collaborate with the City of Los Angeles and other cities to develop a sunset strategy for all oil and gas operations that prioritizes disproportionately affected communities”,²²

backed expectations,” “the character of the governmental action,” and whether the land-use regulations prohibit a particular use of land to promote “the health, safety, morals, or general welfare,” among other factors).

¹⁷ *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993).

¹⁸ *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 495 (1987); see also *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643, 673 (2002) (noting the “minimum showing” required to establish a facial challenge to a statute’s constitutionality as encompassing a demonstration that the ordinance violates due process “in the generality or great majority of cases”) (emphasis removed).

¹⁹ *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

²⁰ In *Lucas*, the Supreme Court confirmed once again that all property is subject to “background principles of the State’s law of property and nuisance[.]” 505 U.S. 1003, 1029. See also *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1347 (Fed. Cir. 2004) (holding that there is no taking where there is a nuisance, regardless of other factors). See also *Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir. 1994) (*same*).

²¹ See *Lucas*, 505 U.S. at 1029 (a regulation that deprives a landowner of all economically beneficial uses is a taking unless the regulation “inhere[s] in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership”).

²² *Action 84*, Our County (Aug. 2019), <https://ourcountyla.lacounty.gov/strategies/strategy-7a?goal=831> (last visited July 16, 2021).

- “Expand the minimum setback distance for oil and gas operations from sensitive land uses”,²³ and
- “Conduct an inventory to identify all abandoned/idled oil and gas infrastructure in LA County, and work with CALGEM (formerly DOGGR) to develop and implement a closure plan, prioritized by condition and proximity to sensitive populations, that includes identification of potential funding sources.”²⁴

Adopting an ordinance to phase out oil and gas production within the County would improve public health outcomes for low-income and BIPOC communities and others living near oil and gas wells, while moving the County closer to its goal of becoming fossil fuel-free.

Additionally, phasing out oil and gas operations would create an opportunity to use former well sites for green energy and other beneficial community uses, such as parks and open space. Redeveloping former oil well sites also creates job training and employment opportunities and can support just transition efforts for former oil company employees. Transforming polluting sites into sustainable and community-serving land uses can help the County accomplish additional sustainability goals, making the County an environmental leader.

V. PHASING OUT OIL AND GAS OPERATIONS IN THE COUNTY IS CONSISTENT WITH ADOPTED AND PROPOSED PLANS IN NEIGHBORING JURISDICTIONS

Local governments within Los Angeles County have recently taken meaningful steps to phase out oil and gas operations within their land-use jurisdictions. These actions demonstrate both that similar action by the County would be consistent with other major planning efforts²⁵, and also that other jurisdictions have concluded such action is consistent with local government police power and legally defensible.

First, the Culver City Council recently voted to phase out oil and gas operations within the Culver City portion of the Inglewood Oil Field. The ordinance prohibits new or expanded oil and gas activity starting on July 28, 2021 and requires the termination and removal of nonconforming oil uses by July 28, 2026, which is the end of the five-year amortization period.²⁶ This action is supported by a technical and economic study that concludes the amortization period will be adequate to ensure producers have had the opportunity to obtain a reasonable return on investment.²⁷ Second, two Los Angeles City Council committees have passed a motion that

²³ *Action 2*, Our County (Aug. 2019), <https://ourcountyla.lacounty.gov/strategies/strategy-1a?goal=314> (last visited July 16, 2021).

²⁴ *Action 3*, Our County (Aug. 2019), <https://ourcountyla.lacounty.gov/strategies/strategy-1a?goal=314> (last visited July 16, 2021).

²⁵ See *Actions 2, 3, and 84*, Our County), *supra* notes 22, 23, and 24.

²⁶ *City Council Votes to End Oil Drilling in Culver City by 2026*, Culver City Observer, <https://www.culvercityobserver.com/story/2021/06/17/news/city-council-votes-to-end-oil-drilling-in-culver-city-by-2026/10243.html> (last visited July 7, 2021); *Inglewood Oil Field*, Culver City, <https://www.culvercity.org/City-Hall/Get-Involved/Inglewood-Oil-Field> (last visited July 7, 2021).

²⁷ See William Cheek, Donald Flessner, & Charles Kemp, *Capital Investment Amortization Study for the City of Culver City Portion of the Inglewood Oil Field*, Baker & O’Brien Inc. (May 29, 2020), available at <https://www.culvercity.org/files/assets/public/documents/city-manager/inglewood-oil-field/bakerobrienreportandexhibi.pdf>; See also *Staff Report #21-389*, City of Culver City (Oct. 26, 2020), available

directs the Department of City Planning to 1) conduct an amortization study, 2) draft zoning code amendments to restrict drill sites in residential areas, and 3) work with the City Attorney to draft an ordinance for phasing out oil and gas extraction activities.²⁸

These efforts point to the feasibility, legality, and consistency with other jurisdictions' plans of phasing out oil and gas operations in the County.

VI. CONCLUSION

To protect the health of Los Angeles' disproportionately impacted residents and our local environment, we ask Los Angeles County to exercise its authority to prohibit new wells and phase out existing oil and gas operations in the County. A phase-out ordinance that includes an amortization period is within the County's authority, and such an ordinance is unlikely to expose the County to significant liability from vested rights or takings claims. We urge the County to adopt a phase-out ordinance to protect Los Angeles' residents from ongoing and severe health and environmental impacts from oil and gas production within the County.

Sincerely,



Sean Hecht
Co-Director
Frank G. Wells Environmental Law Clinic



Tori Kjer, PLA
Executive Director
Los Angeles Neighborhood Land Trust



Beth Kent
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CC: Laura Muraida, Senior Deputy of Environmental Justice, District 2
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at https://www.culvercity.org/files/assets/public/documents/city-attorney/2020-10-26_staff-report-re-amortization-phase-out-resolution.pdf.

²⁸ *Energy, Climate Change, and Environmental Justice Committee Report*, L.A. City Council, https://clkrep.lacity.org/onlinedocs/2017/17-0447_rpt_ECCEJ_12-01-20.pdf (last visited July 7, 2021).

Attachment

July 6, 2021

Rodrigo A. Castro-Silva
Elaine Lemke
Office of the County Counsel
County of Los Angeles
Kenneth Hahn Hall of Administration
500 West Temple Street #648
Los Angeles, CA 90012

Via E-mail

Re: Los Angeles County Oil Ordinance

Dear Mr. Castro-Silva and Ms. Lemke:

On behalf of the Center for Biological Diversity, Communities for a Better Environment, and the Natural Resources Defense Council, we appreciate your office’s assumed involvement in and support of updating the County’s 40-year-old oil and gas production codes to provide stronger protections for public health, the climate, and the environment. Unfortunately, however, the April 13, 2020 Draft Oil Well Ordinance did not reflect best practices to minimize environmental impacts and protect sensitive uses and populations. Rather than protect public health, the proposal served to further entrench harmful extractive practices. In October 2020, more than 80 environmental justice, environmental, and labor groups called on the County to draft more robust and protective regulations to prohibit new drilling and phase out existing drilling. In support of that strategy, we offer the following analysis, which shows that the County has ample legal authority to take this action.

