Katherine Douglas Public Comment #8 LATE DIST

From:	Kevin P. Bundy <Bundy@smwlaw.com>
Sent:	Thursday, May 8, 2025 2:51 PM
To:	sbcob
Cc:	Jesús Armas; Garrett Wong; Adriana de Bruin; Caleb Hersh
Subject:	Board of Supervisors May 13, 2025 Departmental Agenda Item No. 8
Attachments:	Letter from CFROG re Phase-Out Ordinance - 4-21-25.pdf

Good afternoon—

Attached please find a letter to the Board of Supervisors on behalf of Climate First: Replacing Oil and Gas (CFROG) regarding the above-referenced item on the Board's May 13, 2025 Departmental Agenda.

Please kindly provide copies of this letter to the Members of the Board in advance of the meeting and include it in the record for this item. Thank you very much for your assistance.

Best,
Kevin Bundy

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April 21, 2025

Board of Supervisors
Santa Barbara County
105 E. Anapamu Street
Santa Barbara, California 93101-2000

Re: Authority of Santa Barbara County Board of Supervisors to Enact Ordinance Phasing Out Oil and Gas Production

Honorable Members:

This firm represents the organization Climate First: Replacing Oil & Gas ("CFROG"). CFROG asked us to conduct a legal analysis of Santa Barbara County's ("the County's") authority to amend the provisions of the Santa Barbara County Code ("Code") governing onshore oil and gas operations to draw down and ultimately discontinue those operations within the County. On behalf of our client, we are pleased to present this analysis for your consideration here.

Last year, the County adopted its 2030 Climate Action Plan ("CAP"), setting a commendable goal of reducing greenhouse gas emissions in the County's unincorporated area to 50% below 2018 levels by 2030.[1] However, the CAP did not target oil and gas operations or other stationary emissions sources as part of its emissions reduction strategy.[2] CFROG urges the Board of Supervisors ("Board") to consider closing a significant part of this gap by enacting an ordinance ("Ordinance") with the following characteristics. First, the Ordinance would prohibit new oil and gas drilling and declare existing oil and gas drilling and production on unincorporated County lands to be nonconforming uses under the County's zoning code. Second, the Ordinance would state the County's desire to terminate nonconforming oil and gas operations at the end of a reasonable amortization period, subject to extension in individual cases. Third, upon termination of nonconforming operations, the Ordinance would require full site remediation, including plugging and abandonment of wells, removal of equipment, and

[1] *See* COUNTY OF SANTA BARBARA, 2030 CLIMATE ACTION PLAN 1 (Aug. 2024).
[2] *See id.* at 13 fn.4.

restoration of site and soils with regrading and revegetation consistent with the site's natural or agricultural condition.

Oil and gas development in the County dates to the nineteenth century, and the industry's early days represented an important part of the County's development into a modern economy.[3] But Santa Barbara also has an important history of environmental protection, and specifically of regulating the health and safety hazards of oil and gas development. Most notably, the 1969 Union Oil Platform A spill off the Santa Barbara coast was a clarion call for the burgeoning environmental movement that catalyzed a new wave of environmental regulation with nationwide effects.[4]

Unfortunately, however, industry operations continue to present risks to public health and safety, as most recently evidenced by the 2015 Refugio Beach oil spill, which resulted in the release of over 100,000 gallons of crude oil, costing millions of dollars to remediate.[5] And even since 2015, the body of scientific research demonstrating close links between proximity to oil and gas operations and a variety of adverse health outcomes has only been growing. The California Council on Science and Technology, in an independent report assessing the impacts of hydraulic fracturing and other forms of well stimulation, recently recommended setbacks between sensitive land uses and *all* oil and gas development due to potential health and safety risks.[6] This research bears out empirically the same conclusion that the disasters of 1969 and 2015 demonstrated circumstantially: there may be no truly "safe" level of oil and gas production.

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[3] *See, e.g.*, *Oil Spills, Seeps, and the Early Days of Drilling Oil Along California's Coast*, NOAA (Jul. 20, 2016), https://response.restoration.noaa.gov/about/media/oil-spills-seeps-and-early-days-drilling-oil-along-californias-coast.html (last visited Mar. 21, 2025)

[4] *See, e.g.*, *How a Disaster Changed the Face of Ocean Conservation*, NOAA (Oct. 12, 2012), https://response.restoration.noaa.gov/about/media/how-disaster-changed-face-ocean-conservation.html (last visited Mar. 24, 2025)

[5] *See Refugio Beach Oil Spill*, NOAA (Nov. 17, 2023), https://darrp.noaa.gov/oil-spills/refugio-beach-oil-spill (last visited Mar. 24, 2025).

[6] Seth D.C. Shonkoff, et al., *Potential Impacts of Well Stimulation on Human Health in California*, in CAL. COUNCIL ON SCI. & TECH., AN INDEPENDENT SCIENTIFIC ASSESSMENT OF WELL STIMULATION IN CALIFORNIA, VOL. II at 431 (July 2016), https://ccst.us/wp-content/uploads/160708-sb4-vol-II-6-1.pdf; *see also* Jill E. Johnston et al., *Impact of Upstream Oil Extraction and Environmental Public Health: A Review of the Evidence*, 657 SCI. TOTAL ENV'T 187-99 (2019), https://www.sciencedirect.com/science/article/pii/S0048969718348381?dgcid=author.

