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September 10, 2019

Board of Supervisors
County of Ventura
800 South Victoria Avenue
Ventura, California 93009

SUBJECT: Report Back and Seek Board Direction Regarding Potential Amendments to the County's Zoning Ordinances Regarding Oil and Gas Development; All Supervisorial Districts

RECOMMENDATIONS:

1. Receive and file report back regarding new oil and gas development under antiquated permits; and
2. Provide direction to County staff on potential amendments to the County's zoning ordinances to: (a) require discretionary approval of new oil and gas development; and (b) clarify the applicability of the County's oil development standards.

FISCAL/MANDATES IMPACTS: None.

DISCUSSION:

On April 9, 2019, the Board of Supervisors ("Board") gave two directions to staff. One, your Board directed staff to prepare an interim urgency ordinance for your Board's consideration regarding the drilling of new wells, and the re-drilling of existing wells, that would utilize steam injection in the vicinity of potable groundwater aquifers. On April 23 and June 4, 2019, your Board approved and then extended an interim urgency ordinance prohibiting County approval of such new oil wells, and the re-drilling of such existing wells, on a portion of the Oxnard Plain overlying the Fox Canyon aquifer. This interim urgency ordinance will remain in effect until December 7, 2019, unless further extended by your Board.

Two, your Board directed staff to “study potential amendments to the County’s zoning ordinances to require discretionary approval of new development under antiquated oil and gas permits.” The purpose of this Board item is to provide an overview of the legal issues and legislative options regarding this second recommendation, and seek direction for further actions, if any.

A. COUNTY PERMITTING OF OIL AND GAS DEVELOPMENT

1. County’s Antiquated Oil and Gas Permits

Oil and gas exploration and production activities and structures have been subject to a discretionary permitting requirement from the County since adoption of the County’s first zoning ordinance in 1947. Over time the County’s zoning ordinances and standard permits have become more stringent and detailed in their regulation of this land use. Approximately 125 County discretionary permits for oil and gas exploration and production are currently active.

From 1947 through approximately 1966, the County granted discretionary “special use permits” (the predecessor to the County’s “conditional use permits”) authorizing oil and gas exploration and production. These permits describe in very general terms the oil and gas-related activities and structures that are authorized within often large permit areas. They typically contain some variation of the following grant of authority:

Drilling for and extraction of oil, gas and other hydrocarbon substances and installing and using buildings, equipment, and other appurtenances accessory thereto, including pipelines, but specifically excluding processing, refining and packaging, bulk storage or any other use specified in Division 8, Ventura County Ordinance Code, requiring review and Special Use Permit.

The permits typically do not state the maximum number or exact location of allowable wells or other structures, nor do they contain expiration dates (i.e., dates by which the land use must end unless extended by the County). Because these permits were granted before enactment of the California Environmental Quality Act (“CEQA”) in 1970, none of the projects underwent CEQA review prior to initial permitting. The oil and gas permits granted by the County during this era are hereinafter referred to as “antiquated permits.” A representative antiquated permit is attached as Exhibit 1.

When a permittee seeks to add new wells or otherwise engage in new development under antiquated permits, the new development may only require a ministerial zoning clearance from the County.

2. County's Modern-Era Oil and Gas Permits

From approximately 1966 through the 1970's, the County utilized a new discretionary conditional use permit form with more detailed and stringent conditions as compared to the antiquated permits. The conditional use permits from this era typically only authorize the drilling and operation of a limited number of drill sites, wells and/or other structures; require discretionary County approval for all subsequent development; and contain permit expiration dates. Beginning in the early 1980's and continuing to present, the County's conditional use permits typically specify the exact number and location of all authorized wells and other appurtenant structures; impose more detailed and comprehensive conditions; and contain permit expiration dates.

When a permittee seeks to add new wells or otherwise engage in new development under conditional use permits granted by the County from approximately 1966 to present ("modern-era permits"), the new development typically requires a discretionary permit modification.

3. Ministerial Versus Discretionary Decisions

The distinction between ministerial and discretionary land use decisions is important to a full understanding of the County's regulation of oil and gas development. A ministerial decision is made by determining whether the request conforms to objective standards without the exercise of judgment or opinion by the decision-maker. In contrast, a discretionary decision is made by applying broader subjective standards through the exercise of judgment and opinion by the decision-maker. CEQA can apply to discretionary, but not to ministerial, land use decisions. Consequently, only discretionary permitting decisions can require some level of environmental review under CEQA. In addition, only discretionary permitting decisions involve the public noticing of, and a public hearing regarding, the permit request. Discretionary permitting decisions, unlike ministerial ones, also enable the County to impose permit conditions and mitigation measures to address environmental, land use compatibility, and other issues regarding the proposed development.

