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Legal Analysis of Whittier's Right to Extract Oil and Gas Resources Underlying Its Park and Open Space Properties in the Whittier Hills Consistent with Longstanding California Real Estate Law Principles and with Proposition A

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July 2011

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Carlyle Hall is one of California's premier environmental and land use lawyers. After graduating from Yale College, Mr. Hall obtained his JD degree, magna cum laude, from Harvard Law School. He then spent three years in Africa, where his principal assignment was to start a new law school in Uganda. When he came to California, he practiced at O'Melveny & Myers and then founded one of America's first public interest law firms, the Center for Law in the Public Interest (CLIPI). While at CLIPI, he was counsel of record in the first three cases that the California Supreme Court decided under the California Environmental Quality act (CEQA). Many of his cases focused on preserving lands that have become public parks in the Santa Monica Mountains and elsewhere. In 1990, Mr. Hall started his own private practice continuing to specialize in land use and environmental matters. In 2002, he merged his practice into the worldwide law firm, Akin Gump Strauss Hauer and Feld.

Mr. Hall has served as a Commissioner of the Tahoe Regional Planning Agency, and he has received many awards for his legal actions. Since 2002, he has served on the adjunct faculty at the University of Southern California law school, teaching its class in Land Use Law.

INTRODUCTION

This report first addresses the question of whether, under California real estate law, the City of Whittier has the legal right to pursue certain oil and gas development activities proposed to be undertaken on property acquired by it and dedicated for public park and recreational uses pursuant to Los Angeles County's 1992 landmark ballot proposition for *Safe Neighborhood Parks, Gang Prevention, Tree-Planting, Senior and Youth Recreation, Beaches and Wildlife Protection* ("Proposition A"). Proposition A authorized the assessment and expenditure of over a half billion dollars for acquiring, restoring and preserving beach, park, wildlife, and open space resources within the County. After concluding that Whittier may lawfully undertake the proposed oil and gas development activities, this report next addresses the question of what Whittier must do to comply with Proposition A and what authority the Los Angeles County Regional Park and Open Space District (the "District") has under Proposition A and its implementing agreements to control Whittier's proposed activities and to control Whittier's use of revenues that it will obtain from disposition of those subsurface oil and gas resources.

Since approximately 1995, the City of Whittier has owned a fee simple interest in approximately 1,290 acres of land in the Whittier Hills (also known as the Puente Hills) that it purchased with Proposition A grant funds (the "Subject Property"). The City now intends to lease approximately seven acres of the surface of this land to private parties, Matrix Oil Corporation and Clayton Williams Energy, Inc. ("Matrix/Clayton Williams"), for oil and gas development purposes, including oil drilling and production activities.[1] Additional areas around the drilling site will be used as a fire buffer zone and for grading and temporary construction staging, and an existing road connecting to Whittier's Savage Canyon Landfill will be improved to provide site access.

As discussed below, under basic, long-established California real estate law principles applicable to activities proposed to take place in public parks, subsurface activities by the fee simple owner of the property, including extraction of subsurface oil and gas resources, are legally permissible and entirely within the owner's rights, so long as they do not materially impair or substantially interfere with the overall public use of the surface land for park and recreational purposes. In the same vein, if California's public trust doctrine were to be extended to lands like the Subject Property, the City may permissibly balance the various competing natural resource needs and demands and may determine that the proposed oil drilling activities are appropriate.

[1] The general parameters of the proposed project are described in the *Draft Environmental Impact Report ("Draft EIR") for the Whittier Main Oil Field Development Project* (October 2010). The project features described herein are based on the environmentally preferred alternative identified in the Draft EIR: the Consolidated Central Site Alternative with Landfill Road Access, an Integrated Truck Loading Facility, and the Lambert Railroad Right-of-Way Pipeline. Draft EIR at 6-87. This report does not reflect any changes to the environmentally preferred alternative that may have occurred after publication of the Draft EIR.

