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Via Electronic Mail

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

The Healthy Air and Water Initiative to Ban Fracking

Dear Honorable Supervisors:

We are environmental and land use law professors interested in the efforts of local governments in California to limit new hydraulic fracturing and other high-intensity petroleum operations in their communities. We write to provide our views on the constitutionality of The Healthy Air and Water Initiative to Ban Fracking ("Initiative") proposed for Santa Barbara County. This Initiative would amend the Land Use Element of the County's Comprehensive Plan and the County Code to prohibit the development or use of any facility or above-ground equipment in support of onshore "high-intensity petroleum operations," defined as those operations that involve well stimulation treatments, including hydraulic fracturing and acidification, and other enhanced recovery operations. Initiative, § 2. The petroleum industry has asserted that that the proposed Initiative will effect an unconstitutional taking of private property in violation of the Fifth Amendment and the California Constitution.

Based on existing judicial precedent, we firmly disagree with the industry's analysis and conclusion. As discussed below, the Initiative does not rise to the level of a "per se" taking of all economic value of land affected by the prohibition on high-intensity petroleum operations, and on its face, the Initiative does not satisfy the criteria for a partial regulatory taking under the seminal *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), decision. Moreover, any individual property owner claiming that application of the Initiative will result in an unconstitutional taking of property is unlikely to succeed given the limited property interest potentially affected by the Initiative, the speculative nature of any future profit from high-intensity petroleum operations, and the Initiative's incorporation of a "savings clause" that allows the County to avoid an uncompensated taking by granting an exception to the Initiative's prohibition. Initiative, § 5. Accordingly, we believe that the Initiative is likely to pass constitutional muster if challenged in a court of law.

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const., amend. V. The California Constitution includes a similar guarantee: "Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to . . . the owner." Cal. Const., art. I, sec. 19. The California courts generally treat these two constitutional provisions as co-extensive and,

therefore, federal takings jurisprudence normally dictates the outcome of the legal analysis. *E.g.*, *NJD, Ltd. v. City of San Dimas*, 100 Cal.App.4th 1428 (2003).

Where, as would be the case here, there is no actual physical invasion of property, courts evaluate whether there has nevertheless been a "regulatory taking" by looking to (1) the character of the government regulation, (2) the economic impact of the regulation on the owner, and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. *Penn Central*, 438 U.S. at 124. This analysis is an individualized one, based on the particular facts and circumstances at issue before the court. *Id.* (whether government regulation requires compensation "depends largely 'upon the particular circumstances [of the] case'"). The only exception to this fact-based judicial inquiry occurs where a claimant successfully demonstrates that the government regulation "denies all economically beneficial or productive use of land"; under that "relatively rare" circumstance, the action amounts to a categorical taking without resort to the *Penn Central* factors. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 1018 (1992).

The *Lucas* exception does not apply to the proposed Initiative. In *Lucas*, South Carolina's Beachfront Management Act imposed a coastal zone construction ban in order to protect the "extremely valuable" beach and dune from erosion and destruction. *Id.* at 1022. Notwithstanding the legitimate public purpose of the construction ban, the Court found a "per se" taking based on its conclusion that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1020 (emphasis in original). Here, the Initiative does not, by any stretch of the imagination, deny all or even most economically beneficial uses of any parcel that may be subject to the Initiative's limited prohibition. The Initiative does not speak to most uses or types of construction on affected parcels and does not prohibit all oil and gas activities; rather, the Initiative is a legitimate exercise of the County's traditional land use powers to protect public health and welfare by restricting only those surface construction activities that support one class of particularly risky petroleum operations. In short, the Initiative does not effect a "total" taking under *Lucas.*

Accordingly, any constitutional challenge to the Initiative is properly evaluated as a "partial taking" requiring an "ad hoc, factual inquir[y]" under the three-part test set forth in *Penn Central.* As *Penn Central* discussed at length, the Court has routinely upheld, against regulatory taking claims, "land-use regulations that destroyed or adversely affected recognized real property interests"; indeed, restrictive zoning laws "have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property." 438 U.S. at 125. In finding that the historic preservation regulation which limited Penn Central's use of the airspace above its property was *not* an unconstitutional taking, the Court explained that

> the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply

> untenable. . . . "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole – here, the city tax block designated as the "landmark site."

Id. at 130-31. *See also Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331 (2002) (reaffirming that constitutional takings analysis "must focus on 'the parcel as a whole'").

Likewise here, the Initiative affects only one land use – new surface development supporting future high-intensity petroleum operations – and does not otherwise regulate myriad other possible uses of property within the County, including development to support other petroleum operations. As the Supreme Court affirmed in *Keystone Bituminous Coal Ass'n v. DeBendictis*, 480 U.S. 470 (1987), regulation that affects only subsurface mineral extraction does not result in the loss of all economically beneficial uses of the property and does not effect an unconstitutional taking. That case is highly instructive here, for two reasons.

First, it demonstrates that a facial challenge to the Initiative is unlikely to succeed. *Keystone* involved a facial challenge to Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, which imposed restrictions on the extraction of subsurface coal that were "designed to diminish subsidence and subsidence damage in the vicinity," including the creation of sinkholes or troughs, effects on farmers ability to plow or properly prepare their land, and the loss of groundwater and surface ponds. 480 U.S. at 475-76 (noting that "[i]n short, [the Subsidence Act] presents the type of environmental concern that has been the focus of so much federal, state, and local regulation in recent decades"). Because plaintiffs had not alleged any specific injury due to the statute, the only question before the Court was whether enactment of the law constituted an unconstitutional taking. *Id.* at 493. The Court noted that "[t]he posture of the case is critical because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation." *Id.* at 494 (discussing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981)).