The County Has Authority to Regulate Where and When Oil and Gas Production Operations Occur

Courts have long recognized the authority of local governments to use their police and zoning powers to enact local prohibitions and restrictions on oil and gas operations and development.¹ A municipality has an “unquestioned right to regulate the business of operating oil wells within its [] limits, and to prohibit their operation within delineated areas and districts, if reason appears for so doing.”²

This power was especially critical to local governments that dealt with early oil and gas development in the state. Despite being the largest oil producing state in the country at one time, state laws regulating oil and gas activity were virtually non-existent, meaning cities and counties were responsible for regulating the industry themselves. Early discoveries resulted in many oil

¹ Cal. Const. Article XI §§ 5, 7 [Section 11 was renumbered as Section 7 in 1970] (“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”); Pub. Res. Code § 3690; *Richeson v. Helal*, 158 Cal. App. 4th 268, 277 (2007).

² *Beverly Oil Co. v. City of Los Angeles*, 40 Cal. 2d 552, 558 (1953) (internal quotation omitted); *see also* California Attorney General’s Opinion, 59 Ops. Cal. Atty. Gen. 461, 465 (1976) (“[I]t is our opinion that cities and counties have the power to prohibit [oil and gas] operations.”).

operators being active in close proximity to homes and businesses, prompting local governments to enact ordinances to protect their residents.

By 1915, oil development became so rampant that densely packed oil wells were a danger not only to community members but also to other oil drillers. Wells drilled in close proximity caused underground water deposits to leak into nearby oil deposits. In response, California created a statewide “supervisor” position for oil and gas. The supervisor’s duty was to “prevent as far as possible, damage to underground petroleum and gas deposits from infiltrating water and other causes and loss of petroleum and natural gas.”³ Thus, the state’s goal at the time was to protect oil companies from other encroaching oil companies. Yet it was sure to preserve local governments’ independent right to ban oil activity altogether, stating, “provisions of this act shall not apply to any land or wells situated within the boundaries of an incorporated city where the drilling of oil wells is prohibited.”⁴

In 1925, when one such local ordinance prohibiting drilling was challenged, the California Supreme Court upheld it.⁵ The Court stated that the city had the “unquestioned right to regulate the business of operating oil wells within its city limits, and to prohibit their operation within delineated areas and districts, if reason appears for so doing.”⁶

Federal courts followed suit shortly thereafter, upholding Los Angeles’ ordinance banning oil drilling in an area of the city, stating, “there can be no question of the inherent right of the city to control or prohibit such production.”⁷

By 1953, the California Supreme Court considered it “well-settled” that oil and gas prohibitions “accomplish[] a legitimate objective within the police power of the city.”⁸ In *Beverly Oil Co. v. City of Los Angeles*, the Court reiterated that local governments’ police power is “one of the most essential powers of government, one that is the least limitable.”⁹ Indeed, it has been used to prohibit oil and gas activities many times. In the mid-1920s, the City of Los Angeles annexed land on the west side of Los Angeles, and soon thereafter passed a zoning ordinance to prohibit drilling and deepening of wells in the annexed area. The zoning ordinance was amended in 1946 to permit operations of existing wells in those areas as a nonconforming use—much like current wells throughout Los Angeles County. A 1949 amendment to the municipal code required the nonconforming oil extraction operations to be discontinued after a specified period of time.

The issue was litigated, and a court affirmed that “city zoning ordinances prohibiting the production of oil in designated areas have been held valid.”¹⁰ The court explained that “the enactment of an ordinance which limits the owner’s property interest in oil bearing lands located

³ 1915 Cal. Stat., ch. 718, § 3, p. 1404.

⁴ *Id.* at § 53.

⁵ The Huntington Beach municipal ordinance barred “erecting derricks, installing machinery, and drilling oil wells” within business and residential zones. *Pacific Palisades Assoc. v. City of Huntington Beach*, 196 Cal. 211, 214 (1925).

⁶ *Id.* at 217.

⁷ *Marblehead Land Co. v. Los Angeles*, 47 F.2d 528, 532 (9th Cir. 1931).

⁸ *Beverly Oil*, 40 Cal. 2d at 558.

⁹ *Id.* at 557 (internal quotation omitted).

¹⁰ *Id.* at 558.

within the city is not of itself an unreasonable means of accomplishing a legitimate objective within the police power of the city.”¹¹ Other cases, before and after *Beverly Oil*, have ruled similarly.¹² A comparable ordinance in the County of Los Angeles was upheld a few years later.¹³ More recently, in 2001, an appellate court upheld Hermosa Beach’s local ordinance prohibiting oil and gas extraction.¹⁴ The court noted: “Proposition E was adopted with general findings that reinstating the total ban on oil drilling and production in a densely populated urban area is necessary to preserve the environment, as well as to protect the public health, safety and welfare of people and property within Hermosa Beach. It is, therefore, presumptively a justifiable exercise of the City’s police power.”¹⁵

Phasing Out Drilling Will Not Violate Any Operator’s Vested Rights

Oil companies have raised the argument that local ordinances restricting oil and gas activities might violate a permit-holder’s vested rights. This contention will be unsuccessful for several reasons. First, local governments are permitted to restrict activity that endangers public health and safety, as is the case for all public nuisances. This is particularly the case when nuisances are found to be caused by particular operations, based on an evidentiary record.¹⁶

Second, courts have found appeals to vested rights largely unavailing because claimants must show they have (1) acquired all discretionary permits necessary for the prohibited activity, and (2) completed substantial work in good faith reliance on those permits prior to the effective date of the ordinance.¹⁷ Even valid rights do not continue indefinitely; operators have no vested rights once their permits expire. Furthermore, landowners have no right to intensify or expand a

¹¹ *Id.*

¹² *See, e.g., Pacific Palisades Assoc.*, 196 Cal. at 217 (acknowledging that “Huntington Beach has the unquestioned right to regulate the business of operating oil wells within its city limits, and to prohibit their operation within delineated areas and districts, if reason appears for so doing.”); *Marblehead*, 47 F.2d at 531-32 (City of Los Angeles repealed ordinance excluding a strip of plaintiff’s land from residential district in which oil production was prohibited. Court held that the city’s police powers permitted the city to protect inhabitants from fire and noxious gas hazards, and stated “there can be no question of the inherent right of the city to control or prohibit such production, provided it is done reasonably and not arbitrarily. In that event the loss must fall upon the owner whether it prevents him from erecting structures or establishing industries which he desires to erect or establish, or whether it prevents him from developing the inherent potentialities of his land.”); *Friel v. County of Los Angeles*, 172 Cal. App. 2d 142, 157 (1959) (Los Angeles County zoned certain areas for residential uses and denied plaintiffs’ applications for exceptions or variances for the purpose of drilling for oil. Plaintiffs complained that their neighbors in different zones, who were permitted to drill, were drilling the oil underlying plaintiffs’ land, but the court upheld the ordinance, stating: “There is no question that the county has the right to regulate the drilling and operation of oil wells within its lands and to prohibit their drilling and operation within particular districts if reasonably necessary for the protection of the public health, safety and general welfare.”).

¹³ *See Friel*, 172 Cal. App. 2d at 157 (upholding ordinance banning oil well drilling in certain parts of the County).

¹⁴ *See Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach*, 86 Cal. App. 4th 534 (2001).

¹⁵ *Id.* at 555.

