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December 17, 2019

Mike Feuer
Los Angeles City Attorney
James K. Hahn City Hall East, Suite 800
Los Angeles, CA 90012

RE: Los Angeles City Authority for Setback from Oil and Gas Operations

Dear Mr. Feuer:

On behalf of the Los Angeles Neighborhood Land Trust (the "Neighborhood Land Trust"), we are writing to convey our strong support for an ordinance establishing a health and safety buffer around oil and gas operations in the City of Los Angeles (the "City"). The Frank G. Wells Environmental Law Clinic at UCLA School of Law provides outside legal assistance to organizations such as the Neighborhood Land Trust on a range of legal and policy matters. Based on our review of both a recent report from the Los Angeles Petroleum Administrator (the "Petroleum Administrator"), analyzing the fiscal impacts of implementing a proposed setback from oil and gas operations (the "Report"), and a letter previously submitted to your office by the Natural Resources Defense Council, Communities for a Better Environment, and the Center for Biological Diversity (the "Letter"),[1] and in light of our experience working in environmental justice communities, we believe a 2,500-foot buffer zone around oil and gas operations is within the City's legal authority and is critical for protecting the health of Los Angeles residents.

As a community-based, nonprofit park developer, the Neighborhood Land Trust builds and activates greenspaces in the City and advocates for healthy, sustainable land uses. Since 2002, the Neighborhood Land Trust has built 27 parks and community gardens throughout Los Angeles County. Many of the Neighborhood Land Trust's project sites are former vacant lots and brownfields, which has allowed the Neighborhood Land Trust to develop an expertise around transforming polluted land into healthy and sustainable community spaces. The impacts of these parks and gardens extend beyond the site by benefitting and revitalizing communities. Access to greenspace improves physical and mental health and builds community.[2] As a recent study by UCLA's Institute of the Environment and Sustainability found, "[n]earby park space is associated with lower risk of circulatory and cardiovascular disease, lower overall risk of death,

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[1] Please see attached for a copy of the Letter, dated September 4, 2019 and sent by attorneys Joel Reynolds and Damon Nagami (Natural Resources Defense Council), Katherine Hoff (Communities for a Better Environment), and Maya Golden-Krasner (Center for Biological Diversity).

[2] Kathleen L. Wolf, *The Health Benefits of Small Parks and Greenspaces*, Parks & Recreation Mag. (Apr. 3, 2017), *available at* https://www.nrpa.org/parks-recreation-magazine/2017/april/the-health-benefits-of-small-parks-and-green-spaces/.

and better general health."[3] Greenspace also improves environmental conditions and promotes climate resiliency by sequestering carbon, filtering air pollutants, and mitigating the urban heat island effect.[4]

Conversely, oil and gas activities are notorious for polluting the environment and for negatively impacting public health.[5] Oil and gas activities are correlated with higher rates of asthma, sinus problems, eye burning, severe headaches, loss of sense of smell, persistent cough, and nose bleeds, among other longer-term health impacts.[6] Oil and gas operations also produce volatile organic compounds that interact with other chemicals to create ground-level ozone, which contributes to climate change.[7] These health and environmental impacts are most severe in Los Angeles' low-income communities and communities of color, which are subject to pollution from many sources, including oil and gas activities.[8]

A 2,500-foot buffer for oil and gas activities would significantly improve public health and environmental conditions in Los Angeles, and it is squarely within the City's power to enact an ordinance establishing a buffer. Land use regulation is a key function of local government, and similar regulations have been affirmed by the California Supreme Court in a number of decisions discussed in the Letter and below.

We echo the legal points raised in the Letter, and we similarly support establishing a health and safety buffer around oil and gas production operations in Los Angeles. As explained below, we believe that such a setback ordinance would not give rise to a significant risk of valid due process or takings claims from oil and gas production operators located within the buffer zone. We urge the City to adopt an ordinance establishing a 2,500-foot buffer around oil and gas operations, along with a reasonable amortization period of five years, in order to protect the public health and safety of Los Angeles residents.

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3 Jon Christensen et al., *California State Parks: A Valuable Resource for Youth Health*, UCLA Inst. of the Env't & Sustainability, at 4, https://www.ioes.ucla.edu/wp-content/uploads/UCLA-report-on-California-State-Parks-and-Youth-Health.pdf (last visited Nov. 25, 2019).

4 *See Urban Green Spaces*, World Health Org., https://www.who.int/sustainable-development/cities/health-risks/urban-green-space/en/ (last visited Nov. 25, 2019); *see also* Taj Schottland, *Parks as a Climate Solution*, The Trust for Public Land (2018), *available at* https://www.tpl.org/sites/default/files/files_upload/Climate-Smart%20Cities%20Report_GCAS%20report%202018_R6.pdf.

