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LATHAM & WATKINS LLP

May 20, 2014

Board of Supervisors
County of Santa Barbara
105 E. Anapamu Street, Suite 407
Santa Barbara, CA 93101

Re: Proposed Initiative to Ban "High-Intensity Petroleum Operations" Certification

Dear Honorable Supervisors,

We are writing on behalf of Californians for a Safe Secure Energy Future, a coalition created to educate the public about proven, safe oil technologies, to bring to your attention a fundamental problem with the enactment of an initiative to ban "High-Intensity Petroleum Operations" within Santa Barbara County's unincorporated area (the "Initiative"). Any such ban would raise serious constitutional questions as a regulatory taking in violation of the Fifth Amendment to the U.S. Constitution along with Article I, § 19 of the California Constitution, absent just compensation. In light of these concerns, we urge that you not go forward with the Initiative.

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Despite the calls of some to enact a statewide ban on hydraulic fracturing, the State of California has notably declined to enact such a ban. But the proposed Initiative is impermissibly seeking to take matters into its own hands by considering a permanent measure to ban "High-Intensity Petroleum Operations," including hydraulic fracturing, cyclic steam, waterflood or steamflood injection and acid well stimulation treatments. The proposed Initiative would amend Santa Barbara County's Comprehensive Plan Policies and the Santa Barbara County Code to prohibit the use of any land within the County's unincorporated area for, or in support of, so-called "High-Intensity Petroleum Operations," including but not limited to onshore exploration and onshore production of offshore oil and gas reservoirs. The proposal states that the prohibition, if adopted, would not apply to onshore facilities that support offshore exploration or production from offshore wells or to off-site facilities or infrastructure, such as refineries and pipelines that do not directly support High-Intensity Petroleum Operations. The prohibition would apply in any zoning district within the County. Such a ban would immediately and adversely impact existing mineral rights holders lawfully and responsibly operating wells in Santa Barbara County, as well as companies with interests in developing such rights.

The Takings Clause to the U.S. Constitution and its counterpart in the California Constitution (Art. I, § 19) prohibit the taking of private property absent just compensation. This constitutional guarantee is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-124 (1978). As the Supreme Court has admonished, the Takings Clause is "an essential part of the constitutional structure, for it protects private property from expropriation without just compensation; and the right to own and hold property is necessary to the exercise and preservation of freedom." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot*., 560 U.S. 702, 734 (2010); *see also, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) (emphasizing that the Takings Clause is "as much a part of the Bill of Rights as the First Amendment and Fourth Amendment"). The courts have repeatedly acted to protect those rights.

It is well established that this vital constitutional protection extends beyond actual physical takings of property to regulatory takings. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) ("[T]here will be instances when government actions do not encroach upon or occupy property yet still affect and limit its use to such an extent that a taking occurs"). The Supreme Court has unequivocally held that where a government action deprives a landowner of "all economically beneficial use of property," the action constitutes a *per se* regulatory taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992). The only question remaining for the courts in such cases is the amount of just compensation owed to the owner. *Id.* Where an ordinance purports to institute an indiscriminate ban on all oil and gas extraction, it would deprive existing mineral rights holders of all economically beneficial use of their property rights and would constitute an impermissible regulatory taking. *Cf. Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981) (reasoning that enactment of Surface Mining Act did *not* deprive plaintiffs of "economically viable use of their property" because "[t]he Act does not categorically prohibit surface coal mining"), *cited in Lucas*, 505 U.S. at 1016.

But even where the government action is narrower in scope and leaves select economic uses intact, it may still constitute a regulatory taking. The Supreme Court has long held that where a regulation works an economic detriment on property rights owners and interferes with their "distinct investment-backed expectations," the property owners must receive just compensation. *See, e.g., Penn Central Transp. Co.*, 438 U.S. 104. Apart from the *per se* taking discussed above, the Court has generally "resist[ed] the temptation to adopt *per se* rules in . . . cases involving partial regulatory takings, preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002). In essence, the relevant "inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle v. Chevron U.S.A. Inc*., 161 L. Ed. 2d 876, 889 (2005). As the Supreme Court has made clear, whether the regulatory action "substantially advance[s] legitimate state interests" or is believed to be dictated by the public interest is wholly irrelevant to whether it constitutes a taking. *Id.*

The Takings Clause squarely applies to an initiative ordinance adopted by voters. *See, e.g., Arnel Development Co. v. City of Costa Mesa*, 126 Cal.App.3d 330, 337 (1981) ("The city's authority under the police power is no greater than otherwise it would be simply because the

subsequent rezoning was accomplished by initiative."). Accordingly, an initiative cannot effectuate a "taking" without subjecting the city or county to the risk of monetary damages, invalidation of the measure, or both. *See, e.g., Chandis Securities v. City of Dana Point*, 52 Cal.App.4th 475, 484 (1996) (where a land use intitiative constitues a taking, the local jurisdiction will be required "to pay compensation to plaintiffs.").