Beyond traditional real estate principles, Proposition A and its implementing documents place certain restrictions on Whittier's ability to sell, dispose of, or change the use of *surface* park properties acquired with Proposition A funds. These surface-related restrictions are consistent with Proposition A's express "purposes," as set forth in its preamble, statement of intent, and list of benefits, to preserve and enhance beach, wildlife, park, recreation and natural lands ("parklands") acquired with its funds. These Proposition A restrictions are designed to ensure that, as a result of any future sales, dispositions or changes of surface use of acquired parklands, there will be *no net loss of parklands* dedicated to the purposes set forth in the Proposition A funding category for the acquisition in question.[2]

Proposition A itself does not purport in any way to control the City's use or sale of *subsurface* interests. Rather, Proposition A and its implementing documents are consistent with the City's fundamental legal right under applicable real property law, as the owner in fee simple of the land in question, to utilize the *subsurface* oil and gas resources and to expend the revenues obtained in any manner it sees fit consistent with the City's own purposes. As this report discusses, under section 16(b) of Proposition A, Whittier's only legal obligation here is to use the revenues that it will derive from the change of use of a relatively small portion of the *surface* area of the Subject Property (totaling less than three percent of the acquired land in question) to acquire equivalent replacement parkland, or Whittier may choose to reimburse the District's Parks Fund so that the District may acquire the replacement parkland. The contemplated Matrix/Clayton Williams leasing arrangements will also provide Whittier with ample funds to acquire, preserve and improve other parklands in and around the Subject Property and the Preserve and within the region.

The report prepared by Community Conservation Solutions ("CCS") addresses and resolves questions about the intent and requirements of Proposition A and its implementing documents as related to the proposed oil and gas project and to land purchased with Proposition A funds for open space and habitat in the Whittier Hills. *See* CCS, *Review and Evaluation of Proposed Whittier Oil and Gas Project for Consistency with Proposition A* (July 2011). To guide and inform Whittier's ultimate decision regarding the proposed project, the CCS report provides findings regarding the amount of surface parkland area that would be changed from park and open space uses as a result of the proposed project; the steps that must be taken by Whittier to comply with the requirements and intent of Proposition A; and, if those steps are taken, conclusions as to whether the project can be carried out in a manner consistent with Proposition A and its implementing documents.

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[2] This report uses the term "*no net loss*" as shorthand to describe the fundamental intent of Proposition A to require public agencies to replace changed or otherwise converted parklands in order to preserve the overall benefits of land acquired with Proposition A funds, so as to preserve the public investment and resulting benefit to property. This shorthand is not intended to imply that a recipient agency is obligated to replace parkland whose use changes to non-Proposition A purposes with a precisely equivalent *acreage* of parkland. In some situations, for example, it might be entirely appropriate to replace low-value park or open space land with a lesser amount of high-value comparable land.

For its part, the District has the limited legal authority to review and approve Whittier's proposed lease for consistency with Proposition A. The District must exercise this authority within the purview of its own enabling legislation. It cannot unreasonably withhold its approval, and it cannot use its legal authority improperly to force Whittier to surrender or compromise Whittier's legal rights. Nonetheless, the District may contend that Whittier is obligated to restrict its use of oil and gas revenues for certain park, open space or recreation purposes – or even that Whittier is required to transfer oil lease revenues to the District's Parks Fund. Although the District and Whittier may disagree about some of these matters, both agencies should consider the potential benefits of a negotiated settlement versus the costs, delays and uncertainties associated with potential litigation.

I. FACTUAL BACKGROUND

A. Whittier's 1995 Acquisition of Property in the Whittier Hills Pursuant to Proposition A.

On November 3, 1992, Los Angeles County voters overwhelmingly approved Proposition A. That measure established the District and directed an assessment of funds among assessable lots or parcels throughout the County. It further directed that the District distribute the proceeds of the assessment in order to acquire, develop, improve, rehabilitate or restore real property for parks, recreation, beaches, wildlife habitat or natural lands.

Proposition A earmarked certain of its funds for acquisitions within specific geographic areas. In particular, Proposition A earmarked $17.3 million for acquisition and development of land in the Whittier Hills for public park and open space uses. *See* Proposition A §§ 8(b)(2)(QQ) (allocating $9.3 million for Whittier Hills acquisitions), 8(c)(6) (allocating $7 million for Whittier Hills acquisitions) and 11(a) (allocating $1 million for trail development within the Whittier Hills). Proposition A also directed the District to establish procedures by which cities and other entities could obtain such earmarked grant funds. It specified that all recipients of grant funds must agree, among other things, to "maintain and operate in perpetuity" all public park and open space properties acquired, developed, or improved with such funds, while allowing recipient agencies the flexibility to later change the use or dispose of acquired parklands, so long as they make provision to replace that land. *See* Proposition A §§ 9-16.

