ALSTON & BIRD

333 South Hope Street, 16th Floor
Los Angeles, CA 90071-1410
213-576-1000 | Fax: 213-576-1100

Nicki Carlsen Direct Dial: **+1 213 576 1128** Email: **nicki.carlsen@alston.com**

January 31, 2023

City of Los Angeles Department of City Planning
200 North Spring Street, Room 701
Los Angeles, CA 90012
planning.oildrilling@lacity.org

Re: Notice of Appeal of Zoning Administrator's Interpretation of Well Maintenance & Zoning Administrator's Memorandum 141

Dear City of Los Angeles Department of City Planning:

We represent E & B Natural Resources Management Corporation, Hillcrest Beverly Oil Corporation, E&B ENR I, LLC, and Elysium Natural Resources, LLC (collectively, "E&B") regarding E&B's Appeal of the City of Los Angeles Department of City Planning's ("City Planning") "Zoning Administrator's Interpretation" ("ZAI") and "Zoning Administrator's Memorandum (ZA Memo) 141" ("ZA Memo 141"), both circulated on January 17, 2023. On December 2, 2022, the Los Angeles City Council ("City Council") adopted Ordinance No. 187,709 ("Oil Ordinance") adding restrictions, among other things, to existing and future oil and gas operations, including drilling, production, and maintenance of oil wells, effective January 18, 2023. The Oil Ordinance was signed by Mayor Garcetti on December 8, 2022, and it became effective on January 18, 2023. In connection with the implementation of Oil Ordinance, City Planning prepared the ZAI and ZA Memo 141, both of which are proposed documents supposedly intended to "serve as guidance for operators and the public regarding oil drilling regulations in the City." (City Planning's 1/17/23 Email to Stakeholders.)

E&B currently conducts oil and gas operations at several locations within the City of Los Angeles. For example, E&B operates a facility located in the vicinity of San Vicente Boulevard and West Third Street ("San Vicente facility"), Pico Boulevard and Genesee Avenue ("Packard facility") in the City. The San Vicente and Packard facilities collectively extract from 1,297 acres of mineral interests. Additionally, the Murphy facility is located in the vicinity of West Adams Boulevard and Western Avenue, and it extracts from 960 acres of mineral interests. E&B conducts oil production operations within the City in the South Torrance oilfield in the vicinity of East Pacific Coast Highway and Wilmington Boulevard and extracting from 330 acres of mineral interests. E&B also conducts oil production operations within the City in the Wilmington oilfield in the vicinity of W. Sepulveda Boulevard and S. Main Street and extracting from 146 acres of mineral interests. As part of these operations, E&B owns the mineral rights directly in fee or leases the mineral rights from royalty owners.

As it stands, E&B's vested rights and ability to continue operations are jeopardized by the Oil Ordinance, and now further, by the proposed applications of the ZAI and ZA Memo 141 as presently drafted. We submit these comments ahead of the February 1, 2023 deadline to appeal the ZAI and ZA Memo 141 and to reinforce E&B's objections to the Oil Ordinance. Not only are the Oil Ordinance, ZAI, and ZA Memo 141 legally invalid, the City has not conducted a proper environmental analysis that satisfies its obligations under the California Environmental Quality Act ("CEQA").

E&B appeals the ZAI and ZA Memo 141, requesting that the City take the necessary, additional steps to study the environmental impact of these projects, complete the CEQA process, and reconsider the ZAI and ZA Memo 141 as they are currently drafted.

