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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MONTEREY

CHEVRON U.S.A. INC., etc.; et al.,

Petitioners and Plaintiffs,

v.

COUNTY OF MONTEREY, etc.; et al.,

Respondents and Defendants,

and

PROTECT MONTEREY COUNTY and DR. SOLORIO,

Defendant - Intervenors.

AND RELATED CASES.

Case Nos. 16CV003978

[Related Case Nos. 16CV003980, 17CV000790, 17CV000871, 17CV000935, 17CV001012]

Judge: Hon. Thomas W. Wills

DEFENDANT COUNTY OF MONTEREY'S OPPOSITION BRIEF FOR PHASE 1 PROCEEDINGS

[Filed with:
1. Req. for Judic. Notice;
2. Decl. of Burzlaff]

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1. SUMMARY OF ARGUMENT

Measure Z carefully balances protecting the environment with the rights of oil and gas producers, thereby placing it on firm legal ground. On November 8, 2016, the voters of Monterey County exercised their constitutional right to directly adopt local land use legislation by approving Measure Z, an initiative that prohibits certain oil and gas land uses in the County while maintaining land uses that allow for the continuation of existing oil and gas operations. Specifically, Measure Z affects the County's land use designations in three ways: (1) it prohibits land uses in support of hydraulic fracturing and acid well stimulation treatment; (2) it prohibits, subject to a reasonable amortization period, land uses in support of oil and gas wastewater injection and impoundment; and (3) it prohibits land uses in support of new oil and gas drilling.

In their zeal to nullify Measure Z, Plaintiffs ignore reasonable interpretations of the initiative that avoid legal concerns, and contrary to their own interests, urge interpretations of Measure Z that appear designed to prevent their own operations. But Measure Z can and must be construed liberally and practically to avoid annulling the voters' decision to enact these local land use decisions through the initiative process.

When interpreted correctly, Measure Z is not preempted by state or federal law because the state oil and gas statutes and the federal Safe Drinking Water Act expressly preserve the land use authority of local California jurisdictions. While those statutes set the minimum requirements for certain permits associated with oil and gas production, California and federal courts considering preemption have made clear that such standards do not mandate an absolute right to engage in oil and gas production. Therefore, Measure Z's land use limitations are not at odds with state or federal law.

Similarly, Measure Z does not constitute a facial taking of all beneficial use of Plaintiffs' property since a reasonable reading of its terms recognizes that Plaintiffs' existing operations may continue. Furthermore, Measure Z's administrative procedures for amortization of Plaintiffs' businesses, and its exemption for restrictions that might constitute a takings, require Plaintiffs to

exhaust their administrative remedies before their claims are ripe.

The single subject rule and due process claims may also be easily addressed. Each of the three land use restrictions described above seeks to reasonably limit certain oil and gas land uses activities to achieve the express purposes set forth in the initiative. Thus, there can be no doubt the provisions are reasonably germane to a common purpose as required by the single subject rule. Also, the exercise of land use authority to control oil and gas operations has been repeatedly held to be a proper exercise of a public agency's police powers and satisfies the legitimate state interests for due process purposes.

Furthermore, Plaintiffs' challenge that Measure Z is inconsistent with the County General Plan is directly contrary to the law and facts in this case. Legally, California courts have recognized that general plans may be amended by the voter initiative process. Factually, Measure Z requires the Board of Supervisors to make amendments to ensure consistency with the General Plan. Moreover, there is no evidence that Measure Z is inconsistent with the General Plan.

The law regarding the voter initiative process makes every presumption to validate the voters' decisions, and the cases interpreting facial challenges place a heavy burden upon such claims. This brief is based on this law, and in the following matter refutes each of Plaintiffs' arguments. Section 2 describes how the well established liberal legal and factual framework used to interpret Measure Z allows Plaintiffs' operations to continue. Section 3 explains how Measure Z is not preempted under state or federal law. Section 4 illustrates how the mere enactment of Measure Z does not take all beneficial use of Plaintiffs' property. Section 5 demonstrates that Measure Z's land use provisions serve a single subject to protect the environment. While Section 6 establishes that land use restrictions on oil and gas operations are a legitimate state interest for due process considerations. Section 7 shows that Measure Z is consistent with the General Plan, and finally, Section 8 explains how findings are not required for Measure Z. When read liberally, reasonably and practically, Measure Z withstands Plaintiffs' challenges and represents the

exercise by Monterey County's residents of "one of the most precious rights of our democratic process." [1]

2. INTERPRETIVE FRAMEWORK AND FACTUAL BACKGROUND

Phase 1 of this case focuses on Plaintiffs' facial challenges to Measure Z. To assess such facial attacks to a voter adopted initiative, California courts employ a liberal construction of the initiative so that this important constitutional right is protected. In addition, because Phase 1 is limited to facial issues, the relevant background facts are limited to the plain language of the measure, and the process by which it was adopted by the voters. These matters are addressed below.

A. THE COURT HAS A DUTY TO GIVE MEASURE Z A PRACTICAL CONSTRUCTION

The local electorate's right to exercise the powers of initiative and referendum is guaranteed by the California Constitution. Cal. Const. art. II, § 11; DeVita v. County of Napa, 9 Cal.4th 763, 775 (1995). A court must apply a liberal construction in a challenge to an initiative to ensure that right "be not improperly annulled." Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal.3d 582, 591 (1976); DeVita, at 776. "[C]ourts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process.'" Associated Home Builders, 18 Cal.3d at 591 (citing Mervynne v. Acker, 189 Cal.App.2d 558, 563 (1961)).

The California Supreme Court has explained how to construe initiatives:

> [A]n initiative measure should receive a practical construction, that its literal language may be disregarded to avoid absurd results and to fulfill the intent of the framers, and the ambiguities in the

[1] Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal.3d 582, 591 (1976).

> wording of the measure may be clarified by reference to the material presented to the voters in the ballot pamphlet and the contemporaneous construction of the measure by the Legislature.

City and County of San Francisco v. Farrell, 32 Cal.3d 47, 52 (1982) (superseded by statute on other grounds as stated in Borikas v. Alameda Unified School Dist. 214 Cal.App.4th 135, 143 (2013)).

This canon of statutory construction has been repeatedly affirmed by the California Supreme Court. Associated Home Builders, 18 Cal.3d at 591 ("[i]f doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it"); Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal.3d 208, 219 (1978) ("[the] power of initiative must be liberally construed. . . . to promote the democratic process") (brackets and ellipsis in original); San Diego Bldg. Contractors Assn. v. City Council, 13 Cal.3d 205, 210 n. 3 (1974) (quoted above in Amador).

Consistent with these requirements, and in contrast to the interpretations urged by Plaintiffs, Measure Z should be construed liberally, reasonably and practically to avoid assertions of preemption or invalidity. When so construed, Measure Z is not subject to the defects Plaintiffs ask the Court to find in the initiative.

B. THE VOTERS HAVE EXERCISED THEIR CONSTITUTIONAL RIGHT TO ENACT LOCAL LAND USE LEGISLATION

The voters of Monterey County exercised their constitutional power to govern through the democratic process by approving Measure Z on November 8, 2016. Administrative Record ("AR") 392; Joint Case Management Conf. Statement, dated May 24, 2017, ex. A ("Stip."), ¶ 9. In so doing, they implemented a land use initiative designed to protect natural resources, public safety and amenities by limiting, and eventually prohibiting, the use of land within the County for certain oil and gas extraction activities. AR 152-156, 373-374.

Measure Z amends the Monterey County General Plan, the Monterey County Local

Coastal Program Plans, and the Fort Ord Master Plan. AR 151. In particular, Measure Z prohibits within the unincorporated County: (1) the use of land to support hydraulic fracturing, acid well stimulation and similar well stimulation treatments that increase the permeability of the formation (the "Fracking Ban"); (2) the use of land to support both oil and gas wastewater injection and impoundment for storage or disposal after a phase-out period (the "Storage and Disposal Limitation"); and (3) the use of land for drilling new oil and gas wells (the "No Net New Well Limitation"). AR 154-156. The stated purpose of Measure Z is to protect Monterey County's "water, agricultural lands, air quality, scenic vistas and quality of life." AR 152. To support this goal, the Measure included fifteen separate findings, including specific concerns over water quality and supply, soils, biological resources, marine resources, air quality, seismic risks, visual blight, climate change, and economic and employment considerations. AR 152-154.

The proponents of Measure Z, the Registrar of Voters, the County Counsel, and the Monterey County Board of Supervisors all performed their legally required roles under the California Elections Code to place Measure Z on the ballot. AR 118-165, 181, 185-190, 194-195, 314-317; Stip. ¶¶ 2-8. Consistent with these legal requirements, the voters considering Measure Z had a wealth of information, both pro and con, at their disposal before they cast their votes. The proponents' suggested title for the measure captures its overriding environmental protection purpose: "Protect Our Water: Ban Fracking and Limit Risky Oil Operations Initiative." AR 151, 152. The formal title given to Measure Z by the County Counsel describes its three related prongs of land use regulation: "Initiative to Prohibit Fracking and Oil and Natural Gas Well Stimulation Treatments, Prohibit Oil and Natural Gas Wastewater Injection and Impoundment, and Limit New Oil and Natural Gas Operations in Unincorporated Monterey County." AR 151.

In addition, ballot arguments were prepared by both supporters and opponents, along with rebuttals by both groups. AR 364-372, 375-391. Monterey County Counsel prepared an impartial analysis, which was included in the ballot pamphlet. AR 314, 373-374; Stip. ¶ 8. As part of the impartial analysis, County Counsel sought and was provided legal input from both opponents and supporters of Measure Z. AR 330-331, 333-361. As explained in the impartial analysis, Measure Z allows for the injection and impoundment of treated wastewater and also only appears to limit

the drilling of wells exceeding the number operating at the time Measure Z becomes effective, thereby permitting replacement wells. AR 373. Armed with this information and more, 56.07 percent of voters said yes to Measure Z. Stip. ¶ 9.

C. SIGNIFICANT EXISTING OPERATIONS MAY CONTINUE UNDER MEASURE Z

Plaintiffs claim Measure Z will end all oil operations in Monterey County. Such claims are exaggerated. To be sure, the voters imposed new land use restrictions that will affect the oil industry in the future to protect the County's resources and attributes. AR 152-156. However, Measure Z does not bar steam flooding and cyclic steaming currently used by oil extractors; does not prevent the impoundment or injection of treated wastewater or wastewater injected for purposes other than storage or disposal; and does not stop the drilling of replacement wells.

(1) Steam Flooding or Cyclic Steaming May Continue

Under Measure Z's Fracking Ban, land use in support of hydraulic fracturing, acid well stimulation and other similar well stimulation treatment ("WSTs") that increase the permeability of the formation are prohibited. AR 154-155. However, Measure Z expressly states that "[w]ell stimulation treatments do not include steam flooding, water flooding, or cyclic steaming." Id.; Stip. ¶ 24. Steam flood and cyclic steam injection techniques are used by operators in Monterey County's oil fields to decrease oil viscosity and enhance its production. Stip. ¶¶ 16-18. These techniques are distinguishable from WSTs subject to the Fracking Ban, which are defined as treatments designed to make the formation more permeable. AR 155; Stip. ¶ 24.

Despite Measure Z's unambiguous language supporting the ongoing use of steam flood and cyclic steam injection practices, Plaintiffs make an unsupported leap. They argue that Measure Z's Fracking Ban "appears to sweep all oil and gas operations into its purview" and that they "cannot be reasonably certain what conduct is prohibited." Chevron Opening Brief 29:17-

30:10, 35:16-37:8; see also, NARO Opening Brief 16:1-16; Trio Opening Brief 15:12-16:17. These claims are contrary to the express language of Measure Z, as explained above, and also inconsistent with Plaintiffs' existing practices, as explained below.

Measure Z's definition of WSTs incorporates the definition used by the Legislature in Senate Bill No. 4. Cal. Pub. Res. Code § 3157; Stip. ¶ 24. Under Plaintiffs' logic, if steam flood and cyclic steam injection techniques qualify as WSTs, Plaintiffs would have been obligated to obtain a WST permit from the state to legally perform such activities in Monterey County. Stip. ¶ 29. However, as of May 12, 2017, no such permits were issued. Stip. ¶ 29. Meanwhile, Plaintiffs regularly conduct steam flood and cyclic steam injection practices. Stip. ¶ 16. Thus, Plaintiffs' argument is contradicted by their own practices.

The reasonable and practical way to read Measure Z's Fracking Ban is to limit its scope to WSTs that are designed to increase the permeability of the formation. Put simply, the Fracking Ban bans future fracking operations, which everyone concedes do not currently occur in Monterey County, not anything more, and has no impact on current operations.

(2) Impoundment or Injection of Treated Wastewater is Allowed

Plaintiffs suggest that Measure Z is invalid because its Storage and Disposal Limitation bars injection and impoundment of all wastewater that is produced when oil is extracted. Chevron Opening Brief 30:26-31:6; Eagle Opening Brief 26:26-28:18; NARO Opening Brief 16:17-17:22. This contention misconstrues the Storage and Disposal Limitation and overstates its scope. First, Measure Z provides for a phase-out of land uses that support the impoundment and injection of oil and gas wastewater for storage or disposal. AR 155. Second, Measure Z defines "wastewater" as "wastewater brought to the surface in connection with oil or natural gas production, including flowback fluid and produced water." AR 155. The reasonable interpretation of this provision is that it does not apply to land uses in support of treated wastewater. AR 348-350, 373-374.