4. County's Approval of New Oil and Gas Development

Under the County's current zoning ordinances, a brand-new oil and gas development must be authorized by a discretionary conditional use permit. (See Non-Coastal Zoning Ordinance ["NCZO"], §§ 8105-4 and 8105-5, under heading "Mineral Resource Development," and subheading "Oil and Gas Exploration and Production"; Coastal Zoning Ordinance ["CZO"], § 8174-5, under heading "Oil and Gas: Exploration and Production.") Likewise, any material change to an existing modern-era oil and gas permit requires County discretionary approval in the form of a permit modification. (See NCZO, § 8111-6.1; CZO, § 8181-10.4.)

In contrast, requests to conduct new oil and gas development under active antiquated permits may only be subject to the County's ministerial zoning clearance process.¹ The primary standard for determining if a zoning clearance is to be issued in this context is whether the proposed development is consistent with and authorized by the underlying antiquated permit, and complies with the County's applicable zoning ordinance provisions and General Plan policies. (See NCZO, § 8111-1.1.1b; CZO, § 8181-3.1a). Making the permit consistency determination requires a fact-intensive analysis regarding each antiquated permit and zoning clearance request, which can be challenging given the age of the antiquated permits, potential uncertainty over a permit's status (i.e., whether it is active or has been abandoned), the fact that permit boundaries often overlap, and the fact that some antiquated permits may only authorize oil production at certain subsurface depths. Nonetheless, many new oil and gas development requests meet the consistency standard (and comply with applicable zoning provisions and General Plan policies) because, as explained above, antiquated permits typically broadly authorize oil and gas exploration and production structures and activities within the permit area.

Similarly, requests for new oil and gas development under antiquated permits often do not require a discretionary permit modification under the County's existing zoning ordinances because, unlike the County's more modern oil and gas permits (i.e., those granted from approximately 1966 to present), antiquated permits typically do not limit the number of wells and other structures, do not contain expiration dates, and do not contain other express limiting terms and conditions that must be changed in order to authorize the requested development. Consequently, the County often issues ministerial zoning clearances authorizing new oil and gas development under antiquated permits.

B. COUNTY'S ABILITY TO REQUIRE DISCRETINARY APPROVAL OF NEW DEVELOPMENT UNDER ANTIQUATED PERMITS

1. General Rule on Vested Rights

The County has a good legal argument that it can, in general, require newly proposed oil and gas development under antiquated permits to obtain authorization through a discretionary permit modification. Holders of antiquated permits may argue otherwise by claiming to possess vested rights to expand the oil and gas operations without the need for discretionary County approval. The County, however, has a good legal position that holders of typical antiquated permits generally do not have vested

¹ Some antiquated permits have been modified over time and now include more modern conditions, such as specific well limits and expiration dates. New development proposed under such modified permits typically must be approved through the discretionary permit modification process.

rights to engage in new oil and gas development based solely on the original antiquated permits, as explained below.²

Vested rights are based on a permittee's reasonable reliance on a government permit or approval describing a specific development project. Once a permittee has obtained the permit or approval, and has commenced work on the development, the government is estopped (i.e., prohibited) from preventing completion of the work pursuant to subsequently enacted legislation. The seminal California case on vested rights is *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785 ("*Avco*").³

Under *Avco* and subsequent cases, a developer acquires a vested right to complete a particular work of improvement, regardless of a subsequent change in the law, when: (1) the appropriate government agency reviews, approves and issues a grant of authority or permit that specifically describes the particular work of improvement; and (2) the developer thereafter performs substantial work and expends substantial funds and/or incurs liabilities in good faith reliance on the grant or permit.

A permittee has the legal burden of establishing the existence and scope of vested rights. If a permittee establishes a vested right, the government may not, by virtue of a change in the laws, prohibit or impair development authorized by the permit or approval, unless the development presents a threat of harm, danger, menace or nuisance.⁴ Vested rights claims are fact-specific and determined on a case-by-case basis.