¹⁶ *See, e.g., People ex re. Dept. Pub. Works v. Adco Advertisers*, 35 Cal. App. 3d 507, 513 (1973) (finding less than three year amortization period for signs reasonable in part because the legislation declared nonconforming signs to be public nuisances); *see also Stewart Enterprises, Inc. v. City of Oakland*, 248 Cal. App. 4th 410, 423-24 (2016); *Davidson v. County of San Diego*, 49 Cal. App. 4th 639, 649-650 (1996).

¹⁷ *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal. 3d 785, 791 (1976); *see also Trans-Oceanic Oil Corp. v. City of Santa Barbara*, 85 Cal. App. 2d 776 (1948); *Hermosa Beach Stop Oil Coal.*, 86 Cal. App. 4th at 551-53.

nonconforming use.¹⁸ Indeed, the Superior Court, in an unpublished decision, found that the operator in Culver City's portion of the Inglewood Oil Field had no vested rights to drill new wells.¹⁹ The court found that the City's regulatory authority was broad, stating that "[t]he City's right to regulate an existing use of land for oil production may reasonably include regulation of the number, location, and manner of drilling new wells."²⁰

Additionally, any vested rights that may be demonstrated can be terminated pursuant to a reasonable phase-out or amortization period, during which the rights holder may continue operations to recoup a reasonable return on investment.²¹ California courts have long recognized amortization periods as valid ways to balance the competing interests of a landowner's property rights and a local agency's need to implement zoning changes to benefit public health and welfare.²² Courts have approved the use of phase-out periods in a wide variety of contexts,²³ and confirmed that these periods satisfy due process requirements.²⁴ There is also ample caselaw to debunk a favorite argument of oil companies that amortization is categorically unlawful for oil and gas-related land uses.²⁵

To determine an appropriate amortization period, the County can use well-established reasonableness factors to weigh the public gain from removing the nonconforming use against the private loss incurred.²⁶ The County can also include an administrative process that would allow for extensions in those extremely rare circumstances in which operators can show the phase-out period would impair a valid vested right or cause a taking of their legally protectable property rights. The administrative process should be open to the public, allow for public participation, and must weigh the countervailing harm to the public if existing operations are maintained beyond the standard amortization period.

¹⁸ *Paramount Rock Co. v. San Diego County*, 180 Cal. App. 2d 217, 229 (1960); see *Beverly Oil*, 40 Cal. 2d at 557.

¹⁹ *Plains Exploration & Production Co. v. Culver City* (L.A. Super. Ct. No. BS122799, March 26, 2010).

²⁰ *Id.* at 12.

²¹ *Metromedia, Inc. v. San Diego*, 26 Cal. 3d 848, 882 (1980), *rev'd on other grounds*, 453 U.S. 490 (1981); see also *National Advertising Co. v. County of Monterey*, 1 Cal. 3d 875, 880 (1970) (upholding period for signs fully amortized and extending it where costs were not yet recovered).

²² *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 460-61 (1954) (upholding 5-year amortization in challenge by retail plumbing business).

²³ See, e.g., *Livingston Rock & Gravel Co. v. County of Los Angeles*, 43 Cal. 2d 121 (1954) (cement mixing plant); *People v. Gates*, 41 Cal. App. 3d 590, 603 (1974) (wrecking yard); *Castner v. City of Oakland*, 129 Cal. App. 3d 94, 96-97 (1982) (adult bookstore).

²⁴ *Gage*, 127 Cal. App. 2d at 453, 460, 461.

²⁵ Oil companies often cite to *Hansen Bros. Enters. v. Bd. of Supervisors*, 12 Cal. 4th 533, 553 (1996), a quarrying and mining case, to argue that the "diminishing asset doctrine" indefinitely protects their rights to drill oil and gas. However, in *Plains Exploration & Production Co. v. City of Culver City* at 10-12 (L.A. Super. Ct. No. BS122799, March 26, 2010) (unpublished), the Court rejected this same argument that an oil company had a vested right to expand its existing nonconforming use and drill new wells under the diminishing asset doctrine outlined in *Hansen*. Furthermore, the court in *Hansen* expressly acknowledged that amortization may be used to lawfully discontinue existing nonconforming uses. 12 Cal. 4th at 552.

²⁶ *Metromedia*, 26 Cal. 3d at 882. The factors to be weighed include: the amount of the investment or original cost; present actual or depreciated value; dates of construction; amortization for tax purposes (deductions); salvage value; length of the remaining term for a lease; remaining useful life of the nonconforming use; harm to the public if the amortized use remains beyond the prescribed amortization period; cost of removal; and remaining value or allowed uses of the property after removal. *United Bus. Comm'n v. City of San Diego*, 91 Cal. App. 3d 156, 181 (1979); *Gage*, 127 Cal. App. 2d at 461.

Culver City recently commissioned a study to determine what a reasonable amortization period would be for the oil wells within its jurisdiction and found that the operator achieved amortization of its capital investment *within four to five years* of purchasing the wells.²⁷ In addition, even if particular wells fall short of the five-year amortization mark, the study confirms that high returns from performing wells offset low returns from marginal wells. After a presentation on the amortization study and virtual public testimony in August 2020, the Culver City Council unanimously directed staff to develop a framework and timeline for the phase out and remediation of wells in the City’s 78-acre portion of the Inglewood Oil Field. On June 17, Culver City Council voted 4-1 to pass an ordinance to prohibit new drilling, redrilling, and deepening after July 28, 2021 and set a five-year timeline for termination and removal of all existing nonconforming land uses.²⁸ The City of Los Angeles is pursuing a similar strategy, with both the environment committee and planning committee, upon the advice of the City Attorney’s Office and Planning Department, voting to draft an ordinance declaring oil drilling a “non-conforming land use” City-wide and to take steps to create a phase-out process. We urge the County to consider a similar five-year or sooner phase-out strategy.²⁹

Phasing Out Drilling Will Not Result in An Unconstitutional Taking

Oil companies have also raised the specter that regulations effect an unconstitutional taking of their property without due process. However, only a law that inevitably and invariably deprives the property of all of its economic value may be considered an unconstitutional taking on its face.³⁰ Restrictions on oil and gas development are unlikely to result in 100% destruction of value because properties, when viewed “as a whole,” can provide support for alternative uses.³¹ Moreover, an ordinance causes an unconstitutional taking only if that taking is unavoidable, which is rarely the case. Most local governments have administrative processes to determine

²⁷ Cheek, William, et al., Capital Investment Amortization Study for the City of Culver City Portion of the Inglewood Oil Field (May 29, 2020) (utilizing two methods to calculate the reasonable amortization period: modeling the time for amortization of capital investment (“ACI”) for Sentinel’s investment when it acquired Freeport McMoRan’s portfolio of California oil and gas production properties, and modeling the time for ACI based on the original costs to drill and complete the wells and infrastructure made by other operators in the Inglewood Oil Field between 1925 and 2016), available at <https://www.culvercity.org/files/assets/public/documents/city-manager/inglewood-oil-field/bakerobrienreportandexhibi.pdf>.

²⁸ Culver City, Thursday, June 17 Special Meeting Agenda <https://culver-city.legistar.com/View.ashx?M=A&ID=861029&GUID=9C5E0600-2E1B-40B5-84C2-18A3425C0305>.