I. The ZAI, in its Current Form, Must Be Rejected

The Oil Ordinance prohibits oil "well maintenance, drilling, redrilling, and deepening except to prevent or respond to a threat to public health, safety, or the environment, as determined by the Zoning Administrator." (LAMC Section 12.23-C.4(a).) Now by way of the ZAI, the Zoning Administrator prescribes its "interpret[ion of] what drill site activities qualify as oil 'well maintenance.'" (ZAI p. 1.) It defines oil well maintenance "as any scope of work that meets either of the following two criteria:

1. A scope of work that requires a Notice of Intention "Rework Permit" to carry out work project on a well from the California Geologic Energy Management Division (CalGEM).[]

2. A scope of work that requires online notification per the South Coast Air Quality Management District's (SCAQMD) Rule 1148.2 – "Notification and Reporting Requirements for Oil and Gas Well and Chemical Suppliers." (ZAI, p. 1.)

The ZAI is inappropriately vague and ambiguous. The ZAI provides a definition of oil well maintenance (which is integral to application of the Oil Ordinance) that is dependent on the scope of SCAQMD Rule 1148.2. (*See* ZAI, p. 1.) But the ZAI fails to explain how it interacts with the various provisions of Rule 1148.2 or the effect of the Rule's proposed amendments. As such, the ZAI is improperly vague and ambiguous as drafted, leaving operators, suppliers, and other individuals involved in oil and gas extraction operations without proper guidance and understanding for how the Oil Ordinance will ultimately be enforced. (*Zubaru v. City of Palmdale* (2011) 192 Cal. App. 4th 289, 308 ["An ordinance must be clear, precise, definite and certain in terms, and an ordinance vague to the extent that its precise meaning cannot be ascertained is invalid . . ."]; *accord City of Imperial Beach v. Escott* (1981) 115 Cal. App. 134, 139.)

Importantly, SCAQMD's proposed amendments to Rule 1148.2 greatly expands the scope of online notification and reporting requirements for oil and gas wells and chemical suppliers. And taken together with the ZAI, the Oil Ordinance and ZAI's proposed application is not clear. For instance, the Proposed amendments to Rule 1148.2 will expand the online notification requirement to now include any chemical treatment above 20 gallons per day, excluding water. Further, the Proposed amendments to Rule 1148.2 expand the online notification requirement to

encompass workover rigs if their engines do not meet Tier 4 emissions standards. But it is unclear how this is intended to apply.

Moreover, the proposed amendments to Rule 1148.2 include a notification requirement for acidizing, proposed to become effective July 1, 2023. It is vague and ambiguous when the ZAI intends for this component to go into effect; however, at a minimum, it should not be applicable under the ZAI until at least July 1, 2023 when the proposed amendment to Rule 1148.2 becomes effective. As such, the ZAI is inappropriately vague and ambiguous as currently drafted.

II. ZA Memo 141 Cannot Be Adopted as Drafted

ZA Memo 141 is set out to "establish a comprehensive set of procedures and policies for the acceptance and processing of applications for projects, at existing non-conforming sites, where drilling, redrilling, public health, safety, or the environment…." (ZA Memo 141, p. 1.) ZA Memo 141 also "identifies the steps that operators are required to complete prior to commencing proposed scopes of work and outlines the discretionary review procedures and policies for operators." (*Id.*, at p. 2.)

ZA Memo 141 provides that the Zoning Administrator has discretionary review "[f]or projects that propose to maintain, drill, re-drill, or deepen an existing well for oil, gas or other hydrocarbon substances in order to prevent or respond to a threat to public health, safety, or the environment." (*Id.*, at p. 4.) Additionally, it details that projects that demonstrate "an urgent need to commence [] due to an imminent emergency threat to public health, safety, or the environment[,]" will be subject to the administrative review process "by a Zoning Administrator or assigned/delegated City Planning staff." (ZA Memo 141, p. 4.)

Under the discretionary review process set forth in ZA Memo 141, "an operator shall submit all the required application materials for a Health and Safety Exception request," which will be subject to discretionary review by the Zoning Administrator pursuant to LAMC section 12.23-C.4. (*Id.*, at 5.) Applicants must submit form CP-4077 (a DCP Application for Health and Safety Exception Projects for Oil and Gas Drill Sites). (*Id.*, at 6.) Further, the application must include all required information outlined in Form CP-4078. (*Id.*) The Zoning Administrator is required to set a public hearing in which evidence and testimony may be received. Notice of the hearing is given 24 days in advance of the public hearing, but ZA Memo 141 does not include a requirement for the hearing to be set within a certain amount of time. (*See id.*, at p. 7.) Once a decision is made, the Zoning Administrator will issue a written determination, providing a 15-day appeal period. (*Id.*, at p. 8.)