5 *See* Nicole J. Wong, *Existing Scientific Literature on Setback Distances from Oil and Gas Development Sites*, STAND-L.A. (Nov. 2017), *available at* https://www.stand.la/uploads/5/3/9/0/53904099/2500_literature_review_report-v2-share.pdf.

6 *See* Bhavna Shamasunder et al., *Community-Based Health and Exposure Study around Urban Oil Developments in South Los Angeles*, 15 INT'L J. ENVTL. RES. & PUB. HEALTH 138 (2018), *available at* https://www.ncbi.nlm.nih.gov/pubmed/29342985; Seth B.C. Shonkoff & Lee Ann L. Hill, *Human Health and Oil and Gas Development: A Review of the Peer-Reviewed Literature and Assessment of Applicability to the City of Los Angeles*, Physicians, Scientists, & Eng'rs for Healthy Energy (May 9, 2019), *available at* https://www.psehealthyenergy.org/wp-content/uploads/2019/08/Literature-Review.pdf.

7 *See* Wong, supra note 5; *see also Technical Overview of Volatile Organic Compounds*, U.S. Envtl. Prot. Agency, https://www.epa.gov/indoor-air-quality-iaq/technical-overview-volatile-organic-compounds (last visited Nov. 25, 2019); *Ground-Level Ozone Basics*, U.S. Envtl. Prot. Agency, https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics (last visited Nov. 25, 2019).

8 *See* Matthew Rodriquez & Lauren Zeise, *Update to the California Communities Environmental Health Screening Tool*, Cal. Envtl. Prot. Agency & Office of Envtl. Health Hazard Assessment (Jan. 2017), *available at* https://oehha.ca.gov/media/downloads/calenviroscreen/report/ces3report.pdf.

I. A health and safety buffer for oil and gas production operations is within the City's authority pursuant to its inherent local police powers

The Report recently issued by the Petroleum Administrator analyzes, among other topics, the environmental and human health impacts from oil and gas drilling, applicable regulatory authority over oil and gas sites in the City, and the potential economic and fiscal impacts of establishing a distance setback from oil and gas operations. However, the Report does not take the position that a health and safety buffer to protect against public health impacts would fall outside of the authority of local governments or would be preempted by state law. Rather, the Report notes that a setback "would need to be based on the City's land use zoning codes."[9] We agree that the City possesses the authority and legal tools to enact such a buffer ordinance.

Article XI, section 7 of the California Constitution reserves all police powers to local governments. This police power is broadly applicable, "as broad as the police power exercisable by the Legislature itself."[10] Zoning and other land use controls, reasonably related to the health, safety, and general welfare of the public, fall squarely within these local police powers.[11] Furthermore, specifically with respect to oil and gas operations, the California Supreme Court long ago found it to be "well settled" that an ordinance limiting a property owner's interest in oil-bearing lands "is not of itself an unreasonable means of accomplishing a legitimate objective within the police power of the city."[12] Accordingly, the City maintains the authority to pass a land use ordinance that adopts a health and safety buffer of 2,500 feet from oil and gas operations, in order to protect surrounding communities from unreasonable health impacts.

II. A buffer zone does not implicate vested rights and would not subject the City to valid vested rights claims

The Report does not address whether any operator within the proposed 2,500-foot health and safety buffer would be able to demonstrate the existence of vested rights that would allow the operator to continue its oil and gas operations despite the implementation of a buffer ordinance. In fact, it is not at all clear that holders of mineral rights all possess vested rights in their continuing operations, much less in expanding those operations. Moreover, the City may, through amortization, still phase out oil and gas production operations within the City even if operators did possess vested rights for their operations.

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9 Report at 118.

10 *Candid Enters., Inc. v. Grossmont Union High Sch. Dist.*, 39 Cal. 3d 878, 885 (1985).

11 *See, e.g.*, *Fonseca v. City of Gilroy*, 148 Cal. App. 4th 1174, 1181 (2007); *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1151-52 (2006) (noting the "well entrenched" local authority to zone land use and that any ordinances pursuant to that authority should be favored and presumed valid) (citation omitted).

12 *Beverly Oil Co. v. City of Los Angeles*, 40 Cal. 2d 552, 558 (1953); *see also Pac. Palisades Ass'n v. City of Huntington Beach*, 196 Cal. 211, 216-17 (1925) (cities have the right to regulate oil well operations in a reasonable manner); *Marblehead Land Co. v. City of Los Angeles*, 47 F.2d 528, 531 (9th Cir. 1931) (zoning laws seeking to protect residents from safety hazards resulting from drilling operations are a valid exercise of local police powers); *Higgins v. City of Santa Monica*, 62 Cal. 2d 24, 28 (1964) (upholding an ordinance prohibiting oil exploration and drilling in the Santa Monica tidelands); *Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach*, 86 Cal. App. 4th 534, 555 (2001) (holding that an adopted measure banning oil drilling and production in a densely populated urban area to preserve the environment and protect public health is "presumptively a justifiable exercise of the City's police power").