Keystone reiterated that takings claims must be evaluated based on "the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances" presented by a particular parcel; accordingly, plaintiffs "face an uphill battle in making a facial attack on the Act as a taking." 480 U.S. at 495. Likewise here, a facial challenge to the Initiative faces an extremely high hurdle. On its face, the Initiative affects only new development related to certain limited mineral extraction activities that may have especially significant adverse impacts on the surrounding communities. It would be virtually

impossible for a challenger to show that, as a general matter, such limited regulation causes a significant diminishment of value or an unlawful taking of property. Moreover, section 5 of the Initiative provides a mechanism by which individual landowners may seek an exemption from the prohibition of surface development to support high-intensity petroleum operations and by which the County may grant such an exemption when application of the prohibition would otherwise constitute an unlawful taking of property. Thus, the County will have an opportunity to evaluate and address any individualized taking arguments based on the specific facts relative to particular parcels. Given these circumstances, we believe it is highly unlikely that any challenger could satisfy the "heavy burden of sustaining a facial challenge" to the Initiative. *Id.* at 501.

Second, *Keystone* strongly suggests that any "as applied" takings challenge to the Initiative will likewise be unsuccessful. *Keystone* affirmed that landowners cannot sever one "stick" or "strand" in their bundle of property rights and then obtain compensation on the grounds that a legitimate local land use regulation diminishes the value of that single strand, even when state law otherwise authorizes such severance of property rights. 480 U.S. at 496-502 (citing *Andrus v. Allard*, 444 U.S. 51, 65-66 for the proposition that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety"). Moreover, "[i]t is settled that a land use regulation results in a confiscatory 'taking' only when the landowner has been deprived of 'substantially all reasonable use of his property.' Even a significant diminution in value is insufficient to establish a confiscatory taking." *Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal.App.3d 892, 911 (1986). Here, the Initiative affects only one strand in the bundle of property rights – new development in support of future high-intensity petroleum operations – and thus a court is not likely to find that it deprives any landowner of substantially all reasonable us of his or her property.

Under *Penn Central*, the claimant also must show that the Initiative's restrictions interfere with his or her reasonable investment-backed expectations. *Allegretti & Co. v. County of Imperial*, 138 Cal.App.4th 1261, 1277 (2006) (noting that takings challenge may be disposed on any one of the three *Penn Central* factors). That showing would be difficult given that oil and gas exploration is highly speculative. A recent analysis by the U.S. Energy Information Administration confirmed that shale oil contained in the deeply folded geology of the Monterey Formation underlying much of California, including portions of Santa Barbara County, has historically been unrecoverable and will likely remain so even with the assistance of newer acidification and hydraulic facturing techniques used elsewhere in the nation. *See* Los Angeles Times, "U.S. officials cut estimate of recoverable Monterey Shale oil by 96%" (May 21, 2014) (summarizing new U.S. Energy Information Administration estimates). Although oil and gas firms may continue to speculate on Monterey Shale reserves, landowners presently have no reasonable expectation that high-intensity petroleum operations will yield economically profitable resources on their parcels. Given the enormous and continuing uncertainty around the efficacy of high-intensity petroleum operations in California, courts are unlikely to conclude that implementation of the Initiative unduly interferes with an individual landowner's reasonable property value

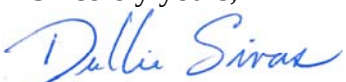
expectations. *See, e.g., Allegretti*, 138 Cal.App.4th at 1279 ("A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.') (quoting *Ruckelshaus v. EPA*, 467 U.S. 986, 1005-06 (1984)).

Finally, if an individual owner were able to demonstrate that application of the Initiative would (1) defeat reasonable investment-backed expectation in profitable extraction of shale oil and (2) deprive an owner of substantially all reasonable use of the property, then the section 5 "savings clause" allows the County to grant an exception to the prohibition on high-intensity petroleum operations and thereby avoid liability.

In sum, the industry's claim that adoption of the Initiative will effect an unconstitutional taking and subject the County to damages is not supported by existing judicial precedent. A facial takings challenge to the Initiative is extremely unlikely to succeed because such claims are evaluated largely on the specific economic facts relevant to a particular parcel and any generalized facial challenge faces a steep uphill battle, especially given the Initiative's "savings clause." Similarly, individual takings claims are not likely to prevail because the Initiative's reach is limited to one relatively small part of any landowner's bundle of property rights and because property owners will be unable to demonstrate reasonable investment-backed expectations in light of the speculative of oil and gas recovery operations in California. Finally, even if a property owner could surmount these substantial hurdles, the Initiative provides a mechanism by which the County may bypass the development prohibition if it determines that application of the prohibition would, under the particular circumstances in question, effect an unconstitutional taking. It thus remains entirely within the County's control to avoid a future takings claim. Accordingly, we do not believe that adoption of the Initiative poses a significant risk of liability for an unconstitutional taking in violation of the U.S. or California Constitution.[1]

Thank you for your consideration of these comments.

Sincerely yours,



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[1] For a more detailed analysis of constitutional takings jurisprudence that comes to a similar conclusion, see Patrick McGinley, *Bundled Rights and Reasonable Expectations: Applying the Lucas Categorical Taking Rule to Severed Mineral Property Interests*, 11 Vt. J. Envtl. L. 524 (Spring 2010).

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