²⁹ Courts have upheld amortization periods for nonconforming signs of two years and eight months, three years, five years, and seven years. *See United Bus. Comm’n.*, 91 Cal. App. 3d at 180-81 (surveying cases). In other contexts, courts have upheld even shorter amortization periods. *See, e.g., Castner v. City of Oakland*, 129 Cal. App. 3d 94, 96-97 (1982) (one year to shutdown adult bookstore); *People v. Gates*, 41 Cal. App. 3d 590, 603 (1974) (one and a half years to shut down wrecking yard). The phase-out period could be extended as necessary for particular drill sites a case-by-case basis.

³⁰ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 1018 (1992); *see also Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330 (2002) (emphasizing that the rule applies only in the rare case where a regulation leaves a property with no use or value at all).

³¹ In *Keystone Bituminous Coal Ass’n. v. DeBenedictis*, 480 U.S. 470, 495 (1987), the U.S. Supreme Court explained that takings claims must be evaluated based on “the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances” associated with a specific parcel; for this reason, plaintiffs “face an uphill battle in making a facial attack on [a regulation] as a taking.” *See also San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal. 4th 643, 673 (2002).

whether a taking has occurred and ordinances that allow local governments to grant limited exemptions to avoid an unconstitutional taking.³²

Likewise, a court is unlikely to find an unconstitutional taking as to any particular operator in an “as-applied” challenge to an ordinance. A *Penn Central* ad-hoc factual inquiry is utilized to decide such cases,³³ and partial or temporary restrictions are typically upheld as constitutional.³⁴ Courts consider a variety of factors, including: the character of the governmental action, the economic impact of the regulation on the owner, and the extent to which the regulation has interfered with distinct (more recently, “reasonable”) investment-backed expectations.³⁵ Even if a property’s value is severely diminished, that is unlikely to be enough to support a takings claim.³⁶ Investors would also likely be unsuccessful in arguing that there is a taking under the reasonable investment-backed expectations prong of the test because the law does not support a guarantee of future profits.³⁷ Finally, oil and gas is a heavily regulated industry and a volatile one, such that it is unreasonable for property owners to expect guaranteed profits for the long term.³⁸

Even if an as-applied takings challenge were successful, the County could likely extend the amortization period as the remedy. Indeed, in instances where the regulation included a reasonable amortization period, courts have concluded no taking occurred.³⁹ It is very unlikely the County would be required to provide any compensation, let alone the extreme amounts advanced by the oil industry.

The oil industry has pointed to the Los Angeles City Petroleum Administrator’s 2019 report on the “Feasibility of Amending Current City Land Use Codes in Connection with Health Impacts and Oil and Gas Wells and Drill Sites” to argue that local governments will incur huge costs to

³² See, e.g., *San Mateo Cty. Coastal Landowners’ Assn. v. County of San Mateo*, 38 Cal. App. 4th 523, 547 (1995).

³³ *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); see, e.g., *Tahoe Regional Planning Agency v. King*, 233 Cal. App. 3d 1365, 1402 (1991). Courts have also included the fact that a regulation prevents harm to neighbors or the public generally (nuisance) as relevant to a *Penn Central* analysis. See, e.g., *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1350-51 (Fed. Cir. 2004).

³⁴ *Rith Energy v. United States*, 270 F.3d 1347, 1350 (Fed. Cir. 2001). Furthermore, oil and gas drilling is a heavily regulated industry, and cities have imposed outright bans on drilling, see *Hermosa Beach Stop Oil Coal.*, 86 Cal. App. 4th at 557, so it would be difficult for oil and gas producers to argue they have a reasonable expectation of being able to produce indefinitely, see *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006-07 (1984).

³⁵ *Penn Central*, 438 U.S. at 124-25; regarding “reasonable” investment-backed expectations, see *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

³⁶ *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (holding that cases “have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.”); see also *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (finding a 92.5 percent diminution in value was not a taking); *Euclid v. Ambler Realty*, 272 U.S. 365, 384 (1926) (ordinance resulting in a diminution of value of 75 percent not a taking); *William C. Hass & Co. v. City and County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (reduction in value from \$2 million to \$100,000 was not a taking).

³⁷ See *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (holding that “loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.”).

³⁸ *MHC Fin. L.P. v. City of San Rafael*, 714 F.3d 1118, 1128 (9th Cir. 2013) (holding that “[T]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.”) (quoting *Concrete Pipe and Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993)); see also *Rith Energy*, 247 F.3d at 1364.

³⁹ *City of Salinas v. Ryan Outdoor Advert., Inc.*, 189 Cal. App. 3d 416, 423-24 (1987) (sign ordinance did not effect a taking where amortization period was reasonable).

pay for constitutional takings claims if they attempt to restrict oil and gas development. The attached 2019 letter explains how the cost estimates in that report were vastly inflated. Among other serious factual and legal errors, the report did not use standard methods to value oil and property interests, relied on an outdated and legally inaccurate understanding of the nature of oil and gas mineral rights, did not include any analysis of an amortization period, and incorrectly assumed that the City of Los Angeles would be liable for abandonment and remediation costs that operators are required by state law to pay. The report also did not address or analyze the potential financial benefits to the City that could result from enacting a health and safety buffer, which include decreased health care costs as well as the reduced costs and economic benefits resulting from cleaner air and water, reduced traffic, decreased noise and light pollution, and mitigation of the adverse effects of climate change. It is troubling that the report does not consider the *public* benefits to Los Angeles communities that are likely to outweigh any speculative profits to the *private* oil industry.

Conclusion

The history of cases regarding oil regulation—even outright bans—in California demonstrates that a reasonable regulation that phases out nonconforming oil operations to protect the health, safety, and welfare of the residents of Los Angeles County and surrounding communities is a valid exercise of the County’s police powers.

Please do not hesitate to contact us with any questions. We hope to work collaboratively with your office as the County continues to address these critical issues.

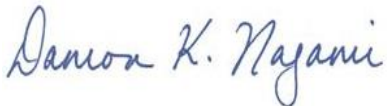
Sincerely,



Liz Jones,
Staff Attorney, Climate Law Institute
Center for Biological Diversity



Alison Hahm
Associate Attorney
Communities for a Better Environment



Damon Nagami
Director, Southern California Ecosystems Project
Senior Attorney, Nature Program
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cc: Laura Muraida, 2nd District Senior Deputy of Environmental Justice
Claudia Gutierrez, 2nd District Senior Deputy of Legal Affairs
Katy Young Yaroslavsky, 3rd District Senior Deputy for the Environment and Arts
Sophie Freeman, 3rd District Associate Deputy for the Environment and Arts

Enclosure:

October 3, 2019 Letter to Mike Feuer Re: “Errors in Report of the City Petroleum Administrator on the Feasibility of Amending Current City Land Use Codes in Connection with Health Impacts at Oil and Gas Wells and Drill Sites”

October 3, 2019

Via E-Mail and U.S. Mail

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Re: Errors in Report of the City Petroleum Administrator on the Feasibility of Amending Current City Land Use Codes in Connection with Health Impacts at Oil and Gas Wells and Drill Sites

Dear Mr. Feuer:

This letter responds to significant errors in the Los Angeles City Petroleum Administrator's July 29, 2019 report addressing the "Feasibility of Amending Current City Land Use Codes in Connection with Health Impacts and Oil and Gas Wells and Drill Sites" (hereafter the "Report"). The Report ostensibly evaluates costs and liabilities associated with establishing health and safety "setbacks" or buffer zones between oil and gas development and sensitive land uses like homes and schools.