Relying on this "growing body of research show[ing] direct health impacts from proximity to oil extraction," the Legislature adopted SB 1137 in 2022.[7] SB 1137 established "health protection zones" within 3,200 feet of "sensitive receptors" (like homes, schools, and health care facilities) where new oil and gas wells are prohibited and existing wells must be more tightly regulated.[8] According to an interactive map[9] maintained by the California Department of Geological Energy Management ("CalGEM"), large portions of Santa Barbara County are already included in verified or potential health protection zones where most new notices of intent to drill can no longer be approved.[10] At the same time, the industry's role in the County's tax revenues and overall economy is small (and shrinking): less than a tenth of one percent of employment, and only 0.2% of tax revenues.[11]

As a result, now is an optimal time for the County to consider an oil and gas phaseout ordinance. Moreover, in the event an ordinance that prohibits new oil and gas development and phases out existing operations is litigated, we believe the County would have strong arguments in response to the most likely claims. Although we have not evaluated facts specific to particular operations or property interests within the County, it is our opinion that an ordinance with the broad characteristics described above could be crafted in a manner that comports with constitutional requirements, and most likely would not impermissibly infringe on vested rights or subject the County to substantial monetary liability for takings of private property. Furthermore, a new state law, AB 3233, now firmly establishes that the County has the authority to phase out oil

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[7] 2022 Stats., ch. 365, § 1(a).

[8] *See* Pub. Resources Code § 3280 et seq. SB 1137 took effect on June 27, 2024, following withdrawal of an oil industry-sponsored referendum petition that had temporarily suspended the bill's effectiveness. *See* Cal. Dept. of Conservation, *Understanding California's Oil and Gas Safety Zones: Senate Bill 1137*, https://www.conservation.ca.gov/calgem/Pages/SB1137.aspx (last visited Apr. 11, 2025).

[9] *See* Cal. Dept. of Conservation, *Health Protection Zones, SB 1137, Public*, https://gis.conservation.ca.gov/portal/apps/webappviewer/index.html?id=1792bc8c0ec9486480c6c07dc1c3ccee (last visited Apr. 11, 2025). A screenshot of verified and potential health protection zones in Santa Barbara County as of April 11, 2025, is attached as Exhibit A.

[10] Pub. Resources Code § 3281(a) (prohibiting new notices of intent to drill with limited exceptions for protection of health and safety, compliance with court orders, and actions necessary to plug and abandon wells).

[11] *See* OLIVIA QUINN, ET AL., THE ECONOMIC, HEALTH, AND ENVIRONMENTAL BENEFITS OF PHASING OUT ONSHORE OIL DEVELOPMENT IN SANTA BARBARA COUNTY 4 (2025).

and gas operations and would not be preempted by state oil and gas law in doing so. We discuss the basis for our opinions in further detail below.

ANALYSIS

I. State law gives the County the authority to phase out oil and gas operations.

While there had been some doubt about the authority of local governments to phase out particular types of oil and gas operations, the Legislature has now put many of those concerns to rest. In 2024, it enacted AB 3233 to overrule *Chevron U.S.A. v. County of Monterey*,[12] a challenge to a Monterey County ballot initiative in which the California Supreme Court had held that local restrictions on oil and gas production methods were preempted by the state oil and gas law.[13] AB 3233 grants local governments the authority to "prohibit oil and gas operations or development in [their jurisdictions] and impose regulations, limits, or prohibitions on oil and gas operations that are more protective of public health, the climate, or the environment than those prescribed by a state law, regulation, or order."[14]

As a result, the County will not likely be preempted by state oil and gas law from prohibiting oil and gas operations or regulating those operations to protect health and safety to a greater extent than state law already does. However, the County should consider repealing or amending any contrary provisions it its code to ensure consistency with AB 3233.[15] Regardless, however, the County should not consider the state oil and gas law, or the *Chevron* precedent, to be a barrier to regulating or prohibiting oil and gas operations, including specific methods of development.

II. The ordinance would not impermissibly impair vested rights.

The California courts have long recognized that zoning restrictions requiring nonconforming uses to be terminated are within the scope of a county's police

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[12] (2023) 15 Cal.5th 135.

[13] *See* 2024 Stats., ch. 550, § 1(b) (finding that "[e]mpowering cities and counties to regulate, limit, or prohibit oil and gas operations in their jurisdictions" will "enable communities to make decisions that align with their needs").

[14] *Id.* § 2 (codified at Pub. Res. Code § 3106.1(a)).

[15] *See, e.g.*, Santa Barbara County Code ("S.B. Code") § 25-19 (stating that "where there is conflict with state regulations or laws, such state regulations or laws shall prevail over any conflicting provisions of [the county Petroleum Code] or contradictory prohibitions or requirements made pursuant thereto").

power and satisfy substantive due process requirements so long as the restrictions are adopted for a proper purpose and not applied unreasonably or arbitrarily. A local government may terminate a nonconforming use immediately if it poses a threat to public health or safety or constitutes a nuisance. A phaseout ordinance that declares existing oil and gas operations to be nonconforming uses and requires that they cease operation after an amortization period falls under this umbrella of nonconforming use legislation.

