UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

E&B NATURAL RESOURCES MANAGEMENT CORPORATION, ET AL.,

Plaintiffs and Petitioners,

vs.

COUNTY OF ALAMEDA, ET AL.,

Defendants and Respondents.

CASE NO. 18-cv-05857-YGR

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

Re: Dkt. Nos. 59, 66

Plaintiffs and petitioners E&B Natural Resources Management Corporation ("E&B"); Laurie Volm; Sharyl G. Bloom and Richard S. Bloom, co-trustees of The Lynn Bloom Trust; James C. Roth; Dolores D. Michaelson; and Michael Karpé initiated this action against defendants and respondents County of Alameda (the "County") and Alameda County Board of Supervisors (the "Board") seeking to overturn the Board's July 24, 2018 decision not to renew two conditional use permits ("CUPs") which are predicates to E&B's continued operation of an oil extraction and production facility on two parcels of land in Livermore, California.

Now before the Court is plaintiffs' motion for partial summary judgment pursuant to Federal Rule of Civil Procedural 56 and Local Rule 7-2 related to the fourth cause of action for declaratory relief. Specifically, plaintiffs move for summary judgment on whether they have a fundamental vested right in oil production operations at the Livermore Oil Field and whether defendants are estopped to extinguish plaintiffs' rights through the CUP renewal process. Plaintiffs also seek a finding that the Court will exercise independent judgment in reviewing plaintiffs' fifth cause of action for a writ of administrative mandamus.

The motion came on for hearing on January 7, 2020. Having carefully considered the papers submitted, the arguments of the parties at the hearing, the admissible evidence, and the pleadings in this action, and for the reasons set forth below, plaintiffs' motion is hereby **DENIED**.[1]

I. BACKGROUND[2]

E&B is an independent oil and gas company headquartered in Bakersfield, California that conducts oil and gas operations at the Livermore Oil Field in Alameda County. The Livermore Oil Field consists of three parcels within a state-recognized field with boundaries established by the California Department of Conservation, Division of Oil Gas & Geothermal Resources: (1) the Greenville Investment Group ("GIG") parcel, (2) the Nissen parcel, and (3) the Schenone parcel. The parcels are zoned as "Large Parcel Agriculture," and oil operations are allowed only by permit.

The GIG parcel is 55.8 acres, primarily consisting of agricultural land. The GIG parcel also has an oil production site consisting of two oil production wells that occupy a 100-foot by 200-foot fenced-in area on the land. Oil production is conveyed by pipeline to the adjacent Nissen parcel. The Nissen parcel is 143.75 acres of flat grassland with fenced-in oil production facilities consisting of five wells and storage and production equipment. The Schenone parcel also has a production area with two fenced-in production wells and a pipeline that conveys the production to the Nissen parcel. The Schenone parcel's permit is not at issue in this litigation.

In 1965, E&B's predecessor, McCulloch Oil Corporation ("McCulloch Oil"), entered into

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process, filed a motion for leave to file an *amicus curiae* brief in support of defendants' opposition. (Dkt. No. 66.) "The district court has broad discretion to appoint amici curiae." *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), abrogated on other grounds by *Sandin v. Conner*, 515 U.S. 472 (1995). Here, in light of the Center for Biological Diversity's historical involvement in this case, the motion for leave to file the *amicus curiae* brief is **GRANTED**, although the Court notes the brief is of limited value as to this motion.

[2] The facts cited herein are undisputed and derive from the parties' separate statements of undisputed material facts, exhibits 59 and 60 of plaintiffs' request for judicial notice, and the hearing on the motion. (Dkt. Nos. 59-6, 64.) With respect to judicial notice, both parties request that the Court take notice of legislative enactments and official governmental documents and records. (Dkt. Nos. 59-6, 63.) Such documents are "not subject to reasonable dispute" and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see also Citizens for Free Speech, LLC v. County of Alameda*, 62 F.Supp.3d 1129, 1136 (N.D. Cal. 2014) (taking notice of County zoning ordinance); *Gardner v. Am. Home Mortg. Servicing, Inc.*, 691 F.Supp.2d 1192, 1196 (E.D. Cal. 2010) ("The documents submitted by Defendants are public[ly] recorded documents of which judicial notice may properly be taken, and accordingly, those documents may be considered in deciding

leases with property owners to develop oil production on the GIG and Nissen parcels. In December 1966, the County granted McCulloch Oil a one-year permit to drill an exploratory well on the GIG parcel.

A few days later, the County adopted an interim ordinance permitting oil extractions on certain land, including on the parcels at issue here, subject to issuance of a "use permit." On March 9, 1967, the County adopted a permanent ordinance to the same effect. Then, on June 13, 1967, the County adopted the "Regulation of Exploratory and Production Oil Wells in Alameda County," which formalized the conditions to be included in use permits issued for oil and gas exploration and production. The regulation set expiration dates of two years for exploratory well permits and 20 years for production well permits. Thereafter, the County approved McCullough Oil's applications for CUPs for exploratory wells and production facilities on the GIG and Nissen parcels. Upon expiration of the use permits in 1987, McCullough Oil applied and obtained approval from the County for CUPs to allow continued oil production operations on the parcels for a renewed 20-year term.