The Report concludes that the City could incur nearly \$100 billion in costs, most of which the Report attributes to liability for constitutional takings claims. However, the cost and liability estimates in the Report appear to be vastly inflated due largely to several serious factual and legal errors, including the following:

- **The Report's valuation of oil and gas property interests fails to follow accepted methods used by appraisers and courts.** The Report's estimates of the value of both "existing" and "future" oil and gas resources contravene standard valuation methodologies used by the courts in evaluating "just compensation" in takings and eminent domain proceedings. Compensation for a taking of private property typically depends on the "fair market value" of the affected interest. The Report, however, does not attempt to establish "fair market value." Instead, it

relies almost entirely on speculative high-end estimates of remaining oil reserves, unconstrained by real-world development restrictions or risks, while simultaneously failing to consider *any* costs of production, capital investment, or other economic factors. The market does not value a business by considering only its assets and none of its liabilities, or only its revenues and none of its costs. Yet this is exactly how the Report values oil and gas resources. The Report's estimates thus appear to be grossly inflated and deeply misleading.

- **The Report relies on an outdated and legally inaccurate understanding of the nature of oil and gas mineral rights.** The Report values oil and gas rights solely in terms of remaining reserves, as if all oil in those reserves were already the personal property of mineral rights holders. The Report's estimates thus appear to be grounded in a conception of property rights in oil and gas that the California Supreme Court abandoned nearly 85 years ago. Under California law, an oil and gas mineral right does not entail *physical ownership* of the oil and gas underlying a parcel, but rather the *right to drill* for that oil and gas. The Report's incorrect understanding of oil and gas property interests contributes further to its inaccurate and excessive cost estimates.
- **The Report fails to include any analysis of an amortization period for existing operations, and thus inaccurately assesses takings liability.** The Report appears to assume that a setback ordinance would result in the immediate and complete elimination of the economic value of all "existing" and "future" oil and gas property interests in the City. This assumption is clearly erroneous. Any setback ordinance would almost certainly include a reasonable amortization period allowing existing facilities to continue operating for at least some period of time, and thus would not cause a total deprivation of economic value. As a result, the Report fails to acknowledge that takings claims arising from existing operations likely would be evaluated under the multi-factor *Penn Central* test, which generally should favor the City.
- **The Report incorrectly assumes that the City would be required to shoulder additional costs.** For example, the Report claims the City would be liable for all costs of well abandonment and environmental remediation, but fails to discuss statutes and principles under which other entities would likely be liable for these costs. The Report also incorrectly concludes that owners of surface property rights would be entitled to compensation for takings, even though the value of surface property interests might well increase as a result of a setback ordinance.

Due to these and other errors addressed in more detail below, we believe that the Report's estimates likely overstate the City's potential takings liability to an extreme degree. At best, the Report's estimates are of little value to decision-makers, and at worst they are affirmatively misleading.

Property interests related to oil and gas in Los Angeles are obviously valuable, and decision-makers understandably want to know the degree to which enacting a setback ordinance might entail financial risk to the City. The Petroleum Administrator's office lacks the legal expertise to reach reliable judgments concerning potential liability, and the inflated estimates in the Report are already undermining rational discussion and sound policy development. Credible, independent guidance from your office correcting the errors and misstatements of law in the Report would significantly benefit City decision-makers by providing them reliable information for consideration in reaching any decision about enacting a health and safety buffer.

I. The Report's Estimates of Potential City Liability for a "Taking" of Oil and Gas Property Interests Have No Basis in Law.

The Report estimates potential liability for a taking of oil and gas property interests based largely on conjecture regarding the value of "existing" and "future" crude oil production.¹ (Report at 125-26.) The value of "existing" production is estimated at \$148-185 million per year. (*Id.* at 125.) However, this estimate is based on solely on

¹ As a threshold matter, the basis for the Report's separate assessment of "existing" and "future" production is unclear. First, as discussed below, the Report's estimate of "future" possible production relies on extremely aggressive hypothetical assumptions about the total amount of recoverable oil remaining in existing oil fields beneath the City. Accordingly, the Report's estimate of "future" volumes of recoverable oil most likely includes "existing" production volumes, creating a risk of double-counting. Second, the Report recommends studying the feasibility of different setback distances for "existing" and "future" production. (Report at 2-3.) But the Report for the most part differentiates only between "existing" and "future" *production volumes*, and does not make clear how a setback ordinance would address "existing" and "future" oil and gas development *activities* that would be subject to the setback. In particular, the Report does not explain whether it assumes setbacks for "future" oil and gas development would affect only the establishment of new oil drilling districts or sites, or whether it assumes "future" setbacks also would apply to "future" production from already developed mineral rights and leases using existing drill sites in existing drilling districts. The Report's lack of precision on this point further undermines its cost and liability estimates.

current production volumes multiplied by current and projected future Midway-Sunset oil prices. (*Ibid.*) The estimate does not appear to include any costs of production, costs of capital, risks, or necessary capital investments.²

The Report estimates that “future” production might be worth up to \$97.6 billion, and that the City could be liable for this entire amount in constitutional takings litigation. (Report at 2-3, 128.) This estimate similarly derives from multiplication of an estimate of potentially recoverable oil volumes by projected Midway-Sunset prices, plus a 6% interest factor over a 20-year period. (Report at 125-26.) Again, the estimate does not appear to consider any costs of production, capital, or investment, and was derived from hypothetical studies that did not appear to include any realistic economic or development constraints.

For several reasons, the Report’s estimates of “existing” and “future” production value cannot form the basis of a judgment as to the City’s possible takings liability.

A. The Report’s Estimates Contradict Standard Valuation Methodologies by Failing to Consider Costs and Other Constraints.

The measure of “just compensation” in takings or eminent domain proceedings is typically the “fair market value” of the property taken. (See, e.g., *Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 203-04.) “Fair market value” is “the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, *each dealing with the other with full knowledge of all the uses and purposes for which the*

² The Report’s assumptions regarding the effect of a setback ordinance on “existing” oil and gas facilities are unclear. Production loss estimates appear to be based on a report by Catalyst Environmental Solutions commissioned by the California Independent Petroleum Association. (See Report at 115-117.) The Catalyst report used an extremely broad definition of “sensitive receptors”—consisting of a long list of land use designations (rather than structures or facilities) that include commercial, open space, recreational, and public facilities uses—in determining whether setbacks of different distances would affect specific existing drill sites. (Appx. 2-6 at 2.) The Catalyst definition is far broader than the definition purportedly used by the Petroleum Administrator “[f]or this report”: “residents, children attending schools, elder care facilities, and daycare facilities.” (Report at 109.) The Report thus lacks any analysis of the effect of setbacks based on the definition of “sensitive receptors” the Report purportedly used.

property is reasonably adaptable and available.” (Code Civ. Proc., § 1263.310 [emphasis added].) In other words, “fair market value” is the price upon which a sophisticated seller and buyer would agree, without duress on either party, taking into account all of the factors affecting the use and purposes of the property.