First, establishing the existence of vested rights requires a showing that the operator obtained all necessary permits for its oil and gas production operations, expended substantial hard costs in good faith in reliance on those permits, and has actually performed substantial work to further those operations.[13] As discussed further below, the Petroleum Administrator's analysis of the fiscal impact of a setback ordinance appears to be based on an assumption that the City must provide compensation for the value of all existing oil deposits; because many holders of mineral rights do not have vested rights to remove all these minerals, the Report mischaracterizes the relationship between the vested rights doctrine and the City's obligations.

Second, where an operator can establish the existence of vested rights, those rights may be "impaired or revoked" if the activities subject to the vested rights "constitute[] a menace to the public health and safety or a public nuisance."[14] As the Report establishes, there are numerous public health and safety impacts from oil and gas operations in the City, providing justification for revoking vested rights where appropriate and necessary.

Third, vested rights also do not grant an operator the authority to continue those operations indefinitely. Rather, as the Letter points out, rights may be lawfully terminated following a reasonable amortization period that would allow the operator to recover a reasonable return on its investment before phasing out operations entirely. The Report does not address an amortization period as part of a setback ordinance, which necessarily means that the Petroleum Administrator assumed that a setback ordinance would *not* include such an amortization period. The failure of the Petroleum Administrator to consider an amortization period as part of a setback ordinance calls into question the Petroleum Administrator's assessment of the fiscal impacts of such an ordinance. Moreover, as the Letter correctly notes, many oil and gas development operators in the City may have already recovered a reasonable return on their investments into their industrial activities. Nevertheless, a setback ordinance that did include a reasonable amortization period would sharply limit the City's liability for vested rights claims.

In summary, there is no basis to assume broadly that vested rights claims from oil and gas operators in the City would be successful in response to a setback ordinance imposing a 2,500-foot health and safety buffer with a reasonable amortization period.

III. An ordinance establishing a buffer zone would not constitute a regulatory taking

The Report assumes that any setback ordinance adopted by the City would be subject to takings challenges by oil and gas operators, under both the United States Constitution and the California Constitution.[15] The Report further assumes that operators might be successful in any such lawsuits, noting that the City could be exposed to "major liability" if operators were to prevail, in the sense that the City would be liable for damages constituting "the present value of the lost profits from the oil and gas that would no longer be recovered in these fields."[16] The Report

13 *Avco Cmty. Devs., Inc. v. S. Coast Reg'l Comm'n*, 17 Cal. 3d 785, 791 (1976).

14 *Davidson v. County of San Diego*, 49 Cal. App. 4th 639, 649 (1996) (internal quotation marks and citation omitted).

15 Report at 118.

16 *Id.* at 124-25.

ultimately concludes that the upper limit of liability resulting from takings litigation—assuming every operator is successful and recovers the full amount of the future value of the 1.6 billion barrels of recoverable oil and gas that would be affected by a 1,500-foot setback from sensitive receptors—could be as high as $97.6 billion.[17]

Despite the concerns raised in the Report, it is unlikely that a setback ordinance would give rise to successful regulatory takings claims. Courts assess the impact of a regulation on a case-by-case basis, and a per se regulatory taking occurs where a regulation deprives a property owner of all economic use of its land.[18] It has been "long established" that there is no per se taking as a result of a "mere diminution in the value of property, however serious."[19] Accordingly, landowners have an "uphill battle" when bringing a takings claim in response to a regulation or ordinance restricting a portion of the allowable uses of that land.[20]

As the Letter properly analyzed, takings claims brought by oil and gas production operators in the City would generally not be successful if the operators merely assert that a setback ordinance severely diminishes the value of their land. To the extent that operators would argue that a setback ordinance interferes with their reasonable investment-backed expectations, such an argument would rest upon the assumption that the operators should be guaranteed to continue their extractive activities to collect future profits. But as the Supreme Court has explained, "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim."[21] Furthermore, oil and gas activities are already subject to numerous and stringent regulations, which are amended frequently as new information is uncovered about the negative impacts and consequences of those activities. As a result, operators cannot reasonably expect to recover guaranteed profits from indefinitely continuing their current activities. Lastly, as noted above, the Report listed a variety of scientific and human health findings confirming that oil and gas development operations produce negative impacts that are severe enough to label those operations as a public nuisance. Courts generally disfavor takings claims when the aim of the regulation at issue is to protect public health and safety,[22] and state

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17 *Id.* at 128, 146-47.

18 *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992); *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (emphasizing that the rule applies only in the rare case where a regulation leaves a property with no use or value at all); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978) (explaining that courts faced with a regulatory taking challenge should consider "[t]he economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," "the character of the governmental action," and whether the land-use regulations prohibit a particular use of land to promote "the health, safety, morals, or general welfare," among other factors).

19 *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993).