ZA Memo 141 includes vague, ill-defined requirements in which the Zoning Administrator can grant an exception under LAMC section 12.23-C.4(a) and allow oil well maintenance. Notably, ZA Memo 141 does not provide or prescribe any timeframe for the application process and determination, which may practically cause oil wells to be deemed abandoned before the Zoning Administrator can grant a Health and Safety Exception. Further, its application process is unclear given its vague and ambiguous framework.

III. The ZAI and ZA Memo 141 Fails to Comply with CEQA and Constitutes Improper Piecemealing

CEQA applies whenever a government agency approves a discretionary project, defined as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Pub. Res. Code § 21065.) CEQA defines "project" as the "whole of an action" and prohibits segmentation of project activities in an effort to minimize the evaluation of environmental effects. "Accordingly, CEQA forbids piecemeal review of the significant environmental impacts of a project." (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal. App. 4th 1209, 1222 (internal citations omitted).) "Agencies cannot allow environmental considerations to become submerged by chopping a large project into many little ones." (*Id.*)

The City concluded that the ZAI and ZA Memo 141 are not projects under CEQA. And despite explicitly refusing to consider the impact of the ZAI and ZA Memo 141 in the MND, the City also stated that the ZAI and ZA Memo 141 were evaluated in the Initial Study prepared by the City to support the Mitigated Negative Declaration prepared for the Oil Ordinance.

In fact, neither the Oil Ordinance nor the MND adopted in conjunction provided any definition for the "maintenance" prohibited by the Oil Ordinance. The Oil Ordinance and the MND also did not take into account the complicated discretionary process that the City intended to impose upon operators who seek to undertake maintenance activities for their existing operations. There was no contemplation of the content included in the ZAI or ZA Memo 141, even though both documents were issued only weeks after the final vote on the Oil Ordinance. The City is required to analyze the "whole of an action," which necessarily includes the manner in which the Oil Ordinance will be implemented. These foreseeable Ordinance amendments and regulatory guidance will change the scope and nature of the Oil Ordinance and its environmental effects. By failing to analyze these changes in the MND, the MND understates the actual impact from the Project, fails to analyze the Project as a whole, and the City cannot rely upon the MND as a basis to avoid the review of these impacts under CEQA.

Further, the ZAI and ZA Memo 141 will undoubtedly impact the availability of mineral resources in the City and the State since the stated goal of the City is to stop oil production within the City limits. "Mineral resources" are an environmental factor pursuant to CEQA, and the "loss of availability of a known mineral resource that would be a value to the region and the residents of the state" or the "loss of availability of a locally important mineral resource recovery site" constitutes an adverse environmental impact. CEQA Guidelines, Appendix G, § XII(a), (b); Public Resources Code § 21060.5. Further CEQA review is needed to analyze the potentially significant environmental effects (both direct and cumulative) to air quality, energy, aesthetics, traffic, odor, and noise as a result of the accelerated rate of abandonment activities as a result of these documents, and the increased importation of oil to replace the decreased local production. Thus, even standing alone, the adoption of these documents have the potential to cause significant environmental effects that require CEQA review.

