

Communication from Public

Name: Theodore Cordova
Date Submitted: 10/05/2022 04:01 PM
Council File No: 17-0447-S2
Comments for Public Posting: Written submissions attached. Thank you.



1608 Norris Road • Bakersfield, CA 93308

October 5, 2022

Honorable Los Angeles City Councilmembers
Energy, Climate Change, Environmental Justice, and River Committee
Submitted electronically at LACouncilComment.com

Re: Oil & Gas Ordinance Draft, related to agenda item 2, Council File 17-0447-S2

Dear Los Angeles City Councilmembers:

E&B Natural Resources (E&B) provides the following comments relating to the Los Angeles City proposed draft Oil & Gas Ordinance.

E&B is a California-based energy producer. We produce over 8,000 barrels of oil per day for Californians including Angelenos. E&B and its affiliates including HBOC complies with rules and regulations administered by multiple agencies at the local, state, and federal levels. We have a personal and collective interest in adhering to California's stringent environmental regulations to protect the safety of our workforce. We are dedicated to producing the cleanest and most environmentally friendly oil and natural gas that meets California climate compliancy. We have over 250 staff working for E&B, many in the Los Angeles area. We also provide monthly royalties to thousands of royalty owners in the local area. We have been a long-time partner to the city, active in the local community and we look forward to continuing to work with LA City on the draft ordinance.

We have all witnessed over these last weeks, months and years (i.e., Ukraine and Russia event, COVID-19, supply chain issues, rising gas prices, etc.) how important it is to be able to source locally and buy locally. California, the fifth largest economy in the world, demands nearly 1.8 million barrels of oil per day and local in-state production only supplies roughly 30% of our state needs. We believe that while demand for the product remains strong, it is best for the local and state economies and the environment to have the ability to procure product locally than from foreign sources including from Ecuador, Saudi Arabia and Russia who don't have the same environmental regulations as California. Our workforce and product have been recognized as critical and essential to our nation and to our state.

We recognize the need for improvement and for change. We believe we can work together to achieve an ordinance that works for the majority of the stakeholders. We appreciate the work staff has done thus far. We offer the following thoughts and recommendations.

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Study Economic and Environmental Impacts. Mitigate for potential unintended consequences.

We recommend the city study the environmental impacts of losing its local production, particularly impacts to air emissions. Where is LA City going to get its oil from? Reducing local production often leads to an increase in foreign imports. California is an energy island and there is no infrastructure like oil pipelines to carry oil into the state from other states. These foreign imports would increase super tanker traffic to our local ports in Long Beach and Los Angeles. According to the South Coast Air Quality Management District, the number one source of toxic pollution in the LA Basin comes directly from port ships including supertankers carrying foreign oil. We also urge the city to study the countries supplying foreign imports, their human rights records and the countries' environmental regulations including Ecuador, Saudi Arabia and Iraq. We also recognize the on-going job transition study, and we would like to see that finalized prior to taking this policy forward. Negative consequences due to the proposed policy should be acknowledged and addressed as part of this overall policy discussion.

Amortization Study and Legal Analysis should be made public by the City Attorney's Office prior to moving forward with this policy.

In the proposed ordinance, the city calls for an amortization period of existing wells and facilities of twenty years. The city, however, has not provided an amortization study to support the 20-year time frame, nor has it explained how such an amortization program is legally authorized for mineral resources. We believe that the city's "potential" amortization program / period has no support in fact or in law and instead serves only to violate E&B and HBOC's constitutionally protected vested rights as well as the rights of the mineral owners. We recommend that the city work with the operators and stakeholders on the amortization study, and we work together to find the right balance of best practices, regulations and good neighbor provisions.

Prohibition on Maintenance Activities is inconsistent with State law and further violates constitutional protections.

The draft ordinance does not allow for maintenance activities which could jeopardize field safety and reliability. There are numerous activities conducted on an oil field to maintain equipment or take other actions to enhance the safe and reliable operation of the field. There are numerous activities that are required by law. Taking away our rights to maintain our wells could pose numerous unintended consequences. We recommend allowing operators to continue to maintain their wells in a safe and responsible manner. Anything less would be reckless and potentially unconstitutional. Let's move forward with smart regulation. We are ready to work with you and City's staff on these specific issues. In fact, we have been working with community, neighborhood councils and local council offices to voluntarily move forward with several best practices and emerging technologies to keep our sites performing optimally. We were the first to implement fence line air monitoring systems, advocate for annual inspections and volunteer for

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additional reporting requirements. Please look to our company to be the model for what is possible.