20 *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *see also San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643, 673 (2002) (noting the "minimum showing" required to establish a facial challenge to a statute's constitutionality as encompassing a demonstration that the ordinance violates due process "in the generality or great majority of cases") (emphasis removed).

21 *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

22 *See, e.g., Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1350-51 (Fed. Cir. 2004) (the exercise of "police power directed at protecting the safety, health, and welfare" of communities surrounding the landowner's property is "the type of governmental action that has typically been regarded as not requiring compensation for the burdens it imposes on private parties who are affected by the regulations") (internal quotation marks omitted) (quoting *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1352 (Fed.Cir. 2001)); *Maritrans Inc. v. United States*, 342 F.3d 1344, 1356 (Fed. Cir. 2003) ("The character of the governmental action factor requires a court to consider the purpose and importance of the public interest underlying a regulatory imposition, by obligating the court to

property and nuisance law remains applicable even in the face of a takings claim, including the doctrine that there is no property right in maintaining a nuisance.[23]

As detailed in the Letter, even if some operators could successfully mount a takings challenge to a setback ordinance, the Report grossly overstates the remedy as constituting damages equivalent to the value of the recoverable oil and gas in its entirety. Rather, as the Letter explains, if a setback ordinance were to incorporate an amortization period, even a successful takings claim may warrant only an extended amortization period, without requiring the City to provide any financial compensation.[24] Because the Report failed even to mention the possibility of an amortization period as part of a setback ordinance, the Petroleum Administrator's conclusions in the Report regarding takings claims are legally flawed and incomplete.

IV. The Petroleum Administrator's calculation of projected costs of a setback ordinance is legally indefensible and grossly inflated

The Report provides an analysis of the potential fiscal impact to the City following the implementation of a setback ordinance throughout the City.[25] The Report sets forth the following conclusion:

> The estimated potential cost to the City of establishing a setback distance on existing operation is $724 million, which includes the minimum value of the current oil production, land value costs, well abandonment costs, environmental clean-up costs, and five years of litigation expenses. It may be lower if the sites are not cleaned up, wells stay unplugged, and the City is successful in the court systems. The estimated potential cost to the City of establishing a future setback distance could be as high as $97.6 billion in compensation for the future value of mineral rights owed from takings litigation.[26]

'inquire into the degree of harm created by the claimant's prohibited activity, its social value and location, and the ease with which any harm stemming from it could be prevented.'") (quoting *Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir. 1994)).

23 *See Lucas*, 505 U.S. at 1029 (a regulation that deprives a landowner of all economically beneficial uses is a taking unless the regulation "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership"); *see also Appolo Fuels*, 381 F.3d at 1347 ("It is a settled principle of federal takings law that under the *Penn Central* analytic framework, the government may defend against liability by claiming that the regulated activity constituted a state law nuisance without regard to the other *Penn Central* factors.") (citations omitted).

24 *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987) ("Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain."); *Hensler v. City of Glendale*, 8 Cal. 4th 1, 11 (1994) (a government found to have committed a regulatory taking "has the option of exempting the property from the ordinance or regulation, or even repealing the ordinance as an alternative to paying compensation for a permanent taking"), *as modified on denial of reh'g* (Sept. 22, 1994).

25 Report at 118-30.

26 *Id.* at 128; *see also id.* at 146-47 (concluding that a surface setback ordinance could cost up to $97.6 billion in lost property values for landowners and could require the City to pay the same amount in constitutional takings claims for future oil and gas development impacted by the setback).

Based on the above legal analysis, the Report's estimates of the potential costs are not only grossly inflated but are also legally indefensible.

A. The Report improperly assumes that every oil and gas operator in the City will file a takings claim in response to a setback ordinance

The Report calculates the value of crude oil reserves within the City limits by taking the estimated 1.6 billion barrels of additional oil that is recoverable with existing technology and multiplying that number by the estimated $59 per barrel and factoring in a projected 6% rate of return for the oil industry in 2019, bringing the total future value of recoverable petroleum reserves to $97.6 billion.[27] The Report then uses this number as the upper limit of costs the City may have to pay oil and gas production operators to compensate them for the future value of their mineral rights following takings litigation.[28] Moreover, the Report relies on analysis from the Assembly Appropriations Committee regarding the fiscal impacts of a 2,500-foot setback ordinance, in which the Committee concluded that such a setback would require the City to expend at least $1 million per year to defend against takings litigation.[29] Inherently, these conclusions in the Report depend on the assumptions that (1) every operator will bring a lawsuit seeking compensation for a taking following the adoption of a setback ordinance, and (2) every operator would be successful in such a lawsuit and would be entitled to compensation in the full amount of their mineral rights.