Here, the Report does not attempt to establish the “fair market value” of potentially affected resources. Specifically, there is no evidence that the Report’s estimates of the value of “future” oil and gas volumes considered development constraints, operational expenses, risks, or any other realistic economic factors that a knowledgeable buyer would consider in determining whether to purchase oil and gas development rights.

The Report relied primarily on two documents in estimating “future” volumes of recoverable oil. (Report at p. 125.) The first document, a one-page U.S. Geological Survey publication from 2013, estimated that 1.4-5.6 billion barrels could be recovered from 10 existing oil fields. (Appx. 2-29 at 1.) The methodology consisted solely of an estimation of original oil in place, multiplied by a rough estimate of hypothetical maximum recovery efficiency. (*Ibid.*) No economic or development constraints were considered. Indeed, the publication noted that “[s]ubstantial recovery of these resources would require field redevelopment and unrestricted application of current best-practice technology, including improved imaging and widespread application of directional drilling, combined with extensive water, steam, and CO₂ floods.” (Appx. 2-29 at 1.) The publication cautioned that “[g]iven the highly urbanized condition of the Los Angeles Basin, *unrestricted development is hard to envision.*” (*Ibid.* [emphasis added].)

The second document, a PowerPoint presentation prepared by the author of the first document, relied on a similar methodology: estimating original oil in place in each of 20 fields lying at least partially within the City, and then estimating potential recoverable volumes if recovery efficiencies could be increased from a current average of 17.5% to as much as 60%. The PowerPoint presentation did not explicitly address urban development constraints, local land use controls, or economics in calculating these maximum recovery efficiencies. (See Appx. 2-30 at 22.) However, the presentation did acknowledge that conflicts between oil and gas development and “urbanization” contribute to “low recovery efficiency.” (*Id.* at 14.)

Both documents thus plainly acknowledge that their assumptions regarding oil and gas recovery are highly unrealistic. Any assessment of “fair market value,” in contrast, would necessarily entail a knowledgeable buyer’s consideration of reasonable physical and economic operating conditions and costs. The Report includes none of this information.

Elsewhere, the Report seems to acknowledge that an estimate of the economic value of reserves must consider production and other costs. For example, the Report states that the “economic value of the oil and gas reserves can be measured by estimating the present discounted value of after-tax cash flows (i.e. annual revenues *minus operational and investment costs*) generated from all future extraction of oil from these reserves.” (Report at 124 [emphasis added].) This quotation is taken almost word for word from an industry-commissioned study by Capital Matrix Consulting. (Appx. 2-8 at 32), which reached far lower estimates of the potential diminution in value of assets that could result from a setback ordinance in Los Angeles County: “If the County were to impose a 500-foot setback requirement today, the reduction in the value of the oil reserves would be between \$290 million and \$815 million, depending on the oil price scenario. The County-wide application of a 2,500-foot setback would reduce economic value of the reserves by \$615 million at the low end, up to \$1.7 billion at the high end.” (Appx. 2-8 at 33.) The Report does not explain why it uses a completely different methodology—one that not only uses unrealistic production assumptions but also fails to account for *any* costs of production or investment—in calculating far higher estimates of potential takings liability for the City.

Case law and standard appraisal methods confirm that mineral rights are not valued using the one-sided assumptions employed by the Report. Rather, mineral rights valuations typically are conducted by an experienced appraiser using one or both of two general methods: (1) a “sales comparison” approach, where comparable, recent sales between reasonably prudent buyers and sellers establish fair market value; or (2) an “income capitalization” approach, which calculates expected revenues from the sale of minerals, minus the costs of extraction and transport to market, reduced to present value using an appropriate discount rate. (See generally Starsick, *Valuation of Minerals in Condemnation Proceedings: The Keys to Quick and Just Compensation*, 24 Energy & Min. L. Inst. ch. 3, § 3.02 (2004), pp. 90-96; see also, e.g., *Whitney Benefits, Inc. v. United States* (Cl. Ct. 1989) 18 Cl. Ct. 394, 408-15.) Applied to oil and gas interests, these methods necessarily would include the costs of producing oil and gas under realistic environmental and economic conditions, and would not simply speculate about the gross value of oil and gas that hypothetically could be produced if none of those constraints applied.

California case law further confirms that valuation must be based on standard practices in the developed market for relevant property interests. In *Central Valley Gas Storage, LLC v. Southam* (2017) 11 Cal.App.5th 686, 692-93, the Court of Appeal upheld a trial court’s valuation of a natural gas storage lease based on surface acreage—the approach typically used for leases in the “developed market” for gas storage—and

rejected a “speculative” valuation based on an estimate of underground storage volume at a particular property. *Central Valley Gas Storage* underscores that valuation of mineral interests in the City turns on practices established by knowledgeable buyers and sellers in the “developed market” for those interests, not on highly speculative and unrealistic estimates of underground reserves.

In sum, the Report’s estimates of potential City takings liability are not grounded in “fair market value.” A rational buyer at the very least would consider historical recovery efficiencies, development and land use constraints, declining productivity in known oil fields, anticipated costs of production and capital, necessary capital investment, discount rates, risks, and other factors in determining what to pay for a mineral right, lease, or royalty interest. The Report considers none of this information. Instead, the Report presents only one side of the ledger—revenues and assets, but not costs or liabilities. No rational buyer would agree to a price based on only half of the relevant information. The Report’s unconstrained and unsupportable estimate of potential liability thus lacks a sound basis in fact or law and is highly likely to mislead decision-makers.

B. The Report Fundamentally Misconstrues the Nature of Property Rights in Oil and Gas Under California Law.

The Report’s estimate of potential oil and gas reserve value in the City also reflects a fundamental misunderstanding of the nature of oil and gas mineral rights in California—in other words, the kind of property interest that an oil and gas mineral right entails.

By estimating oil and gas values based solely on theoretically recoverable volumes, the Report treats oil and gas as the personal property of mineral rights owners in the City. (Report at 126 [discussing “projected future value of the *remaining oil reserves belonging to mineral rights owners*”] [emphasis added].) However, “it is firmly established in California that *no one owns oil and gas in its natural setting.*” (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1138 [emphasis added].) Oil and gas themselves become personal property only *after* they are extracted and reduced to possession. (*Id.* at 1137.)

Indeed, the California Supreme Court decisively rejected the Report’s conception of property rights (known as the “oil and gas in place doctrine”) in 1935. (*Callahan v. Martin* (1935) 3 Cal.2d 110, 117-18; see also *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 878.) Oil and gas, unlike other minerals, can migrate across the boundaries of surface ownerships; as a result, surface drillers extracting from an underground reservoir can

remove (and take possession of) oil and gas that may have been under someone else's surface parcel. (See *Callahan*, 3 Cal.2d at 116-17.) Under California law, therefore, an oil and gas mineral right does not entail *physical ownership* of the oil and gas underlying a parcel, but rather the *right to drill* for that oil and gas. (See, e.g., *Atlantic Oil Co. v. County of Los Angeles* (1968) 69 Cal.2d 585, 594; *Lynch*, 164 Cal.App.3d at 102.) Accordingly, it is inaccurate and misleading for the Report to value mineral rights solely in terms of remaining reserves, as if all oil in those reserves were already the personal property of mineral rights holders.