The distinction between treated and untreated wastewater is evident in the intent

expressed by supporters in Measure Z.[2] Supporters were concerned about the water supply, as evidenced by Measure Z's thematic title, "Protect Our Water: Ban Fracking and Limit Risky Oil Operations Initiative." AR 151, 152. For example, they worried about water and soil contamination associated with improper wastewater storage and disposal and spills. AR 153 (finding 5). Accordingly, the supporters' concern over contamination from oil and gas wastewater cannot reasonably be construed to include concern about clean, treated or purified water being impounded or injected and added to the water supply.

The County Counsel Impartial Analysis of Measure Z, which was included in the ballot pamphlet, concluded that treated wastewater may be impounded and injected. AR 373-374, Stip. ¶ 8. This analysis stated that although the "measure would eventually prohibit using land for impoundment and injection of Wastewater … it appears the measure allows Wastewater to be treated and then injected or impounded in ponds and allowed to percolate." AR 373. In other words, once water is treated and reclaimed, such as the water purified in the reverse osmosis plant discussed below, it would no longer qualify as "oil and gas wastewater" and would be outside the scope of Measure Z. The County Counsel Impartial Analysis is a helpful and proper tool for resolving the concern of Plaintiffs that they won't be able to impound or inject treated wastewater.[3] Ballot arguments also are a proper interpretive tool and confirm that impounding or injecting treated wastewater is not prohibited. Hermosa Beach, 86 Cal.App.4th at 551. Here, the Argument in Favor of Measure Z stated that the initiative "encourages oil companies to treat their toxic wastewater for beneficial reuse." AR 364. The Argument against Measure Z does not refute this conclusion. AR 367. Rather, it makes the unsupported statement that the initiative would "lead to a shutdown of oil production." Id.

The reasonable and practical construction of Measure Z's Storage and Disposal Limitation is that produced water that is treated to remove contaminants is no longer produced water and may be used for steam flooding, percolated or injected underground. This view comports with

[2] "Absent some basis for determining that the intent of the electorate was in conflict with the intent of the drafters, evidence of the drafters' intent is an appropriate tool in interpreting the scope of an initiative." Hermosa Beach, 86 Cal.App.4th at 551.

[3] Hermosa Beach, 86 Cal.App.4th at 551 (independent analysis by city attorney informed court's interpretation of scope of initiative prohibiting certain oil drilling operations on city-owned property).

the title of Measure Z, the County Counsel Impartial Analysis and the ballot arguments.

(3) Impoundment or Injection for Purposes Other than Storage or Disposal is Allowed

Regardless of whether treated wastewater may be injected, the injection of recycled produced water for steam flooding is still allowed as long as it is not for storage or disposal. Measure Z, Section 2, LU-1.22, defines "oil and gas wastewater injection" as "the injection of oil and gas wastewater into a well for underground storage or disposal." AR 155. Similarly, "oil and gas wastewater impoundment" means the "storage or disposal of oil and gas wastewater in depressions or basins in the ground . . . ." AR 155. Because recycling for steam flooding purposes will inject the water back into the oil formation where it will be produced again with oil and gas is not storing or disposing of the recycled water. Burzlaff Decl. ¶ 4; Baker Report 49.[4] This contradicts Plaintiffs assertion that the Storage and Disposal Limitation will end all oil production at San Ardo. Chevron Opening Brief 35:16-37:8; Aera Opening Brief 25:6-27:10; Eagle Opening Brief 26:26-28:18; NARO Opening Brief 15:8-20.

(4) Replacement Wells that Do Not Increase the Total Number of Wells are Permitted

Plaintiffs contend that Measure Z's No Net New Well Limitation prevents them from drilling the new wells necessary for oil production. Chevron Opening Brief 31:7-22, 34:3-35:15; Aera Opening Brief 24:5-25:5; CRC Opening Brief 9:18-10:5; Eagle Opening Brief 28:19-29:22; NARO Opening Brief 15:8-20; Trio Opening Brief 16:18-28. Again, Plaintiffs reach too far. And again, the County Counsel Impartial Analysis and ballot arguments demonstrate how to reasonably interpret the measure.

[4] The Burzlaff Decl. is the Decl. of Alan Burzlaff in Supp. of Def. Cty. of Monterey's Phase I Opening Br., dated Sept. 28, 2017. The Baker Report is part of the Decl. of Charles G. Kemp in Supp. of Pl. and Pet'r Aera Energy LLC's Phase I Opening Br., etc., dated Aug. 10, 2017 (ex. A – Baker & O'Brien Independent Expert Report.)

The County Counsel explained that Measure Z "would prohibit drilling 'new' wells," but "because a stated purpose of the initiative is to prevent expansion of oil and gas operations it appears that the prohibition applies only to drilling wells exceeding the number operating at the time the measure becomes effective, and would permit replacement wells." AR 373-374 (emphasis added). Similarly, the Argument in Favor of Measure Z explains that it prohibits new wells, but "allows existing oil wells to be reworked via re-drilling, or horizontal drilling, to extend their productive lives." AR 364. The argument Against Measure Z does not address the issue, other than to broadly state that the measure "will lead to a shutdown of oil production." AR 367, 375.

Measure Z's findings provide further evidence of the drafters' intent to limit future expansion to protect natural resources and other county attributes, while permitting existing operations to continue. AR 152-154 (findings 3, 7, 8, 10, 11, 12, 13, 15); Hermosa Beach, 86 Cal.App.4th at 551. For example, finding 10 refers to the need to "curtail the number of new oil and gas wells" to protect scenic vistas and tourism, prevent degradation of road conditions, and avoid noise, traffic and safety concerns. AR 154.

D. MEASURE CONTAINS CONSTITUTIONAL SAFEGUARDS

Not only does, Measure Z enact reasonable limitations on land uses in support of oil and gas extraction, it contains multiple constitutional safeguards that protect it from facial attacks by Plaintiffs. For example, Measure Z's Storage and Disposal Limitation is expressly subject to a reasonable amortization period. Section 2, provision LU.1-22, states that "[i]n order to provide a reasonable amortization or 'phase-out' period," the Storage and Disposal Limitation will not commence until five years of Measure Z's effective date In addition, Measure Z provides that this amortization period may be extended for up to ten additional years on a case-by-case basis by the Planning Commission. This amortization period for the Storage and Disposal Limitation enables oil and gas operators to phase out the prohibited land uses, while recouping their investments related to those land uses. AR 155.

More broadly, Section 6(A), Section 6(B) and Section 6(C) of Measure Z collectively assure that Measure Z's provisions will not impair vested rights or result in an unconstitutional taking of private property. AR 159-160. Section 6(A) provides that the initiative shall not be applied "to prohibit any person or entity from exercising a vested right, obtained pursuant to State law, as of the Effective Date of this Initiative." Section 6(B) provides that the initiative's provisions "shall not apply to the extent, but only to the extent, that they would violate the constitution or laws of the United States or the State of California." Section 6(C) permits the Board of Supervisors to grant an exception to the application of any Measure Z provision if the Board finds, based on substantial evidence, that such application would constitute an unconstitutional taking of property. These constitutional safeguards insulate Measure Z from Plaintiffs' facial attacks.

Additionally, Section 7(H) recognizes that future clarification may be needed and authorizes the Board of Supervisors, after noticed hearing, to adopt any implementing ordinances, guidelines, rules and regulations needed to further Measure Z's purpose. AR 160, 349. Finally, Section 9 contains a clause requiring a broad interpretation of the measure to achieve its purpose, as well as a severability provision, which confirms the voters desire that all of the initiative's remaining provisions should survive if any individual provision is held invalid. AR 161.

3. MEASURE Z IS NOT PREEMPTED BY STATE OR FEDERAL LAW

The key to the preemption analysis of Measure Z is whether or not the state or federal oil and gas statutes mandate that local jurisdictions permit the activities regulated by the statutes. The preemption cases cited by both Plaintiffs and the County recognize this distinction. Because the express language of those statutes and cases squarely on point allow local land use bans of oil and gas operations, the applicable statutes do not mandate such operations, and Measure Z is not preempted by state or federal law.

A. COURTS MAY NOT LIGHTLY PRESUME STATE PREEMPTION OVER LOCAL POLICE POWERS

Under the California Constitution, counties have the authority to make and enforce "all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. art. XI, § 7; City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc., 56 Cal.4th 729, 738 (2013). As the California Supreme Court explained: "This inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders, and preemption by state law is not lightly presumed." City of Riverside, 56 Cal.4th at 738. In fact, "California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute." City of Riverside, 56 Cal.4th, at 743 (emphasis in original); Big Creek Lumber Co. v. Cty. of Santa Cruz, 38 Cal.4th 1139, 1151 (2006).

Accordingly, courts will only find that state law preempts the exercise of this local police power if the local legislation "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." Great Western Shows v. County of Los Angeles, 27 Cal.4th 853, 860 (2002). Local legislation is duplicative of general law when it is "coextensive therewith," and contradictory when it is "inimical thereto." Id. Local legislation enters an "area fully occupied" when:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

Id. at 860-861. As explained next, federal preemption is very similar.

B. COURTS PRESUME FEDERAL PREEMPTION DOES NOT APPLY

A presumption against preemption is well established in federal law. Big Creek Lumber Co. v. County of Santa Cruz, 38 Cal.4th 1139, 1150 n. 7 (2006). The United States Supreme Court noted that "[w]hen Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Id. (citing Bronco Wine Co. v. Jolly, 33 Cal.4th 943, 956-957 (2004)); California v. ARC America Corp,. 490 U.S. 93, 101 (1989) (same quote).[5]

With that assumption, federal law may preempt a state regulation under the Supremacy Clause in three circumstances. U.S. Const. art. VI, cl. 2; Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712-713 (1985). First, Congress may supersede state law by express statement. Id. at 713. Second, preemption may be inferred when it is clear from comprehensive regulation that Congress has "'left no room' for supplementary state regulation." Hillsborough, 471 U.S. at 713; Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 204 (1983). Field preemption also may be inferred where "the field is one in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Hillsborough, 471 U.S. at 713; Pacific Gas, 461 U.S. at 205 (same quote).

Third, even where Congress has not completely occupied a specific field, courts will nullify state law to the extent it actually conflicts with federal law. Conflict preemption arises when it would be a physical impossibility to comply with both state and federal regulations or where state law is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Oneok, Inc. v. Learjet, Inc., ___U.S. ____; 135 S.Ct. 1591, 1595 (2015)

[5] "For purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985).

(citing California v. ARC America Corp., 490 U.S. 93, 101 (1989)).

C. MEASURE Z IS NOT PREEMPTED BY STATE LAW.

(1) Local Land Use Authority May Prohibit Oil and Gas Operations

California courts, as well as the California Attorney General, have repeatedly recognized the validity of local land use ordinances prohibiting oil and gas land uses, notwithstanding state legislation regulating oil and gas operations. In Beverly Oil Co. v. Los Angeles, 40 Cal.2d 552, 558 (1953), the California Supreme Court upheld the City of Los Angeles's enforcement of a zoning ordinance that barred the drilling of new oil wells or deepening of existing wells, but permitted the continued operation of existing oil wells. Beverly Oil, 40 Cal.2d at 555. The Court stated that although state statutes exist that favor the conservation of oil deposits, a city zoning ordinance prohibiting production of oil in designated areas is not "of itself an unreasonable means of accomplishing a legitimate objective within the police power of the city." Id. at 558.

Likewise, in Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach, 86 Cal.App.4th 534, 540 (2001), the voters adopted an initiative that reinstated a total ban on oil drilling within the City of Hermosa Beach. The court had no trouble concluding that the initiative was presumptively a justifiable exercise of the City's policy power. Id. at 555. Notably, despite the existence of all the state and federal laws that Plaintiffs here seeks to employ to argue for preemption, none of the parties in Hermosa Beach disputed the validity of reinstating the total ban on oil drilling within the City; they only argued about how that ban applied to an existing project.

As discussed in more detail below, the California Attorney General has also confirmed the power of local agencies to use local land use powers to address oil and gas land uses. 59 Ops.Cal.Atty.Gen. 461 (1976).[6] Based on a review of then existing case law, the Attorney General concluded that counties had the power to prohibit oil and gas land uses. Id. at 466. In

[6] 59 Ops.Cal.Atty.Gen. 461 is attached to Pls.' Req. for Judicial Notice in Supp. of Phase 1 Proceedings, dated Aug. 11, 2017 ("Pls. Joint RJN"), ex. 32.

addition, the Attorney General concluded that counties could also regulate the drilling, operation, maintenance and abandonment of oil and gas wells with respect to phases of such activities not in conflict with state law. Id. at 462.

Finally and most significantly, the California Supreme Court held in Higgins v. Santa Monica, 62 Cal.2d 24, 32 (1964), that a City of Santa Monica ordinance banning oil and gas drilling on tidelands and submerged lands was not preempted by state statutes regulating the use of such lands for production of oil and gas. Higgins, 62 Cal.2d at 32. Although the state statutes preempted local ordinances "with respect to the mode and manner" by which a city could execute oil leases to such lands, "there has been no preemption of the field of determining whether or not such lands should be developed for oil or gas." Id. The question of whether or not such lands should be developed, "as the permissive language of sections 7057 and 7058 of the Public Resources Code and section 718 of the Civil Code clearly shows, is one that has been left to the discretion of the city involved." Id. (emphasis in original). Therefore, this case squarely answers the question before this Court about whether Measure Z has been preempted.

Collectively, these authorities demonstrates that Measure Z's Fracking Ban, Storage and Disposal Limitation and No New Net Well Limitation fall squarely within the County's police power and are not preempted by state law.

