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November 9, 2020

Via Electronic Mail Only

Members of the Board of Supervisors
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Re: November 10, 2020 Agenda Item 47: Amendments to Article 7, Section 8107-5 of the Ventura County Non-Coastal Zoning Ordinance and Article 5, Section 8175-5.7 of the Ventura County Coastal Zoning Ordinance to Modify Permitting Requirements for Certain New Oil and Gas Exploration and Production Operations

Honorable Members of the Board of Supervisors:

On behalf of Climate First: Replacing Oil and Gas ("CFROG"), we respectfully urge the Board of Supervisors to accept the Planning Commission's recommendation and adopt the above-referenced ordinance and accompanying findings. As explained in the Board Letter, the proposed amendments to the Non-Coastal Zoning Ordinance ("NCZO") and Coastal Zoning Ordinance ("CZO") are necessary to establish a "single, consistent permitting process for all new oil and gas development proposals," ensure "consistent application" of current development and operational standards, and provide "some level of environmental review." (Board Letter at 5.)

Our July 28, 2020 letter to the Planning Commission (attached and incorporated by reference) addressed the County's legal authority to enact the proposed amendments, particularly with respect to "vested rights" claimed under antiquated oil and gas conditional use permits ("antiquated CUPs"). This letter briefly elaborates on several meritless objections raised by oil industry representatives before the Planning Commission and this Board.

Contrary to the claims of certain oil and gas companies, the proposed amendments will not shut down the industry in Ventura County. Rather, the proposed amendments will ensure that the oil and gas industry plays by the same rules as everyone else who

must obtain a discretionary permit to carry out a particular land use. Discretionary review does not automatically entail denial of applications. Discretionary permits are routinely approved for a wide range of land uses in the County, provided those uses are consistent with General Plan and zoning designations and applicable land use standards.

The Board Letter acknowledges that the proposed amendments could have some economic effects. The scale of any such effects, however, cannot be known given the "numerous variables" affecting oil and gas production; moreover, any such effects "are driven in large part by global oil prices." (Board Letter at 8.) Again, the proposed amendments in and of themselves simply require discretionary review of new oil and gas operations. The proposed amendments will not halt existing oil and gas operations. Nor will they preclude all new oil and gas operations. Industry objections based on a feared shutdown—including claims the proposed amendments will take private property without compensation—thus do not reflect a fair or accurate reading of the amendments.

Nor will the proposed amendments interfere with any vested rights associated with antiquated CUPs. As explained in County Counsel's opinions on the proposed amendments and in our July 28, 2020 letter to the Planning Commission, requiring discretionary review of *new and expanded* oil and gas development does not affect vested rights and lies squarely within the County's legal authority. Moreover, each proposed ordinance contains a savings clause providing that current oil development operational standards apply to existing operations only to the extent that they do not impair any vested rights under California law. Proposed NCZO § 8107-5.2(a); Proposed CZO § 8175-5.7.2(a).

Industry's arguments that the County has not properly reviewed the proposed amendments under the California Environmental Quality Act ("CEQA") similarly lack merit. First, industry letters claim CEQA's categorical exemption for regulatory actions taken to protect the environment (CEQA Guidelines section 15308) does not apply here because the amendments may cause potential impacts, including impacts on mineral resources. The Supreme Court rejected a substantively identical argument, holding that evidence that a project may have a significant impact does not automatically render CEQA's categorical exemptions inapplicable. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086.) Here, the County has determined that there are no unusual circumstances distinguishing these amendments from the types of actions generally considered to fall within the ambit of 15308. Industry comments on the proposed amendments simply fail to address *Berkeley Hillside*.

In any event, there is no clear statutory support in CEQA for treating an effect on oil and gas production as an "environmental impact." Although "minerals" are among the

"physical conditions" comprising the "environment" for CEQA purposes (Public Resources Code section 21060.5), the Public Resources Code's definition of "minerals" specifically *excludes* natural gas and petroleum (*id.*, section 2005). Nothing in CEQA or the CEQA Guidelines expressly identifies petroleum resources as part of the "environment" protected by the statute.[1] The oil companies' real concern is with the economic impacts they claim will result from the amendments, not any actual environmental impacts. Socioeconomic impacts, however, are not treated as significant environmental impacts under CEQA. (CEQA Guidelines §§ 15131(a), 15382.) Industry concerns about narrow economic impacts also obscure the costs associated with poorly regulated oil and gas extraction activities. As local decision-makers, it is imperative for Supervisors to look at the total costs of new and expanded development, including the public health burdens and clean-up costs that may ultimately outweigh the tax revenue gained through allowing indefinite expansion without discretionary review.