C. The Report Erroneously Assumes a Setback Ordinance Would Result in a Complete and Immediate Deprivation of Economic Value, And Misapplies Governing Law as a Result.

The Report seems to assume that production would immediately cease at all existing facilities and drill sites upon enactment of a setback ordinance, resulting in the complete elimination of the economic value of all oil and gas property interests in the City. However, the Report fails to account for the near-certainty that a setback ordinance would include a reasonable amortization period during which existing facilities could continue to operate. As a result of this failure, the Report misapplies the law governing takings claims.

A regulatory taking occurs in one of two instances: (1) where a regulation deprives the property owner of 100 percent of the economic value of the property, *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1018 (often called a “categorical taking”), or (2) where a regulation does not completely eliminate the economic value of the property, but nonetheless “goes too far” under the multi-factor test announced in *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104, 124 (“*Penn Central*”) (often called a “*Penn Central* taking”). In applying *Penn Central*, courts consider three main factors: (1) the economic effect of the regulation, (2) the regulation's interference with reasonable investment-backed expectations, and (3) the character of the governmental action. See *Penn Central*, 438 U.S. at 124. A regulation will not be found to cause a taking if any one of these three factors is not met. See *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1277; *Bronco Wine Co. v. Jolly* (2005) 129 Cal.App.4th 988, 1035.

The Report's apparent assumption that a setback ordinance would eliminate all economic value in oil and gas—and thus give rise to slew of categorical takings claims—is unfounded. Following enactment of a setback ordinance, existing oil and gas operations (including operations arguably subject to vested rights) presumably would become nonconforming uses. Vested, nonconforming uses typically may not be

terminated immediately absent a determination that they constitute a nuisance. (*See Davidson v. City of San Diego* (1996) 49 Cal.App.4th 639, 649.)

However, such uses may be terminated, consistent with due process principles, following a reasonable amortization period. (See, e.g., *National Advertising Co. v. County of Monterey* (1970) 1 Cal.3d 875, 879; *City of Los Angeles v. Gage* (1954) 127 Cal.App.2d 442, 460-61; see also *Bauer v. City of San Diego* (1999) 75 Cal.App.4th 1281, 1294 [requiring notice and opportunity to be heard before permitted, lawful use terminated].) Accordingly, it is almost certain that any setback ordinance adopted by the City would include an amortization period and due process protections.³

In the context of a setback ordinance's application to existing operations, a reasonable amortization period could dramatically reduce the City's potential takings liability under either *Lucas* or *Penn Central*. Yet the Report completely fails to consider the effect of an amortization period on possible takings claims.⁴

First, the amortization period would preserve the economic value of existing operations, effectively foreclosing a *Lucas*-based argument that mere enactment of the setback ordinance would deprive those operations of all economic value. Even if some oil and gas remained in the ground following the expiration of the amortization period, it is unlikely that a court would find a categorical taking because the owner would have been able to extract economic value prior to and during the amortization period. (See *Rith Energy v. United States* (Fed. Cir. 2001) 270 F.3d 1347, 1350 [finding no categorical taking where mining company was able to remove 9% of its coal from leased property prior to permit revocation].)

³ The Report notes that the Municipal Code establishes a process for terminating non-conforming oil and gas uses after 20 years (Report at page 118), but fails to consider the implications of any amortization period in discussing potential takings liability. We understand that community advocates have asked for a far shorter amortization period, subject to extensions in individual cases under specific circumstances, in conjunction with a setback ordinance.

⁴ The Report recommends that future feasibility studies “address a requirement to provide relief and an administrative remedy to comply with federal due process and takings law for any oil and gas operators or stakeholders” affected by new setback requirements. (Report at pp. 2-3). It is not clear exactly what is meant by this recommendation, but ordinances declaring and phasing out nonconforming uses routinely provide for a reasonable amortization period as a way of protecting vested rights in accordance with due process.

Second, a reasonable amortization period—one sufficient to allow owners and operators to recover their investments—would both mitigate economic damages and reduce interference with owners’ and operators’ reasonable investment-backed expectations, tilting two of the three main factors in the *Penn Central* analysis in the City’s favor. *See Penn Central*, 438 U.S. at 124.

There may be a subset of mineral rights and interests—namely, interests that have never been developed, and for which no current production exists—that would not benefit from an amortization period. Holders of mineral rights who have never drilled for those rights and would be precluded from doing so under a setback ordinance conceivably might bring categorical takings claims. However, the fair market value of any unexercised mineral rights would be highly speculative. As the Report acknowledges, no new oil drilling districts have been established in the City since 1990. (Report at 13). The Report does not address whether any such rights are likely to exist, or what their value might be if they do exist. Although the value of any such rights might be established by comparative sales of similarly speculative mineral interests (see, e.g., *Cal-Bay Corp. v. United States* (9th Cir. 1948) 169 F.2d 15, 19), we know of no authority that their value should reflect the unconstrained estimates of theoretically recoverable oil and gas advanced in the Report.

Notably, the Report’s estimates of “future” oil and gas volumes were based on existing oil fields, and did not include “yet-to-find oil” or “source rock plays.” (Appx. 2-30 at p. 26 [cited in Report at pp.125-26].) Owners of mineral rights and other interests in existing oil fields, even if they have never directly leased or drilled for oil and gas pursuant to those rights, nonetheless may be subject to pooling or unitization agreements under which they are already receiving economic value. Because these owners likely would benefit from an amortization period that preserves economic value in their interests, their takings claims—if any—most likely would be *Penn Central* claims, not categorical claims.

Accordingly, we believe it is likely that the vast majority of potential takings claimants who might be affected by a setback ordinance hold interests in existing operations in developed fields that would be subject to a reasonable amortization period. Those claimants most likely would not have “categorical” claims for total economic deprivation under Lucas, but rather would have only *Penn Central* claims. As I am sure you are aware, the *Penn Central* factors should strongly favor the City.

II. The Report Erroneously Concludes that the City Would be Liable for Other Costs of Setback Implementation.

A. Abandonment and Remediation Costs

The Report appears to assume that the City would be responsible for the entire cost of abandoning active and idle oil wells following enactment of a setback ordinance. (See Report at 126-27.) The basis for this assumption is unclear. As a general matter, the operator of a well—not the jurisdiction in which it is located—is responsible for abandoning that well in accordance with state law. Operators must provide indemnity bonds or other financial assurances for each well or group of wells they operate (Public Resources Code, §§ 3204, 3205, 3205.2), and may terminate or cancel those bonds only when the well or wells have been properly abandoned (*id.*, § 3207).⁵ The State Oil and Gas Supervisor also may require the current operator of a deserted well or production facility to plug and abandon the well, and if the current operator lacks adequate financial resources to do so, may impose financial responsibility on prior operators. (*Id.*, § 3237(c).) And if no operator with adequate financial resources can be found, the State may undertake abandonment, using funding from statutory charges on oil and gas interests. (*Id.*, §§ 3237(c)(5), 3250.) Nothing in the statutory scheme envisions that ultimate responsibility for abandonment will fall on local governments.