The above-stated requirement for a permit or approval to specifically describe the development project in order to create a vested right is a critical factor. The *Avco* court held that a governmental permit may only give rise to vested rights if the permit affords "substantially the same specificity and definition to a project as a building permit." (*Avco, supra*, 13 Cal.3d at p. 794.) *Avco's* "functional equivalent of a building permit"

² While the government can be found to have unlawfully impaired a permittee's vested rights merely by enacting a law subjecting a previously permitted development to a discretionary approval process, the permittee must possess vested rights in the proposed development in the first instance before it can be found that the government impaired vested rights in this way.

³ The court in *Avco* found the developer did not have vested rights despite spending millions of dollars in reliance on a final tract map and local zoning regulations. In response to the harsh effect *Avco's* holding had on developers, the Legislature authorized local governments to enter into binding development agreements with developers regarding project approvals. (See Gov. Code, §§ 65864 et seq.)

⁴ Even when a permittee has established vested rights, the County possesses constitutional land use authority to regulate the subject development, including by requiring compliance with most of the County's oil development standards, as explained below.

requirement is based on balancing the developer's need for certainty regarding its development proposal without unduly impairing the government's ability to address environmental concerns and regulate land use. The federal Ninth Circuit Court of Appeals has summarized this balance as follows:

"If the public is to be deprived of its power to control pollution and other problems caused by overdevelopment, it should be deprived only to the extent necessary to ensure private parties a reasonable degree of certainty about the legal status of their investments." (*Lakeview Dev. Corp. v. City of S. Lake Tahoe* (9th Cir. 1990) 915 F.2d 1290, 1299.)

2. Lack of Specificity

Given the typical antiquated permits' lack of specificity regarding the scope and composition of the development authorized by the permits, the County has a good argument the permits no longer confer vested rights to engage in *new* development. Again, these permits do not state the number or exact location of any wells or other structures that are authorized by the permits; instead, they generally authorize the permittee to conduct oil and gas exploration and production activities within the permit area. The permits are thus analogous to general zoning designations – which do not give rise to vested rights – in that they generally allow a land use to occur within an often-large area without specifying the details of a specific facility, structure, equipment or operation. Consequently, holders of these permits cannot cite to any particularly described oil and gas project as being authorized by the permits in order to satisfy this critical vested rights requirement.

On the other hand, permittees have a good position that they have acquired vested rights to continue operating *existing* oil and gas facilities that have been developed pursuant to antiquated permits. Even though the antiquated permits themselves do not specifically describe the projects that may be developed under the permits, the County has long required permittees to obtain a zoning clearance and/or building permit for each new well and related structure. Permittees with antiquated permits presumably possess vested rights to continue operating such equipment as particularly described in these zoning clearances and/or building permits in accordance with *Avco*. Permittees also have a good position that they possess vested rights to continue operating oil facilities that were lawfully established before the County began requiring a CUP, zoning clearance and/or building permit.

3. Time Period for Development

Even if vested rights in a permit are acquired, a lengthy delay by the permittee to proceed with the project on a pace reasonably close to that contemplated when the project was approved may cause the vested rights to be lost. If, contrary to our view,

broadly worded antiquated permits did convey vested rights to engage in some level of oil and gas development once perfected (absent subsequently issued zoning clearances and/or building permits more particularly describing the associated structures), the County has a good argument that the time periods for permittees to exercise these rights by building out new development under the initial antiquated permits have now expired. The antiquated permits were granted between approximately 53 and 72 years ago. Thus, permittees have had decades to build out the oil and gas projects under the initial approvals. The County has a good argument that permittees are not entitled to construct any new oil and gas development, without first obtaining discretionary County approval, because the permittees' vested rights have lapsed through unreasonable delay in completing the initially approved projects.

4. Prior County Counsel Opinion

In 2014, County Counsel addressed the issue of vested rights and antiquated permits in a memorandum attached as Exhibit 2. The issue then presented was the County's authority to impose new conditions on *existing* oil and gas operations subject to antiquated permits. For purposes of addressing that specific issue, the memorandum assumes that permittees possess some level of vested rights in antiquated permits and proceeds to explain how such vested rights constrain the County's ability to impose new permit conditions on the *existing* operations. The memorandum does not, however, address the threshold issue now presented: Whether typical antiquated permits – i.e., those with broad authorizing language that do not specify the number and location of allowable wells or other structures – give rise to vested rights in and of themselves. For the reasons stated above, County Counsel believes they typically do not.

