



September 9, 2019

VIA ELECTRONIC MAIL

Chair Bennett & Members of the Board of Supervisors
County Government Center
800 South Victoria Avenue
Ventura, CA 93009

Re: *September 10, 2019 Agenda Item No. 35, Report from County Counsel and Proposed Amendments to County Zoning Ordinance Regarding Oil and Gas Development*

Dear Chair Bennett & Members of the Board of Supervisors:

This comment letter is being submitted to the County of Ventura ("County") by Aera Energy, LLC ("Aera") in connection with September 10, 2019 Agenda Item No. 35, more particularly described as a report from County Counsel and the Board of Supervisors' ("Board") consideration of proposed amendments to County zoning ordinance regarding oil and gas development. We ask that this letter, and the comments contained herein, be made a part of the County's administrative record regarding this matter.

With respect to County Counsel's report, we are compelled to point out a number of untenable legal positions in Counsel's report regarding the applicability of the vested rights doctrine in the context of oil and gas extraction and production activities undertaken pursuant to duly issued conditional use permits ("CUP"). As set forth in detail below, we strongly disagree with Counsel's position on the scope and applicability of the doctrine of vested rights. We further disagree with Counsel's assertion that the doctrine would not prevent the County from subjecting ongoing oil and gas operations to current provisions of the Non-Coastal Zoning Ordinance ("NCZO") and requiring the issuance of discretionary permits for any new wells not specifically identified by location and number in an active CUP, or for the re-drilling or deepening of existing wells if such re-drilling or deepening is not specifically authorized in an active CUP.

With respect to the administrative process employed by the County, we note that the County has effectively pre-determined the text of this amendment to the NCZO without any public participation whatsoever. As discussed below, should the County proceed as currently outlined, this would constitute a violation of the due process rights of interested parties and the public at large, as well as violation of the County's own regulations regarding code amendment.

Finally, County Counsel mistakenly concludes that advancing this newly developed and legally unsupported take on vested rights, as well as the instant NCZO amendments flowing therefrom, will have no fiscal consequences. This is demonstrably false, as discussed more fully below. The County's pursuit of this NCZO amendment, which is based on a flawed legal analysis (and is wholly inconsistent with County Counsel's previous legal analysis on the very same topic), would leave industry stakeholders no choice but to bring costly legal challenges that would be borne directly by the County and its residents.

A. RELEVANT BACKGROUND

As you are aware, Aera and its predecessors in interest have been conducting oil and gas extraction and production operations in the County for more than seventy (70) years in accordance with use permits issued pursuant to County zoning regulations enacted as early as the 1940s. These permits did not include any requirement for subsequent discretionary approvals and did not include any requirement that the wells within use permit boundaries be subject to location or number conditions.

B. THE COUNTY'S VESTED RIGHTS ANALYSIS IS FLAWED

Based on Aera's legal review of County Counsel's newly prepared report, Aera takes issue with the incomplete application of the legal analysis set forth in the seminal case of *Avco Community Developers, Inc. v. South Coast Regional Commission*, (1976) 17 Cal.3d 785 ("*Avco*") as well as County Counsel's very own 2014 legal assessment of vested rights, which patently contradicts Counsel's newly prepared report and the County's historical practices regarding oil and gas operations within its jurisdiction.

With respect to *Avco*, County Counsel's newly prepared report concludes that vested rights only attach to specific development proposals. As noted by Aera's legal review, the report disregards two critical legal points concerning vested rights. First, subsequent case law has clearly concluded that the doctrine of vested rights applies to use permits and the activities authorized thereunder. Second, while the *Avco* case provides a general discussion of vested rights in the context of residential development projects, the relevant legal authority when dealing with a vested right to extract minerals is *Hansen Brothers Enterprises v. Board of Supervisors*, (1996) 12 Cal.4th 533 ("*Hansen*").

Based on Aera's legal review, Post-*Avco* decisions have held that use permits confer vested rights. *HPT IHG-2 Properties Tr. v. City of Anaheim* (2015) 243 Cal. App. 4th 188, 199 (where a CUP has been issued and the landowner has relied on it to its detriment, the landowner has a vested right.); see also *Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal.App.4th 359, 367. The scope of the vested rights is the scope of activity authorized under the permit. *Santa Monica Pines, Ltd. v. Rent Control Bd.* (1984) 35Cal.3d 858, 865.