The oil industry's most likely argument against a phaseout ordinance of this nature would be that that the Ordinance impermissibly infringes on property owners'[16] "vested rights" to continue existing operations. In our view, the prevailing case law suggests that such an argument would be unlikely to succeed. Only certain property owners may claim a vested right to operate oil and gas wells, and even those vested wells may be lawfully phased out after a reasonable amortization period, or even sooner in the event that they are found to be nuisances.

A. Only a limited set of well owners would have a vested right to continue operating existing wells.

Operators of oil and gas wells may obtain a "vested right" to commence or continue operations either by (1) lawfully operating existing wells prior to enactment of an ordinance prohibiting those operations, or (2) obtaining all necessary building and other discretionary permits, and completing substantial work in good-faith reliance on those permits, prior to the effective date of an ordinance prohibiting those operations.[17]

Property owners engaged in previously lawful activities are entitled to continue those activities despite new zoning regulations prohibiting them; such activities generally become legal nonconforming uses.[18] When wells that were legally constructed and operated become nonconforming uses, property owners have a vested right to operate

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[16] This analysis uses the term "property owners" to refer collectively to anyone with a relevant oil and gas property interest. In this context, "property owners" may include not only owners of surface interests, but also owners of mineral rights that have been severed from surface ownership (so-called "split estates"). Other relevant property interests may include interests in oil and gas leases and royalty interests. *See generally Atlantic Oil Co. v. County of Los Angeles* (1968) 69 Cal.2d 585, 593-95; *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 878-79.

[17] Vested rights also may be obtained pursuant to a development agreement, a vesting tentative subdivision map, or a local "permit-vesting" ordinance. *See Davidson v. County of San Diego* (1996) 49 Cal.App.4th 639, 646-47.

[18] *City of Los Angeles v. Gage* (1954) 127 Cal.App.2d 442, 453-54.

those established wells as provided for in existing approvals.[19] However, vested rights can be no greater than those specifically granted by applicable permits.[20] Current County law is in accord with this limit.[21]

Some property owners may also be able to claim a vested right to complete construction and operate new wells previously approved, provided they have obtained all required permits (including building permits) and have completed substantial work in good faith reliance on those permits prior to the effective date of the Ordinance.[22] By statute, the County further grants vested rights to owners who have begun construction and have been "diligently" prosecuting it before their projects become nonconforming uses.[23]

Aside from these limited circumstances, however, property owners likely would not be able to claim a vested right to drill or operate new oil and gas wells. Nor would property owners likely be able to claim a right to expand existing oil and gas operations.[24] The County's laws already forbid expansion of nonconforming oil and gas operations outside of a very limited exception for "minor enlargements, expansions,

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[19] *Halaco Engineering Co. v. South Central Coast Regional Com.* (1986) 42 Cal.3d 52, 73, 76 (right to continue nonconforming settling pond that was a part of a lawful business).

[20] *See Russ Bldg. Partnership v. City and County of San Francisco* (1988) 44 Cal.3d 839, 854.

[21] *See, e.g.*, S.B. Code § 35.101.080 (stating that nonconforming uses can be continued only in compliance with applicable permits).

[22] *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785, 793. *Compare Trans-Oceanic Oil Corp. v. City of Santa Barbara* (1948) 85 Cal.App.2d 776 (finding vested right in oil operations when city had issued conditional use permit and property owner constructed concrete foundations and other improvements), *with Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 552 (finding no vested right to drill where owner obtained conditional use permit but lacked required Coastal Commission permit and local building permit).

[23] S.B. Code § 35.101.040.

[24] *See Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, 557 (upholding city's ban against drilling new wells or deepening existing wells as applied to established oil and gas operation and rejecting owner's claim of a vested right to drill new wells); *Paramount Rock Co. v. San County of San Diego* (1960) 180 Cal.App.2d 217, 229 (no right to expand or move nonconforming uses).

extensions, or structural alterations" that *benefit* health, safety and the environment, and that will not increase capacity or intensity or extend the life of those operations.[25] Moreover, property owners would not be able to renew oil and gas production at wells that were voluntarily abandoned.[26] In the County, abandonment is effective after a continuous year of an owner not exercising their vested right.[27]

In sum, the County could adopt an Ordinance that prohibits new oil and gas drilling and declares existing operations to be nonconforming uses. Some, but likely not all, of those nonconforming operations may involve vested rights. Vested rights may be allowed to continue—but not to expand—or they may be lawfully terminated as discussed below. As we read it, the County Code presently reflects prevailing state law on the scope of vested rights to continue operations.

