MusickPeeler

ATTORNEYS AT LAW

2801 TOWNSGATE ROAD, SUITE 200
WESTLAKE VILLAGE, CALIFORNIA 91361

TELEPHONE: (805) 418-3100
FACSIMILE: (805) 418-3101
WWW.MUSICKPEELER.COM

LOS ANGELES
ORANGE COUNTY
SAN DIEGO
SAN FRANCISCO
SANTA BARBARA COUNTY
VENTURA COUNTY

JANE ELLISON USHER
j.usher@musickpeeler.com
(213) 629-7748

November 9, 2020

VIA ELECTRONIC MAIL: clerkoftheboard@ventura.org

Ms. Kelly Long, Chair
Ms. Linda Parks, Vice Chair
Mr. Steve Bennett
Mr. Robert O. Huber
Mr. John C. Zaragoza
Ventura County Board of Supervisors
800 South Victoria Avenue
Ventura, CA 93009

Re: ***Opposition to Agenda Items 34 and 47***
Denial of Due Process, Deprivation of Vested Rights and Violation of the California Environmental Quality Act (Supervisor-Recommended and County-Initiated Zoning Amendments to Article 7, Section 8107-5 of the Non-Coastal Zoning Ordinance and Article 5, Section 8175-5.7 of the Coastal Zoning Ordinance)

Dear Honorable Supervisors:

We again appear before you on behalf of a substantial coalition of founding landowners in Ventura County. They include mineral rights owners, together with agricultural property owners, who wish to express their deep concern with your process and the pending proposals. The long-established constitutional liberty and property interests of our clients are the subject of the amendments to the County zoning ordinances that you are now considering. Your actions on the proposed amendments will either support or undermine the continued ability of our clients to live, work, and maintain their businesses and philanthropic activities in Ventura County.

Stated most succinctly, the proposed zoning ordinance amendments will eliminate vested rights without the payment of just compensation. This represents an impulsive and unnecessary departure from time-honored constitutional and common law. The existing permits that the County proposes to rewrite were the product of hearings, investigations and operating conditions. Their implementation is subject to constant regulatory oversight. What's more, your proposed reversal of long-standing vested rights is combined with a failure to comply with the California Environmental Quality Act ("CEQA"). We ask that you seek independent legal guidance on these consequential topics, before rushing headlong to embroil our government in a further sea of litigation.

We summarize below the primary deficiencies in your process and in the legal analysis presented to you by the County's planners and counsel, and we again introduce you to our clients so that you can consider their bona fides and their decades of contribution to the County:

- **Our Coalition of Founding Families.** With their approval, we share this list of our directly-impacted clients: Thomas and Mary V. Taylor, Trustees of the Thomas Family Irrevocable Trust dated October 21, 2005, Margo Ferris, Trustee of the James P. McLoughlin 1989 Trust dated February 22, 1989, James Chambers, Toril Lee Raymond, Trustee of the Integrity Builders Trust (also known as the Revocable Management Trust) dated April 17, 2015, Patricia Sutherland Peters, Trustee of the Sutherland Family Revocable Trust dated June 6, 1988, Edward T. Chambers, Trustee of The Chambers Trust dated November 6, 2014, Robert W. Thomas and Marie M. Thomas, Trustees of the Thomas Family Trust dated August 5, 1983, Stanley H. Chambers, Jr., John Edward William Chambers, Margaret Mary McMonigle, Robert Michael Chambers, Mary Ellen Moro, David H. Chambers, Trustee of the David and Deborah Chambers 2000 Revocable Living Trust, Nancy J. Chambers Kolanz, Trustee of the Amended and Restated Kolanz Family Trust dated June 7, 2010, Elizabeth Chambers Martinez, Trustee of the Martinez Living Trust dated December 8, 2015, Donald E. de Nicola, Trustee of The De Nicola Family Living Trust Established October 15, 2014, collective members of McLoughlin Ranch, Coast Ranch Family, LLC consisting of the heirs of William Arthur Hobson, Abram Lincoln Hobson, Edith Hobson Hoffman, Fred Smith and other multi-generation members of their families, Seacliff Land, LLC, George Graham, Trustee of the George Graham Trust, Timothy S. McGrath, Trustee of the Tim S. McGrath Trust, Ann Cooluris, Trustee of the Ann C. Cooluris Trust, Sean McGrath, Trustee of the McSean Trust, Jurgen Gramckow, Trustee of the J & G Gramckow Family Trust, the other partners and tenants in common holders of McGaelic Group, L.P. and affiliates, and Elkins Royalty Group, LLC.