IV. The Oil Ordinance, ZAI, and ZA Memo 141 are Further Unsupported by Law, Infringe Upon E&B's Vested Rights, and Interfere with Continuing Operations

a. The Obstacles and Delays Created by the ZAI and ZA Memo 141 Will Cause the Unintended Abandonment of Existing Wells

The City's Oil Ordinance prohibits well maintenance "except to prevent or respond to a threat to public health, safety, or the environment, as determined by the Zoning Administrator." (LAMC Section 12.23-C.4(a).) The ZAI's interpretation of well maintenance allows maintenance under certain circumstances, which remain vague and ambiguous as currently drafted, but if any oil and gas operator sought to seek an approval from the Zoning Administrator or the City to conduct needed maintenance based on health and safety purposes, the approval process could extend beyond a year, resulting in "deemed terminated" finding for "discontinued" operations. Additionally, ZA Memo 141 now burdens formerly by-right or permitted operations to justify and demonstrate the need for maintenance to keep existing operations under the Oil Ordinance's health and safety exception. Thus, as a result of the ZAI's restrictive interpretations of well maintenance, along with the new, lengthy procedures for existing operations to continue maintenance as prescribed by ZA Memo 141, the City and City Planning are essentially terminating these uses well before any 20-year amortization period.

b. The Oil Ordinance, ZAI, and ZA Memo 141 Violate Due Process under the U.S. and California Constitutions

Under the United States Constitution and the California Constitution, the City may not deprive Plaintiffs of property rights without due process of law. (Cal. Const., Art. 1, § 7(a); U.S. Const. amend V, XIV; *College Area Renters & Landlord Ass'n v. City of San Diego* (1996) 43 Cal.App.4th 677, 686.) Arbitrary or irrational governmental action that infringes on a property owner's rights violates substantive constitutional due process. (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 541; *Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330, 337.) In the City's rush to adopt the Oil Ordinance, provide interpretation of the well maintenance, and implement unlawful procedures through the ZAI and ZA Memo 141, the City has also failed to demonstrate that oil and gas production in the City results in any environmental, health, or safety hazards. Without any viable justification for its actions, the City lacks any legitimate interest in terminating oil and gas operations throughout the City.

c. The Oil Ordinance, ZAI, and ZA Memo 141 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* (1992) 505 U.S. 1003, 1014.) "The right to remove oil and gas from the ground is a property right." (*Maples v. Kern Cty. Assessment Appeals Bd.* (2002) 103 Cal.App.4th 172, 186.)

E&B has vested property rights by its fee and leasehold ownership in mineral rights and its right to conduct its operations in the City, but the Oil Ordinance, ZAI, and ZA Memo 141 ignore these

rights, imposing oil well maintenance requirements and procedures that significantly curtail maintenance efforts, which will lead to the abandonment of wells long before the 20-year period ends. For instance, ZA Memo 141 improperly burdens operators to show maintenance is needed to prevent a threat to public health or safety, even if needed to maintain existing operations. The process prescribed by ZA Memo 141 fails to provide a timeframe, putting oil wells at risk of abandonment before the determination process can even conclude. But when dealing with vested property rights, the City cannot terminate E&B's existing operations without either the payment of just compensation or a demonstration that the existing, permitted operations and the associated maintenance are presently constituting a nuisance (which it has not). As such, the ZAI and ZA Memo 141, if implemented, serve to impose an unconstitutional taking of E&B's property as an owner of mineral rights and as an oil and gas operator, along with the property of the landowners and the mineral rights holders in connection to E&B's leasehold interests.

d. <u>The Oil Ordinance, ZAI, and ZA Memo 141 Are Preempted by State Law</u>

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* (1994) 7 Cal.4th 725.) 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).)

The City's Oil Ordinance, the ZAI, and ZA Memo 141 conflict 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).