B. The County may terminate vested, nonconforming oil and gas operations after a reasonable amortization period.

As discussed above, some property owners within the County would likely have vested rights to continue operating existing oil and gas wells as nonconforming uses under the terms of their permits. Nonetheless, the County may constitutionally require the elimination of these vested, nonconforming land uses once owners are given an opportunity to come into compliance during a reasonable amortization period commensurate with the investment involved.[28]

Amortization periods have already been used to wind down nonconforming oil and gas operations *within Santa Barbara County*. In 1990, the County rezoned the property containing the Ellwood Onshore Facility (prior to incorporation of the City of Goleta) to make the facility a nonconforming use.[29] About twenty years later, the City of Goleta, which had taken over land use authority in the area from the County, decided to

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[25] S.B. Code §§ 35.101.020.G, 35.82.120.E.

[26] *Stokes v. Board of Permit Appeals* (1997) 52 Cal.App.4th 1348 (no right to operate abandoned uses).

[27] S.B. Code § 35.101.020.D.

[28] *National Advertising Co. v. County of Monterey* (1970) 1 Cal.3d 875, 879; *Tahoe Regional Planning Agency v. King* (1991) 233 Cal.App.3d 1365, 1394 (amortization and termination are "constitutionally equivalent" to immediate payment of just compensation through eminent domain).

[29] *See* WILLIAM D. CHEEK, DONALD L. FLESSNER & CHARLES G. KEMP, CITY OF GOLETA, ELLWOOD ONSHORE OIL AND GAS PROCESSING FACILITY AMORTIZATION STUDY 4 (2016), https://www.cityofgoleta.org/home/showdocument?id=11371.

terminate the nonconforming use.[30] It commissioned an amortization study in 2016 which concluded that the owner had fully recouped its investment.[31] While the termination of that facility has been complicated by the owner's ongoing bankruptcy proceedings, the process that the city followed illustrates how a similar process might take place under a County-wide phaseout.

Any phaseout Ordinance the County enacts should require completion of an amortization study to identify reasonable amortization periods for existing oil and gas operations that will become nonconforming as a result of the Ordinance. The Ordinance should also provide for a notice and hearing process, similar to that contemplated by County Code section 35.101.070, for terminating nonconforming oil and gas uses after the completion of the amortization period while providing procedural due process protections for vested rights-holders.[32]

C. An amortization period that allows owners to recoup their investments is likely reasonable.

If an owner raised a legal challenge the amortization period's reasonableness, the court would need to weigh "the public gain to be derived from a speedy removal of the nonconforming use against the private loss which removal of the use would entail."[33] But an amortization period is generally reasonable if the original investment in the nonconforming use has been recovered.[34] Courts will discount the costs for associated infrastructure that can be relocated or has salvage value.[35] Further, a well

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[30] *See* Giana Magnoli, *Goleta Explores Ordinance that Could Close Venoco's Ellwood Onshore Facility*, NOOZHAWK (Dec. 14, 2014, 11:00 PM), https://www.noozhawk.com/goleta_ordinance_venoco_ellwood_onshore_facility_12141214.

[31] *See* CHEEK ET AL., *supra* note 29, at 3.

[32] *See Bauer v. City of San Diego* (1999) 75 Cal.App.4th 1281, 1294 (permittee with vested property right entitled to protections of due process before permit may be revoked).

[33] *Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 882-83, *rev'd on other grounds*, (1981) 453 U.S. 490.

[34] *See National Advertising Co.*, 1 Cal.3d at 880 (upholding period for signs fully amortized and extending it where costs were not yet recovered).

[35] *Gage*, 127 Cal.App.2d at 461; *United Bus. Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 181.

owner should not be able to rely on the costs of maintenance, repairs, or operating in calculating their investments.[36]

Some of the factors relevant to private loss that a court may consider in a challenge to an amortization period's reasonableness include: (1) original cost; (2) present value; (3) date of construction; (4) period of time for which owners may claim cost recovery tax deductions; (5) salvage value; (6) length of remaining term in cases of leased property; (7) remaining useful life, and; (8) remaining value or allowable uses of the property after removal.[37] However, we believe that many of these factors do not necessarily weigh in favor of a longer amortization period. For example, a well may have a useful life beyond the amortization period necessary to allow an owner to recoup their investment, but the courts have repeatedly rejected arguments that an amortization period is unreasonable where a use continues to have income-producing value and could be maintained for long periods.[38] High removal costs too do not automatically translate to longer amortization periods; these costs should be discounted because wells must eventually be properly abandoned under state law regardless of when production ceases.[39] Further, any cleanup or abandonment costs that enhance the value of the property may be discounted.[40]

On the other side of the ledger, the public has much to gain from the speedy cessation of oil and gas operations, and much to lose from their continuance. Recent reports from the University of California, Santa Barbara and the County's own

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[36] *National Advertising Co.*, 1 Cal.3d at 880; *People v. Gates* (1974) 41 Cal.App.3d 590, 605.

[37] *United Bus. Com.*, 91 Cal.App.3d at 181 (citing *Metromedia*, 26 Cal.3d at 883); *Gage*, 127 Cal.App.2d at 461. An amortization ordinance need not explicitly consider all of these factors to be found constitutional. *See Metromedia*, 26 Cal.3d at 884. Nonetheless, in our experience it is common practice for amortization ordinances to require consideration of these and other factors, particularly in reviewing applications to extend an amortization period.