These assumptions have no factual support and are not a reasonable projection of expected litigation activity following the implementation of a setback ordinance. For the reasons explained above and in the Letter, it is highly likely that the vast majority of operators would not succeed in takings litigation. Even if there were some successful takings claims, the City's financial liability may be quite limited. We concur with the recommendation in the Letter that the City should adopt a setback ordinance that provides for a reasonable amortization period of five years for all operators. Under such an ordinance, the City could extend the amortization period for particular operators that can successfully establish a regulatory taking, rather than paying monetary damages to those operators. Ultimately, the Petroleum Administrator cannot reasonably assess the City's potential liability without providing both a good faith evaluation of the realistic likelihood of success for anticipated takings challenges and a proper assessment of the available remedies.

B. There is no basis to support the conclusion in the Report that the City would be responsible to bear well abandonment and cleanup costs

The Report calculates that oil well abandonment could cost the City up to $321 million.[30] To arrive at this figure, the Report states that wells located at a drill site, approximately 725 within the City, would cost about $250,000 each to abandon, and the approximately 375 wells located on non-drill sites would cost $375,000 to abandon.[31] The Report does not explain why the City

27 *Id.* at 125-26.
28 *Id.* at 128.
29 *Id.* at 127-28.
30 Report at 126-27.
31 *Id.* at 126.

would be responsible to pay for the abandonment cost for each well, but the Report notes that the abandonment cost "would be an item of dispute" in litigation or would be the City's obligation if the operator declared bankruptcy.[32] Furthermore, the Report calculates that environmental remediation and cleanup could cost the City up to $150 million, relying upon an isolated example of cleanup costs for a well in Beverly Hills after the operator declared bankruptcy to conclude that cleanup could cost $6.25 million per acre of drill sites.[33]

First, pursuant to California regulations, operators are responsible to plug and abandon wells and must obtain permits to do so.[34] Thus, the default position—not articulated in the Report—is that the operator is responsible for the costs of ceasing its oil drilling operations, not the City.

Second, the Report appears to assume, in its high-end estimate of $321 million, that every single operator would be successful in a takings claim following the enactment of a setback ordinance and would receive compensation for the cost of cleanup and abandonment. Again, per the above, such an assumption is baseless and indefensible given the high likelihood that takings challenges would not succeed or, if successful, would not require the City to compensate the operator.

Third, the Report does not provide any assessment of the likelihood that operators would become bankrupt in the aftermath of a setback ordinance. Many of these operators maintain oil and gas production operations outside of the City as well, so it is highly unlikely that all operators would declare bankruptcy and avoid having to pay for abandonment and cleanup. Besides, the Letter correctly explained that when an operator is found to be financially insolvent, it is the burden of the state—not local governments—to plug and abandon wells. Thus, the fiscal impact of cleanup and abandonment would not be borne by the City alone, if at all. And in any event, oil wells within the City will be abandoned and cleaned up eventually, whether or not the cleanup would be subject to a shorter-term timeline pursuant to a setback ordinance with an amortization period. Therefore, as the Letter correctly notes, the fiscal costs of cleanup and abandonment cannot fairly be attributed solely to a setback ordinance, which merely accelerates the timeline that those costs are incurred.

Lastly, the Report's calculation of cleanup costs does not take into account certain cleanup initiatives and policies the City can include as part of a setback ordinance or otherwise. We agree with the Letter that the City should strive to make all oil and gas production operators responsible for the cleanup costs of their own industrial activities, rather than imposing those costs on the public in addition to the harmful externalities of oil and gas activities already borne by City residents.

C. The Report fails to address the financial benefits of a setback ordinance

Finally, as the Letter explains, the Report does not attempt to assess the financial *benefits* to the City and its residents from a setback ordinance, which are far from negligible. Shutting down oil and gas development activity within the setback distance would protect numerous communities

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32 *Id.* at 127.

33 *Id.*

34 *See* 14 C.C.R. § 1714 (operators must obtain written approval prior to plugging and abandoning wells); *id.* § 1723 (providing operational requirements for methods to plug and abandon wells).

from continued exposure to human health impacts and air and water pollution, thereby reducing health care costs for many Los Angeles residents. The elimination of industrial activity would decrease traffic, reduce noise and light pollution, and reduce greenhouse gas emissions. The aggregate benefits from a setback ordinance would be immense and would more than offset any financial costs incurred in implementing the ordinance and phasing out nonconforming uses within the setback distance. The Petroleum Administrator did not address any of these benefits in the Report—a particularly glaring oversight since these benefits would be the justification for adopting a setback ordinance in the first place.

In conclusion, not only does the Report grossly inflate the expected financial costs of implementing the setback ordinance, but the Report fails even to mention the long-term financial benefits to the City from such an ordinance. Therefore, the Report's fiscal analysis of the proposed setback ordinance is inaccurate and incomplete.