This vested rights issue is nuanced. Even though typical antiquated permits do not confer vested rights to engage in *new* development for the reasons stated above, permittees who have developed oilfield facilities under them have presumably obtained vested rights in their *existing* wells and other structures. Consequently, the 2014 County Counsel memorandum accurately recognizes permittees' presumptive vested rights in *existing* oilfield facilities and explains how these vested rights constrain the County's ability to impose new conditions on *existing* operations.

C. POTENTIAL ZONING ORDINANCE AMENDMENTS

1. Requiring Discretionary Approval of New Development under Antiquated Permits

The County's zoning ordinances contain specific regulations for oil and gas exploration and production. (NCZO, § 8111-5; CZO, § 8175-5.7.) These regulations could be amended to require a discretionary permit modification to authorize new development proposed under typical antiquated permits, and any other discretionary County permits, that do not specifically describe and authorize the newly proposed

oilfield structures. This discretionary permit modification requirement would be in addition to the County's existing permit modification requirement which, as explained above, applies whenever a permittee seeks to change the terms and conditions of an existing discretionary permit.

Applying the County's discretionary permit modification process to new development proposed under antiquated permits would require some level of CEQA review of the proposed development and the provision of public notice and a public hearing by the County's decision-making authority regarding the request. In order to approve the proposed development, the County's decision-making authority would need to find that the proposed development meets the County's general permit approval standards (see NCZO, § 8111-1.2.1.1a; CZO, § 8181-3.5) including, among others, that the proposed development would not be detrimental to the public interest, health, safety, convenience, or welfare; would not be obnoxious or harmful; and is compatible with existing and potential land uses in the general area.

This discretionary permitting process would thereby provide the County with the ability to: (1) fully investigate and publicly disclose the potential environmental impacts of the proposed development under CEQA; (2) weigh the merits of the proposed development against its potential negative impacts in deciding whether to approve the new development; and (3) impose permit conditions on approved development to mitigate potential environmental impacts and to address relevant land use issues, including conditions developed pursuant to the County's oil development guidelines and design standards set forth at NCZO section 8107-5.5 and CZO section 8175-5.7.7.

2. Clarifying Applicability of County's Oil Development Standards

The County's oil and gas regulations could also be amended to clarify another issue implicated by antiquated permits: the applicability of the County's oil development standards. These standards regulate various operational issues such as well and equipment siting, grading, lighting, waste handling, noise, site maintenance and site restoration. (See NCZO, § 8107-5.5; CZO, § 8175-5.7.8.) The County's current zoning ordinances state that the oil development standards apply to "permits" granted or modified by the County on or after March 24, 1983, the date upon which many of the County's current oil and gas standards were adopted. However, it is sometimes not clear what County oil development standards apply to oilfield structures and operations conducted pursuant to permits granted or issued before March 24, 1983.

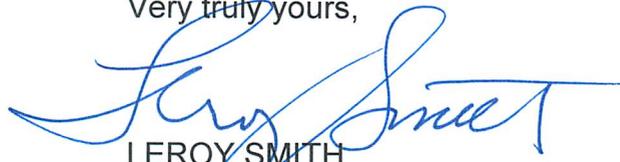
This issue can be clarified by amending the County's zoning ordinances to state that the County's oil development standards uniformly apply to all oil and gas exploration and production operations to the extent: (i) such standards would impose more stringent restrictions than those set forth in existing permit conditions, laws, or regulations applicable to the operation; and (ii) application of such standards would not impair any vested right of an operator under California law. The latter vested rights

exception is needed because certain oil development standards, such as the oil structure siting and setback requirements, could not be applied to existing facilities without potentially impairing a permittee's vested rights.

These potential zoning ordinance amendments are reflected in a draft revised version of NCZO section 8107-5.2 attached as Exhibit 3, which can be compared to the existing version of this section attached as Exhibit 4. This NCZO section, and its counterpart at section 8175-5.7.2 in the CZO, address the applicability of the County's oil and gas regulations.

This board item has been reviewed by the County Executive Office, the Auditor-Controller's Office and the Resource Management Agency Planning Division. If you have any questions, please call me at (805) 654-2581.

Very truly yours,



LEROY SMITH
County Counsel

Attachments:

- Exhibit 1 – Special Use Permit 393 Granted in 1955
- Exhibit 2 – 2014 County Counsel Memorandum
- Exhibit 3 – Draft Revised NCZO section 8107-5.2
- Exhibit 4 – Current NCZO section 8107-5.2