[38] *Metromedia*, 26 Cal.3d at 882-83 (citation omitted) ("It is not required that the nonconforming property concerned have no value at the termination date."); *see also United Bus. Com.*, 91 Cal.App.3d at 182; *Salinas v. Ryan Outdoor Advertising, Inc.* (1987) 189 Cal.App.3d 416, 424.

[39] *See* Pub. Resources Code §§ 3208, 3228-30, 3237; 14 Cal. Code Regs. § 1723 et seq.

[40] *See United Bus. Com.*, 91 Cal.App.3d at 182 (noting that although removal of signs required extensive remodeling of the outside of the building, the remodel would enhance the property's value).

consultants estimated that the public health benefits of imposing a well setback distance of one mile in the County would result in an avoided mortality cost of between $54 and $81 million by 2045, and that the same setback requirement could result in greenhouse gas emissions reductions of 344,072 MT CO_2 equivalent.[41] Evidence of public harm from not terminating the use need not even rise to the level of being a nuisance to weigh against extending an amortization period.[42]

Ultimately, we believe an approach that prescribes a reasonable minimum amortization period or periods applicable to nonconforming operations, based on a study using the factors discussed above to determine the time necessary to recover initial investments and a rate of return, would likely withstand a legal challenge to the reasonableness of the prescribed period.[43] An additional process for extending the amortization period in individual cases could help avoid infringement on vested rights if there is evidence a particular owner cannot sufficiently recoup their investment and a reasonable rate of return within the initial amortization period.[44] That process could be built into the notice and hearing procedure, discussed in the previous section, that would be utilized whenever a vested, nonconforming well is proposed to be terminated after the amortization period lapses.

D. The County may immediately terminate nonconforming oil and gas operations that are nuisances.

During the amortization period, the County retains authority to terminate operations that constitute a nuisance. A county may terminate a nonconforming use notwithstanding the amortization period if there is a "compelling public necessity" to do

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[41] *See* QUINN, ET AL., *supra* note 11, at 3, 5

[42] *See Metromedia*, 26 Cal.3d at 863-64.

[43] *See United Bus. Com.*, 91 Cal.App.3d at 180-81 (discussing cases upholding range of amortization periods for billboards and signs). We believe a *facial* challenge to the amortization period is unlikely to succeed. *See id.* at 181; *Metromedia*, 26 Cal.3d at 883. Because an ordinance along the lines we suggest would provide a reasonable initial amortization period coupled with an opportunity for extension in specific cases, it would be difficult for a challenger to show that the Ordinance was unreasonable or unconstitutional in the "great majority of cases," as a facial challenge requires. *San Remo Hotel L.P. v. City & County of San Francisco* (2002) 27 Cal.4th 643, 673.

[44] Even if a court found an amortization period to be unreasonable as applied, the remedy would not be invalidation of the ordinance or a requirement that the County pay damages, but an extension of time. *See National Advertising Co.*, 1 Cal.3d at 880.

so, which includes the use being a nuisance.[45] If, after a public hearing, the County determined that continuing a specific operation constitutes a nuisance as a matter of fact, it could immediately terminate that operation.[46]

The County's Petroleum Code already declares all violations of the Code's operational restrictions on oil and gas production to be per se nuisances.[47] Owners and operators are on notice about the possibility that health and safety violations might be ordered abated by County authorities. Adopting a reasonable amortization period for nonconforming uses thus poses no legal barrier to vigorous enforcement of existing health and safety measures and abatement of nuisances.

III. Designating oil and gas operations as nonconforming uses and phasing them out after a reasonable amortization period would reduce the risk of a successful takings challenge.

An industry challenge to an Ordinance that phased out oil and gas operations along the lines we propose would also likely allege that it results in an unconstitutional taking of private property for public use without just compensation.[48]

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[45] *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1530.

[46] *See Bauer*, 75 Cal.App.4th at 1294 (compelling public necessity to revoke use permit may exist "if the conduct of the business as a matter of fact constitutes a nuisance"); *Livingston Rock & Gravel Co. v. Los Angeles* (1954) 43 Cal.2d 121, 128 (city could terminate nonconforming uses where "after a public hearing, upon notice, it is found that the nonconforming use is so exercised as to be detrimental to the public health or safety, or so as to be a nuisance"). Counties do not have an explicit statute conferring this power, as cities do. *See* Gov. Code § 38771 (granting cities the power to "declare what constitutes a nuisance"). However, the Court of Appeal has ruled that this distinction is immaterial. Unless an "enforcing authority's declaration of nuisance in some way misleads the landowner into misunderstanding the nature of the violation," the police power conferred on counties by the state constitution allows them to require the abatement of violations of land use ordinances as nuisances. *Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 256 & fn. 2; *see also City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 761 ("Unless exercised in clear conflict with general law, a city's *or county's* inherent, constitutionally recognized power to determine the appropriate use of land within its borders [citation] allows it to define nuisances for local purposes, and to seek abatement of such nuisances." (emphasis added)).

[47] *See* S.B. Code § 25-7.g.