(2) Measure Z Does Not Duplicate or Contradict State Statutes

Measure Z, which focusses on above-ground land uses, does not duplicate or contradict the state's oil and gas statutes, which focus on well drilling activities below-ground. The Division[7] supervises the drilling, operation, maintenance, plugging and abandonment of oil and gas wells in California. Cal. Pub. Res. Code § 3106; Stip. ¶ 30. Additionally, pursuant to Senate Bill No. 4, the Division developed a regulatory and permitting system, effective in July 2015, for the oil and gas industry's use of WSTs including hydraulic fracturing. Cal. Pub. Res. Code §§

[7] The Division of Oil, Gas and Geothermal Resources, known as "DOGGR," is located within the Department of Conservation. Cal. Pub. Res. Code § 3002.

3150-3161; Stip. ¶ 33. In contrast, Measure Z's Fracking Ban, Storage and Disposal Limitation and No Net New Wells Limitation prohibit above-ground land uses. AR 154-156; 373.

As the California Supreme Court explained, a court will not find a preemptive conflict when a local ordinance neither "mandate[s] what state law expressly forbids," nor "forbid[s] what state law expressly mandates." Great Western, 27 Cal.4th at 866. In Great Western, Los Angeles County passed an ordinance which prohibited the sale of firearms and ammunition on County property. Id. at 859. Plaintiff gun show operator argued that state statutes which regulated the manner in which gun show licenses could be obtained preempted the ordinance. Id. at 860, 864-865. The Court disagreed and explained: "Although the gun show statutes regulate . . . the sale of guns at gun shows, and therefore contemplate such sales, the statutes do not mandate such sales …." Id. at 866.

The California Supreme Court has repeatedly found that just because a statutory scheme regulates and licenses certain activities, it does not preempt local ordinances that prohibit such activities when state statutes do not mandate such activities. Big Creek, 38 Cal.4th at 1161 ("while the forestry laws generally encourage 'maximum sustained production of high-quality timber products' . . . , they do not require every harvestable tree be cut") (citing state forestry law); City of Riverside, 56 Cal.4th at 755 ("neither the CUA nor the MMP requires the cooperative or collective cultivation and distribution of medical marijuana that Riverside's ordinance deems a prohibited use within the city's boundaries") (emphasis in original). This is why, as discussed above, California courts and the Attorney General have uniformly recognized the power to adopt local bans on oil and gas land uses.

In comparison, the cases cited by Plaintiffs are based on provisions of the firearms statutes, which are not similar to the oil and gas statutes at issue here. In Suter v. City of Lafayette, 57 Cal.App.4th 1109, 1122-1123 (1997), the City of Lafayette adopted an ordinance that required firearms dealers to employ two of the three alternatives to store firearms which California Penal Code Section 12071(b)(14) allows. Chevron Opening Brief 17:20-25, 19:20-22; Aera Opening Brief 13:6-8. The Court found that where the state expressly permits operation under a certain set of standards, local authorities are preempted from imposing more stringent

standards. Id. at 1125. However, the court upheld the city ordinance, which required dealers to provide security devices with the firearms they sell, because state law "neither requires nor prohibits dealers from including them with the sale of every firearm." Id. at 1126. Here, the state oil and gas statutes neither require nor prohibit Measure Z's land use restrictions,

Plaintiffs cite Great Western, 27 Cal.4th at 868, for the general proposition that when a statutory scheme promotes a certain activity and at the same time, permits more stringent local regulation of that activity, local regulation cannot be used to completely ban the activity. Chevron Opening Brief 17:25-18:1; Eagle Opening Brief 20:3-11. In other words, if the statute contemplates more stringent local regulations, by implication it contemplates at least some activity. However, California courts and the Attorney General have already examined the state statutes governing oil and gas operations, and decided that land use restrictions of these operations are valid exercises of the police power.

Plaintiffs also rely upon Fiscal v. City and County of San Francisco, 158 Cal.App.4th 895, 900 (2008), in which a local ordinance prohibited city residents from possessing firearms or selling, distributing, transferring and manufacturing firearms and ammunition. Chevron Opening Brief 18:3-6, 19:11-19, 19:23-20:7, 25:11-12; Aera Opening Brief 16:1-3; Eagle Opening Brief 16:11-13; Trio Opening Brief 11:13-17. The legal infirmities with the ordinance were clear since the Penal Code guaranteed residents the right to purchase and own firearms, the Government Code expressly preempted local enactments relating to the licensing and registration of firearms, and the Penal Code provisions for "Saturday Night Specials" impliedly preempted local ordinances. Id. at 912-914. No such provisions exist in this case.

Because the state statutes do not mandate that oil producers must be allowed to operate or forbid local ordinances from prohibiting their operations, there is no contradiction between those statutes and Measure Z.

(3) The Field Is Not Fully Occupied by the State

(i) Exclusively a Matter of State Concern

In this action, the California Legislature has not voiced an express preemptive intent to fully occupy the field of oil and gas land uses.[8] To the contrary, the Legislature has, in at least two circumstances, expressly provided for the simultaneous preservation of local control with the state oil and gas statutory scheme. Cal. Pub. Res. Code §§ 3160(n), 3690. In addition, the above cases have not found such an express intent. Supra, County Brief § 3(C)(1).

The Legislature enacted Public Resources Code Section 3160(n) as part Senate Bill No. 4, described above. This states that the well stimulation treatment statute "does not relieve the division or any other agency from complying with any other provision of existing laws, regulations, and orders." Cal. Pub. Res. Code § 3160(n). An Assembly analysis of Senate Bill No. 4 explained that the "legislative intent of PR Section 3160(n) is clear: the [Division] and all other agencies (state or local) are not absolved from complying with any other provision of existing laws, regulations, and orders (including court orders) . . . . This bill does not limit a local government's ability to enforce its own approval authority . . . " [9,10]

Similarly, Public Resources Code Section 3690 states that the oil and gas statutes governing unit operations[11] "shall not be deemed a preemption by the state of any existing right

[8] Express preemption requires that the Legislature "voice such an intent." Candid Enterprises, Inc. v. Grossmont Union High School Dist. 39 Cal.3d 878, 886 (1985).

[9] Def. Cty. of Monterey's Req. for Judicial Notice in Supp. of Trial Br., dated Sept. 28, 2017 ("County RJN"), ex. A (Cal. Assemb. Nat. Res. Comm., Assemb. Floor Analysis, S.B. 4 3d S. reading, 2013-2014 Sess., at 9 (amend. Sept. 6, 2013).

[10] The author of Senate Bill No. 4, Senator Fran Pavley, sent a letter on Sept. 12, 2013, to Secretary of Senate Gregory Schmidt, emphasizing that in accord with the savings clause in Cal. Pub. Res. Code § 3160(n), § 3160(d)(2)(B) (pertaining to the time period to approve certain permits) was not intended to preempt existing laws, regulations, and orders that may require additional review or mitigation associated with WSTs, including local government's authority over land use. County RJN, ex. B (letter from S. Fran Pavley to Sec. of S. Gregory Schmidt, dated Sept. 12, 2013). The letter is available at http://cleanwateraction.org/files/publications/SB%204%20letter%20to%20journal%20final.pdf

[11] Unit operations involve the "management, development and operation of lands as a unit for the production of oil and gas [to aid] in preventing waste, increase[ing] the ultimate recovery of oil and gas, and facilitate[ing] concurrent use of surface lands for other beneficial purposes. Cal. Pub. Res. Code § 3630.

of cities and counties to enact and enforce laws and regulations regulating the conduct and location of oil production activities, including, but not limited to, zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment, and inspection." While the scope of each of these savings clauses applies to certain aspects of the oil and gas statutes, they demonstrate that the Legislature expressly intended not to preempt the field.

There is also no basis to imply oil and gas operations are exclusively a matter of state concern. Public Resources Code Section 3206.5 provides that any city or county may require information from the Division about non-producing wells and may formally request that they be plugged and abandoned, upon which the Division is required to make a determination within 120 days as to whether the wells should be plugged or abandoned. This provision "attest[s] to the Legislature's desire to have state and local authorities work together in a cooperative effort." Waste Resource Technologies v. Dept. of Pub. Health of the City and Cty. of San Francisco, 23 Cal.App.4th 299, 307 (1994); see, Cal. Pub. Res. Code § 3320.1(c) (preserving eminent domain authority of cities and counties pursuant to unit or cooperative agreement commitments to ameliorate land subsidence problems overlying or adjacent to producing oil or gas pools). Rather than exclude local authority, the statutory scheme seeks to include and work with the local agencies.

The Chief Deputy Director of the Department of Conservation, Jason Marshall, underscored the lack of State field preemption in testimony before the Monterey County Board of Supervisors on September 23, 2014. In response to a question about the authority of local jurisdictions under Senate Bill No. 4, Mr. Marshall stated:

> [S]o when the County is considering a project under CEQA for that land use authority, separate and distinct from the – the permit that DOGGR will have to issue for the – the notice of intent to drill or even the WST, it is the County's not just opportunity but really responsibility to make sure that all of the environmental impacts are identified and – and appropriately mitigated through the – that CEQA process.

County RJN, ex. C (Cty. Bd. of Supervisors meeting, Sept. 23, 2014, 3:23-24; 161:14 – 162:8).

The fact that numerous statutes deal with a regulated field "does not by itself show that the subject … has been completely covered so as to make the matter one of exclusive state concern." Galvan v. Superior Court of San Francisco, 70 Cal.2d 851, 861 (1969), superseded by statute on other grounds, Fiscal, 158 Cal.App.4th at 907. Preemption is not a "quantitative problem" involving a "statutory nosecount." Galvan, 70 Cal.2d at 861. Rather, the task is to determine whether the state has occupied an area of legislation that includes the subject of the local legislation and "is sufficiently logically related so that a court, or a local legislative body, can detect a patterned approach to the subject." Id. at 862 (some areas of weapons control preempted, but not entire field).

Here, the subject of the local legislation is land use, not underground oil and gas activities, and no "detectable pattern" of land use regulation can be found in the State's statutory scheme. The reason is simple. Land use decisions are a local matter and California courts have concluded that State oil and gas statutes do not preclude local zoning provisions related to the siting of oil and gas activities. Beverly Oil Co., 40 Cal.2d at 558; Higgins, 62 Cal.2d at 32.

The Attorney General reached the same conclusion, drawing a line between below-ground and above-ground activities. 59 Ops.Cal.Atty.Gen. 461 (1976). The Attorney General concluded that underground phases of oil and gas activities "appear" to be fully occupied by the State's statutory scheme. Id. at 478. However, local governments may impose "regulations more stringent than those imposed by the state" on non-subsurface activities, "so long as [local regulation] do[es] not conflict with, frustrate the purposes of, or destroy the uniformity of the [Division's] statewide regulatory conservation and protection plan." Id. at 479. These above-ground activities include land use, environmental protection, aesthetics, public safety, and fire and noise prevention. Id. Therefore, the Attorney General expressly found that local prohibitions on surface impoundments are permissible and not preempted by State law. 59 Ops.Cal.Atty.Gen. at 482. Consistent with the Attorney General's opinion, Measure Z is limited to above-ground land uses.

In summary, the statutes and regulations governing oil and gas production in California do

not establish the subject is exclusively a matter of state concern. Rather, the pattern of state deference to local land use legislation concerning such production proves the opposite.

(ii) Paramount State Concern

When evaluating whether a "paramount state concern" precludes further or additional local action, courts look to whether ''substantial geographic, economic, ecological or other distinctions are persuasive of the need for local control, and whether local needs have been adequately recognized and comprehensively dealt with at the state level." Great Western, 27 Cal.4th at 862 (citing Galvan,70 Cal.2d at 863-864).

In Galvan, the City and County of San Francisco enacted an ordinance requiring the registration of all firearms within San Francisco with certain exceptions. Galvan, 70 Cal.2d at 855. In finding there was no "paramount State concern," the California Supreme Court explained that "no elaborate citation of authority" was required to conclude that "problems with firearms are likely to require different treatment in San Francisco County than in Mono County." Galvan, 70 Cal.2d at 864.

Furthermore, in City of Riverside, 56 Cal.4th at 729, 737, the California Supreme Court upheld the City of Riverside's prohibition on medical marijuana dispensaries based on the "inherent local police power," which "includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders." Id. at 738. The Court explained the importance of protecting "California's diverse counties and cities" from a "one size fits all" policy for marijuana dispensaries. Id. at 756. The Court noted that some communities might not have sufficient commercial or industrial space for such facilities, while others might have concerns about increased crime, congestion, blight and drug abuse from dispensaries. Id. at 755-756.

Monterey County, unlike many other areas of the State, is California's fourth largest oil-producing county, averaging more than 20,000 barrels of oil per day from several oil fields. Eagle Opening Brief 2:14-15. San Ardo Field is the eighth most productive oil field in California. Aera

Opening Brief 2:19-20. Monterey's citizens, in mounting the Measure Z campaign, balanced oil and gas production with the County's unique agricultural heritage and rural character, its attraction as a tourist destination, and its many biological and marine resources. AR 153 (finding 7); 154 (findings 10-12). While some communities might view themselves as "well suited" to accommodate land uses involving oil and gas drilling, the voters in Monterey County should be permitted to make "the reasonable decision" that the prohibited land uses in Measure Z represent "unacceptable local risks and burdens." City of Riverside, 56 Cal.4th at 756.

(iii) Adverse Effect on Transient Citizens of the State

"The third potential indicium of implied preemptive intent focuses on whether the subject matter of the ordinance has been partially covered by the statute and is of such a nature as to cause an undue adverse effect on the transient citizens of the state." Sherwin-Williams Co. v. City of Los Angeles, 4 Cal.4th 893, 905-906 (1993). In Sherwin-Williams, the City of Los Angeles passed an ordinance regulating the retail display of aerosol paint and broad tipped marker pens. Id. at 895–896. Plaintiff Sherman Williams Co. argued that the state statute defining the lawful transfer of aerosol paint and requiring retailers to post warnings against vandalism preempted the ordinance. Id. In concluding that it did not, the Court held: "neither the prevention of graffiti nor the retail display of aerosol paint and broad-tipped marker pens is a matter in which transient citizens of the state are particularly concerned." Id. at 906.