Between 2006 and 2009, E&B purchased the rights to operate and produce oil from the Livermore Oil Field for $2.5 million. When the use permits expired in 2007, the County approved McCullough Oil's applications for CUPs to continue oil operations at Livermore Oil Field for an additional 10-year term. Along with its purchase of the rights to Livermore Oil Field, E&B understood that it was acquiring use permits that were subject to renewal.

From 2015 to 2018, E&B invested approximately $1 million at the Livermore Oil Field, installing fencing to enclose the operational areas, replacing aging storage tanks, rebuilding the secondary containment, replacing the flow lines, painting the pump jacks, and investing in new tanks with modern leak detection equipment. E&B also purchased fee title (surface and mineral rights) to the Nissen parcel for $1.4 million. More recently, in 2019, E&B acquired a small surface parcel within the Nissen parcel from the U.S. government for $30,000.

In 2017, E&B submitted applications to renew the use permits for operations on the GIG and Nissen parcels. The County's Board of Zoning Adjustments ("BZA") held an initial public hearing on February 22, 2018 to consider jointly the two CUP renewal applications for the

Livermore Oil Field. The BZA heard public comment and continued consideration of the CUP applications in order for staff to obtain information from the Environmental Health Department. The County held a second public hearing on May 24, 2018. After again hearing public comment, the BZA recommended conditional approval of the CUPs.

On June 1, 2018, the Center for Biological Diversity ("CBD") appealed the BZA's conditional approval of the CUPs to the County's Board, arguing in part that E&B's operations raised a threat of groundwater contamination. The Board heard CBD's appeal on July 24, 2018, and subsequently voted to grant CBD's appeal, thereby denying E&B's CUP renewal applications.[3]

II. LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A moving party bears the burden of specifying the basis for the motion and the elements of the causes of action upon which the plaintiff will be unable to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to the non-moving party to establish the existence of a material fact that may affect the outcome of the case under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

III. DISCUSSION

The Court begins by considering whether plaintiffs possess a fundamental vested right to continue operations at the Livermore Oil Field.

"The grant or denial of a conditional use permit is an administrative or quasi-judicial act. Judicial review must be in accordance with [California] Code of Civil Procedure section 1094.5."

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[3] Concurrent with the appeal proceedings before the Board, E&B raised the issue of its vested rights on July 5, 2018. (Dkt. No. 59-2, ¶ 14.) The County did not address plaintiff's vested

Goat Hill Tavern v. City of Costa Mesa, 6 Cal.App.4th 1519, 1525, 8 Cal.Rptr.2d 385 (1992) (internal citations omitted). "If [an administrative] decision does not substantially affect a fundamental vested right, the trial court considers only whether the findings are supported by substantial evidence in light of the whole record." *Id.* at 1525-1526. If, however, "an administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence." *Id.* at 1525.

Whether an administrative decision substantially affects a fundamental vested right "must be decided on a case-by-case basis." *301 Ocean Ave. Corp. v. Santa Monica Rent Control Bd.,* 228 Cal.App.3d 1548, 1556, 279 Cal.Rptr. 636 (1991). Thus, "no exact formula exists by which to make this determination," but "courts are less sensitive to the preservation of purely economic interests." *Id*. Further, an entity acquires vested rights to continue its existing land use if it performs substantial work and incurs substantial liabilities in good-faith reliance upon a permit issued by a government agency. *Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n*, 17 Cal.3d 785, 791 (1976). "The ultimate question in each case is whether the affected right is deemed to be of sufficient significance to preclude its extinction or abridgment by a body lacking *judicial* power." *Whaler's Vill. Club v. California Coastal Com.*, 173 Cal.App.3d 240, 252, 220 Cal.Rptr. 2 (1985) (citation omitted, emphasis in original).

Each party cites to cases that support their positions in certain respects, but all are distinguishable from this case. Plaintiffs, for their part, contend that they have a fundamental vested right in continuing operations at Livermore Oil Field because the County has approved such operations since 1966, and E&B and its predecessors relied on those approvals to make significant investments in the land. In support of this claim, plaintiffs primarily rely on *Goat Hill Tavern*. There, a local tavern operated for over 35 years as a legal nonconforming use, during which time the owner invested more than $1.75 million on refurbishments. *Goat Hill Tavern*, 6 Cal.App.4th at 1522-23. In 1988, the owner expanded the tavern to add a game room. *Id*. at 1523. Four years after the fact, the owner applied for and obtained a six-month CUP for the expansion. *Id*. Another year passed when, following citizen complaints, the city discovered that the permit

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