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V. Conclusion

In order to protect the health of Los Angeles' most vulnerable residents and our local environment, we ask the City of Los Angeles to exercise its authority to support a 2,500-foot setback for oil and gas activities. A setback ordinance establishing a health and safety buffer of 2,500 feet from sensitive receptors for oil and gas production operations is legally defensible as within the City's authority under the California Constitution and decades of case law, and such an ordinance is unlikely to expose the City to significant liability from vested rights or takings claims. The Report grossly exaggerated the potential fiscal impact of a setback ordinance through unreasonable and incomplete assumptions, and the Report failed to account for the substantial financial benefits that the City would receive from the termination of industrial activities within the buffer zone. We urge the City to adopt a setback ordinance to protect Los Angeles residents from ongoing and severe human health impacts from oil and gas production within the City.

Sincerely,

Sean B Hecht

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Frank G. Wells Environmental Law Clinic

Tori Kjer, PLA
Executive Director
Los Angeles Neighborhood Land Trust

Benjamin Harris
Attorney and Shapiro Fellow
Frank G. Wells Environmental Law Clinic

Beth Kent

Beth Kent, Esq.
Policy and Legal Fellow
Los Angeles Neighborhood Land Trust

CC: Mayor Eric Garcetti, Office of the Petroleum Administrator, Members of the City Council

Attachment

September 4, 2019

Mike Feuer
Los Angeles City Attorney
James K. Hahn City Hall East, Suite 800
Los Angeles, CA 90012

Cc: Mayor Garcetti, Petroleum Administrator Uduak-Joe Ntuk, Members of the City Council

RE: Los Angeles City Authority for Setback from Oil and Gas Operations

Dear Mr. Feuer:

We write to express our support for an ordinance establishing a health and safety buffer zone around oil and gas production operations in Los Angeles, and we write to voice our strong objections to some of the legal assumptions underlying the Petroleum Administrator's recently published report. Based on the legal analysis summarized below, it is our belief that a buffer zone is squarely within the law and would not subject the City to the grossly exaggerated financial liability assumed in the report. We urge the City Attorney to support a 2,500-foot buffer to protect communities in Los Angeles.

The City has the authority to pass an ordinance regulating where and when oil and gas production operations occur

California courts have long recognized the power of Los Angeles County localities to regulate oil and gas.[1] Land use regulation in California historically has been a function of local government under article XI, section 7 of the California Constitution, which reserves the police power to local governments.[2] The Supreme Court of California has declared that local governments' ability to enact land use zoning regulation is "well entrenched" and in enacting land use zoning ordinances "every intendment is in favor of the validity of such ordinances."[3] The California Supreme Court has also held that it is "well settled that the enactment of an ordinance which limits the owner's property interest in oil bearing lands located within the city is not of itself an unreasonable means of accomplishing a legitimate objective within the police power of the city."[4] Here, the enactment of a buffer zone to protect the health and safety of Angelenos is a reasonable regulation based in scientific evidence about the health impacts of oil drilling and falls well within established law on the authority of the city to regulate.

A buffer zone ordinance would not expose the City to excessive vested rights claims

A property owner may obtain a "vested right" to undertake land uses if the operator has obtained all necessary permits to complete the work, expended substantial hard costs in good faith reliance on those permits, and in fact performed substantial work.[5] However, vested rights may be "impaired or revoked"

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[1] See *Beverly Oil Co. v. City of Los Angeles*, 40 Cal. 2d 552 (1953); *Pac. Palisades Ass'n v. City of Huntington Beach*, 196 Cal. 211 (1925); *Marblehead Land Co. v. City of Los Angeles*, 47 F.2d 528, 534-535 (9th Cir. 1931); *Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach*, 86 Cal. App. 4th 534, 540 (2001); *Higgins v. City of Santa Monica*, 62 Cal.2d 24 (1964).
[2] Cal. Const., art. XI, § 7; *Big Creek Lumber Co. v. Cty. of Santa Cruz*, 38 Cal. 4th 1139, 1151 (2006), *as modified* (Aug. 30, 2006).
[3] *Big Creek Lumber Co. v. Cty. of Santa Cruz*, 38 Cal. 4th 1139, 1152 (2006), *as modified* (Aug. 30, 2006) (citations omitted).
[4] *Beverly Oil Co. v. City of Los Angeles*, 40 Cal. 2d 552, 558 (1953).
[5] *Avco Community Developers, Inc. v. South Coast Reg'l Com.*, 17 Cal.3d 785, 791 (1976).

for activities "constitut[ing] a menace to the public health and safety or a public nuisance."[6] And even where a property owner can show a vested right, those rights can be terminated without violating due process if the government agency provides a reasonable phase-out — or amortization — period, during which the holder may continue operations to recoup a reasonable return on its investment.[7] A "reasonable" amortization period is determined by weighing the public gain from removing the nonconforming use against the private loss entailed.[8] Further, an amortization period is reasonable if the original investment in the nonconforming use has been recovered.[9] Here, many oil and gas operators, even if they establish a vested right, have operated for decades, have recouped their costs many times over, and may not require any amortization. And the buffer zone clearly serves a strong public purpose in protecting the health and safety of Angelenos.