The Oil Ordinance, ZAI, and ZA Memo 141 effectively phase out oil and gas production in the City, which is further accomplished by the curtailment of oil well maintenance through the new requirements and procedures under the ZAI and ZA Memo 141 – which is an activity that a "statute or statutory scheme seeks to promote," they impermissibly "frustrate[] the statute's purpose" and are therefore preempted. (*Great W. Shows, Inc. v. Cnty. of L.A*. (2002) 27 Cal.4th 853, 867–870.) Indeed, California law vests complete authority in CalGEM to "supervise the drilling, operation, ***maintenance,*** and abandonment of wells ***so as to permit owners or operators of wells to utilize all methods and practices known to the oil industry for the purpose of increasing the ultimate recovery of underground hydrocarbons*** and which, in the opinion of the supervisor, are suitable for this purpose in each proposed case." (Pub. Res. Code §3106, subd. (b).) Rather than "increas[e] the ultimate recovery of underground hydrocarbons," the requirements will have the opposite effect, and therefore frustrate the purpose of Public Resources Code section 3106. And by making continued oil operations prohibitively expensive in Los Angeles City with increased parameters to apply for and conduct oil well maintenance, the City will only make it difficult or impossible for operators to continue the aggressive well abandonment schedule that has been effectively encouraged by CalGEM's regulations.

The Oil Ordinance, ZAI, and ZA Memo 141's proposed requirements are preempted because they duplicate and enter an area that is fully occupied by state law, and they frustrate a statutory purpose of increasing the ultimate recovery of hydrocarbons. Local legislation conflicts with state law where it "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Sherwin-Williams Co. v. City of L.A.* (1993) 4 Cal.4th 893, 898.) Local legislation conflicts with state law where it "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Id.* at 897.) Local legislation is "duplicative" when it is coextensive of state law. (*Id*.) In addition, legislation enters

an area that is "fully occupied" by state law when the legislature expressly or impliedly manifested an intent to occupy the area. (*Id*.)

Here, state law already regulates areas of law that the Oil Ordinance, ZAI, and ZA Memo 141 attempt to regulate. Public Resources Code section 3206.1 already mandates CalGEM to review, evaluate, and update its regulations pertaining to idle wells. These regulations implement new testing requirements for idle wells and provide specific parameters for testing. (Cal. Code Regs., tit. 14 §§ 1772.1, 1772.1.4.) The regulations provide a six-year (6) compliance period for testing wells idle as of April 1, 2019 and a Testing Waiver Plan for those wells that an operator commits to plugging and abandoning within eight years. (*Id*., § 1772.2.) Operators are also required to submit an idle well inventory and evaluation for each of their idle wells. (*Id*., § 1772.) The regulations also provide requirements for monitoring and mitigating inaccessible idle wells, a regulatory definition for partially plugging idle wells, and requirements for operators to submit a 15-Year Engineering Analysis for each idle well idle for 15 years or more. (*Id*., §§ 1722.1.2, 1772.4.) These comprehensive requirements evidence a clear intent by the state to uniformly regulate the restoration of oil and gas sites, including the plugging and abandonment concerns addressed by the Oil Ordinance, ZAI, and ZA Memo 141. The City's ongoing attempt to regulate these activities, now with new proposed procedures and requirements for oil well maintenance during the amortization period, enters an area fully occupied by state law and is therefore preempted. (*Sherwin-Williams*, *supra*, 4 Cal.4th at 989.)

In addition, and as the ZAI points out, SCAQMD has extensive rules regarding the air quality concerns that the City purportedly seeks to address by its new requirements. (*See, e.g.*, SCAQMD Rules 1148.1 and 1148.2.) "The Legislature has designated regional air pollution districts as the primary enforcers of air quality regulations." (*So. Cal. Gas Co. v. So. Coast Air Quality Mgmt. Dist*. (2012) 200 Cal.App.4th 251, 269.) And in fact, these rules are actively implemented and enforced by the SCAQMD. By restricting maintenance activities by specifically incorporating the type of activities regulated by CalGEM and the SCAQMD, the ZAI seeks to prohibit activities that are comprehensively regulated by the State. Similarly, by imposing a convoluted approval process that will result in the effective abandonment of existing oil and gas operations, ZA Memo 141 serves to frustrate state law. "If the preemption doctrine means anything, it means that a local entity may not pass an ordinance, the effect of which is to completely frustrate a broad, evolutional statutory regime enacted by the Legislature." (*Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895, 914–915.)