Similarly, the California Supreme Court in Galvan, 70 Cal.2d at 864-865, found that San Francisco County's firearms registration ordinance did not place undue burden on transient citizens. The Court reasoned that the firearms law interfered less with transients than: a Fresno ordinance prohibiting consumption of alcoholic beverages on the street, a Los Angeles gambling ordinance or a Los Angeles loitering ordinance, none of which were preempted by State law, "and all of which apply to anyone within the geographic confines of the city, and not merely to residents." Id. at 865 (emphasis in original).

The same analysis applies here. The three land use provisions in Measure Z apply only to

property interests within Monterey County. The Measure places no discernable "undue adverse effect" on citizens from elsewhere who might pass through the County. Sherwin-Williams, 4 Cal.4th at 905-906. In fact, the opposite is true. Monterey County has a proud agricultural tradition and pastoral atmosphere which is well suited to its scenic vistas and natural resources. AR 153-154. Presumably everyone, residents, tourists and other visitors, benefit from Measure Z.

D. MEASURE Z IS NOT PREEMPTED BY FEDERAL LAW

(1) Federal Law Does Not Expressly Preempt Measure Z

Express preemption "begin[s] with the statutory text, necessarily the source of the best evidence concerning the breadth of Congress's preemptive intent." Quesada v. Herb Thyme Farms, Inc., 62 Cal.4th 298, 308 (2015). The Division permits and regulates Class II injection wells in California under the Underground Injection Control ("UIC") program. This program is part of the federal Safe Drinking Water Act, 42 U.S.C, §§ 300f-300j-27 ("SDWA"), to meet minimum federal requirements to prevent underground injection that endangers drinking water sources. 42 U.S.C. § 300h(b).[12] In this case, the SDWA has a savings clause that states that nothing in the UIC program "shall diminish any authority of a State or political subdivision to adopt or enforce any law or regulation respecting underground injection" as long as such law or regulation does not "relieve any person of any requirement otherwise applicable under this title." 42 U.S.C. § 300h-2(d).

This unambiguous savings clause precludes a finding of express intent by Congress to preempt state or local laws.[13] Quesada, 62 Cal.4th at 308-310 (examined where the Organic

[12] Because the State of California implements the minimum requirements of the SDWA through its state law program discussed above, there is a threshold legal question of whether federal preemption even applies here. As discussed above, the state law program at issue does not preempt Measure Z. In itself, this conclusion should negate the contention that Measure Z is somehow preempted by the SDWA.

[13] Riegel v. Medtronic, Inc., 552 U.S. 312, 330 (2008), is factually distinguishable. Chevron Opening Brief 21:4-5. There, the medical device statutes at issue expressly preempted state requirements "different from, or in addition to, any requirement applicable … to the device' under federal law." Id. at 321. In contrast, under the SDWA UIC program, the federal standards are identified as "minimum requirements." 42 U.S.C. § 300h(b).

Foods Act does not contain language of exclusivity, and therefore, did not preempt local laws); Hillsborough, 471 U.S. at 716 ("Given the clear indication of FDA's intention not to preempt and the deference with which we must review the challenged ordinances, we conclude that these ordinances are not preempted by the federal scheme") (emphasis in original).

(2) Federal Law Leaves Room for Measure Z

Given the savings clause discussed above, it would also be improper to conclude that Congress "has left no room" under the SDWA for supplementary regulation by a state or political subdivision. That is exactly what the court in Bath Petroleum Storage, Inc. v. Sovas, 309 F.Supp.2d 357 (N.D. N.Y. 2004), concluded when it held that New York's additional state permits for underground injection beyond what was required by the EPA-administered UIC program were not preempted by the SDWA. The court reviewed the statutory framework and found that "there is room for state regulation over areas in which the SDWA and its UIC program don't enter." Id. at 367. Similar conclusions have been reached by other courts interpreting similar statutory language. For example, in Pacific Gas & Electric, 461 U.S. at 194, the United States Supreme Court held that the Atomic Energy Act did not preempt the field and upheld California's statute that conditioned the construction of nuclear plants on findings by a State Commission that adequate storage facilities and means of disposal are available for nuclear waste. Relying upon an express savings clause in the federal Act and its legislative history, the Court concluded that Congress gave the United States "complete control of the safety and 'nuclear' aspects of energy generation" and allowed the states traditional authority over the need "for generation capacity, the type of generating facilities to be licensed, land use, rate making, and the like." Id. at 212.

Also, in Hillsborough, 471 U.S. at 713, the United States Supreme Court reviewed federal regulations governing blood plasma collection and a county ordinance imposing additional donor and record keeping requirements. The Court rejected "the argument that an intent to pre-empt may be inferred from the comprehensiveness of the FDA's regulations at issue here." Id. at 716.

Rather, the FDA's disavowal of any intent to preempt state and local regulation, which was consistent with the Congressional intent and was never changed, precluded an implicit intent to preempt the field. Id. at 716–719.

In this case, Congress stated in the SDWA that local authority over underground injections was preserved while the UIC program would govern the safeguards for such injections. Measure Z does not impair the UIC program; it merely sets forth where certain land uses that support oil and gas wastewater injection or impoundment for storage or disposal may occur. In light of the SDWA language, there is no basis to find field preemption.

(3) Federal Law Does Not Conflict with Measure Z

Preemption intent may be inferred where compliance with both state and federal law is impossible or when state law prevents execution of the full purposes and objectives of Congress. Hillsborough, 471 U.S. at 713; Pacific Gas & Electric, 461 U.S. at 204. Measure Z does not meet either standard.

Like Plaintiffs here, petitioners in Pacific Gas & Electric, 461 U.S. at 217, argued that the California statute requiring a finding of adequate storage facilities for nuclear waste conflicted with the federal regulation of nuclear waste disposal. Specifically, the Nuclear Regulatory Commission ("NRC") issued an order concluding that progress toward the development of nuclear disposal facilities allowed it to license new reactors. However, "[b]ecause the NRC order does not and could not compel a utility to develop a nuclear plant, compliance with both it and § 25524.2 [State law requiring finding of adequate disposal facilities] is possible." Id. at 218-219 (brackets added). Similarly, because the UIC program does not and could not compel an oil producer to proceed with reinjection, compliance with both it and Measure Z is possible.

In Hillsborough, 471 U.S. at 721, petitioners argued that the ordinance conflicted with the federal regulations since it imposed more stringent requirements on plasma centers and donors, and thereby was an obstacle to the federal goal of ensuring an adequate supply of plasma. However, the Court did not see any evidence that Congress or the United States Food and Drug

Administration struck a balance between safety and quantity, which might be impaired by the additional requirements on plasma donations imposed by the ordinance. Id. In the present case, states that obtain enforcement primacy for the UIC program are tasked with meeting minimum federal requirements to prevent underground injection that endangers drinking water sources. 42 U.S.C. § 300h(b). Measure Z reflects a policy decision on whether to allow these operations, but it by no means changes the federal requirements. Therefore, Measure Z is not an obstacle to the SDWA's goal to protect drinking water sources.

Plaintiffs' assertion that the SDWA preempts Measure Z is therefore based on a failure to acknowledge the "savings clause" in the SDWA and a misreading of relevant case law. For example, the SDWA expressly allows regulations by state programs which interfere with or impede underground injection when "such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection." 42 U.S.C. § 300h(b)(2). In other words, consistent with the fundamental purpose of the SDWA to protect sources of drinking water, states or political subdivisions such as the County may regulate in ways that may restrict certain underground injections to help achieve the fundamental purposes of the SDWA.

In the main case upon which Plaintiffs rely, EQT Production Co. v. Wender, 191 F.Supp.3d 583 (S.D. W.Va 2016), the court failed to acknowledge the full text of subsection 300h(b)(2). Chevron Opening Brief 21:6–22:6; Aera Opening Brief 16 n. 8, 18:5-6; Eagle Opening Brief 19:8-19; Trio Opening Brief 13:11-28. Although the court analyzed subsection 300h(b)(2), it omitted the exception for requirements that "are essential to assure that underground sources of drinking water will not be endangered by such injection." Id. at 601. Therefore, its conclusion is not supported by the actual language of the SDWA. In addition, EQT's conclusion is fundamentally based on an analysis West Virginia's unique land use law and regulations of the oil and gas industry there. The court found that under West Virginia law, "oil and natural gas extraction is a highly valuable economic activity subject to centralized environmental regulations by the DEP [Department of Environmental Protection]." Id. at 603. It further found that "plenary power over oil and gas activities in the state is given over to the DEP." Id. Since the DEP did not have an express grant of authority, it lacked the ability under West

Virginia law to act. In California, however, the power of counties to regulate the location of oil and gas operations in their jurisdictions, state oil and gas statutes notwithstanding, is firmly established. Therefore, this West Virginia District Court case is irrelevant to an assessment of the County's police power under California law.

Another case cited by Plaintiffs also fails to support their assertion of federal preemption. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 694 (1984), involved an Oklahoma statute requiring cable television operations to delete alcoholic beverage advertisements. Chevron Opening Brief 17:17-19, 22:13-15; Eagle Opening Brief 19:28-20:2. The Oklahoma statute was preempted because the Federal Communications Commission "has unambiguously expressed its intent to pre-empt any state or local regulation of this entire array of [advertising] signals carried by cable television systems." Id. at 701 (brackets added). Rather than expressly preempting local regulation, the SDWA expressly allows it.

Crosby v. National Foreign Trade Council, 530 U.S. 363, 367 (2000), concerned a Massachusetts law regulating state contracts with companies doing business with Burma. Chevron Opening Brief 17:15-17, 22:11-17; Eagle Opening Brief 19:26-28; Trio Opening Brief 12:24-28, 14:1-3. However, it was preempted by a federal law imposing sanctions on Burma because Congress intended to provide the President with flexible authority over economic sanctions against Burma, Congress intended to limit economic pressure to a specific range, and the President has the authority to speak for the United States to encourage democracy and human rights in Burma. Id. at 374-388. The oil and gas statutes could not be more different than the federal sanctions statute since they set strict operating standards for industry, rather than providing authority to another branch of government.

Another case cited by Plaintiffs concluded the local ordinance was not preempted because the California statutes were different than the Resource Conservation and Recovery Act ("RCRA"). City of Riverside, 56 Cal.4th at 760, is cited for the proposition that local governments may not wholly exclude activities that are sanctioned or encouraged by state law. Chevron Opening Brief 22:20-23:2. The Court explained that unlike RCRA, the medical marijuana statutes "do not mandate that local jurisdictions permit such activity." Id. at 760-761.

Plaintiffs' mistake is to assume that the oil and gas statutes "authorize" their activities. The California Supreme Court in Riverside "made clear that a state law does not 'authorize' activities, to the exclusion of local bans, simply by exempting those activities from otherwise applicable state prohibitions." Id. at 758. Like the medical marijuana statutes, the oil and gas statutes in this case do not mandate that the County permit such activities.[14, 15, 16]

Here, Measure Z was enacted to protect the environment, public safety, and economic attributes of Monterey County by amending the General Plan and other land use plans. AR 152-154. It was supported by 15 specific findings, demonstrating to voters that it was a "reasonable response to protect a legitimate local concern." AR 152-159. Thus, Measure Z's land use prohibitions are intended to protect local health and safety concerns, which is consistent with the goals of the UIC.

[14] One case cited by Plaintiffs did not even consider the preemption of a local ordinance or state statute, but rather, examined causes of action in a complaint. Whistler Invs., Inc. v. Depository Trust & Clearing Corp., 539 F.3d 1159 (2008); Chevron Opening Brief 22:17-19. The Securities Exchange Act of 1934 provided for the registration of clearing agencies by the Securities and Exchange Commission. Id. at 1163. Plaintiffs in Whistler sued three federally registered clearing agencies for misrepresentation under Nevada law for their handling of trades according to federally approved rules. Id. at 1166-1168. Because these claims directly attacked the existence or operation of the federally approved rules, the causes of action, not the underlying Nevada laws, were preempted by federal law. Id. In our case, we are considering a local ordinance, not a cause of action, and land use prohibitions that do not attack the existence or operation of the federally approved UIC program.

[15] Yet another case upon which Plaintiffs rely illustrates the differences between statutes at issue in the cases they cite and this case. The United States Supreme Court in United States v. Locke, 529 U.S. 89, 94 (2000), considered federal and Washington State statutes enacted to prevent maritime oil tanker spills. Chevron Opening Brief 23:10-12, 23:17-21. In particular, Locke examined federal and state reporting requirements for vessels. Id. at 114–115. Washington contended that its requirements were not preempted because they were similar. Id. at 115. The Court rejected this argument since Congress intended the federal law to be the sole source of a vessel's reporting obligations. Id. Unlike the Washington and federal statutes in Locke, Measure Z is not similar to the UIC program, and the SDWA expressly allows for local authority.

[16] Plaintiffs also rely upon a case involving an express preemption provision. Friends of the Eel River v. North Coast R.R. Auth. Auth., 3 Cal.5th 677 (2017), provided that if CEQA compliance prevented a privately owned railroad from operating, it would be preempted by federal law. Chevron Opening Brief 20:9-13. However, the federal law in that case, the ICC (Interstate Commerce Commission) Termination Act of 1995, contained an express preemption clause: "Its remedies are exclusive and expressly preempt States remedies 'with respect to regulation of rail transportation.'" Id. at 711 (citing 49 U.S.C. §10501(b)). The SDWA contains an express savings clause, not an express preemption clause.