A buffer ordinance would not constitute a regulatory taking

Facial takings claims would likely be unsuccessful[10] and categorical takings claims would be unlikely to succeed because the buffer zone regulation would not deprive property owners of all economic use of their land.[11] Courts look at regulatory takings claims on a case-by-case basis.[12] However, even under the *Penn Central* test, which courts use to evaluate regulatory takings claims where a property's value is impaired by a regulation, takings claims would likely fail. First, even if a property's value is severely diminished, that in itself would not be enough to support a takings claim.[13] Second, investors would likely be unsuccessful in arguing that there is a taking under the reasonable investment-backed expectations prong of the test because the law does not support a guarantee of future profits.[14] Moreover, oil and gas is a heavily regulated industry and a volatile one, such that it is unreasonable for property owners to expect guaranteed profits for the long term.[15] And third, the character of the

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[6] *Davidson v. County of San Diego*, 49 Cal.App.4th 639, 650 (1996).

[7] *Metromedia, Inc. v. San Diego*, 26 Cal.3d 848, 882 (1980). *See also National Advertising Co. v. County of Monterey*, 1 Cal.3d 875, 879 (1970); *City of Los Angeles v. Gage*, 127 Cal.App.2d 442, 460 (1954); *United Bus. Com. v. City of San Diego*, 91 Cal.App.3d 156, 180 (1979) (reasonable amortization period satisfies due process requirements); *Livingston Rock and Gravel Co. v. Los Angeles*, 43 Cal.2d 121, 126-28 (1954).

[8] *Metromedia, Inc. v. City of San Diego* 26 Cal.3d 848, 882-83 (1980), *rev'd on other grounds,* 453 U.S. 490 (1981).

[9] *See National Advertising Co. v. County of Monterey*, 1 Cal.3d 875, 880 (1970) (upholding period for signs fully amortized and extending it where costs were not yet recovered).

[10] In *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 495 (1987), the U.S. Supreme Court explained that takings claims must be evaluated based on "the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances" associated with a specific parcel; for this reason, plaintiffs "face an uphill battle in making a facial attack on [a regulation] as a taking." *See also San Remo Hotel L.P. v. City and County of San Francisco,* 27 Cal.4th 643, 673 (2002).

[11] *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1018. *See also Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330 (2002) (emphasizing that the rule applies only in the rare case where a regulation leaves a property with no use or value at all).

[12] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

[13] *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (holding that cases "have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."). *See also Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (finding a 92.5 percent diminution in value was not a taking); *William C. Hass & Co. v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (reduction in value from $2 million to $100,000 was not a taking).

[14] *See Andrus v. Allard*, 444 U.S. 51, 66 (1979) (holding that "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.").

[15] *MHC Fin. L.P. v. City of San Rafael*, 714 F.3d 1118, 1128 (9th Cir. 2013) (holding that"'[T]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the

government action[16] does not support a takings claim because this regulation's aim is to protect human health and safety from nearby oil and gas operations. Finally, courts will decline to find a taking if the restricted activity is found to be a nuisance.[17] Nevertheless, even if an as-applied takings challenge were successful, the remedy in most instances would be for the City to extend the amortization period. Indeed, in instances where the regulation included a reasonable amortization period, courts have concluded no taking occurred.[18] It is very unlikely the City would be required to provide any compensation, let alone the extreme amounts advanced in the Petroleum Administrator's report.[19]

The costs of passing a setback ordinance

Based on the legal analysis above, we find the projected setback ordinance costs of the recently published City Petroleum Administrator report to be grossly exaggerated and inaccurate. The costs of passing a setback ordinance fall into two main categories: well abandonment and cleanup, and litigation costs and potential claims.

As to well abandonment and cleanup, the cost estimate in the report is significantly inflated. For example, it is unclear why the report appears to assume—based apparently on a single example in Beverly Hills—that it would be solely the City's responsibility to pay for well abandonment. Operators are required to properly abandon their wells.[20] In the event an operator becomes financially insolvent, responsibility for plugging and abandoning wells often falls to the state.[21] Moreover, regardless of whether it happens in five years or twenty years, all of the existing wells and drill sites will need to be properly abandoned and remediated. At best, failing to enact a buffer will simply delay any costs, but not eliminate them.

Furthermore, cleanup costs would be substantially diminished if the City were to implement "polluter pays" policies to ensure that oil and gas operators pay for the costs imposed by their operations, and to decrease the risk that operators default on their obligations and offload the costs onto the public. Remediation and cleanup should be the responsibility of oil and gas operators, not taxpayers, and the City could ensure this through a combination of policies. Enacting such policies would further reduce the cost projections in the Petroleum Administrator's report.

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legislative end.'" (citing *Concrete Pipe and Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993)). *See also Rith Energy v. United States*, 247 F.3d 1355, 1364 (Fed.Cir. 2001).