Any Action by City Council's Energy, Climate Change, Environmental Justice, and River Committee is Premature Until CEQA Process is Complete.

The City issued a notice that the Mitigated Negative Declaration (MND) is available for public comment and review, with the 30-day comment period closing on October 17, 2022. The Energy, Climate Change, Environmental Justice, and River Committee's responsibilities include "overall review of environmental impact reports or statements, or of the environmental impact of proposed Council actions that have not been considered as part of a land use decision" (Resolution, January 12, 2021, City Council Committees.) The City Planning Commission decided not to consider the comments on the MND and indicated that would be considered by the City Council, the decision-making body. Given that the responsibilities of the Energy, Climate Change, Environmental Justice, and River Committee include review of environmental issues for the City Council, the Committee should postpone any action until the CEQA process is complete.

In regard to plugging and abandoning wells, we recommend that you continue to engage operators in these discussions, work with the state agency CalGEM, and stay consistent with state law and the existing state idle well program.

We also incorporate by reference all of the comments submitted by Alston & Bird to the City Planning Commission in its letter dated September 20, 2022 (attached for convenience to this letter).

It is our hope that we can continue to work together towards an improved ordinance that works for all parties. Please do not hesitate to call upon us for additional information. Please use us as a resource. Thank you for your time and consideration of our comments.

Best regards,

A handwritten signature in black ink, appearing to read 'Louis Zylstra', with a stylized flourish at the end.

Louis Zylstra, PE
Senior Vice President, Los Angeles Basin
E&B Natural Resources

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REFERENCES

1. South Coast Air Quality Management District,
<https://www.aqmd.gov/nav/about/initiatives/clean-port>

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September 20, 2022

City Planning Commission
City of Los Angeles
201 N. Figueroa Street
Los Angeles, CA 90012
cpc@lacity.org

Re: CPC-2022-4864-CA; CF No. 17-0447 – September 22, 2022 Hearing

Dear City Planning Commission:

We represent E&B Natural Resources and its affiliated entities (collectively “E&B”) regarding the City’s proposed ordinance to amend the Los Angeles Municipal Code “to prohibit new oil and gas drilling activities and make existing extraction a nonconforming use in all zones.” (City Planning Commission, Regular Meeting Agenda, September 22, 2022.) The proposed ordinance would also “phase out all oil drilling activities in the City of Los Angeles by immediately banning new oil and gas extraction and requiring the abandonment of existing wells after an amortization period.” (Id.)

E&B submitted a comment letter as a part of the August 30, 2022, public hearing on this matter to express its opposition to the proposed ordinance. However, the City has not addressed adequately the issues raised in the letter, and appears to be rushing this process forward without fully considering all of the legal implications of adopting this ordinance. The City issued a revised ordinance on September 13, 2022, along with an 893-page staff report, and yet refuses to provide additional opportunity to provide public comment.

We submit these further comments to reinforce E&B’s original objections. As described in this letter, the City has not set forth a legitimate basis for its proposed action. E&B urges the City to take additional time to review these issues and to reconsider the proposed ordinance as it is currently drafted.

1. Approval of the Proposed Ordinance Would Not Be a Legitimate Exercise of the Police Power

While the City is afforded a fair amount of latitude in adopting land use regulations, the City’s police power is not unlimited. The City here fails to demonstrate that the proposed ordinance is reasonably related to the public welfare. See *Associated Home Builders, Inc. v. City of Livermore*,

Alston & Bird LLP

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18 Cal.3d 582 (1976). The City fails to forecast the probable effect of the ordinance, fails to identify the competing interests involved, and fails to justify why the ordinance reflects a reasonable accommodation of competing interests. For example, the ordinance excludes certain uses, but applies to all oil and gas operations across the City without distinguishing among different locations or operations, even though the City acknowledges that some locations are situated in heavy industrial areas. No analysis of the impacts of this ordinance on any specific property has been performed.