Aera advocates that the *Hansen* decision, not the *Avco* decision, governs vested rights in the context of mineral extraction. In *Avco*, a housing developer sought to establish a vested right to complete a residential project for which it never obtained any permits for the buildings it wished to construct. Oil and gas operations do not rely on fixed buildings and infrastructure. By their

nature, wells and facilities will need to be located and relocated, re-drilled and deepened from time to time over the course of many years as the extraction of the oil and gas is a diminishing asset and facilities for extraction must be deployed so as to access the reserves as they are depleted at various locations on the affected property. California law regarding vested rights for diminishing assets is different from the vesting concepts set forth in *Avco*, as the California Supreme Court confirmed in the *Hansen* decision. In that case, the High Court made the point that mineral extraction uses, unlike uses that operate within an existing structure or boundary, anticipate the extension of extraction activities into other areas of the property that were not being exploited at the time a subsequent zoning change is proposed. As the High Court explained:

"The very nature and use of an extractive business contemplates the continuance of such use of the entire parcel of land as a whole, without limitation or restriction to the immediate area excavated at the time the ordinance was passed. A mineral extractive operation is susceptible of use and has value only in the place where the resources are found, and once the minerals are extracted it cannot again be used for that purpose." 12 Cal.4th at 553-554.

And, again, even if one were to ignore the foregoing legal precedent, County Counsel's argument to that the effect that vesting requires a permit with a specific scope and composition is extremely suspect in light of: (1) County's Counsel's very own 2014 legal assessment of vested rights, which patently contradicts Counsel's newly prepared report; and (2) the County's historical practices regarding oil and gas operations within its jurisdiction.

C. THE COUNTY IMPROPERLY PRE-DETERMINED THE NCZO AMENDMENT

Due process demands that interested parties and the public at large be permitted to participate in governmental decisions affecting their interests. As County Counsel's report concedes and as confirmed by Aera's legal review, the proposed NCZO amendment and underpinning vested rights analysis were developed entirely behind closed doors. Specifically, the public was afforded no opportunity to be heard on this matter as between: (1) the date the County directed staff to "study potential amendments" to the NCZO (April 9, 2019); and (2) the date this matter appeared on the Board Agenda with the language of the proposed NCZO amendment fully formulated (September 5, 2019). Furthermore, it is unclear from the public notices prepared for this matter whether the Board will be taking action on the amended language on September 10, 2019. Therefore, in an abundance of caution, Aera preemptively points out that action on the proposed NCZO amendment at this time would violate due process.¹

Moreover, any future efforts by the County to provide interested parties and the public with an opportunity to exercise their due process rights would be a sham proceeding. The record on this matter to date clearly demonstrates that the County has pre-determined its language of choice for this amendment based on a flawed legal analysis and will not independently consider subsequent public input.

¹ Taking action on the NCZO amendment would also violate the County's own local land use regulations. See County Code §§ 8115-1 et seq. See also, Government Code § 65853.

D. NCZO AMENDMENT WILL TRIGGER COSTLY LITIGATION

Should the County elect to proceed with this zoning amendment, industry stakeholders will be left with no choice but to seek judicial recourse to protect their property rights. Even if the County ultimately prevails in court, defending multiple judicial actions will cost the County hundreds of thousands of dollars. If the County does not ultimately prevail, the County will incur costs that will easily exceed several million dollars. A reviewing court will closely consider all decisional law relating to vested rights, in particular decisions that concern mineral extraction. A reviewing court will consider the fact that the County's legal advisor has issued two reports on the doctrine of vested rights that patently conflict with one-another. Finally, a reviewing court will necessarily examine the whole of the record in this matter and note that a just one use classification, oil and gas extraction and production, was singled out for disparate, adverse treatment as compared to other, similar uses within the County's jurisdiction.

Sincerely,

A handwritten signature in black ink, appearing to read 'William Spear', followed by a horizontal line.

William Spear
Manager of Operations

Cc: Ms. Rosa Gonzalez, Chief Deputy Clerk of the Board
Mr. Leroy Smith, Esq., County Counsel (*via U.S. Mail*)
Ms. Denee A. DiLuigi, Esq. (Aera)