E. IF ONE OF MEASURE Z'S LAND USE PROVISIONS IS INVALID, THE DOCTRINE OF SEVERABILITY PRESERVES THE VALID PROVISIONS

Measure Z contains a severability clause. AR 161.[17] "Although not conclusive, a severability clause normally calls for sustaining the valid part of the enactment, especially when the invalid part is mechanically severable." Santa Barbara School Dist. v. Superior Court of Santa Barbara County, 13 Cal.3d 315, 331 (1975); California Redevelopment Assn. v. Matosantos, 53 Cal.4th 231, 270 (2011). "When the ordinance contains a severability clause, an invalid provision is severable if it is grammatically, functionally, and volitionally separable." MHC Financing Limited Partnership Two v. City of Santee, 125 Cal.App.4th 1372, 1393 (2005).

An enactment passes the grammatical test when the valid and invalid parts can be separated by paragraph, sentence, clause, phrase or single words. MHC Financing, 125 Cal.App.4th at 1393. A provision is functionally severable if it can be applied independently and the remaining provisions can "stand on their own, unaided by the invalid provisions nor rendered vague by their absence nor inextricably connected to them by policy considerations." Id. "The volitional requirement for severability is met if the voters likely would have adopted the initiative without the invalid provisions." Id.

Here, each of the three Measure Z land use provisions is grammatically separable because each "can be removed as a whole without affecting the wording of any other provision." Calfarm Ins. Co. v. Deukmejian, 48 Cal.3d 805, 822 (1989). Each provision is also functionally separable

[17] Measure Z's severability clause states:

> This Initiative shall be interpreted so as to be consistent with all applicable Federal, State, and County laws, rules, and regulations. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, part, or portion of this Initiative is held to be invalid or unconstitutional by a final judgment of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Initiative. The voters hereby declare that this Initiative, and each section, subsection, paragraph, subparagraph, sentence, clause, phrase, part, or portion thereof would have been adopted or passed even if one or more sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, parts, or portions were declared invalid or unconstitutional. If any provision of this Initiative is held invalid as applied to any person or circumstance, such invalidity shall not affect any application of this Initiative that can be given effect without the invalid application. AR 161.

because each constitutes a separate prohibition of a particular type of land use. For example, Measure Z's prohibition on impounding or injecting untreated wastewater for storage or disposal would not be required for the prohibition on new wells to take effect. Thus, Measure Z meets the grammatical and functional tests.

Finally, the land use provisions of Measure Z are volitionally separable. Measure Z voters were well informed about the three land use provisions upon which they were passing judgment. County Counsel's title and summary of the "chief purpose and points of the proposed measure" clearly delineated the three distinct land use provisions in the title, in the summary, and in the Notice of Intention to Circulate Petition. AR 151. The Initiative itself did the same. AR 154-156. The County Counsel Impartial Analysis similarly pointed out all three types of land use prohibitions. AR 373-374. The Argument in Favor of Measure Z made clear that "fracking, acidizing and wastewater injection" were of great concern to voters at several points, and it also stated clearly that Measure Z "prohibits new wells." AR 364.

The voters also were fully informed of Measure Z's overriding environmental and public purposes. AR 151-154, 364, 387. Although each individual provision restricts a different type of land use, all seek to protect the environment, public safety, and the local economy and amenities. AR 151-154. A similar circumstance arose in Santa Barbara, 13 Cal.3d at 319, involving a Santa Barbara School District initiative enacting certain anti-busing legislation and repealing statutes intended to prevent and eliminate racial and ethnic imbalance in pupil enrollment. The constitutional portion, repealing the racial balance statutes, was severable from the unconstitutional part, anti-busing legislation, because they were all "subsumed within an overall purpose to eliminate forced integration by busing." Id. at 331.

Although cited by Plaintiffs in opposition to volitional separability, the California Supreme Court held the void provisions were severable: "it seems eminently reasonable to suppose that those who favor the proposition would be happy to achieve at least some substantial portion of their purpose, namely to eliminate a State commitment to racial balance in the schools." Id. at 332; Chevron Opening Brief 28:20-25. Likewise, it is reasonable to conclude that the citizens who voted for Measure Z would be "happy to achieve at least some substantial

portion" of the protection for the environment, public safety, and the local economy and amenities.

Plaintiffs rely upon Birkenfeld v. City of Berkeley, 17 Cal.3d 129 (1976), but that Court refused to apply the doctrine of severability because it would require re-writing the ordinance. Chevron Opening Brief 27:10-22; CRC Opening Brief 15:3-25. There, the California Supreme Court concluded a rent control charter amendment, which created a new board with circumscribed powers, violated the constitutional limits of the police power because its procedures to adjust maximum rents were so cumbersome, they would deny the landlords due process of law. Id. at 135. The constitutional defect could not "be cured simply by excision but only by additional provisions" which would rewrite the board's procedures, and were beyond the Court's power to provide. Id. at 173. The Court found that it was not clear "that the electorate would have approved the measure if the Board had been given broader rental adjustment powers." Id. at 174.

Other cases cited by Plaintiffs in opposition to severance either did not address volitional separability or held that the valid provisions were volitionally separable. Barlow v. Davis, 72 Cal.App.4th 1258, 1266 (1999) (cited by Plaintiffs for its statement of the law on volitional separability, but decided on functional separability). Chevron Opening Brief 26:4-7; Eagle Opening Brief 23:20-23. Gerken v. Fair Political Practices Comm'n, 6 Cal.4th 707, 719 (1993) (valid ban on publicly funded mass mailings was severable). Chevron Opening Brief 26:7-10, 26:14-16; Eagle Opening Brief 23:23-24:2; Aera Opening Brief 21:23-24. Calfarm Inc. Co. v. Deukmejian, 48 Cal.3d 805, 822 (1989) (invalid provision in state initiative on insurance regulation found severable). Chevron Opening Brief 25:20-26:1, 27:23-28:3; Aera Opening Brief 21:18-23, 21:24-22:3.

Unlike Birkenfeld, Measure Z did not create a new board or body with certain new powers. It created three new land use restrictions. In the event one of Measure Z's provisions is found invalid, no new procedures would be needed to enable the other provisions to be effectuated because the County already has adequate procedures to implement its General Plan and the other plans amended by Measure Z. Thus, it would be inaccurate to conclude that voters

would have preferred a severed portion of Measure Z to nothing at all or that they would not have enacted the initiative without the invalid provisions.

4. MEASURE Z DOES NOT CONSTITUTE AN UNCONSTITUTIONAL TAKING OF PROPERTY

Plaintiffs' facial takings claims fail for two separate and independent reasons. First, Measure Z allows oil and gas production to continue, which means Plaintiffs cannot show the requisite loss of all beneficial use of property from the mere enactment of the initiative. Second, Measure Z established administrative procedures, which may moot Plaintiffs takings claims, and which confirm that the enactment of the measure alone has not taken their property. These principles of takings jurisdiction are firmly established.

A. A FACIAL TAKINGS CLAIM REQUIRES THAT THE LEGISLATIVE ACT REMOVE ALL BENEFICIAL USE OF PROPERTY

A facial challenge to a legislative enactment is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). In a facial challenge involving a takings claim, a petitioner must show that the "mere enactment" of a measure deprived it of economically viable use of his or her property. Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 495 (1987); Hodel v. Va. Surface Mining & Reclamation Assn., 452 U.S. 264, 295 (1981). "Both the state and federal Constitutions guarantee real property owners 'just compensation' when their land is 'taken' … for public use." Herzberg v. County of Plumas, 133 Cal.App.4th 1, 12-13 (2005); Cal. Const. art. I, § 19; U.S. Const. amend. V.[18] Accordingly, a

[18] By virtue of including damage to property, the California clause "protects a somewhat broader range of property values" than the corresponding federal provision, but apart from this difference, California and federal courts interpret the two clauses congruently. San Remo Hotel v. City & Cty. of San Francisco, 27 Cal.4th 643, 664 (2002).

facial challenge does not present a "concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land." Hodel, 452 U.S. at 295.

The courts recognize two categories of government regulatory action that "generally will be deemed per se takings for Fifth Amendment purposes." Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005) (emphasis on original). The first, not relevant here, involves the permanent physical invasion of property. Id. The second applies when "the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good…." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015, 1019 (1992) (emphasis in original). Outside the narrow per se categories, regulatory takings are generally as applied challenges governed by the factors in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), Lingle, 544 U.S. at 538. This ad hoc, factual, multifactor inquiry that occurs under a Penn Central analysis would take place in a later phase of this case.

B. PLAINTIFFS HAVE NOT SUFFERED A "COMPLETE ELIMINATION OF VALUE"

Under the Lucas test for a facial regulatory taking, a plaintiff must show that "all economically beneficial or productive use of land" is lost. Lucas, 505 U.S. at 1015; Lingle, 544 U.S. at 538; Hodel, 452 U.S. at 295-296. The United States Supreme Court explained the categorical Lucas test as follows:

> Under that rule, a statute that "wholly eliminated the value" of Lucas' fee simple title clearly qualified as a taking. But our holding was limited to "the extraordinary circumstance when no productive or economically beneficial use of land is permitted" . . . The emphasis on the word "no" in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. . . .

> Anything less than a "complete elimination of value," or a "total loss," the Court acknowledged, would require the kind of analysis applied in Penn Central.

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 329-330 (2002) (no per se taking of landowners' property upon imposition of planning agency's temporary moratoria on development).

In Hodel, coal producers in Virginia brought a pre-enforcement facial takings challenge involving certain provisions of the Surface Mining Control and Reclamation Act, which established a nationwide program to regulate surface coal mining operations. Hodel, 452 U.S. at 268, 273. Concluding that the Act survived scrutiny under the Lucas test, the United States Supreme Court noted that the Act did not "categorically prohibit" surface coal mining, but rather, regulated conditions under which such operations could be conducted. Id. at 296. The Court also noted that the Act did not "purport to regulate alternative uses to which coal-bearing lands may be put." Id. Thus, there was "no reason to suppose that 'mere enactment' of the Surface Mining Act [had] deprived appellees of economically viable use of their property." Id. at 297.

In Agins v. City of Tiburon, 447 U.S. 255, 257 (1980), the United States Supreme Court upheld the City of Tiburon's zone change which imposed density restrictions that allow plaintiffs to build between one and five single-family residences on their five acre tract. Plaintiffs' facial takings claim alleged that land in Tiburon is more valuable than any than any other suburban property in California, plaintiffs' property has the highest market value of all land in Tiburon, and the City's zone change completely destroyed the value of that property. Id. at 258. The United States Supreme Court affirmed the California Supreme Court's decision denying the facial taking claim because plaintiffs "may be permitted to build as many as five houses on their five acres of prime residential property." Id. at 262.

Measure Z, on its face, has not resulted in a Lucas taking in Monterey County. First, Measure Z permits existing oil and gas operations, which numbered more than 1,500 at the time voters approved the initiative, to continue. AR 152, 364, 373-374. Second, Measure Z's Fracking Ban expressly allows numerous existing operational activities, including steam flooding, water

flooding, cyclic steaming, routine well cleanout work, routine well maintenance, routine removal of formation damages due to drilling, bottom hole pressure surveys and routine activities that do not affect the integrity of the well or the formation. Supra, County Brief § 2(C)(1). Third, Measure Z's Storage and Disposal Limit does not bar land uses in support of percolation or injection of treated produced water, or injection of produced water that is not for storage or disposal. Supra, County Brief §§ 2(C)(2), 2(C)(3). Fourth, Measure Z's No Net New Well Limit allows replacement wells that do not increase the total number of wells. Supra, County Brief § 2(C)(4).

Additionally, Measure Z does not prevent Plaintiffs from using their properties for other permissible uses under the Monterey County Zoning Code. Chapter 21.28 of the Monterey County Zoning Ordinance, for example, lists numerous permissible uses in Heavy Industrial Zoning Districts, where oil operations are currently located. Pls. Joint RJN, ex. 34, 12-18.

C. MEASURE Z'S ADMINISTRATIVE PROCEDURES ALSO BAR A FACIAL TAKINGS CLAIM

The administrative relief available under Measure Z creates a separate and independent ground to preclude a facial takings claim. The United States Supreme Court in Hodel highlighted the potential for future "administrative relief" under the Act to deny plaintiffs' facial claim. Hodel, 452 U.S. at 297. Specifically, the Court stated that the appellees could not, at that juncture, legitimately raise a court claim because they had not taken advantage of the Act's opportunities to obtain administrative relief by requesting either a variance or a waiver from surface mining restrictions they challenged. Id. "If appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions." Id.

Following Hodel, the United States Supreme Court explained in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985), that a "claim that the application of government regulation effects a taking of a property interest is not ripe until the

government entity charged with implementing the regulations has reached a final decision regarding the application of the regulation to the property at issue." In that case, plaintiff failed to seek a variance from the land use restrictions to which it objected. Id. at 191. Absent a "final, definitive position" regarding the application of the regulations, a court cannot determine whether a compensable takings has occurred. Id.

Importantly, Sections 3 and 6 of Measure Z provide administrative proceedings to avoid an unconstitutional taking. First, Section 6 includes a reasonable five-year amortization period for the phase-out of vested rights in land uses that support oil and gas wastewater injection and impoundment for disposal or storage, and Section 3 allows for two five-year extensions. AR 159-160. Second, Section 6 contains an express provision that Measure Z provisions do not apply to the extent they would violate the constitution or laws of the United States or California. AR 160. And third, Section 6 provides that the Monterey County Board of Supervisors may grant, upon request of a property owner contending that application of the initiative effects an unconstitutional taking of property, an exception to application of any Measure Z provision if the Board finds, based on substantial evidence. AR 157.[19]

Plaintiffs have yet to take advantage of these exemption procedures, which are being completed, will be extensive and will provide due process protections. For example, the County Board of Supervisors may approve a reasonable amortization period and/or exemption under Sections 3 and 6. Or, the Board may give a Plaintiff an exception from Measure Z to avoid a takings under Section 6. Thus, at this phase in the case, it is impossible to demonstrate that the mere enactment of Measure Z effects an unconstitutional taking.