The Report also estimates \$150 million in environmental remediation and cleanup costs to the City. (Report at 127.) This estimate appears to be based on a single example where the operator of *a drill site on Beverly Hills Unified School District property* went bankrupt and was relieved of its responsibility for abandonment and remediation costs in bankruptcy court. The City of Beverly Hills subsequently agreed to take on the costs of monitoring and abandonment on behalf of the School District. (*Ibid.*) However, the Report does not explain why these seemingly unique facts—however unfortunate—should serve as the basis for estimates of abandonment and remediation costs at *all* drill sites in the City of Los Angeles, regardless of the operator’s financial condition or the identity of the surface owner. Again, it appears that the Report simply went out of its way to provide a high cost estimate without adequate foundation.

⁵ A bill currently awaiting the Governor’s signature would authorize the state to require substantial additional bonding to cover the cost of plugging and abandoning wells and decommissioning production facilities. AB 1057 (Limón), § 13 (enrolled Sept. 16, 2019).

B. Surface Land Value Costs

The Report concludes that if a setback ordinance were enacted, the *surface* landowners at drill sites would need to be compensated for the “deprivation [of their] property rights,” to the tune of \$100 million. (Report at 126.) Again, the Report fails to explain the basis for this conclusion.

Mineral rights are commonly severed and held separately from surface property rights. Where oil and gas rights have been severed from the surface estate, a setback ordinance most likely would not cause any “deprivation” of property rights in the surface estate.⁶ If the surface owner of a drill site happened also to hold the mineral rights for the parcel, a court would assess the effect of the ordinance on the “parcel as a whole.” (See *Murr v. Wisconsin* (2017) 137 S.Ct. 1933, 1945-46 [discussing factors relevant to determining “parcel” affected by regulation].) The court would likely conclude that no categorical taking occurred because substantial economic value—upwards of \$4 million per acre on average, by the Report’s own estimation—would remain in the surface estate. Indeed, the value of the surface estate at the time the ordinance is enacted ultimately might be enhanced by both termination of the mineral rights holder’s right of entry for purposes of exploration and production (see, e.g., *Wall v. Shell Oil Co.* (1962) 209 Cal.App.2d 504) and by future development that could occur after cessation of oil and gas production.

C. Litigation Costs

The Report assumes that the City will likely incur litigation costs of \$1 million per year. (Report at 127-28.) The Report claims the City Attorney’s office concurs in this estimate (*id.* at 128), but the foundation for the estimate—an Assembly Appropriations Committee analysis of AB 345 (Muratsuchi)—is questionable. AB 345 proposes a setback of 2,500 feet between oil and gas operations and defined sensitive land uses *statewide*, which the Division of Oil, Gas & Geothermal Resources (“DOGGR”) estimates would affect nearly 16,000 active and idle wells; DOGGR’s litigation cost

⁶ A surface owner might have retained an interest in some percentage of ongoing production at the site—for example, under a lease or by reservation in a grant deed (see generally 47 Cal. Jur. 3d Oil and Gas §§ 22, 26)—but that would be in the nature of a *mineral* interest, not a surface interest. The value of that interest, moreover, likely would be established by one of the standard appraisal methods discussed above, and would not have anything to do with “average land value” in Los Angeles.

estimate was explicitly based on this anticipated effect.⁷ According to the Report, there are approximately 1,100 active and idle wells in the City of Los Angeles (Report at 126), only some portion of which would be affected by a City setback ordinance. The Report does not explain how the same estimate of litigation costs would apply given at least a fifteen-fold difference in the number of potentially affected wells.

III. The Report’s Assertions Regarding Preemption and Jurisdictional Limitations Are Unsupported.

The Report suggests that a setback ordinance affecting both existing operations and “future development” in Los Angeles might be preempted by state law. (See Report at 145, 147.) The Report further suggests that the City may not impose a setback greater than 1,500 feet due to proximity to other jurisdictions. Neither suggestion is correct.

The Report’s suggestion regarding preemption is not based on any cogent analysis of preemption principles, but rather solely on a misreading of a single comment letter from the Attorney General’s office regarding an ordinance adopted by the City of Arvin. In that letter, the Attorney General rejected the argument that Arvin’s ordinance—which prohibited drilling in certain zones and imposed setbacks in zones where drilling was allowed—conflicted with a state statute encouraging the “wise development of oil and gas resources.” (Appx. A2-31 at 6 [citing Pub. Resources Code § 3106].) Because Arvin’s ordinance did not prohibit existing operations that could “demonstrate vested rights” and would not “eliminate future access” to oil and gas located in restricted areas, the Attorney General found no conflict with state law. But the Attorney General did *not* conclude—as the Report claims—that the ordinance would have been preempted “if the setbacks had impacted existing oil and gas operations.” (Report at 145.) Because Arvin’s ordinance did not present this concern, the Attorney General had no reason to analyze it.

A setback ordinance in the City would not be preempted. The state’s oil and gas statutory scheme has long acknowledged and preserved the right of local governments to regulate—and even to prohibit—oil and gas development. (See, e.g., Pub. Resources Code, § 3012 [recognizing that incorporated cities may prohibit the drilling of oil wells].) A setback ordinance—even one affecting both existing operations and “future development”—would be entirely consistent with the history and purpose of the statutory

⁷ Assembly Committee on Appropriations, Analysis of AB 345 (May 8, 2019) at p. 2 (available at http://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB345.)

scheme.⁸ Moreover, as discussed above, the setback ordinance under consideration here would affect existing development only in accordance with vested rights and due process. In short, the Report's misreading of the Attorney General's letter does not support its suggestion that a setback ordinance might be preempted.

Finally, the Report makes the somewhat puzzling claim that "1,500 feet is the furthest jurisdictional distance limit that the City could set before potentially conflicting with other jurisdictional authorities, like the Ports of Long Beach and Los Angeles, Los Angeles World Airports, Unincorporated Los Angeles County, and adjacent municipalities." (Report at 147.) It is not clear what this means, and the Report does not offer further explanation. The City of Los Angeles has land use jurisdiction only within the City of Los Angeles. Wells drilled under the control of "other jurisdictional authorities" presumably would not be subject to the City's ordinance; nor would City setback distances presumably preclude drilling in areas outside the City limits. This aspect of the Report deserves clarification, as it could lead City officials to believe they are limited in considering a setback distance adequate to protect public health.

IV. Conclusion

The City Council directed the Petroleum Administrator to answer numerous questions in the Report, but did not ask for a legal analysis of takings liability or preemption. Unfortunately, the Report ventured into legal territory anyway—and made a number of egregious errors in the process. As a result, the Report's findings and recommendations are of little use to City decision-makers, and are far more likely to mislead than to inform.

The City Council and the public require and deserve a realistic, independent analysis of the legal and liability issues surrounding a potential setback ordinance. Absent such analysis, reasoned policymaking will likely prove impossible. Accordingly, we encourage your office to clearly and publicly correct the misstatements of law and misapprehensions of fact in the Report, so that the Council and the community can move forward with appropriate legislation.

⁸ The Legislature recently adopted changes to Public Resources Code section 3106. If signed by the Governor, these changes—effective January 1—would eliminate the "wise development" language on which the Attorney General relied and replace it with "wise oversight of development." AB 1440 (Levine), § 1 (enrolled Sept. 9, 2019).

Mike Feuer
October 3, 2019
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Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Kevin P. Bundy

cc: Mayor Eric Garcetti (via email)
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