2. The City's Proposed Amortization Period is Arbitrary, Unreasonable and Not Supported by any Evidence

The City's proposed ordinance would impose a 20-year amortization period on oil and gas operations, but the City has failed to provide any evidence or factual support for this chosen 20-year period. "[A]n amortization period *is not* an absolute or unqualified defense to a takings claim." *Levin Richmond Terminal Corp. v. City of Richmond*, 2020 U.S. Dist. LEXIS 156103, *36-37, emphasis added. Rather, the legislation must provide a "reasonable amortization period commensurate with the investment involved." *Id.*, quoting *Elysium Institute, Inc. v. County of Los Angeles*, 232 Cal. App. 3d 408, 436 (1991). While it is questionable that amortization would apply at all to oil and gas interests (see below), any amortization process requires factual evidence to demonstrate the property owner's reasonable investment backed expectations are satisfied. The City indicates that it is the process of preparing an amortization report, but that is putting the proverbial cart before the horse. The amortization study needs to be prepared before any amortization ordinance is adopted.

3. The 20-Year Amortization Period is Illusory

The City's proposed ordinance prohibits well maintenance, maintenance that is required to operate the wells. The City claims that it will allow maintenance under certain circumstances, but if any oil and gas operator sought to seek an approval from the City to conduct maintenance based on health and safety purposes, the approval process could extend beyond six months, resulting in "deemed terminated" finding for "discontinued" operations. Thus, by prohibiting maintenance, the City is essentially terminating these uses well before any 20-year period.

4. City's Proposed Ordinance Would Constitute a Taking of Vested Rights in Violation of the U.S. and California Constitutions

The U.S. and California Constitutions provide that private property shall not be taken without just compensation. U.S. Const. amend. V; Cal. Const., Art. 1, § 19. These constitutional protections apply to regulatory takings. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992). "The right to remove oil and gas from the ground is a property right." *Maples v. Kern Cty. Assessment Appeals Bd.*, 103 Cal.App.4th 172, 186 (2002). The City's proposed ordinance serves to affect an unconstitutional taking of E&B's property as an oil and gas operator, along with the property of the landowners and the mineral rights holders.

E&B has vested property rights to operate in the City but the proposed ordinance ignores these rights, prohibiting maintenance on the wells, and requiring abandonment of these wells within

20 years or perhaps far less. Again, without an amortization study, it is difficult to understand the City's thinking.

5. Amortization Does Not Apply to the Extraction of Mineral Resources

The City fails to evaluate the legal propriety of establishing an amortization period for the extraction of mineral resources and ignores the legal doctrine that would invalidate this proposed ordinance – the diminishing asset doctrine. See *Hansen Bros. Enters. v. Board of Supervisors*, 12 Cal.4th 533 (1996). The California Supreme Court in *Hansen* recognized the “diminishing asset” doctrine and defined the scope of vested rights for mining, quarrying and other extractive uses, recognizing the unique qualities of extractive uses and holding that it includes an expansion of those uses.

As explained in the context of a quarry, the court in *Hansen* stated:

The very nature and use of an extractive business contemplates the continuance of such use of the entire parcel of land as a whole, without limitation or restriction to the immediate area excavated at the time the ordinance was passed. A mineral extractive operation is susceptible of use and has value only in the place where the resources are found, and once the minerals are extracted it cannot again be used for that purpose. “Quarry property is generally a one-use property. The rock must be quarried at the site where it exists, or not at all. An absolute prohibition, therefore, practically amounts to a taking of the property since it denies the owner the right to engage in the only business for which the land is fitted.”

Hansen, 12 Cal.4th at 553-54 (and cases cited therein).

Similarly, E&B's vested oil and gas rights are uniquely situated in the City, and the proposed ordinance seeks to terminate the extraction of those resources in the entire City, without the ability to extract them elsewhere. See *Los Angeles v. Gage*, 127 Cal.App.2d 442 (1954). Under the diminishing asset doctrine, E&B is entitled to produce oil and gas resources under its vested rights until the resource is exhausted or otherwise uneconomical to produce -- the continued production of oil and gas resources is the expanded use and is protected under *Hansen*.

