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May 15, 2014

Via E-Mail and U.S. Mail

Board of Supervisors
County of Santa Barbara
105 East Anapamu Street
Santa Barbara 93101

Michael C. Ghizzoni, County Counsel
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Re: The Healthy Air and Water Initiative to Ban Fracking
May 20, 2014 Board Meeting

Dear Honorable Supervisors and Mr. Ghizzoni:

Our firm represents the Santa Barbara County Water Guardians, a coalition of concerned parents, professionals, farmers, students and others opposed to fracking and other high-intensive petroleum operations in Santa Barbara County. We have advised Santa Barbara County Water Guardians in connection with its efforts to propound The Healthy Air and Water Initiative to Ban Fracking. The County Registrar of Voters will certify that the Initiative has qualified for the ballot at the Board's May 20, 2014 meeting.

We write to respond to several false and misleading statements that have been made by the oil industry regarding similar local measures banning fracking and other high-intensity petroleum operations. Specifically, the oil industry claims that these measures will effect a taking of private property requiring compensation by local governments and that they are preempted by state law. Neither of these claims are true.

First, under no circumstances would the County be liable to compensate oil companies, well owners, or royalty holders for any lost profits that allegedly may result from passage of the Initiative. This is true both as a matter of law and under the express

terms of the Initiative. Any suggestion that the County would be forced to pay millions of dollars if the Initiative passes is nothing more than a scare tactic.

Second, the County and the voters have the clear legal authority to regulate oil and gas land uses through the Initiative. Of course the State regulates this risky industry. But the Legislature has never restricted local governments' land use authority to decide whether and where oil and gas operations may occur. In fact, state law expressly recognizes this authority, and local governments in California have long exercised it.

The Board of Supervisors has the discretion to order a report on the effect of the Initiative at its May 20, 2014 meeting. Elections Code § 9111. We welcome any impartial analysis of the impacts of the Initiative. When the Board of Supervisors receives the section 9111 report, the Elections Code requires the Board to either adopt the Initiative or place it on the ballot for the voters to consider. The Board has no power to decide the validity of the Initiative or withhold it from the ballot. *See Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 148 ("local governments have the purely ministerial duty to place duly certified initiatives on the ballot").

I. The Initiative is a Land Use Measure With a Takings Exception

The Initiative amends the Land Use Element of the County's Comprehensive Plan and the County Code to define high-intensity petroleum operations as including fracking, acid well stimulation treatments, cyclic steam injection, and other enhanced recovery operations. The Initiative then adopts a new land use policy prohibiting the development of any facility or above-ground equipment in support of onshore high-intensity petroleum operations. Nothing in the Initiative regulates how fracking or any other down-hole activity is conducted. The Initiative simply establishes that development in support of these operations is not an allowed land use and is prohibited in the County's unincorporated areas.

This prohibition applies prospectively, to any new treatments or wells. It allows vested, existing high-intensity petroleum operations to continue to operate. Thus, landowners, well operators, and royalty holders may continue to receive income from oil produced from conventional, low-intensity petroleum operations, and from any lawfully existing high-intensity petroleum operations.

In addition, the Initiative specifically allows the Board of Supervisors to permit a high-intensity petroleum operation to the extent necessary to avoid an unconstitutional taking and the payment of any compensation. Section 5 of the Initiative provides that it shall not apply to the extent that it would effect an unconstitutional taking of property without just compensation under the State or Federal Constitution. Under this section, a landowner may request an exception to the application of the Initiative. If the Board of Supervisors finds that prohibiting the high-intensity petroleum operation would constitute a taking, it may grant the request; a vote of the people is not required in that circumstance.

II. The Measure Will Not Give Rise to a Taking and the County Will Not Be Liable for Compensation

The Constitution protects landowners from the government's acquisition or occupation of private property without just compensation. In certain circumstances, land use regulations that resemble a physical invasion can rise to the level of a "taking" and require compensation. However, land use regulations do not effect such a taking simply because landowners or businesses will be financially affected. Regulatory takings can occur only where a regulation deprives the property owner of 100% of the economic value of the property, *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, or, in limited cases, where the property is severely diminished in value, *Penn Cent. Transp. Co. v. City of New York* (1978) 438 U.S. 104, 124.¹

Regulatory takings claims based on a "diminution in value" theory rarely succeed, however. See *Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1026 ("Police power legislation results in a confiscatory 'taking' only when the owner has been deprived of substantially all reasonable use of the property.... Even a significant diminution in value is insufficient to establish a confiscatory taking."). Indeed, the U.S. Supreme Court has recognized that even a regulation that deprives a property owner of 95% of the value of his or her property may go uncompensated. *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1019 fn. 8; see also *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust* (1993) 508 U.S. 602, 645 ("[O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a takings.").