[48] *See* U.S. Const. amend. V; Cal. Const. art. I, § 19.

Nonetheless, we believe that such claims are unlikely to succeed.[49] A phaseout ordinance is unlikely to be considered a taking as a categorical matter because it neither physically invades property nor deprives it of 100% of its economic value. Nor is the Ordinance likely to be considered a regulatory taking under the fact-specific framework of *Penn Central Transportation Co. v. City of New York.*[50]

A. The Ordinance is unlikely to result in a categorical taking.

The government is required to compensate property owners as a categorical matter only if it physically occupies an owner's property or deprives the property of all economic value.[51] Deprivation of all economic value is interpreted strictly, and, absent physical occupation, a court will only find a regulation to be a categorical taking if it leaves the property with *no* use or value whatsoever.[52]

The Ordinance would not likely result in a categorical taking because it neither requires the physical occupation of private property nor deprives property owners of all viable economic use of their property. Property owners with interests in existing oil and gas operations affected by the Ordinance would be able to extract oil and gas from existing wells during the Ordinance's amortization period, with the possibility of an additional extension. Because those operations would retain and generate economic value during the amortization period, the Ordinance would not completely eliminate the economic value of those affected property interests. Moreover, oil and gas property owners who also control surface rights could potentially devote their land to other economically productive uses that may be more compatible with uses in surrounding communities. And even if the County requires a nonconforming operation to be shut

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[49] We focus in this letter on takings challenges to particular applications of the Ordinance rather than facial takings challenges to the "mere enactment" of the Ordinance. *Hodel v. Virginia Surface Mining and Reclamation Assn.* (1981) 452 U.S. 264, 294-96. For several reasons, we believe it would be very difficult for an industry challenger to prevail on a facial takings claim. Critically, the inclusion of mechanisms to extend the amortization period before terminating particular nonconforming operations would make it difficult for the industry to argue that the Ordinance, at the time of its enactment, takes affected property interests in the "great majority of cases." *San Remo*, 27 Cal.4th at 673.

[50] (1978) 438 U.S. 104.

[51] *See Cedar Point Nursery v. Hassid* (2021) 594 U.S. 139, 149; *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1018.

[52] *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 330 (stating that "[a]nything less than a 'complete elimination of value'" is not a categorical taking (quoting *Lucas*, 505 U.S. at 1019)).

down because it is a nuisance operation, the shutdown would not likely result in a categorical taking because nuisance abatement is one of the background restrictions on property rights that fall within the County's police power.[53]

B. The Ordinance is unlikely to result in a regulatory taking.

Because the Ordinance would not likely eliminate all of a property interest's economic value, it would not likely result in a taking as a categorical matter. However, a taking may also be found where a regulation is the "functional equivalent[]" of seizing property by eminent domain.[54] We believe it is unlikely that a court would find that the Ordinance meets this standard. Under *Penn Central*, a regulation can result in a taking based on its (1) economic impact, (2) interference with reasonable, investment-backed expectations, and (3) character.[55] A court can dismiss a regulatory takings claim if even one of these considerations weighs against a finding that a taking has occurred.[56] The *Penn Central* test is necessarily fact-specific, and it is not possible to anticipate every conceivable claim. Nonetheless, we believe all three *Penn Central* factors favor the County and would weigh against most takings claimants.

First, the economic impact of the Ordinance would not likely weigh in favor of finding a regulatory taking. "[M]ere diminution in value of property," even if significant, is not sufficient to demonstrate a taking.[57] In several cases, courts have found reductions in value of as much as ninety-five percent not to be significant enough to weigh in favor of a *Penn Central* taking, even when the owner could not recoup their initial investment.[58] The Ordinance will affect the economic value of each property interest differently, but as discussed in the previous section, the impacts would likely be limited. The amortization period will allow vested rights-holders to continue operations

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[53] *See Cedar Point*, 594 U.S. at 160.
[54] *Lingle v. Chevron, U.S.A., Inc.* (2005) 544 U.S. 528, 539.
[55] *Penn Central*, 438 U.S. at 124.
[56] *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.
[57] *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust* (1993) 508 U.S. 602, 645.
[58] *See, e.g., William C. Hass & Co. v. City and County of San Francisco* (9th Cir. 1979) 605 F.2d 1117 (95 percent reduction in value); *MHC Fin. L.P. v. City of San Rafael* (9th Cir. 2013) 714 F.3d 1118, 1127-28 (85 percent reduction in value).

and recoup their initial investments plus a reasonable rate of return.[59] Furthermore, mineral rights-holders who also hold surface rights may find that the economic value of phasing out their oil and gas operations is offset by gains in economic value from other surface land uses.