Plaintiffs cases are either premised upon the admission that property rights were destroyed, involved an as applied challenge, or rejected the facial takings claim. Pennsylvania

[19] Plaintiffs argue that the Board of Supervisors cannot decide whether a takings has occurred because it usurps the court's authority. Chevron Opening Brief 38:16-39:24; CRC Opening Brief 10:17-12:23. However, California courts have recognized the validity of nearly identical provisions. Livingston Rock & Gavel Co. v. Cty. of Los Angeles, 43, Cal.2d 121, 124 (1954) (ordinance allowed the agency to apply the rezoning only if it avoids "impairing the constitutional rights of any person"); San Mateo Cty. Coastal Landowners' Ass'n v. City of Napa, 38 Cal.App.4th 523, 547 (1995) ("The provisions of this ordinance shall not be applicable to the extent, but only to the extent, that they would violate the constitution or laws of the United States or State of California"). Measure Z does not usurp this Court's authority since Plaintiffs may seek judicial review of any administrative decision by the Board of Supervisors.

Coal Co. v. Mahon, 260 U.S. 393 (1992), relied upon the admission that property rights were destroyed. Chevron Opening Brief 33:15-19; Aera Opening Brief 22:17-19, 23:16-17, 23-24 n. 11; CRC Opening Brief 6:22-7:11, 8:20-9:1, 9:26-28; Eagle Opening Brief 26:1-5, 28:16-18. In this 1922 case, a state statute prohibited coal mining that could undermine the foundations of homes meeting certain criteria. Id. at 412-413. Because "the statute is admitted to destroy previously existing rights of property and contract," it was not difficult for the United States Supreme Court to conclude that to make "it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." Id. at 413-414. In contrast, the County disputes the extent Measure Z interferes with Plaintiffs operations and determining that impact is for an as applied challenge. Supra, County Brief § 2(C). Furthermore, the safeguards in Measure Z provide exceptions to prevent a takings. Supra, County Brief § 2(D).

Braly v. Board of Fire Commissioners of the City of Los Angeles, 157 Cal.App.2d 608, 611, 616 (1958), is an as applied takings case. Chevron Opening Brief 33:19-24; CRC Opening Brief 9:8-17; Eagle Opening Brief 26:6-19. In that case, the court reviewed a local well-spacing ordinance which prevented plaintiffs from obtaining a well drilling permit because of the location of their property. Id. at 610-611. The court found the denial of a well drilling permit was an unconstitutional taking of property because the ordinance, as applied to the unique locational situation of the landowners, provided them no adequate means of protecting their right to extract oil from their property. Id. at 614-616. Braly is distinguishable because Measure Z does not prevent Plaintiffs from extracting oil.

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 500 (1987), rejected the facial claim. Aera Opening Brief 23:8-9; CRC Opening Brief 7:22-23, 8:1-2, 9:2-7; Eagle Opening Brief 25:21-24. There, the United States Supreme Court considered a facial takings challenge to a state statute designed to prevent subsidence. Id. at 474. The Court began by noting the "uphill battle in making a facial [takings] attack" because the ad hoc factual inquiries "must be conducted with respect to specific propert[ies] and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." Id. at 495. In rejecting the claim,

the Court refused to accept petitioners narrow definition of the mineral estate as a separate segment for denial of economically viable use. Id. at 500-501.

Like petitioners in Keystone, Plaintiff California Resources Corporation ("CRC") contends that its mineral rights are completely taken by Measure Z. CRC Opening Brief 8:7-10:5. However, at this stage, we do not know whether Measure Z prevents production of mineral rights from CRC's properties, whether those mineral rights were valuable, whether other uses may be made of those rights, what is the economic impact of Measure Z and many more questions. These questions and more must be answered in an as applied challenge.

In conclusion, Measure Z does not, on its face, constitute an unconstitutional taking of property requiring its invalidation. It does not effect a complete elimination of value under the Lucas test and it contains potential for future administrative relief highlighted in Hodel and Williamson.

D. MEASURE Z ON ITS FACE DOES NOT IMPAIR PLAINTIFFS' VESTED RIGHTS

A vested right is a right that has become fixed and cannot be defeat or denied by subsequent conditions or a change in regulations, unless it is taken and paid for. Urban Renewal Agency v. Cal. Coastal Zone Conservation Commission, 15 Cal.3d 577, 583-584 (1975). A property owner can claim a vested right under the prior land use regulations if the owner has (1) obtained a permit, and (2) performed substantial work and incurred substantial liabilities in good faith reliance upon the issued permit. Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal.3d 785, 791 (1976).

However, cities and counties may eliminate vested rights pursuant to their police powers, without compensation, following a reasonable amortization period. United Business Commission v. City of San Diego, 91 Cal.App.3d 156, 179 (1979); Los Angeles v. Gage, 127 Cal.App.2d 442, 454, 460 (1954). "A legislative body may well conclude that the beneficial effect on the community of the eventual elimination of all nonconforming uses by a reasonable amortization

plan more than offsets individual losses." Gage, 127 Cal.App.2d at 460. The critical factor is whether the amortization period is reasonable. Id.

In Gage, the court held that a county ordinance that required a nonconforming plumbing business to relocate within a five year amortization period was not an unconstitutional as applied taking of the business owner's property rights. Id. at 450, 461. The Gage court explained that: "Use of a reasonable amortization scheme … allows the owner of the nonconforming use, by affording an opportunity to make new plans, at least partially to offset any loss he might suffer." It explained that the reasonableness of the amortization period depends on the investment, the nature of the use, and the character, age and other factors of any structures. Id. at 459-460.

In Livingston Rock, 43 Cal.2d at 128, the California Supreme Court determined that a county rezoning ordinance's twenty year amortization provisions were not an as applied impairment of plaintiffs constitutional rights. Id. at 127-128. The ordinance rezoned properties from industrial and manufacturing to light manufacturing and allowed a twenty year period for continued uses as long as it did not impair "the constitutional rights of any person." Id. at 124. In upholding the validity of the ordinance, the Court explained that implicit in the police power is "the principle that incidental injury to an individual will not prevent its operation, once it is shown to be exercised for proper purposes of public health, safety, morals, and general welfare." Id. at 127. The Court focused on the exception for the impairment of constitutional rights, and noted that "care has been taken" in the ordinance to "refrain from the interference with constitutional guarantees, and in the light of such express language it would be a contradiction in terms to hold that the regulations are nevertheless unconstitutional." Id. at 128.

Measure Z on its face, has two important protections related to vested rights. First, Section 6(A) provides that the initiative shall not be applied "to prohibit any person or entity from exercising a vested right, obtained pursuant to State law, as of the Effective Date of this Initiative." AR 159. Therefore, consistent with other provisions of Section 6, a person who asserts that Measure Z would impair a vested right has the opportunity to seek from the County an exception to the application of Measure Z. On its face, therefore, there is no violation of a vested right. To the contrary, there is a protection of vested rights embedded in the initiative. Second,

Measure Z's Disposal and Impoundment Limitation is subject to an automatic five year phase in period, which also can be extended for an additional ten years. AR 157, 159-160. Taken together, these two constitutional safety valves prevent any claim, at this time, that Measure Z violates vested rights.

Plaintiff Chevron U.S.A. Inc. and related Plaintiffs (collectively "Chevron") claim Measure Z's amortization provisions are unreasonable because they will not be able to recoup their overall operational investments in oil fields. Chevron Opening Brief 36:1-37:8. Plaintiffs Aera Energy LLC ("Aera") and Eagle Petroleum, LLC ("Eagle") challenge the amortization provisions on the grounds that they are meant for billboards, not oil fields. Aera Opening Brief 27:11-30:21; Eagle Opening Brief 29:23-30:21. These assertions are wrong for several reasons.

First, contrary to Aera's assertion, many cases have applied amortization to businesses, not just signs. Elysium Inst. v. Cty. of Los Angeles, 232 Cal.App.3d 408, 417, 434-436 (1991) (nudist camp); Gage, 127 Cal.App.2d at 447 (plumbing business); Livingston Rock, 43 Cal.2d at 124 (cement mixing plant). Second, Plaintiffs do not explain from an appraisal perspective why oil fields, which are appraised and sold, cannot be amortized to calculate a reasonable period to recoup their investments. If the reason is because fifteen years is not enough time as Chevron claims, then we are facing an as applied takings issue that must be resolved in a later phase of this case. Third, and most importantly, Plaintiffs ignore the vested rights protections contained in Section 6. If a person in the future is able to demonstrate that it has a vested right to continue certain injection or impoundment land uses, Section 6(A) of Measure Z permits the County to grant an exception for this use, even beyond the fifteen year amortization period. Similarly, if Measure Z's application constitutes an unconstitutional taking of property, Section 6(C) allows the County to grant an exception to allow land uses necessary to avoid a taking.

In sum, on the record here, the vested rights protection and amortization provisions in Measure Z are reasonable on their face, given the length of time allowed for phase-out, and Measure Z's extension and exemptions provisions. In addition, the constitutional protections in Measure Z, like the constitutional protections in the ordinance in Livingston, will enable property owners to wind down any nonconforming uses without impairment of their rights. AR 160.

5. MEASURE Z MEETS THE SINGLE-SUBJECT REQUIREMENT

Plaintiffs contend that Measure Z was really a fracking ban, and therefore, the other land use provisions violate the single subject rule. CRC Brief 18:5-28:6. However, the stated purpose of Measure Z to protect the County's water, environment and other resources was made abundantly in its title, summary, text and other materials provided to the voters. The Fracking Ban, the Storage and Disposal Limitation and the No Net New Well Limitation each limit oil and gas operations in the County and therefore, are "reasonably germane" to that purpose. Accordingly, Measure Z easily satisfies the single-subject role.

A. AN INITIATIVE'S PROVISIONS MUST ONLY BE "REASONABLY GERMANE" TO ITS PURPOSE

The California Constitution provides that an "initiative measure embracing more than one subject may not be submitted to the electors or have any effect." Cal. Const. art. II, § 8(d). The single-subject requirement is "a constitutional safeguard adopted to protect against multifaceted measures of undue scope." Brosnahan v. Brown, 32 Cal.3d 236, 253 (1982). The rule is satisfied when all parts of an initiative are "reasonably germane" to each other and to the general purpose of the initiative, despite its "varied collateral effects." Id. at 245; Amador Valley Joint Union High School Dist. v. State Board of Equalization, 22 Cal.3d 208, 230 (1978).

The single-subject requirement must be construed liberally to sustain an initiative that "fairly disclose[s] a reasonable and common sense relationship among [its] various components in furtherance of a common purpose." Brosnahan, 32 Cal.3d at 253. The rule does not require that "each of the provisions of a measure effectively interlock in a functional relationship." Legislature of the State of Cal. v. Eu, 54 Cal.3d 492, 513 (1991). Nor does it require "a showing that each one of a measure's several provisions was capable of gaining voter approval independently of the other provisions." Brosnahan, 32 Cal.3d at 251.

B. MEASURE Z'S LAND USE PROVISIONS ARE "REASONABLY GERMANE" TO ITS PURPOSE

Numerous California cases have concluded that initiative provisions more disparate than Measure Z's provisions were reasonably germane to their purpose. In Shea Homes Limited Partnership v. Cty. of Alameda, 110 Cal.App.4th 1246, 1256 (2003), voters approved Alameda County's land use planning initiative that revised the urban growth boundary, limited hilltop development, and limited landfills and coordinated solid waste management policies and programs. Id. at 1252-1253, 1256. Developers single-subject challenge characterized the initiative as having two separate subjects: (1) constriction of the urban growth boundary and changing land use designations to eliminate new housing approvals, and (2) alteration of county solid waste management and planning practices to limit landfills and conform them to other agencies. Id. at 1255. The developers argued, among other things, that the measure's title, introductory section, ballot description and voter pamphlet arguments did not mention the solid waste provisions, thereby misleading voters about the breadth of the initiative, and the solid waste provisions were wholly unrelated to land use. Id. at 1257.

The court disagreed, concluding that the measure's provisions limiting landfills and requiring the county to coordinate solid waste policies with other county agencies were "eminently germane" to the measure's purpose of protecting open space and agricultural lands. Id. at 1256. For example, the court noted that limiting landfills "clearly allow[ed] for greater open and/or agricultural space," and that changes to the county's waste policies and practices "will promote and/or require recycling, which in turn will reduce the need for landfill." Id. at 1256-1257. The two types of provisions thus were "complementary mechanisms" to achieve the measure's purposes. Id. at 1257. The Shea court also found the literature provided to voters sufficient because the opening paragraph of the measure's text referenced the need for protecting against undesirable development in open spaces and agricultural lands, and the second page contained a finding that landfills are environmentally harmful land uses and that recycling would reduce their necessity. Id. at 1257.

Similarly, in San Mateo Cty. Coastal Landowners', 38 Cal.App.4th at 553-554, petitioners contended that an initiative to amend San Mateo County's local coastal program embraced two distinct subjects in violation of the single subject rule: (1) a change in coastal land use policies, and (2) off-shore drilling and onshore refineries. In rejecting this claim, the court pointed out that the eight stated purposes of the measure, which included preventing construction of onshore facilities and pipelines for offshore drilling, were all "directed at the single general purpose expressed in the title: protection of coastal resources." Id. at 554. The court also concluded that the findings describing the degradation of coastal resources that could result if extensive onshore facilities were constructed in the coastal zone clearly "demonstrate the policies restricting or prohibiting the location of onshore oil facilities are reasonably germane to the purposes stated in the section 1 of the initiative." Id.