Second, industry letters assert that CEQA review of new and expanded oil development under antiquated CUPs is precluded because many of the CUPs were issued prior to CEQA's adoption. (See CEQA Guidelines § 15261(b).) As a threshold matter, this assertion has no bearing on whether the County has complied with CEQA in considering these proposed amendments. Rather, the argument addresses whether the County can review *future* oil and gas proposals under CEQA—proposals that have not yet been formulated and are not yet before the County. As such, the objection is beside the point and does not affect the Board's adoption of the proposed amendments.

Industry's objection also misconstrues the law. CEQA's "ongoing project" exemption applies only to continued operations within the specific parameters of authorizations granted prior to CEQA's enactment. The proposed amendments, in contrast, apply to new and expanded operations, not any operations that may be ongoing pursuant to the specific terms of any antiquated CUP. The "ongoing operations" exemption thus does not apply here. (See *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 969.)

In sum, the proposed amendments will bring long-overdue consistency and fairness to review of proposals for new and expanded oil and gas development in Ventura

[1] Industry letters cite the County's CEQA procedures, which appear to treat actions that would hamper or preclude access to oil and gas resources as environmental impacts. However, the Supreme Court has made clear that where CEQA does not clearly encompass a particular environmental impact, guidelines requiring analysis of that impact are invalid. (See *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 387–388.)

County. The amendments are squarely within the County's legal authority, and CFROG respectfully urges their adoption.

Thank you for your consideration of our views in this matter.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Kevin P. Bundy

Encl.: July 28, 2020 Letter to Planning Commission

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July 28, 2020

Via E-Mail

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Re: July 30, 2020 Agenda Item 7: Zoning Text Amendments to Article 7, Section 8107-5 of the NCZO and Article 5, Section 8175-5.7 of the CZO, Regarding Antiquated Conditional Use Permits for Oil and Gas Development (Case No. PL20-0052)

Dear Chair White and Members of the Commission:

This firm represents Climate First: Replacing Oil and Gas ("CFROG") in matters related to oil and gas development in Ventura County. CFROG supports the proposed amendments to Article 7, Section 8107-5 of the Ventura County Non-Coastal Zoning Ordinance and Article 5, Section 8175-5.7 of the Ventura County Coastal Zoning Ordinance. These amendments would ensure that all new and expanded oil and gas development—including development on parcels covered by vague, long-outdated conditional use permits ("antiquated CUPs")—receive appropriate discretionary review and are subject to the County's current health and safety regulations.

When the Board of Supervisors first directed staff to consider amendments to address problems related to antiquated CUPs in September 2019, industry representatives submitted comments asserting that the zoning amendments infringe on vested rights. County Counsel explained to the Board last year (and the Staff Report for today's item further demonstrates) that these objections lack merit.[1] As discussed in further detail

[1] See Letter from Leroy Smith, County Counsel, to Board of Supervisors (Sept. 10, 2019) ("County Counsel Memo").

below, the analyses in the County Counsel Memo and the Staff Report correctly reflect settled California law.

Over the past several days, industry representatives have submitted a number of form comments by email, all referring to the proposed amendments as an "orchestrated effort to shut down all oil and gas operations in Ventura County." Nothing could be further from the truth. Again, the proposed amendments do not affect existing, legally vested operations *at all*. They do not require *any* operations to "shut down." Rather, the zoning amendments simply require a discretionary permit to undertake *new or expanded* oil and gas development, and ensure that current health and safety standards govern those projects.

Nothing in the zoning amendments affects existing operations with vested rights. Nothing in the zoning amendments applies current regulations to properties or facilities operating pursuant to vested rights. On the contrary, the proposed zoning amendments essentially just require the oil industry to follow the same rules that apply to others seeking County approval to conduct land use activities that could affect public health, safety, and the environment. The proposed zoning amendments are reasonable and lawful, and the Commission should recommend their adoption to the Board of Supervisors.

I. The County May Require Discretionary Review of New and Expanded Oil and Gas Operations Under Antiquated CUPs.

The proposed zoning amendments properly provide for discretionary review of new and expanded petroleum operations without infringing on existing vested rights. This is so for three basic reasons. First, the antiquated CUPs at issue here typically do not describe the activities they authorize with sufficient specificity to support vested right claims. Second, because the zoning amendments would require discretionary permits only for new and expanded development, it is unlikely that any permit holder could demonstrate sufficient work or investment in reliance on an antiquated CUP to claim a vested right; by the same token, any right to develop granted by antiquated CUP, but not yet exercised, arguably lapsed long ago. Third, by their terms, the zoning amendments would limit applicability of current oil and gas regulatory standards to operations where vested rights would not be affected.