Second, the County could marshal several strong arguments against claims that the Ordinance interferes with owners' reasonable investment-backed expectations. Frustration of an expectation of profit is not enough to weigh in favor of a regulatory taking, because there is no absolute property right in future profits.[60] This is particularly true for heavily regulated industries, where property owners are expected to reasonably anticipate new and restrictive regulation, including through land use policy. The County already subjects the oil and gas industry to intense regulation.[61] The fact that other jurisdictions in California have already imposed outright bans on oil drilling,[62] combined with the Legislature's affirmation in AB 3233 of local governments' power to do so, undermines any expectation that an operator would be guaranteed to continue drilling indefinitely. In addition, because oil and gas are finite resources, the County may also be able to establish that, when the owners purchased the property, they could not have reasonably expected to extract oil beyond the useful life of the wells. Many vested wells would be allowed to continue operating through the amortization period and potentially through the end of some of those wells' useful lives, which should leave economic expectations undisturbed for many potential claimants. Finally, reasonable investment-backed expectations may simply be difficult for claimants to establish due to the

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[59] Although an amortization period may not provide an absolute defense against a takings claim, *see King*, 233 Cal.App.3d at 1402, the availability and reasonableness of the amortization period should weigh against finding a taking under *Penn Central*.

[60] *See Andrus v. Allard* (1979) 444 U.S. 51, 56 ("[L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.").

[61] To give one example of a particularly restrictive land use regulation, the County's coastal land use plan requires almost all onshore operations supporting offshore production in the County's south coast to occur out of a single group of collocated facilities. *See* COUNTY OF SANTA BARBARA, SANTA BARBARA COUNTY COMPREHENSIVE PLAN: COASTAL LAND USE PLAN 69 (2019). The County's operational regulations are similarly restrictive and clearly anticipate possible cessations of operations. For example, *all* drilling permits expire automatically if drilling has not been started within a year of issuance, and all operations permits can be revoked "upon action by the board of supervisors." S.B. Code § 25-5.B.3.

[62] *See, e.g.*, *Hermosa Beach Stop Oil Coalition*, 86 Cal.App.4th at 540.

speculative nature of oil and gas development. Estimates of the value of oil deposits can change drastically, and oil prices are famously volatile. In this unique regulatory environment, the City could argue, no oil and gas producers can have a reasonable expectation of being able to produce indefinitely.

Third, the "character" of the Ordinance for takings purposes is almost certainly favorable to the County. This factor generally tests whether a regulation is akin to a "physical invasion by government," as opposed to a "public program adjusting the benefits and burdens of economic life to promote the common good."[63] Regulations that are designed to protect public health and safety are usually not considered akin to physical invasion.[64] Furthermore, regulations that apply to broader sets of parties are less likely to be considered takings on character grounds than regulations that "single[] out" specific regulated entities.[65] Here, the primary purpose of the Ordinance would be to protect public health and safety. Furthermore, it would apply to all owners of interests in oil and gas operations within the County. Although some property owners may be more burdened by the regulation than others, its scope is relatively broad compared to, say, a regulation that applied to only certain operators. Accordingly, its character should not weigh in favor of being a regulatory taking.

In sum, although it is not possible to anticipate every factual situation, the *Penn Central* factors generally should favor the County in regulatory takings challenges to the Ordinance. The inclusion of a reasonable amortization period to reduce the economic impact of the Ordinance, the oil and gas industry's heavily regulated status, and the Ordinance's role in protecting public health and safety, are likely to weigh against a finding of a taking in most circumstances. That said, the County could consider adopting a narrow exemption or variance process in order to avoid applying the Ordinance in a matter that would cause a taking in a particular circumstance.

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[63] *Penn Central*, 438 U.S. at 124.

[64] *See, e.g.*, *Colony Cove Properties, LLC v. City of Carson* (9th Cir. 2018) 888 F.3d 445, 454; *Appolo Fuels, Inc. v. United States* (Fed. Cir. 2004) 381 F.3d 1338, 1350-51; *Maritrans Inc. v. United States* (Fed. Cir. 2003) 342 F.3d 1344, 1356 (citing *Creppel v. United States* (Fed. Cir. 1994) 41 F.3d 627, 631); *640 Tenth, LP v. Newsom* (2022) 78 Cal.App.5th 840, 863-64.

[65] *Rose Acre Farms, Inc. v. U.S.* (Fed. Cir. 2009) 559 F.3d 1260, 1281; *see also, e.g.*, *Bridge Aina Le'a, LLC v. Land Use Commission* (9th Cir. 2020) 950 F.3d 610, 636 (finding that "generally applicable" land use procedure did not impermissibly "single[] out" landowners despite its "concentrated effect" on particular plaintiffs).

CONCLUSION

Based on our review of vested rights, regulatory takings, and preemption law, we believe that challenges on these grounds would be unlikely to succeed. Of course, it is not possible to evaluate every possible factual situation in advance. But we believe that an Ordinance that phases out oil and gas operations by declaring them nonconforming uses and eventually requiring existing wells to stop operations after a reasonable amortization period (supported by a fact specific amortization study) could withstand the most likely industry challenges on the above grounds.