6. The Proposed Ordinance is Preempted by State and Federal Law

The California Constitution states: “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Cal. Const., Art. XI, Sec. 7. Local laws conflict with general law if the local laws duplicate, contradict or enter an area fully occupied by general law. *Morehart v. County of Santa Barbara*, 7 Cal.4th 725 (1994). The court in *Morehart* states:

The general principles governing state statutory preemption of local land use regulation are well settled. “The Legislature has specified certain minimum standards for local zoning regulations (Gov. Code, § 65850 et seq.)” even though it also “has carefully expressed its intent to retain the maximum degree of local

control (see, e.g., *id.*, § 65800, 65802)." (*IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89 [2 Cal.Rptr.2d 513, 820 P.2d 1023].) "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws*." (Cal. Const., art. XI, § 7, italics added.) "'Local legislation in conflict with general law is void. Conflicts exist if the ordinance duplicates [citations], contradicts [citation], or enters an area fully occupied by general law, either expressly or by legislative implication [citations].'" (*People ex rel. Deukmejian v. County of Mendocino* (1986) 36 Cal.3d 476, 484 [204 Cal.Rptr. 897, 683 P.2d 1150], quoting *Lancaster v. Municipal Court* (1972) 6 Cal.3d 805, 807-808 [100 Cal.Rptr. 609, 494 P.2d 681]; accord, *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897 [16 Cal.Rptr.2d 215, 844 P.2d 534].)

Morehart, 7 Cal.4th at 747; see also California Attorney General's opinion recognizing preemptive effect of State oil and gas laws, 59 Ops. Cal. Atty. Gen. 461,462 (1976).

Local regulations may also be preempted based on federal law under the Supremacy Clause of the U.S. Constitution. U.S. Const., Art. VI, cl. 2; see also *Ting v. AT&T*, 319 F.3d 1126, 1135 (9th Cir. 2003).

The City's proposed ordinance conflicts with California law regarding the production of oil and gas, including drilling, operations, abandonment and maintenance. The authority to regulate all aspects of oil and gas production, including downhole activities, rests with CalGEM. Cal. Pub. Res. Code §3106(b). The State's oil and gas laws read: "To best meet oil and gas needs in this state, the supervisor shall administer this division so as to encourage the wise development of oil and gas resources." Cal. Pub. Res. Code § 3106(d).

The State laws and associated regulations reflect an intent to occupy the entire area: Cal. Pub. Res. Code §§ 3000-3112 (General Provisions and Administration); Cal. Pub. Res. Code §§ 3130-3132 (Underground Injection Control), Pub. Res. Code §§ 3150-3161 (Well Stimulation); Cal. Publ. Res. Code §§ 3180-3187 (Natural Gas Storage Wells), Cal. Pub. Res. Code §§ 3200-3238 (Regulation of Operations); Cal. Pub. Res. Code §§ 3240-3241 (Abandoned Wells); Cal. Pub. Res. Code §§ 3250-3258 (Hazardous Wells); Cal. Pub. Res. Code §§ 3260-3263 (Acute Orphan Wells); Cal. Pub. Res. Code §§ 3270-3270.6 (Regulation of Production Facilities); Cal. Pub. Res. Code §§3275-3277 (Interstate Cooperation in Oil and Gas Conservation); Cal. Pub. Res. Code §§ 3300-3314 (Unreasonable Waste of Gas); Cal. Pub. Res. Code §§ 3315-3347 (Subsidence); Cal. Publ. Res. Code §§ 3350-3359 (Appeals and Review); Cal. Pub. Res. Code §§ 3400-3433 (Assessment and Collection of Charges); Cal. Pub. Res. Code §§ 3450-3451 (Recommendation of Maximum Efficient Rates of Production); Cal. Pub. Res. Code §§ 3780-3787 (Oil Sumps). The regulations include more detailed requirements for onshore wells (14 Cal. Code Reg. §§1712-1724.10), environmental protections for production facilities, tanks, pipelines (14 Cal. Code Reg. §§ 1750-1779.1), and expressly address well stimulation and seismic activity (14 Cal. Code Reg. §§ 1780-1789).