Under settled California law, a vested right arises where a landowner has (1) obtained specific governmental approval for a project, including any necessary building permit (or the functional equivalent of a building permit), (2) completed substantial work, and (3) incurred substantial liabilities in good faith reliance on the permit. *Avco*

Community Developers, Inc. v. South Coast Regional Commission (1976) 17 Cal.3d 785, 793. *Avco* remains the leading case on vested rights in California; although "land use planning law has evolved greatly since *Avco* was decided in 1976…, the vested rights doctrine enunciated by *Avco* has stood the test of time." *Consaul v. City of San Diego* (1992) 6 Cal.App.4th 1781, 1801.

Under these settled standards, holders of antiquated CUPs cannot assert a vested right to new or expanded oil and gas development.

First and foremost, antiquated CUPs issued between 1947 and 1966 lack the specificity required to give rise to vested rights. Only a building permit or its functional equivalent—a permit that specifies the precise location, number, and type of structures to be built—can support a claim of vested rights. In *Avco*, for example, the Supreme Court held that a tract map and grading permits lacked sufficient detail "to determine the precise scope of any purported right to construct buildings on the tract"; the Court therefore was "compelled to deny the claim of a common law vested right." 17 Cal.3d at 794-95; see also, e.g., *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 324 (finding town's "general endorsement" of a particular development alternative "could not be viewed as the functional equivalent of a building permit establishing a vested right"); *Consaul*, 6 Cal.App.4th at 1800-01 (finding dwelling unit allocation insufficient to support claim of vested right absent building permit, notwithstanding specific application showing location and elevation of proposed buildings).

The antiquated CUPs at issue here do not meet *Avco*'s standards for specificity. They do not contain detailed information concerning the location, number, or characteristics of wells and supporting structures and facilities. These CUPs are not the functional equivalent of building permits. Indeed, as the Staff Report notes, new oil and gas development on lands covered by antiquated CUPs has long required *additional*, more specific approvals, in the form of zoning clearances or building permits, in order to proceed. See Staff Report at 6-7; County Counsel Memo at 6. While *existing* operations authorized by specific zoning clearances and building permits arguably could be subject to vested rights (assuming all conditions outlined in *Avco* and other cases are met), holders of antiquated CUPs cannot claim a vested right to *new and expanded* operations. "[V]ested rights are no greater than those specifically granted by the permits themselves." *Russ Bldg. Partnership v. City and County of San Francisco* (1988) 44 Cal.3d 839, 854; see also *Santa Monica Pines, Ltd. v. Rent Control Board* (1984) 35 Cal.3d 858, 865 (rejecting "erroneous notion" that permittees may claim a "vested right to obtain a vested right").

Nor can holders of antiquated CUPs show that they have satisfied *Avco*'s other conditions with respect to new and expanded development. Permittees must not only have obtained specific approval, but also must have completed substantial work and incurred substantial liabilities in good faith reliance on that approval. *Avco*, 17 Cal.3d at 791. Here, the proposed ordinance by its terms applies only to activities that permittees have not yet commenced; the new and expanded operations that would require discretionary permits by definition are those on which no substantial work has yet occurred. That an antiquated permit holder might have contemplated additional development at some point is insufficient to support a vested right. See, e.g., *Ideal Boat & Camper Storage v. County of Alameda* (2012) 208 Cal.App.4th 301, 315-16; *Paramount Rock Co. v. San Diego County* (1960) 180 Cal.App.2d 217, 232.