  Our coalition represents generations of ownership of real property going back to the time before Ventura was a county. These founding families have been highly regarded local stewards who have contributed in deep and meaningful ways to the County it is today. They have been particularly well known for their inclusiveness, and for their appreciation of the contributions of those that have followed them who have likewise cherished the history, inclusiveness, economic and ethnic diversity, balanced economy and long term perspective and stewardship of our special part of the world. They are devoted philanthropists for multiple institutions in our County, including hospitals in Ventura and on the Oxnard Plain, museums in Ventura, Oxnard and Santa Paula, and multiple other healthcare organizations that safeguard the welfare of our entire community.

- **Failure of Public Participation and Transparency.** Our clients are vitally interested in the proposed zoning amendments and in your deliberations. Yet, they, and so many other stakeholders, will be denied the right to participate in a transparent, informed public hearing.

At this juncture, the Governor's executive powers may well be exceeded and no longer of solace or guidance to you in limiting public process in the present context of a non-emergency matter. The Hall of Administration has remained closed to us throughout this process, both when this matter was before the Planning Commission and now before you. We fully support the closure due to the resurging cases of COVID-19. However, the County's requirement that our clients pre-register to participate in a Zoom hearing, or passively stream a live broadcast, is not a lawful substitute for due process. Many of our clients and other stakeholders are not Zoom or internet able.

Further, having ourselves participated in your earlier hearings on the County's 2040 General Plan Update and EIR, by both Zoom and live streaming, we are painfully familiar with their inadequacies, which have included, by way of examples, continually broken reception, the inability of speakers to transmit their comments, unread and missing comments, extended breaks in the streaming during which your non-public conversations occur, introduction of new material after public comment has been closed, and the fleeting on-screen sharing of vital new documents for brief seconds after which they are removed from public view. **We therefore request that your hearing be continued until such time as the public's right to participate and be heard, and public hearing transparency, can be restored.**

- **The Amendments Revoke Vested Rights and Threaten Equal Protection.** At the heart of the zoning amendments is a fundamental legal issue, which the County proposes to rewrite in a novel, untested manner that is at odds with the prevailing law. The law of vested rights currently holds, and has held for decades, that issued permits, on which substantial sums have been spent in reliance, entitle the permit holder to the continued use of the rights granted, without cessation or amendment. There are few circumstances that might authorize the County to revoke a vested right, as the ordinances before you propose to do. Those narrow circumstances, such as a threat to public health and safety, are not claimed here by the County, and the record before you contains no substantial evidence of such a threat. Moreover, even if such circumstances had been claimed and proven, the legal issues would still be legion, including constitutional claims of takings, the absent rights to pre and post due process deprivation hearings, substantive due process rights, and application of the laws of just compensation.

  In lieu of attending to the legal questions raised by the zoning amendments, particularly in the face of squarely contradictory legal opinions from County Counsel, the zoning amendments create a unique permitting regime for existing oil field operations that are already permitted by the County. This regime imposes new and different obligations on oil and gas permits than are contained in every other permit issued by the County. It ignores the vested rights analysis appropriate to mineral extraction and a diminishing asset as set forth in *Hansen Brothers Enterprises v. Board of Supervisors* (1996) 12 Cal.4th 533. **The amendments propose that existing oil and gas permits are not vested, and new permits**

are required, for: (1) any well that is not individually named by location and number in an existing permit, (2) the redrilling of permitted wells unless redrilling is expressly authorized by the existing permit, and (3) the installation of any permanent structure unless specifically identified in, or replacing an existing structure with the same dimensions at the same location as in an existing permit. Not only does this turn the established law of vested rights on its head, but it poses questions of equal protection and basic fairness, since no other County permits are being subjected to a similar redefinition or treatment.