In November 1993, Whittier executed a Project Agreement (Grant No. 58L1-94-0034) with the District whereby the District transferred to the City $9.3 million to acquire approximately 4,000 acres of land in the Whittier Hills contiguous to Hellman Park and Murphy Ranch Park.[3] In return, Whittier agreed to "maintain and operate in perpetuity" the acquired parkland for the purposes set forth in Proposition A. Like all other project agreements that the District entered into regarding recipient agencies' use of Proposition A funds to acquire

[3] As used herein, the term "Project Agreement" means the agreement between Whittier and the District pursuant to Grant No. 58L1-94-0034. Although Whittier received additional funds pursuant to other project agreements, all of the project agreements with the District contain similar language. Moreover, they must all be interpreted consistent with Proposition A.

parklands, Whittier's Project Agreement did not require Whittier to convey, assign or otherwise transfer any subsurface mineral rights to the District as a condition of receiving the acquisition funds.

In 1995, the City expended these Proposition A funds to purchase, among other areas, the 1,290-acre Subject Property in the Whittier Hills. Pursuant to the purchase agreements, Whittier acquired fee simple rights in the Subject Property, including the subsurface mineral rights. The Subject Property had formerly been owned by the Chevron and Unocal oil companies, and, for more than 100 years, had been exploited for oil and gas production. When the City acquired the Subject Property in 1995, it contained numerous roads and close to 550 active and closed oil wells and related oil and gas production facilities. It was recognized that it would take many years and substantial investment of additional public funds to restore the degraded portions of the property to high quality natural habitat.

Among other acquisition-related documents, the City in 1995 concurrently executed and recorded certain restrictive covenants by which it agreed to limit use of the Subject Property. Under the restrictive covenant for the former Unocal property, Whittier agreed to restrict use of the acquisition area "in perpetuity exclusively for public open space and recreational purposes," including hiking, biking and horseback riding. Any activity inconsistent with these purposes is prohibited. Under the restrictive covenant for the former Chevron property, Whittier agreed to restrict use "forever in a natural undeveloped open space condition," "for wildlife habitat and habitat restoration purposes," and "to prevent any use" that would "impair or interfere with [the site's] conservation values." Permitted uses include hiking, biking and horseback riding. Any activities "inconsistent" with habitat conservation or the permitted uses are prohibited.

The Subject Property is now part of the larger, 3,860-acre Puente Hills Landfill Native Habitat Preserve. Although Whittier continues to own the Subject Property, the Puente Hills Landfill Native Habitat Preservation Authority, a joint powers authority that includes the City, the County and other entities, manages the Preserve. Under the Authority's operative plan for the Preserve, the use of the majority of the Subject Property has been, and for the long term will be, restricted for native habitat recovery purposes, with only limited public hiking trails. *See* Puente Hills Landfill Native Habitat Preservation Authority, *Resource Management Plan* (July 26, 2007). The above-ground portions of the site that would be used for oil production activities are located in the area that is closed to public access.

B. Whittier's 2008 Lease of Subsurface Oil and Gas Resources Underlying the Whittier Hills to Matrix Oil Company and Clayton Williams Energy, Inc.

In 2008, the City undertook discussions with Matrix/Clayton Williams, which had been investigating the subsurface resources underlying the Subject Property. According to these companies, due to the rising price of oil and gas and the development of new drilling and production technology, much of the oil and gas reserves still underlying the surface of the Subject Property could now be extracted economically and efficiently through underground slant/directional drilling and other technologies. All of the oil and gas production-related

activities could be conducted from one or more small, consolidated surface areas comprising only a relatively few acres in the Subject Property's southwest corner.

On October 28, 2008, Whittier entered into a conditional Oil, Gas, and Mineral Lease Agreement with Matrix/Clayton Williams. Pursuant to this Agreement, subject to certain conditions first being satisfied, the City agreed to lease not more than seven acres of the surface land to Matrix/Clayton Williams for its oil drilling and other production equipment. The conditions that must first be satisfied before the lease becomes operative include (a) the District's approval releasing the drill site from protected area status under Proposition A, (b) the City's issuance of a conditional use permit ("CUP") authorizing Matrix/Clayton Williams to proceed with the oil and gas operations, and (c) the City's completion of CEQA environmental review in connection with its consideration of the CUP. Under the lease, once the conditions are satisfied, the City would provide Matrix/Clayton Williams authority to extract the underlying oil and gas resources. For its part, Matrix/Clayton Williams has paid the City an up-front "rental" fee and, should the lease conditions be met and drilling operations commence, it would pay Whittier royalty payments from the revenues it receives from its subsequent sale of the produced oil and gas. In addition, Matrix/Clayton Williams would pay the Puente Hills Landfill Native Habitat Preservation Authority management and habitat enhancement fees ranging from $60,000 to over $180,000 annually after drilling operations have commenced.