[16] If a government regulates to prevent harm or protect public health and safety, that weighs against finding a taking. *See, e.g., Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1350-51 (Fed.Cir. 2004), *Maritrans Inc. v. United States*, 342 F.3d 1344, 1356 (Fed.Cir. 2003) (citing *Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir. 1994)).

[17] In *Lucas*, the Supreme Court confirmed once again that all property is subject to "background principles of the State's law of property and nuisance[.]" 505 U.S. 1003, 1029. *See also Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1347 (Fed. Cir. 2004) (holding that there is no taking where there is a nuisance, regardless of other factors). *See also Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir. 1994) (same).

[18] *City of Salinas v. Ryan Outdoor Advert., Inc.*, 189 Cal. App. 3d 416, 423-24 (Ct. App. 1987) (sign ordinance did not effect a taking where amortization period was reasonable).

[19] *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987); *Hensler v. City of Glendale,* 8 Cal.4th 1, 11 (1994), *as modified on denial of reh'g* (Sept. 22, 1994).

[20] 14 C.C.R. §§ 1714, 1723.

[21] *See e.g.,* DOGGR, Idle Well Program, https://www.conservation.ca.gov/dog/idle_well ("If well owners become insolvent or desert their idle wells, responsibility for plugging and abandoning the wells often falls to the State. Since 1977, DOGGR has plugged and abandoned about 1,400 wells at a cost of $29.5 million (the funding is from an assessment on production").

With regard to the costs of litigation and potential claims, the report's calculations seem to be based on a scenario in which every mineral rights owner sues for the full potential value of his or her holdings and then wins on the full value of his claims[22]—a state of affairs that is so improbable as to be nearly impossible. As discussed above, takings and vested rights challenges to the setback ordinance are likely to fail. And the law does not guarantee a return on every drop of oil in the ground.[23] Indeed, the assertion that "the City would be required to pay the present value of the lost profits from the oil and gas that would no longer be recovered in these fields" is simply inaccurate. As discussed above, the "present value of lost profits" is not the equivalent of "just compensation" for several reasons: profits are speculative; courts have declined to find a taking where property value has been reduced by 90 percent or more; there is no property right for a nuisance activity; and the *Penn Central* factors weigh against providing compensation. Even if mineral rights holders were to prevail in some limited cases, the remedy would likely be for the City to extend the amortization period or grant a variance, not issue a cash payment.

Indeed, the report fails to discuss an amortization period at all, which would be a key component of a City setback ordinance. An amortization period, as discussed above, is a recognized way for local jurisdictions to legally phase out nonconforming uses and limit takings liability. With regard to a potential amortization period, we do not believe that, as the report implies, a site-by-site analysis would be required. The City could decide on a standard amortization period and then extend this period as necessary on a case-by-case basis. In addition, we urge the City to consider an amortization period of five years.[24] The current amortization period of twenty years, which is contained in the City's outdated oil and gas code, is not health protective and is out of step with the City's vision for a sustainable, healthy future.

Finally, the report did not address or analyze the potential financial benefits to the City that could result from enacting a health and safety buffer, which include decreased health care costs as well as the reduced costs and economic benefits resulting from cleaner air and water, reduced traffic, decreased noise and light pollution, and mitigation of the adverse effects of climate change. It is troubling that the report does not consider the *public* benefits to Los Angeles communities that are likely to outweigh any speculative profits to the *private* oil industry.

Conclusion

In summary, we believe that a buffer zone ordinance establishing a setback between sensitive uses and oil and gas operations is squarely within the powers of the City and is not likely to be overturned on the grounds of takings or vested rights claims. Exaggerated cost projections contained in the Petroleum Administrator's report do not reflect reality, and revenues could be generated to offset any expenses

[22] For example, the report states that "If the plaintiffs [in a lawsuit] were to prevail, the City would be required to pay the present value of the lost profits from the oil and gas that would no longer be recovered in these fields to the oil companies and owners of the mineral rights affected by the ordinance." Page 125.

[23] *See Andrus v. Allard*, 444 U.S. 51, 66 (1979) (holding that "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.").

[24] Courts have upheld amortization periods for nonconforming signs of two years and eight months, three years, five years, and seven years. *See United Bus. Com. v. City of San Diego*, 91 Cal.App.3d 156, 180-181 (1979) (surveying cases). In other contexts, courts have upheld even shorter amortization periods. *See e.g., Castner v. City of Oakland*, 129 Cal.App.3d 94, 96-97 (1982) (one year to shutdown adult bookstore); *People v. Gates*, 41 Cal.App.3d 590, 603 (1974) (one and a half years to shut down wrecking yard).

associated with a setback ordinance. Existing law supports establishing a strong buffer zone ordinance in Los Angeles, and a buffer zone is greatly needed to protect the health and safety of Angelenos.

Sincerely,

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