The City lacks the statutory authority or justification to impose unnecessary requirements that are intended to address issues that the Legislature has already delegated to other agencies.

e. <u>The ZAI and ZA Memo 141 are Inconsistent with the General Plan</u>

The City, in its adoption and enactment of the Oil Ordinance, and now through its proposal of the the ZAI and ZA Memo 141, failed to demonstrate how the Oil Ordinance, ZAI, or ZA Memo 141 are compatible and consistent with the General Plan. (See Gov. Code § 65860.) The City's determination that the Oil Ordinance, ZAI, and ZA Memo 141 are consistent with the General Plan is wholly lacking in evidentiary support. It is not sufficient merely to state in a conclusory fashion

that they are consistent with the General Plan if unsupported by the evidence. Moreover, the City has acted arbitrarily and capriciously throughout the entire process to adopt these provisions and abused its discretion in doing so.

The General Plan's Land Use Element states:

> The General Plan encourages the protection of major facilities, such as landfills, solid waste disposal sites, energy facilities, natural gas storage facilities, oil and gas production and processing facilities, military installations, and airports from the encroachment of incompatible uses.

(General Plan Land Use Element, Pg. 74.) The General Plan also includes Mineral Resources Zones (Figure 9.6) that depicts oil and gas resources. Land Use Policy 7.5 states:

> Ensure land use compatibility in areas adjacent to mineral resources where mineral extraction and production, as well as activities related to the drilling for and production of oil and gas, may occur.

None of these General Plan provisions, though directly related to oil and gas uses, are sufficiently addressed by the City in its analysis of the ZAI or ZA Memo 141.

The Oil Ordinance, ZAI, and ZA Memo 141 must be consistent with the General Plan, such that "[t]he various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in such a plan." (Gov. Code, § 65860 (a)(ii).) The "constitution for all future developments" is the general plan. (*Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570.) The failure of the City to sufficiently evaluate the Oil Ordinance, ZAI, and ZA Memo 141's consistency with the General Plan is a fatal flaw, separate and apart from all other infirmities.

In addition, the absence of any meaningful General Plan analysis further demonstrates that the City failed to prepare a proper CEQA analysis. In addition to the CEQA issues raised above regarding the loss of mineral resources, land use and planning is one of the mandated topics in CEQA's Appendix G, the Environmental Checklist Form, and the checklist asks: "Would the project [c]ause a significant environmental impact due to a conflict with any land use plan, policy, or regulation adopted for the purposes of avoiding or mitigating an environmental effect?" The failure to answer this question must be added to the lengthy list of CEQA violations.

f. <u>The Oil Ordinance, ZAI and ZA Memo 141 are Inapplicable Because Amortization Does Not Apply to the Extraction of Mineral Resources</u>

City Planning fails to evaluate the legal propriety of establishing an amortization period and further restricting well maintenance provisions 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* (1996) 12 Cal.4th 533.) 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 Oil Ordinance, ZAI, and ZA Memo 141 limit E&B's ability to properly maintain its oil wells and effectively eliminate the extraction of those resources in the City, without the ability to extract them elsewhere. (*See Los Angeles v. Gage* (1954) 127 Cal.App.2d 442.) The Oil Ordinance, ZAI, and ZA Memo 141 in their current construction will effectively work to deprive E&B of the right to engage in the only business for which its subsurface mineral rights are fitted. 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.*

g. <u>The Oil Ordinance and the Maintenance Requirements and Procedures Determined by the ZAI and ZA Memo 141 Is Not a Legitimate Exercise of the Police Power</u>

The Oil Ordinance, ZAI, and ZA Memo 141 are each, and taken together, arbitrary, capricious, entirely lacking in evidentiary support, and contrary to established public policy supporting the extraction of oil and gas in the City. While the City is afforded latitude in adopting land use regulations, the City's police power is not unlimited. Land use regulations, such as the ZAI or ZA Memo 141, must be "reasonable in object and not arbitrary in operation [in order to] constitute a valid exercise of that power" and reasonably related to the public welfare, which the City fails to demonstrate. (*La Mesa v. Tweed & Gambrell Planning Mill* (1956) 146 Cal. App. 2d 762, 768; *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582.)