Thank you for your consideration of our views in this matter.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

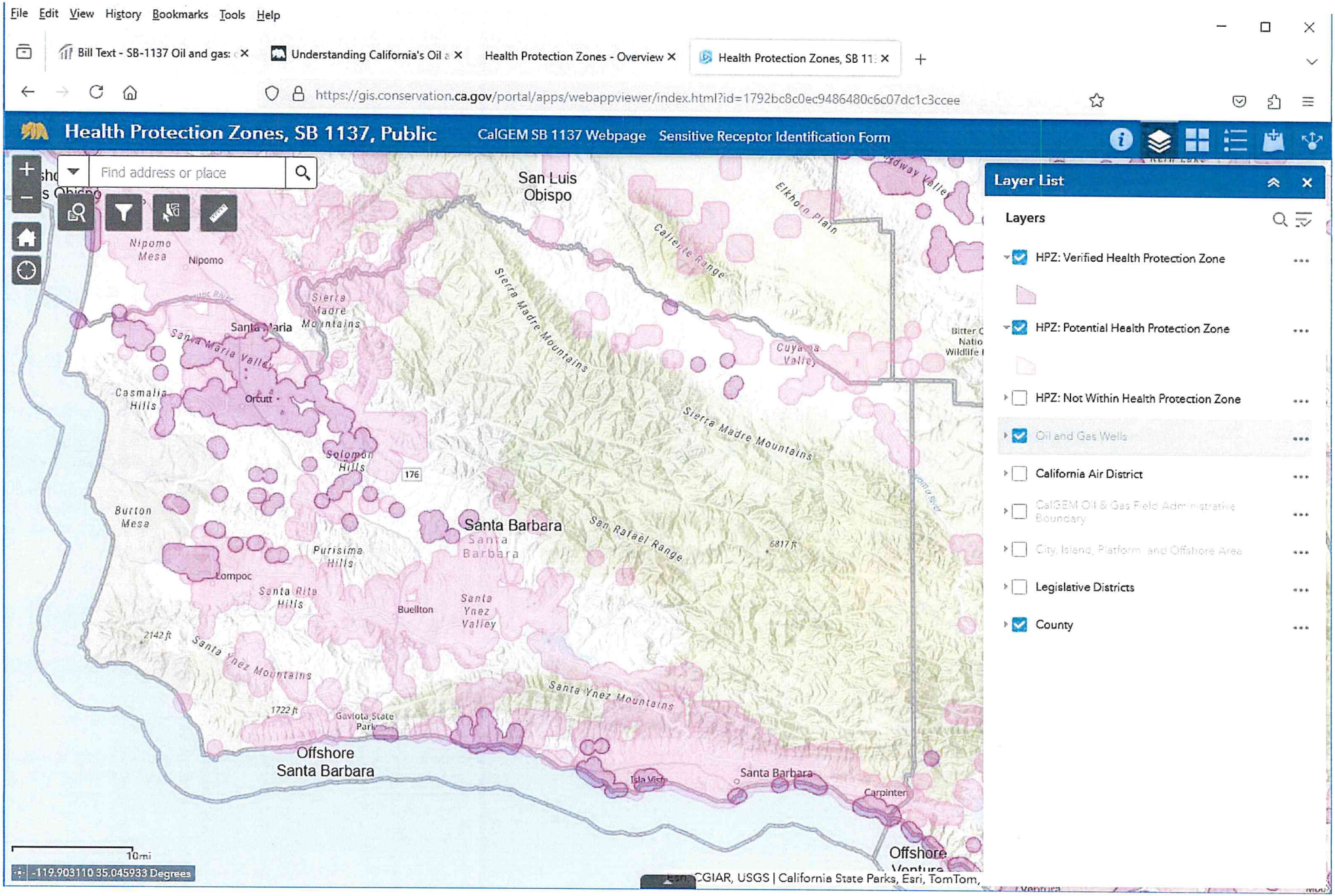
Kevin P. Bundy

Attachment:

Ex. A: Cal. Dept. of Conservation, *Health Protection Zones, SB 1137, Public* (screen capture of GIS map as of April 11, 2025)

1890608.6

EXHIBIT A


File Edit View History Bookmarks Tools Help
Bill Text - SB-1137 Oil and gas:
Understanding California's Oil a
Health Protection Zones - Overview
Health Protection Zones, SB 11:
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Health Protection Zones, SB 1137, Public
CalGEM SB 1137 Webpage
Sensitive Receptor Identification Form
Find address or place
Layer List
Layers
HPZ: Verified Health Protection Zone
HPZ: Potential Health Protection Zone
HPZ: Not Within Health Protection Zone
Oil and Gas Wells
California Air District
CalGEM Oil & Gas Field Administrative Boundary
City, Island, Platform, and Offshore Area
Legislative Districts
County
San Luis Obispo
Nipomo Mesa
Nipomo
Sierra Madre Mountains
Santa Maria
Santa Maria Valley
Casmalia Hills
Orcutt
Solomon Hills
176
Burton Mesa
Santa Barbara
Purisima Hills
Lompoc
Santa Rita Hills
Buellton
Santa Ynez Valley
San Rafael Range
6817 ft
2142 ft
Santa Ynez Mountains
1722 ft
Gaviota State Park
Offshore Santa Barbara
Isla Vista
Carpinteria
Offshore
Elkhorn Plain
Caliente Range
Cuyama Valley
10mi
-119.903110 35.045933 Degrees
CGIAR, USGS | California State Parks, Esri, TomTom,