7. The City's Proposed Ordinance Triggers Other Constitutional Violations (Due Process, Equal Protection, Contractual Relations)/Section 1983

a. Equal Protection and Due Process

The U.S. and California Constitution's guarantee equal protection of the laws and adequate due process. These rights also apply in the land use context. Cal. Const., Art. 1, § 7(a); U.S. Const. amend V, XIV; *College Area Renters & Landlord Ass'n v. City of San Diego*, 43 Cal.App.4th 677, 686 (1996). Substantive due process addresses improper governmental interference with property rights and irrational actions by government decision-makers. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 541 (2005); *Arnel Development Co. v. City of Costa Mesa*, 126 Cal.App.3d 330, 337 (1981).

In the City's rush to adopt an amortization ordinance, the City has not followed the necessary procedures to demonstrate that oil and gas production in the City results in any environmental, health, or safety hazards. The City has failed to prepare any amortization study to support its purported 20-year amortization period, the proposed ordinance would prohibit maintenance to operate the wells, further curtailing operations, and it is recommending action by the City Council without completing the CEQA process. Furthermore, certain other oil and gas uses in the City are exempt, without sufficient explanation for those exemptions.

b. Impairment of Contractual Relations

Both the U.S. and California Constitutions prohibit the enactment of laws effecting a "substantial impairment" of contracts, which applies to public contracts as well as contracts between private parties. *Alameda County Sheriff's Assn. v. Alameda County Employees' Retirement Assn.*, 9 Cal.5th 1032, 1074 (2020). E&B has contracts with various private parties, which impose obligations on E&B that continue beyond the date the amortization period expires. The proposed ordinance will impair these contracts by forcing E&B to terminate its operations on or well before the 20-year deadline, which will undermine E&B's reasonable expectations under the contracts.

c. The City's Liability for Damages Under the Civil Rights Act

The federal Civil Rights Act, 42 U.S.C. § 1983 ("Section 1983"), provides a cause of action for damages based on claims arising from violations of federal rights. *Svein v. Melin*, 138 U.S. 1815, 1822 (2018). As discussed at length herein, the proposed Ordinance will significantly impair E&B's constitutional rights, including its right to just compensation, due process rights, and equal protection rights. Accordingly, if the City adopts the proposed ordinance, the City will place itself at significant risk of liability under Section 1983, including for payment of damages suffered as a result of unreasonably phasing out oil and gas production in the City.

8. The City's CEQA Document is Out for Public Comment and City Cannot Make CEQA Findings

The City issued a notice that the Mitigated Negative Declaration is available for public comment and review, with the 30-day comment period closing on October 17, 2022. Until that process is complete, the City Planning Commission would not be able to make the CEQA findings set forth in the recommended action in the staff report. (Staff Report, p. F-6.)

9. The Proposed Ordinance Illegally Seeks to Eliminate the Dominant Estate of Oil and Gas Rights Across Entire City

The City's proposed ordinance seeks to eliminate all oil and gas production in the entire City. However, oil and gas rights function as a dominant estate, and this dominant estate allows the mineral rights holder to use the surface as reasonably required to access the minerals. *Vaquero Energy, Inc. v. County of Kern*, 42 Cal. App. 5th 312, 319-320 (2019); *Bourdieu v. Seaboard Oil Corp.*, 38 Cal. App. 2d 11, 16-17 (1940); *Wall v. Shell Oil Co.*, 209 Cal.App.2d 504, 511-514 (1962). The City fails to acknowledge and ignores this dominant estate in presenting the proposed ordinance, and provides no basis, much less a legitimate basis, for this action. The proposed ordinance would prevent any mineral rights holder from exercising the dominant estate protected by law. Separate and apart from the fact that the proposed ordinance would constitute a taking of this dominant estate and associated oil and gas rights, the City cannot as a matter of law eliminate the dominant estate from each and every parcel in the entire City.

10. Constitutes of Breach of Contracts between Oil and Gas Operators and City

E&B has several leases with the City for its oil and gas operations, and this proposed ordinance may serve to effect a breach of those leases.

For all of these reasons, we urge the City to reject the proposed ordinance and to reconsider its approach to oil and gas operations in the City.

Sincerely,

[ORIGINAL SIGNED]

Nicki Carlsen