Like the measure at issue in Shea, Measure Z's purpose was made clear within the first two pages of the initiative. Its three related prongs of land use regulation were listed in the official title and summary on the first page. AR 151. Its purpose – to protect Monterey County's water, agricultural lands, air quality, scenic vistas and quality of life – and the relationship of the land use regulations to that purpose were described on the second page. AR 152. And the secondary thematic title of the initiative, "Protect Our Water: Ban Fracking and Limit Risky Oil Operations Initiative" was stated on both the first and second pages, further punctuating the connection between the purpose and the interrelated land use provisions. AR 151, 152.

With this purpose in mind, Measure Z's land use provisions are reasonably germane to one another because they all involve land uses dedicated to aspects of oil and gas production that can lead to impacts on the resources Measure Z seeks to protect. In Shea, the court found that the limitation on landfills could logically be expected to preserve open space. In this case, Measure Z's limitations on land uses supporting well drilling, well stimulation treatments and wastewater disposal address potential environmental impacts of oil and gas production. The three land use restrictions, therefore, constitute "complementary mechanisms" for furthering Measure Z's overarching purpose. Shea, 110 Cal.App.4th at 1257. Additionally, the second through fourth pages of Measure Z contain fifteen findings describing the environmental and resource concerns

that justify the three types of land use restrictions. AR 152-154. Just as the court in San Mateo found that the measure's findings demonstrated a sufficient relationship between the prohibited onshore facilities and degradation of coastal resources, so too Measure Z's fifteen findings draw a clear connection between one or more of the prohibited land uses and the singular purpose of protecting resources.

The initiative provisions in Plaintiffs' cases lacked a common purpose. In California Trial Lawyers Assn. v. Eu, 200 Cal.App.3d 351, 360 (1988), the proposed ballot initiative ran 120 pages and its purpose was controlling the cost of insurance. CRC Opening Brief 19:12, 21:23-22:1, 23:16-23, 27:12-17, 28:16-19. The court held that it violated the single-subject rule because it included a two paragraph provision regulating campaign contributions, which was not only unrelated to the initiative's purpose, but was inserted in the middle of the lengthy document where it bore no connection to what preceded or followed it, and was so obscure it was unlikely voters would discover it. Id. at 355, 360-361. In contrast, Measure Z was fifteen pages long, its three land use prohibitions were all listed on the first page, and their relationship to Measure Z's overall purpose was readily apparent in Measure Z's statement of purpose and its findings. AR 151-161.

In Senate of the State of California v. Jones, 21 Cal.4th 1142, 1146, 1168 (1999), the California Supreme Court held that a proposed initiative embraced two separate and wholly unrelated subjects: transferring reapportionment power from the Legislature to the Supreme Court, and the compensation of state legislators and officers. CRC Opening Brief 18:5-28:26 (passim). The Court explained that under prior case law, provisions in an initiative could not be found reasonably germane based on a single subject " so broad that a virtually unlimited array of provisions could be considered germane … essentially obliterating the constitutional requirement." Id. at 1162 (citing Chem. Specialties Mfrs. Ass'n v. Deukmejian, 227 Cal.App.3d 663, 671 (1991)). The Jones Court rejected an argument that the disparate issues in that case were reasonably germane because they involved "voter approval of political issues," a "phrase that could well encompass the entire range of matters dealt with by the political system." Id. In

contrast, Measure Z's three land use prohibitions each serve to achieve the purpose of protecting County resources by restricting certain land uses in support of oil and gas extraction.

Finally, in Chem. Specialties, 227 Cal.App.3d at 670, the stated purpose was "public disclosure, i.e., truth-in-advertising." CRC Opening Brief 19 n 23, 24:12-14. This purpose "is so broad that a virtually unlimited array of provisions could be considered germane thereto . . . essentially obliterating the constitutional requirements." Id. at 671. Indeed, "the measure seeks to reduce toxic pollutants, protect seniors from fraud and deceit in the issuance of insurance policies, raise the health and safety standards in nursing homes, preserve the integrity of the election process, and fight apartheid." Id. This is a far cry from Measure Z which seeks to protect the County's water, environment and other resources with restrictions on three types of land uses that support oil and gas production.[20]

C. NEITHER THE PROPRIETY NOR THE COMPLEXITY OF MEASURE Z SHOULD BE PART OF THE SINGLE-SUBJECT ANALYSIS

In evaluating a single-subject challenge, a court does not evaluate whether an initiative's provisions "are wise or sensible, and will combine effectively to achieve their stated purpose." Eu, 54 Cal.3d at 514 (emphasis in original) (citing Amador, 22 Cal.3d at 219). As the Supreme Court stated in Amador: "We do not consider or weigh the economic or social wisdom or general propriety of the initiative. Rather, our sole function is to evaluate [it] legally in the light of established constitutional standards." Amador, 22 Cal.3d at 219.

In addition, it is improper to assume that the complexity of an initiative's issues necessarily leads to a finding of single-subject violation. Brosnahan, 32 Cal.3d at 251-252. In Brosnahan, the California Supreme Court held that Proposition 8, a statewide initiative with

[20] CRC cites two other cases to support its single subject rule argument, but they rejected the single subject rule challenge. Amador, 22 Cal.3d at 231-232 (a real property tax rate limitation, a real property assessment limitation, a restriction on state taxes and a restriction of local taxes all pertained to the general topic of property tax relief). CRC Opening Brief 23:11-14, 28: 14-16. Brosnahan, 32 Cal.3d at 242-245, 247 (provisions for restitution, safe schools, truth in evidence, bail, prior convictions and six other provisions shared a "common concern" for victims' rights). CRC Opening Brief 19:15-17, 22:25-23:2, 23:5-6, 24:1-3.

numerous provisions to advance the "common concern" of promoting the rights of crime victims, did not violate the single-subject rule. Id. at 247. The Court rejected the argument that the complexity of Proposition 8 may have led to confusion or deception among voters because the measure received widespread publicity, and the voters received election materials including the title and summary prepared by the Attorney General, a detailed analysis by the Legislative Analyst, a complete text of the proposed law, and written arguments on both sides. Brosnahan, 32 Cal.3d at 252. The Court also found "improbable" the assumption of petitioners that "the people did not know what they were doing." Id. Courts ordinarily should assume that voters "have voted intelligently upon an amendment to their organic law, the whole text of which was supplied each of them prior to the election and which they must be assumed to have duly considered." Id. (emphasis in original) (citing Amador, 22 Cal.3d at 243-244).

Accordingly, claims that the oil industry is complicated and that voters could not be expected to understand alleged impacts to the oil industry after Measure Z's passage are unwarranted. CRC Opening Brief 24:17-19; 25:5-11. As in Brosnahan, Measure Z voters had access to the title and summary prepared by County Counsel, a County Counsel impartial analysis, the complete text of Measure Z and ballot arguments both pro and con. AR 151-161, 364-391; Stip. ¶ 8. Therefore, the proper conclusion is that the voters "duly considered" Measure Z's provisions and "voted intelligently." Brosnahan, 32 Cal.3d at 252.

6. MEASURE Z SATISFIES ALL DUE PROCESS REQUIREMENTS

Measure Z meets substantive due process requirements because the County may use its police power to prohibit oil and gas operations. In addition, the text of Measure Z, the relevant interpretative aids and the future administrative proceedings that will clarify any ambiguities address any procedural due process concerns. For these reasons and more, the Plaintiffs' due process arguments fail.

A. MEASURE Z DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS

As explained above, Monterey County's constitutional and statutory authority to prohibit certain oil and gas operations is well established, Supra, County Brief § 3(C)(1). Under the California Constitution, the County "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. "Enactment of [an] ordinance prohibiting exploration for and production of oil, unless arbitrary, is a valid exercise of the municipal police power." Hermosa Beach, 86 Cal.App.4th at 555; Beverly Oil, 40 Cal.2d at 558; Higgins, 62 Cal.2d at 32. Contrary to Plaintiffs' contentions, nuisance suppression is not a requirement, and financial hardship is not material. Beverly Oil, 40 Cal.2d at 560; Friel v. County of Los Angeles, 172 Cal.App.2d 142, 157 (1959); NARO Opening Brief 10:1-4; CRC Opening Brief 15:11-12, 15:21-23.

"The [substantive] due process protection focuses on the government's means and purpose: whether the government's method rationally furthers legitimate ends." Kavanau v. Santa Monica Rent Control Board, 16 Cal.4th 761, 770–71 (1997) (brackets added). In a facial substantive due process challenge, a petitioner must show the government action is "clearly arbitrary and unreasonable" and that the governmental body could have had "no legitimate reason for its decision." Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1234 (9th Cir. 1994). As the Supreme Court explained:

> [A]s long as there are considerations of public health, safety, morals or general welfare which the legislative body may have had in mind, which have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations justify the regulation.

Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 522 (1962) (citing Miller v. Board of Public Works, 195 Cal. 477, 490 (1925)).

In Consolidated Rock, 57 Cal.2d. at 518, plaintiff owned land containing rock, sand and gravel. The zoning allowed agricultural and residential use, but prohibited rock, sand and gravel

operations. Plaintiff challenged the constitutionality of the ordinance on due process grounds, and characterized the land as "one use property" with economic value only for the excavation of rock, sand and gravel. Id. at 520. The California Supreme Court acknowledged that evidence showed the property did not hold "appreciable economic value" for any other use. Id. at 530. However, the Court also found that the operations could create dust that would have "a damaging effect upon the sufferers of respiratory ailments" and "would adversely affect property values." Id. at 520. The Court stated that "any reasonable basis in fact to support the legislative determination of the regulation's wisdom and necessity" will justify such government regulation. Id. at 522.

Numerous cases have followed this principle in upholding land use zoning restrictions. E.g., Kawaoka, 17 F.3d at 1236 (preserving agricultural heritage, limiting development, reducing potential traffic problems and addressing anticipated water shortage); Higgins, 62 Cal.2d at 28 (preventing "inconvenience, noisome effects, and potential dangers that may accompany and follow the exploration for, and production of, oil"); Beverly Oil, 40 Cal.2d at 560 (preventing detriment "to the public health, safety and welfare" from oil production); Hermosa Beach, 86 Cal.App.4th at 555 (protecting the environment from oil drilling).

Here, Measure Z's proponents were concerned about protecting Monterey County's water, agricultural lands, air quality, scenic vistas and quality of life by prohibiting land uses in support of certain oil and gas operations. AR 151-154. Among proponents' concerns were air pollutants "linked to poor health outcomes and reduced agricultural yields." AR 153 (Finding 9). Such a finding, in and of itself, is a legitimate reason and a reasonable basis to support the measure's wisdom and necessity. Air quality was but one of many cited concerns that led voters to approve Measure Z. AR 151-154. The fact that Plaintiffs disagree with those concerns does not render Measure Z unconstitutional. Consolidated Rock, 52 Cal.2d at 522; NARO Opening Brief 23:1-29:5. Nor do claims of potential lost profits. Consolidated Rock, 57 Cal.2d at 519-520; Chevron Opening Brief, 10:14-15. Measure Z proponents raised legitimate "considerations of public health, safety, morals or general welfare" that were neither arbitrary or unreasonable under established case law. AR 151-154. The majority of voters agreed. Stip. ¶ 9. Thus, the Measure satisfies substantive due process under the state and federal Constitutions.

B. MEASURE DOES NOT VIOLATE PROCEDURAL DUE PROCESS

In a facial challenge to an enactment based on vagueness, a court should uphold the challenge only if the enactment "is impermissibly vague in all of its applications." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982); Evangelatos v. Superior Court, 44 Cal.3d 1188, 1201 (1988). Future hypothetical situations are unavailing. People v. iMERGENT, Inc., 170 Cal.App.4th 333, 341 (2009).

In Hoffman Estates, 455 U.S. at 491-492, the village enacted an ordinance regulating drug paraphernalia and making it unlawful to sell "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs" without first obtaining a business license. Plaintiff retailer alleged the ordinance was unconstitutionally vague because the ordinance's standard, "designed or marketed for use," was ambiguous. Id. at 493, 500. The United States Supreme Court disagreed. Id. at 497, 505.

The Court explained that a law must "'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly'" and must provide explicit standards for those who apply them to prevent arbitrary and discriminatory enforcement. Id. at 498 (citing Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972)). The "degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment." Id. For example:

> [E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.

Id. The Supreme Court concluded that the "designed for use" portion of the standard was "sufficiently clear" because it covered at least some of the items sold by the retailer, including

certain pipes and "roach clips" typically used to smoke marijuana. Id. at 502. Further, the enactment provided a "fair warning of what [was] proscribed" because it was clear from the ordinance and related guidelines that the retailer's marketing activities required a license. Id. at 502-503.

Similarly, in Evangelatos, 44 Cal.3d at 1201-1202, the California Supreme Court upheld a statewide initiative that modified the traditional, common law joint and several liability doctrine against a facial claim of vagueness. There, plaintiff catalogued a series of questions relating to the application of Proposition 51 and claimed the existence of such unanswered questions rendered the measure unconstitutionally vague on its face. Id. at 1201. The Court responded to this "flawed" contention by stating:

> Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear. So long as a statute does not threaten to infringe on the exercise of First Amendment or other constitutional rights, however, such ambiguities, even if numerous, do not justify the invalidation of a statute on its face.

Id. at 1201.