For instance, the City published an Oil and Gas Health Report dated July 25, 2019, which confirms that 1.6 billion barrels of recoverable oil and gas reserves remain beneath the City, alone "rivaling the reserves of the Middle Eastern countries, like Saudi Arabia, Iraq, and Kuwait 14,000 miles away." The Oil Ordinance, ZAI, and ZA Memo 141 significantly curtail efforts to continue oil and

gas operations, significantly adding new requirements and procedures to get approval for oil well maintenance. In effect, this will reduce the ability to continue with oil and gas operations. But importantly, these new requirements and procedures placed on oil and gas operations will not eliminate the City's ongoing demand for oil and gas products. To meet demand, every barrel of oil per day that is not produced within the City must necessarily be produced elsewhere, requiring further expenses and potential negative environmental impacts by instead requiring the importation of oil. Additionally, reliance on foreign oil from Middle Eastern countries, and in the midst of the ongoing crisis in Ukraine, may create national security concerns. And indeed, over the past several years, California sources of petroleum have been replaced by Alaskan and foreign sources.

Moreover, implementation of the ZAI and ZA Memo 141 will work to reduce oil well maintenance, ultimately resulting in the loss of good-paying industry jobs, such as those for which E&B supplies to the City's residents through its oil and gas operations. But fatally, the City fails to properly forecast the probable effect of the Oil Ordinance, ZAI, and ZA Memo 141, fails to identify the competing interests involved, and fails to justify why the ordinance reflects a reasonable accommodation of competing interests.

h. <u>The Oil Ordinance, ZAI, and ZA Memo 141 Interfere With E&B's Contractual Relations Within the City</u>

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.* (2020) 9 Cal.5th 1032, 1074.) E&B has contracts with various private parties, which impose obligations on E&B that likely will continue beyond the date the Oil Ordinance's amortization period expires. The Oil Ordinance will impair these contracts by forcing E&B to terminate its operations on or well before the amortization deadline, which will undermine E&B's reasonable expectations under the contracts. Moreover, the ZAI and ZA Memo 141 seek to impose unreasonable and vague maintenance requirements and procedures that will effectively restrain or eliminate the ability to maintain oil wells and extract essential mineral resources, and thus impair these contracts, far before the amortization period ends.

i. <u>The City's Liability for Damages Under the Civil Rights Act</u>

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. (*Sveen v. Melin* (2018) 138 U.S. 1815, 1822.) As discussed at length herein, the proposed Ordinance will significantly impair E&B's constitutional rights, including its right to just compensation and due process rights. Accordingly, if the City implements the Zoning Administrator's interpretation of well maintenance, as prescribed by the ZAI, or the new requirements and procedures listed by ZA Memo 141, the City and City Planning will place themselves at significant risk of liability under Section 1983, including for payment of damages suffered as a result of unreasonably phasing out oil well maintenance, and consequently, oil and gas production in the City.

j. <u>The Requirements Imposed by the Oil Ordinance, ZAI, and ZA Memo 141 Constitute a Breach of Contracts Between Oil and Gas Operators in the City</u>

E&B has several leases with the City for its oil and gas operations, and the Oil Ordinance, definition of oil well maintenance under ZAI, and the new requirements and procedures to apply for oil well maintenance under ZA Memo 141 serve to effect a breach of those leases.

For all of these reasons, we urge the City to reconsider the adoption of the ZAI or ZA Memo 141 unless and until it cures the numerous legal defects discussed herein.

Sincerely,

Nicki Carlsen

NC:dtc