"Laws that create new obligations, impose new duties, or exact new penalties because of past transactions have been universally condemned by both civil and common-law writers." 58 Cal. Jur. 3d Statutes § 31. The partner to this established jurisprudence is that: "Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest. [Citations.]" (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612, 156 Cal.Rptr. 718, 596 P.2d 1134.) These requirements "are not rooted in statute but are compelled by the stronger force of constitutional principle." (*Id.* at p. 616, 156 Cal.Rptr. 718, 596 P.2d 1134; *Van't Rood v. Cty. of Santa Clara* (2003) 113 Cal. App. 4th 549, 569, 6 Cal. Rptr. 3d 746, 763.) The zoning amendments create new obligations and impose new duties. They do so without the required due process to our clients and others with property interests to protect. For these reasons, the Board of Supervisors should reject the amendments.

- **The Required Consistency Findings Cannot be Made.** The Board of Supervisors is required to make General Plan consistency findings before it can recommend enactment of the proposed zoning ordinance amendments. These findings of consistency simply cannot be make on these facts and this record:

    - **The Amendments are Inconsistent with Good Planning Practices.** One such finding requires the Board of Supervisors to confirm that the proposed amendments represent good planning practices. In support, the Board is referred to an earlier Staff Report that states: "The zoning amendments represent good zoning practice because they would implement a single, uniform permitting and environmental review process for all new oil and gas development that is expected to result in a more consistent decision-making process that is also more protective of both public health and environmental resources." This justification is specious; the Ventura zoning code already offers a single, uniform permitting and environmental review process for all new development. The more relevant question for consistency with good planning practice is whether the zoning amendments follow established precedent and the relevant law in their treatment of vested rights. They do not. "The rights of the users of property as those rights existed under prevailing zoning conditions are well recognized and have always been protected." (*McCaslin v. City of Monterey Park* (1958) 163 Cal. App. 2d 339, 329 P.2d 522; 66 Cal. Jur. 3d Zoning And Other Land Controls § 266.) Because the zoning amendments chart a

planning path that is at odds with recognized best planning practices and that is fraught with serious constitutional and case law questions, it cannot be concluded that they are consistent with good planning practice.

- **The Amendments are Inconsistent with the General Plan.** Another mandatory finding requires the Board to conclude that the proposed zoning ordinance amendments are consistent with the goals, policies and programs of the updated Ventura County General Plan. In support, a consistency analysis is provided as Exhibit 36 to the Board letter for the non-coastal zoning amendments. **However, this analysis concludes that the opposite finding may well be true.** Among other things the County's own consistency analysis states: "The potential economic impacts associated with the proposed zoning amendments are not known given the numerous variables associated with the oil and gas industry's potential future development plans which are not known to the County and are driven in large part by global oil prices. Nevertheless, based on these potentially negative economic ramifications, the proposed zoning ordinance amendments could be considered inconsistent with Policies EV-3.1 and 3.3. In summary, by applying a discretionary permit approval and environmental review process to certain new oil and gas development proposals that at present require a ministerial permit and no environmental review, the zoning ordinance amendments would slow and/or reduce the potential expansion of certain new local oil and gas development which in turn could negatively impact this economic sector and its employment base."

- **The Claimed CEQA Exemption is Unsupported.** In order to adopt the non-coastal zoning amendments, staff has acknowledged in its letter to the Board that the Board must comply with the California Environmental Quality Act ("CEQA"). The Planning Department has proposed that it can comply by claiming a categorical exemption from CEQA to which no special circumstances apply. However, the claimed exemption cannot be used in this case on this record. Categorical exemptions from CEQA must be narrowly construed: "Because the exemptions operate as exceptions to CEQA, they are narrowly construed." (*Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 793, 124 Cal.Rptr.2d 731.) "Exemption categories are not to be expanded beyond the reasonable scope of their statutory language." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125, 65 Cal.Rptr.2d 580, 939 P.2d 1280.) If the project is not exempt – either because it does not fall within an exempt category or because an exception makes the exemption unavailable – then the agency must conduct an initial study, to be followed by the appropriate environmental document. (*San Lorenzo Valley Cmty. Advocates for Responsible Educ. v. San Lorenzo Valley Unified Sch. Dist.* (2006) 139 Cal. App. 4th 1356, 1373, 44 Cal. Rptr. 3d 128, 139; *CEQA Guidelines* 14 CCR § 15063.)