Here too, a litany of questions and speculations about the future hypothetical application and enforcement of Measure Z do not render the measure unconstitutionally vague. Chevron Opening Brief 30:5-10, 30:22-25, 31:21-22, 32:4-7. Measure Z's provisions provide numerous instances where its application is clear, precluding a conclusion that it is constitutionally vague on its face. For example, the Measure Z prohibits land uses in support of drilling new oil and gas wells, while providing that existing oil and gas wells, numbering about 1,500 at the time of passage, may continue operating. AR 152. The Measure Z prohibits land uses in support of hydraulic fracturing, acid well stimulation and other similar WSTs, while expressly stating that steam flooding, water flooding, cyclic steaming and certain other routine practices are allowed. AR 155. Moreover, the purpose of the Fracking Ban is to prohibit WST practices that increase

formation permeability, while the purpose of the expressly permitted steam flooding and cyclic steam injection is to reduce viscosity. AR 155; Stip. ¶¶ 16-18, 24.[21]

These provisions are not ambiguous or uncertain. They are clear, declarative statements about allowable land uses that "afford[s] fair warning of what is proscribed." Hoffman Estates, 455 U.S. at 502-503. Like the business interests described in Hoffman Estates, Plaintiffs here have an economic stake in their oil and gas operations, can be expected to plan in accordance with Measure Z, and may seek clarification of its provisions. Indeed this litigation and the numerous comment letters regarding the County's administrative exemption process confirm that Plaintiffs are doing exactly what the United States Supreme Court contemplated.

The California Supreme Court's decision in Amador is instructive for understanding another reason why Plaintiffs' vagueness claims must fail here. According to the Court, state legislation and administrative regulations enacted shortly after Proposition 13 passed demonstrated the new taxation scheme could be placed "into operation in a reasonably workable fashion." Amador, 22 Cal.3d at 246-247. The Court emphasized that it could not, and should not "attempt to pass upon the meaning or validity of each contested provision in every hypothetical context" at such an early stage because the adjudication of such matters "must await an actual controversy, and should proceed on a case-by-case basis as the need arises." Id. at 247 (citing County of Nevada v. McMillen, 11 Cal.3d 662, 674 (1974)).

In explaining the wisdom of this principle, the Court noted that many, if not most, of the uncertainties described by petitioners "may disappear if a reasonable, common sense approach is used" in future interpretations and if "appropriate weight is given to the contemporaneous construction of the legislative and administrative bodies charged with its enforcement in accordance with well-established legal precedent." Id. at 248. If the implementing provisions incorrectly manifested the voters' intent, judicial challenge would be available as a remedy. Id. at 247.

[21] With an enactment that "follows voter approval, the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure" may be employed to help determine the probable meaning of uncertain language. Amador, 22 Cal.3d at 245-246; see also Mills v. County of Trinity, 108 Cal.App.3d 656, 663 (1980).

Here, Measure Z's Section 6 provides for future administrative proceedings involving exemptions for certain projects, while Section 7(H) authorizes the Board of Supervisors to adopt implementing ordinances, guidelines, rules and regulations as necessary. AR 159-160. Under Amador, Measure Z's implementing provisions make it likely that uncertainties noted by Plaintiffs now "may disappear" under a "reasonable, common sense approach" going forward. Amador, 22 Cal.3d at 247-248. Given Measure Z's many unambiguous provisions and applications, which give fair warning about what is required, and given the clarity provided by relevant interpretive aids, it cannot be said that Measure Z is "impermissibly vague in all its applications." Hence, the void for vagueness challenge cannot stand.

7. MEASURE Z IS CONSISTENT WITH THE GENERAL PLAN

The NARO Plaintiffs (collectively "NARO") conclude through circular reasoning and unsupported assertions that Measure Z is unlawfully inconsistent with the Public Services and Economic Development Elements of the Monterey County General Plan. NARO Brief 7:1-23:19. NARO's empty contention must be rejected by the Court because: (1) it is well settled law in California that planning and zoning (including proposed amendments to a general plan) are appropriately the subject of the voter initiative process; (2) Measure Z, on its face, ensures consistencies between Measure Z and the General Plan, all Area Plans, the Coastal Land Use Plans, the Fort Ord Master Plan, and all other plans, ordinances and policies; and (3) there is no evidence that Measure Z is inconsistent with the Public Services and Economic Development Elements of the 2010 General Plan.

A. THE GENERAL PLAN AMENDMENTS REQUIRED BY MEASURE Z ARE PERMITTED UNDER CALIFORNIA LAW

The California Constitution, Article II, Section 11, guarantees the local electorate's right to initiative. It is the "duty of the courts to jealously guard this right of the people," and to "apply

a liberal construction to this power whenever it is challenged in order that the right [to local initiative or referendum] not be improperly annulled." DeVita v. County of Napa, 9 Cal.4th 763, 776 (1995) (brackets in original).

The California Supreme Court held that "general plans can be amended by initiative." DeVita, 9 Cal.4th at 775. In concluding that general plans can be amended by initiative, Justice Mosk painstakingly detailed the history of voter initiatives, and the evolution of the jurisprudence upholding the initiative measures amending zoning ordinances, and general plan amendments, as well as interpreting California Elections Code Section 9111 as expressly permitting general plan amendments by initiative. Id. at 774-777.

A general plan is required under California Government Code Section 65300.5 to be "internally consistent." DeVita, 9 Cal.4th at 773 (citing Cal. Gov. Code § 65302). Except in extreme circumstances, courts lack authority to interfere in the consistency findings between an initiative amending a general plan and other existing elements of the general plan. 20th Century Ins. v. Garamendi, 8 Cal.4th 216, 278 (1994) (fact finding is a quasi-legislative function); Carrier v. Robbins, 112 Cal.App.2d 32, 35-36 (1952) (courts will not usurp the board of supervisors' findings absent "an abuse of discretion, fraud, bad faith or unreasonable and arbitrary action").

B. MEASURE Z, SECTION 7(F), DIRECTS THE BOARD OF SUPERVISORS TO MAKE AMENDMENTS TO ENSURE CONSISTENCY WITH THE GENERAL PLAN

The arguments raised in NARO's facial challenge to Measure Z, that the initiative is invalid because it is inconsistent with the Public Services and Economic Development Elements, should be summarily dismissed, as the same arguments were dismissed by the court in Citizens for Planning Responsibility v. County of San Luis Obispo, 176 Cal.App.4th 357, 378 (2009). In that case, petitioners unsuccessfully argued that the general plan amendment initiative (Measure J) was "invalid because it is inconsistent with the airport land use plan and other elements of the County's general plan." Id. at 377-378. The court rejected petitioner's arguments because,

among other reasons, "Measure J contains amendments to the affected general plan elements to make Measure J consistent with the General Plan." Id.

Here, Measure Z, like the initiative in Citizens for Planning Responsibly, includes amendments to ensure that Measure Z is consistent with the General Plan. The plain text of Measure Z, at Section 7(F), includes various amendments to the General Plan, specifically directing the "County of Monterey . . . to amend the Monterey County General Plan . . . and other ordinances and policies affected by this Initiative as soon as possible. . . . to ensure consistency between the provisions adopted in this initiative and other sections of the General Plan . . ." AR 160. The NARO plaintiffs fail to present any argument as to why Measure Z, Section 7(F), would not remedy any alleged inconsistency.[22]

NARO's arguments that Measure Z is invalid based on alleged inconsistencies is also not ripe for adjudication because the Board of Supervisors have not yet undertaken the Section 7(F) such amendments and other implementing ordinances as necessary to ensure consistency between the initiative and the General Plan and all other plans, ordinances and policies.

C. MEASURE Z IS CONSISTENT WITH THE PUBLIC SERVICES AND ECONOMIC DEVELOPMENT ELEMENTS

Not only are NARO's inconsistency arguments refuted by the plain text of Measure Z and the bar to claims that are not ripe, but Measure Z is in fact consistent with the Public Services and Economic Development Elements of the Monterey County General Plan. NARO argues that Measure Z is inconsistent with the Public Services Element of the General Plan because the General Plan encourages the use of recycled water for groundwater replenishment and to reduce the use of potable water. NARO Opening Brief 17:16-22.

[22] Measure Z recognizes that amendments to the Coastal Land Use Plans would require the Coastal Commission certify that the amendment was consistent with the California Coastal Act. AR 160 (paragraph 7(C)); Cal. Pub. Res. Code § 30514. Additionally, any amendment to the Fort Ord Master Plan must be submitted to the Fort Ord Reuse Authority for certification of consistency with the Fort Ord Reuse Plan and the Fort Ord Reuse Authority Act. AR 160 (paragraph 7(D)); Cal. Gov. Code §§ 67650-67700.

Specifically, NARO argues that Measure Z conflicts with PS-3.12 and PS-4.4 because Measure Z would prohibit Chevron from reducing the salt content of "produced water" and then injecting that "partially treated water," for steam injection purposes. Id. 11-18. As discussed above, NARO'S arguments reach too far. Measure Z does not bar steam flooding or cyclic steaming currently used by oil extractors, and does not prevent the impoundment or injection of treated wastewater or wastewater injected for purposes other than storage or disposal. Supra, County Brief § 2(C)(1). Once wastewater, as that term is used in the Measure, is cleaned, treated or purified, it is no longer the oil and gas wastewater and chemicals which spurred the proponents to prepare and seek voter approval of Measure Z. Supra, County Brief § 2(C)(2); AR 349.

NARO'S selective interpretation of PS-4 is also without merit. The General Plan's policies in PS-4 to "ensure adequate treatment and disposal of wastewater" and to "encourage groundwater recharge through the use of reclaimed wastewater" are completely inapplicable to oil and gas wastewater because these policies specifically relate to sewage. The County General Plan related to sewage specifically defines "wastewater" as "sewage, gray water, and any and all other contaminated liquate waste substances associated with human habitation." Pls. RJN, ex. 62 (Monterey General Plan, Glossary, 16).

NARO's arguments that Measure Z is inconsistent with the General Plan Economic Development Element are equally meritless because the oil and gas industry is not identified as a "Key Industry" or a "Key Industry Cluster" under the General Plan, and there is no evidence that Measure Z is inconsistent with ensuring economic growth. The General Plan defines "Key Industries" as those that fit the "special character of Monterey County." Pls. RJN, ex. 62 (Monterey General Plan, Glossary, 10). The General Plan further defines "Key Industry Clusters" as agriculture, tourism, education and research, building and design, and wellness and lifestyle. Id. Therefore, there is no evidence that Measure Z would adversely impact any Key Industries.

NARO's speculative argument that Measure Z would impair the County's tax base must be rejected. Initiative measures, particularly land use initiatives might impact the tax base of a County, but speculation regarding potential consequences of enactment do not constitute a basis on which to invalidate an otherwise properly enacted initiative measure. Birkenfeld, 17 Cal.3d at

144. In Birkenfeld, the California Supreme Court rejected published articles depicting dire consequences attributed to rent control and contrary materials praising rent control. The Court found that such information, while potentially helpful to a legislative body, could not be relied on by the court to determine the validity of an initiative measure. Id. At this initial stage of determining the facial sufficiency of Measure Z, the Court should disregard the various "studies"[23] relied on by NARO as conjecture. As discussed above, NARO's arguments, and the assumptions incorporated in the unsubstantiated "studies," that Measure Z will "shut down" oil and gas operations in Monterey County is beyond any reasonable interpretation of the initiative.

NARO'S argument that the Measure Z will adversely impact businesses by prohibiting Salinas Valley groundwater recharge is without merit because, as discussed above, Measure Z would not prevent the injection or disposal of clean, treated, or purified water. Supra, County Brief § 2(C)(2).

8. FINDINGS ARE NOT REQUIRED TO FIND MEASURE Z VALID

NARO's arguments that Measure Z's fifteen findings fail to establish a valid public purpose for Measure Z miss the mark with respect to the validity of an initiative measure and are otherwise without merit. NARO Brief 23:20-29:5.

First, unless specifically required by statute, legislative actions do not require explicit findings. Cormier v. County of San Luis Obispo, 161 Cal.App.3d 850, 852 (1984) (denial of mandamus affirmed because county's general plan was a legislative act which did not require specific findings for adoption of an amendment). Further, "burdensome statutory requirements mandating . . . findings to support its decision, need not be satisfied when the legislation is enacted via initiative or referendum." Chandis Sec. Co. v. City of Dana Point, 52 Cal.App.4th

[23] NARO argues that the Administrative Record in this matter should be supplemented to include materials provided in response to a Public Records Act Request. NARO Opening Brief, 18:17-20 n.6. NARO's position is contrary to law and would impermissibly conflate official actions undertaken by the County with material simply in the possession of the County. Monterey County for Energy Independence is not part of Monterey County and was not commissioned by Monterey County to perform any economic study. NARO's attempts to attribute the study and its conclusion as official acts of Monterey County are misleading and improper.

475, 486 (1996); See, Building Industry Assn. v. City of Camarillo, 41 Cal.3d 810, 824 (1986) (the statutory requirement for findings to justify reduced housing opportunities "does not apply to initiative measures").

Second, legislative findings reveal the legislative analysis and thought process behind a legislative decision. Where a body acts within its authority, a reviewing court should give deference to the body's judgment and not assume that legislation was enacted with an improper purpose or motive. United States v. O'Brien, 391 U.S. 367, 383 (1968).

Here, where the Court must construe the initiative in the most favorable manner in favor of validity, the voters of Monterey County have adopted certain findings supporting the adoption of Measure Z. While the Plaintiffs in this action may disagree, and be willing to hire experts sympathetic to those views, the Court's duty is to jealously guard the initiative right to the extent any doubts can be reasonably resolved in favor of the peoples' initiative.

9. CONCLUSION

Measure Z reflects a careful balance between the desire to protect the environment with the need to respect the property rights of affected parties. This balance must be examined in the context of the deference courts pay to the voters will exercised in the initiative process and to local land use authority. Viewed with this perspective, the statutes, case law and Measure Z itself compel the conclusion that Measure Z is not preempted by federal or state law, does not violate the single subject rule, does not cause a facial taking, does not violate due process and is consistent with the General Plan.

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