Moreover, even if the antiquated CUPs could have given rise to vested rights when issued, any rights to new and expanded development under those permits would have lapsed long ago. Vested rights can be lost or abandoned when permittees do not proceed with the permitted activity within a reasonable time. *Hansen Brothers Enterprises v. Board of Supervisors* (1996) 12 Cal.4th 533, 568. Similarly, failure to pursue a permit-authorized activity within a reasonable amount of time can cause rights never to vest at all. *Lakeview Development Corp. v. City of South Lake Tahoe* (9th Cir. 1990) 915 F.2d 1290, 1299. Where permittees proceed within a reasonable time despite factors beyond their control, a court may allow for some delay in commencing work under a properly issued permit. See *Trans-Oceanic Oil Corp. v. City of Santa Barbara* (1948) 85 Cal.App.2d 776, 790-91 (permittee promptly commenced, and again moved to complete, construction of oil drilling operation within reasonable period following disruptions caused by World War II). But where uses have been discontinued or their commencement delayed for several years without such extenuating circumstances, courts have dismissed vested rights claims. See, e.g., *Stokes v. Board of Permit Appeals* (1997) 52 Cal.App.4th 1348, 1354 (no vested right to operate after use discontinued for seven years); *Lakeview Development Corp.*, 915 F.2d at 1299 (12-year delay in development prevented rights from vesting). Here, the relevant antiquated permits were granted between 53 and 72 years ago—far too long by any reasonable standard to commence new operations under a claim of vested rights.

Finally, the proposed amendments apply current County regulations to oil and gas development only to the extent such regulations will not interfere with vested rights. This is entirely consistent with the law governing nonconforming uses. Cf., e.g., *City of Los Angeles v. Gage* (1954) 127 Cal.App.2d 442, 453-54. In short, nothing in the proposed zoning amendments infringes on valid vested rights.

II. Industry's Arguments Against Discretionary Review Fail.

Oil industry representatives submitted letters to the Board of Supervisors in September 2019 outlining several objections to requiring discretionary review of new oil and gas development on lands covered by antiquated CUPs. None of the objections in those letters has merit.[2]

A. The "Diminishing Asset" Doctrine Does Not Apply to Oil and Gas Development.

Industry comments from 2019 contended that the "diminishing asset" doctrine—a very narrow exception to *Avco* recognized in *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533—gives oil and gas operators a vested right to expand operations under antiquated CUPs indefinitely. The contention has no legal support.

The diminishing asset doctrine does not apply to oil and gas operations. Rather, it applies to gravel pits, quarries, and other mining operations that by definition consume the "corpus" of the parcel itself. See *Hansen Brothers*, 12 Cal.4th at 553-55; *McCaslin v. City of Monterey Park* (1958) 163 Cal.App.2d 339, 349. Under this doctrine, a permit to operate a quarry or a gravel mine may, under certain circumstances, convey a vested right to expand operations in the future. Oil and gas drilling, in contrast, does not consume the physical parcel, does not necessarily require extension of drilling into other areas of the property, does not require the use of the entire parcel, and often allows other contemporaneous uses of the surface. Indeed, oil and gas development need not even be on the same parcel as the underlying mineral right; directional drilling, as well as pooling and unitization agreements, often allow access to oil and gas from beneath neighboring parcels. The Supreme Court long ago rejected the argument that oil and gas operators have a vested right "to reach any and all oil underlying [their] property." *Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, 559. Rather, local governments may reasonably prohibit drilling of new wells or deepening of existing wells where, as here, the right to produce from existing wells continues. *Id.* at 559.

Industry comments confuse different types of "mineral" rights. Although oil and gas rights are often referred to as "mineral" rights, the law treats oil and gas very

[2] As discussed above, industry representatives have submitted additional comments to the Planning Commission regarding today's agenda item. However, as of the time this letter was submitted, none of those comments add to or expand on the erroneous legal analysis in the industry letters from last September.

differently from other "minerals" like rock and gravel. The statutory definition of "minerals" expressly *excludes* "natural gas" and "petroleum." Pub. Resources Code § 2005. Unlike the rock in a quarry, oil and gas are "fugacious"—that is, oil and gas may migrate from beneath the surface estate, and may be captured by drilling from other locations, while "non-fugacious" minerals like coal, gold, and rock stay in one place and form a physical part of the surface estate. *See, e.g., Gerhard v. Stephens* (1968) 68 Cal.2d 864, 897-98; *Beverly Oil*, 40 Cal.2d at 559 (noting that oil and gas are "migratory" substances that may be drained from beneath adjoining parcels). The distinction is legally critical: while an owner of non-fugacious mineral rights holds title to the physical minerals themselves, *see Gerhard*, 68 Cal.2d at 897-98, an owner of oil and gas mineral rights does not hold title to any physical oil and gas, but rather holds title to an exclusive "right to drill." *See, e.g., Atlantic Oil Co. v. County of Los Angeles* (1968) 69 Cal.2d 585, 594.