  In this case, planning staff claims use of the Class 8 exemption for "actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance,

restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment." (*CEQA Guideline*s 14 CCR § 15308.) For support, staff offers this conjecture, "By requiring discretionary approval for all new oil and gas development, the project will enable the County to achieve the five major objectives of CEQA: (1) study and disclose potential environmental impacts; (2) prevent or reduce environmental damage; (3) disclose and provide reasoning for County permitting decisions; (4) promote interagency coordination; and (5) encourage public participation." But broad conjecture is not what is required to authorize use of the Class 8 exemption. To use the claimed categorical exemption, the County must "marshal substantial evidence" to support the conclusion that the zoning amendments fall within the exemption. (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115, 62 Cal.Rptr.2d 612.) No such evidence has been offered by the County. The County has not considered or assessed the negative impacts to the environment that may result from the amendments, including, for example, the transportation, natural resource, air quality, greenhouse gas and other impacts attendant replacing local oil and gas with outsourced, imported, less strictly regulated oil and gas. Because the County has made no effort to marshal evidence that the zoning amendments will protect the environment, and has therefore offered us no chance to scrutinize or rebut that evidence, the exemption cannot be employed. The necessary finding of compliance with CEQA cannot be made.

- **The Amendments are Impermissibly Segregated from Integrally Related Actions.** As you know, in September 2020, following the time of the Planning Commission's recommendation on the proposed zoning ordinance amendments, you adopted an update to the County's General Plan, together with its accompanying EIR. The General Plan Update and EIR also addressed the County's oil and gas permitting regimen, but inexplicably stopped short of surfacing and considering these integrally related zoning amendments, which had already been fully fleshed out and acted upon by the Planning Commission. We cannot understand why you would act on two such integrally related matters on two separate tracks, separated only by a period of a few weeks.

  In your November 10, 2020 agenda item 34, your Board proposes to double-down on this piecemealing of integrally related actions. Agenda item 34 recommends that the "Board establish a policy of limiting new discretionary oil and gas facility/operations to a fifteen year time period, with the exception of permits for reclamation activities." As with the separation of the General Plan Update and EIR from the instant amendments, this additional de-coupling appears to reflect only gamesmanship – designed to deprive the public of transparency and an opportunity to understand and participate in the breadth of your proposed actions, from a policy perspective and most especially with CEQA in mind.

  The CEQA rubric for the postponement and separation of actions that are essential to understanding and evaluating both the zoning amendments and the General Plan Update/EIR

is commonly described as piecemealing. "CEQA forbids 'piecemeal' review of the significant environmental impacts of a project." (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs*. (2001) 91 Cal.App.4th 1344, 1358, 111 Cal.Rptr.2d 598.) Agencies cannot allow "environmental considerations [to] become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences." (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284, 118 Cal.Rptr. 249, 529 P.2d 1017; see also *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal. App. 4th 1209, 1222, 150 Cal. Rptr. 3d 591, 601.)

We submit that it is improvident, and a violation of law, for the zoning amendments to be stripped from the General Plan Update/EIR process and now from the fifteen-year permit constraint. That separation from the instant effort deprives us of an informed review of the totality of what was before you, is before you now, and will be before you shortly.

***

We respectfully request that you engage the legal expertise necessary to answer the serious vested rights and CEQA questions raised in this letter. To be sure, County Counsel has vacillated in its opinion, which should not give you confidence. Our clients and we join in the comments that you have received and will receive in opposition to the proposed zoning amendments in this matter, including the letters from ABA Energy, Aera Energy, California Resources Corporation, Carbon California, Ventura County Coalition of Labor, Agriculture and Business, and the Western States Petroleum Association. We hope that you will refrain before plunging the County into litigation, which is the likeliest outcome from the ill-conceived recommendations before you.

We reserve all rights to identify and provide additional comments to you in this matter, and we thank you for your consideration of our remarks.

Very truly yours,

Jane Ellison Usher
for MUSICK, PEELER & GARRETT LLP

cc: Laura K. McAvoy, Esq., Musick Peeler & Garrett

1247385.1