An initiative banning hydraulic fracturing and other high intensity petroleum operations would automatically trigger serious constitutional concerns. While the Initiative purports to be a land use regulation, it amounts to an outright ban on all oil and gas extraction. The Initiative purports to ban not only hydraulic fracturing or acidizing, but also all necessary and conventional methods for extracting oil and gas in the County. It bans any land use activity that "supports" what the Initiative terms "Secondary and Enhanced Recovery Operation." (Initiative, at p. 6.) It then defines "Secondary and Enhanced Recovery Operation" as "any operation where the flow of hydrocarbons into a well are aided or induced with the use of injected substances..." (*Id*., at p. 7.) The list of prohibited substances—which is not exhaustive—includes water, air, steam, and any other substances. By prohibiting the injection of all substances under the guise of a land use regulation, the Initiative effectively bans virtually every technique involved in producing oil and gas from wells—including many techniques currently employed in the recovery of oil and gas in Santa Barbara County.

At a minimum, such a ban would substantially interfere with the vested rights of mineral right holders and would upend their settled expectations. However labeled and formulated, a ban on virtually all extraction methods would prevent both mineral right holders and developers from making use of their rights under previously employed methods and would cause significant losses on their investments due to the severely restricted scope of operations and the highly reduced output of oil and gas. *Cf. Penn Cent. Transp.*, 438 U.S. at 138 ("The restrictions imposed [] not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties."). Indeed, an outright ban would effectively deprive them of all economically viable use of their property rights and therefore rise to the level of a *per se* regulatory taking as well.

Courts have recognized that similar laws constituted impermissible regulatory takings. For example, in *Braly v. Board of Fire Com'rs of City of Los Angeles*, the California Court of Appeals noted that, "[u]nder the law of [California], the landowner has a property right in oil and gas beneath the surface, not in the nature of an absolute title to the oil and gas in place, but as an exclusive right to drill upon his property for these substances." 157 Cal. App. 2d 608, 612 (2d Dist. 1958). "This is a right"—the Court held—"which is as much entitled to protection as the property itself, and the undue restriction of the use thereof is as much a taking for constitutional purposes as appropriating or destroying it." *Id.* Thus, the Court found that the mere future possibility that petitioners may be able to drill on their land afforded no adequate means of protection or substitute for the owners' right to extract oil from their property presently, and that therefore the ordinance in question was unconstitutional and invalid. Likewise, in *Trans-Oceanic Oil Corp. v. City of Santa Barbara*, the Court of Appeals granted a writ of mandamus to compel the city, its mayor, and members of the city council to annul and rescind their revocation of a permit to drill an oil well within the city, and to reinstate such permit. 85 Cal. App. 2d 776 (2d Dist. 1948). The Court held, among other things, that since the permit had been regularly

issued and preliminary work undertaken in accordance therewith, the permittee acquired a vested property right protected by the Fifth Amendment, which could not be destroyed by the adoption of a zoning ordinance prohibiting the permitted use of the property. *Id.*

The Supreme Court has also long ago proclaimed the importance of mineral rights in the context of the Takings Clause. In the seminal case of *Pennsylvania Coal Co. v. Mahon*, a deed granted plaintiffs the surface rights to certain land but reserved to defendant the right to mine all coal under the surface owner's property. 260 U.S. 393 (1922). In an effort to protect the surface owner's interests, the state enacted—pursuant to its police powers—legislation that "forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than 150 feet from any improved property belonging to any other person." *Id.* In finding that the Act constituted a taking requiring just compensation, the Court held that the "protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation." *Id.* "When this seemingly absolute protection is found to be qualified by the police power," the Court remarked, "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.* The Constitution, however, does not permit that to "be accomplished in this way." *Id.* The Court specifically cautioned against the "danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.*

The purported savings clause included in the proposed Initiative (§ 5) does not move the constitutionality needle. The self-serving and circular statement that the initiative is not unconstitutional because the Board will take care not to apply it in cases that would violate the Constitution cannot and does not shield the measure from review. Indeed, that provision merely serves as recognition that the sweeping ban the Initiative proposes to enact is fraught with constitutional perils. Nor does the potential for an exception resolve the problem. The provision leaves enormous, if not unfettered, discretion in the hands of the Board—an entity not equipped to evaluate a takings claim from a legal standpoint—and offers no guidance or set criteria for the issuance of a permit/exemption. And, in any event, this provision at most would transform a facial challenge into an as-applied one, without alleviating these constitutional concerns.

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The serious constitutional problems raised by the proposed Initiative banning all "High-Intensity Petroleum Operations" strongly counsel against any further action in that direction. We therefore urge you not to endorse or act upon any proposals to that effect.

We appreciate your attention to this very important matter. Please do not hesitate to contact us should you have any questions or need further information.

Very truly yours,

George J. Mihlsten
of LATHAM & WATKINS LLP

Gregory G. Garre
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cc: Mr. Michael Ghizzoni, County Counsel