¹ Note that in *Penn Central*, the U.S. Supreme Court held that the land use law at issue was *not* a taking. 438 U.S. at 138.

The Initiative would not effect a compensable taking because it does not deprive landowners of viable economic use of their property. Landowners could continue to extract oil on their property using conventional techniques or any vested high-intensity technique. And landowners would remain free to devote their land to other allowable and economically profitable uses, such as farming or development.

The Initiative also expressly authorizes the Board to make an exception in the unlikely event that the Initiative is found to effect an unconstitutional taking. *See San Mateo County Coastal Landowners' Ass'n v. County of San Mateo* (1995) 38 Cal.App.4th 523, 547 (recognizing that land use initiative's savings clause gave county flexibility to avoid potentially unconstitutional application of its requirements). Accordingly, even if the Initiative should effect a taking in some unforeseen circumstance, the claimant's remedy would be to seek an authorized exception. A landowner would not be able to seek judicial relief until it had sought this exception from the County—and it has been denied.

The oil industry has also asserted that a possible reduction in the size of future royalty payments could require local governments to compensate royalty holders. But there is no legal authority to support this novel theory, or its related argument that oil operators would somehow have separate takings claims. As with the oil industry's other arguments, these allegations have been intended primarily as campaign tactics to intimidate voters.

The oil industry has cited to *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534 to suggest that takings compensation claims will "financially destroy" local governments that ban oil and gas operations. But, that case did *not* hold that the City was required to pay compensation for a taking of private property. The court in fact *affirmed* the initiative measure as a valid exercise of local police powers.

Finally, the oil industry has speculated that passage of initiative measures banning fracking and other high-intensity petroleum operations will decrease property values, and therefore tax revenues. The opposite is true. The types of high-intensity petroleum operations prohibited by the Initiative not only degrade residents' quality of life, but also pose grave environmental and public health risks. Over the long term, these effects drive property values down and negatively affect other land uses, such as agriculture and tourism. In any event, the residents of Santa Barbara County are in the best position to determine which land uses best protect property values and serve the interests of County residents.

III. State Law Does Not Preempt Local Regulation of Oil and Gas Operations

The Initiative is not preempted by state oil and gas laws. Under the California Constitution, “[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.” Cal. Const., art. XI, § 7. Local legislation conflicts with state law and is preempted if it “enters an area fully occupied by general law . . . by legislative implication.” *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 743. The oil industry has claimed that local measures banning fracking are preempted under this doctrine by mischaracterizing them as regulating “downhole matters.” It has also erroneously asserted that state law fully addresses all aspects of these operations. Both claims are false.

As discussed above, the Initiative does nothing to regulate the downhole operation of oil and gas wells. It is a land use measure. It prohibits the development or operation of above-ground facilities in support of onshore high-intensity petroleum operations in all unincorporated areas. The Initiative does not address well casing designs or drilling, injection, or disposal techniques. In other words, it does not regulate *how* oil and gas operations are conducted; it simply controls where and whether certain land uses may take place. The California Supreme Court has repeatedly rejected claims of preemption under similar circumstances. *See, e.g., City of Riverside*, 56 Cal.4th at 743 (upholding local ban on marijuana dispensaries); *Big Creek Lumber Company v. County of Santa Cruz* (2006) 38 Cal.4th 1139 (upholding zoning ordinance prohibiting timber harvesting and helicopter staging in certain areas of the county); *Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24 (upholding local initiative prohibiting oil and gas drilling on tidelands).

Finally, the Legislature has expressly recognized that local governments may regulate oil and gas land uses. *See* Pub. Res. Code § 3690 (“[t]his chapter shall not be deemed a preemption by the state of any existing *right of cities and counties to enact and enforce laws and regulations regulating the conduct and location of oil production activities*, including, but not limited to, zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment, and inspection.”). Accordingly, cities and counties have been validly regulating oil and gas operations for decades. *See, e.g., Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, 557-558. California courts have made clear that “there is no preemption where state law expressly or implicitly allows local regulation.” *City of Riverside*, 56 Cal.4th at 758.

IV. Conclusion

The Healthy Air and Water Initiative to Ban Fracking is a valid land use regulation that will protect the County's environment, public health, and quality of life. Contrary to the oil industry's assertions regarding similar measures, it will not effect a takings giving rise to claims of compensation.

We appreciate your time and consideration. Please let us know if you would like to discuss these matters.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



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