The principles underlying the diminishing asset doctrine as described in *Hansen Brothers* thus do not apply to oil and gas operations. Indeed, none of the comments from industry cited a single decision, from California or any other state, extending the doctrine to petroleum development.[3]

B. CUPs Do Not Automatically Create Vested Rights.

Industry comments to the Board of Supervisors also erroneously claimed that cases following *Avco* have determined that CUPs can create vested rights.[4] As discussed above, however, a CUP can give rise to vested rights only if it is highly specific—in other words, if it is the functional equivalent of a building permit. For example, a CUP that requires further specific permits before drilling may occur does not give rise to vested rights. See *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 552–553. The antiquated CUPs at issue here are not self-executing, but rather require subsequent specific approval through zoning clearances and building permits.

None of the cases cited in industry comments alters the basic principles in *Avco* or holds that *all* conditional use permits automatically create vested rights. For example, the CUP found to create vested rights in *HPT IHG-2 Properties Trust v. City of Anaheim*

[3] One California Superior Court *rejected* a similar industry attempt to extend the diminishing asset doctrine to oil and gas operations for many of the same reasons discussed above. *Plains Exploration & Production Co. v. Culver City* (L.A. Super. Ct. No. BS122799, March 26, 2010).

[4] The Supreme Court in *Avco* found it unnecessary to decide this issue. 17 Cal.3d at 794.

(2015) 243 Cal.App.4th 188, authorized construction of a highly specific project: hotels consisting of a defined number of rooms with a large, landscaped setback and specific parking requirements, based on a site plan that detailed the exact location of buildings and other improvements. *Id.* at 192-94. Similarly, although the court in *Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal.App.4th 359, found that a previous owner's CUP for a "tennis ranch" created a vested right, it also found that the subsequent owner's improvements for purposes outside of the specific terms of the CUP did *not* give rise to vested rights. See *id.* at 369-70, 372-73. Far from supporting industry's position here, *Malibu Mountains* underscores that any vested rights arising from a CUP are limited to the specific activities authorized therein. Nothing in either of these cases stands for the proposition that any CUP, no matter how vague or broadly written, gives rise to vested rights.

C. The Proposed Amendments Do Not Violate Equal Protection.

Finally, industry comments objected that requiring discretionary review for new oil and gas development would unlawfully single one land use "classification" out for disparate treatment. This claim also fails.

There is no question the County can regulate land uses specific to oil and gas development. Even prohibiting oil and gas operations in a zone where other uses are allowed is not per se unreasonable. *Beverly Oil*, 40 Cal.2d at 560 ("The fact that [plaintiff's oil and gas] operations are restricted in a zone where others are permitted to operate planing mills, shooting galleries, skeet shooting, pig pens, wholesale poultry and rabbit slaughtering and stone cutting is not in itself a sufficient basis for holding that the zoning authorities have acted in an arbitrary or unreasonable manner in respect to the plaintiff's property."). The County may regulate different entities differently so long as there is "any reasonably conceivable set of facts that provides a rational basis for the classification" grounded in a legitimate public purpose. *Vaquero Energy, Inc. v. County of Kern* (2019) 42 Cal.App.5th 312, 324. Protecting health, safety, and the environment are legitimate public purposes. *Id.* at 325. Oil and gas development poses threats to health and safety that other industries do not pose. The County could rationally conclude that regulating oil and gas advances legitimate health and safety interests, which is all the equal protection clause requires in this context. See *id.* at 327-28.

Here, the revised ordinance would not prohibit new drilling; rather, it would merely require a discretionary permit for new oil and gas development not explicitly authorized by antiquated CUPs issued nearly a lifetime ago. Requiring a discretionary permit for a new or expanded land use is not arbitrary, but rather is consistent with the manner in which many other land uses requiring conditional use permits are regulated in

the modern world. Indeed, the industry is not seeking equal treatment, but rather is asking for special, different treatment by advocating for an expansive—and erroneous—interpretation of "vested rights" that would not apply to any other industry or land use category.

III. Conclusion

As the Supreme Court observed in *Avco,* allowing vague and indeterminate governmental approvals to give rise to "an exemption of indeterminate duration from the requirements of any future zoning laws" could lead to "serious impairment of the government's right to control land use policy." 17 Cal.3d at 797-98. The proposed zoning amendments will not infringe on vested rights, but rather will help bring the County's permitting activities into line with long-established principles of California law.

In short, the proposed amendments are reasonable, lawful, and necessary to protect public health and safety. The Planning Commission should recommend adoption of the amendments to the Board of Supervisors.

Thank you for your consideration of these comments.

Very truly yours,

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cc: Mindy Fogg, Case Planner
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