In April 2009, Matrix/Clayton Williams submitted a CUP application to Whittier seeking the City's approval to utilize the leased site so that it could drill, explore, and extract the remaining recoverable oil and gas reserves still underlying the Subject Property. Pursuant to the City's environmental review process under the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 *et seq.*, the potential significant environmental impacts of the proposed drilling and production activities are presently being evaluated, and, if, after considering the environmental documents, other various reports and all public comments, the City decides to proceed, mitigation measures would be applied pursuant to CEQA to reduce the likely impacts of the project.

As currently formulated, the proposed project's above-ground activities at and around the drilling site and the Landfill access road would occupy or impact only a small portion of the Subject Property. The oil and gas production facilities would consist of one consolidated site for all oil and gas production. Draft EIR at 5-6. The consolidated site would contain a central processing area, an enclosed well cellar for up to 60 underground wells, and an integrated truck loading facility (oil, gas, and produced water pipelines and electrical conduits would be constructed below ground). *Id.* at 5-6, 5-8, and 5-18. The total area required for these facilities would be approximately 7.0 acres. In addition, an area around the consolidated site would be graded and used for temporary construction staging and would be subject to fuel modification. Further, within the Subject Property, the proposed project would utilize approximately 1.25 miles of an existing road connecting to Whittier's Savage Canyon Landfill. *Id.* at 5-14. Portions of this roadway would need to be improved to ensure emergency access (emergency access could also be achieved through Catalina Avenue). Widening the roads and clearing an area within 10 feet on either side for fuel modification would use approximately 5 acres. Draft EIR at 6-43. At

most, the overall area that would be changed and/or temporarily disturbed, including areas that would be temporarily disturbed during construction and areas that would be restored, by these proposed *surface* oil and gas production activities would be less than 33 acres, or less than three percent of the Subject Property's total 1,290-acre parklands. This is less than one percent of the entire 3,860-acre Preserve. None of the project's *subsurface* activities would affect any of the Subject Property's habitat, public open space or recreational uses on these parklands.

On January 27, 2011, Superior Court Judge Ann Jones announced her ruling regarding a demurrer by the City of Whittier and other respondents in a lawsuit brought by certain individuals and a non-profit organization. Judge Jones ruled that the plaintiffs could provisionally go forward with their case challenging the 2008 lease between the City and Matrix/Clayton Williams as an alleged violation of the public trust doctrine and Proposition A. Judge Jones' ruling anticipated that plaintiffs' would amend their complaint, that the City would continue to process the CUP requested by Matrix/Clayton Williams, and that, at some point, the Superior Court might make a definitive ruling on the merits, which ruling would then, of course, be subject to appeal.

II. LONGSTANDING CALIFORNIA REAL ESTATE LAW PRINCIPLES GOVERNING USE OF LANDS DEDICATED FOR PUBLIC PARK USES GIVE WHITTIER THE LEGAL RIGHT TO EXTRACT OIL AND GAS UNDERLYING THE SUBJECT PROPERTY, SO LONG AS THE PROPOSED SURFACE ACTIVITIES DO NOT MATERIALLY IMPAIR OR SUBSTANTIALLY INTERFERE WITH THE PUBLIC'S USE OF THE PARKLAND.

A. General Principles Regarding Dedications of Land for Public Park Uses.

Under basic, long-standing traditional principles of California real estate law, lands may be dedicated for various public purposes, including public roads, streets and alleys, and public parks and squares. *See* Hagman and Maxwell, *California Real Property* (1991) § 361.04. Such lands may be dedicated for public use (1) through an express deed that conveys the fee simple (or an easement) to the fee owner of the site (or the easement owner) (an express dedication); (2) through the overall conduct of the owner of the land that manifests an intent to dedicate the land in question to the public and an acceptance by the public of that offer of dedication by actual use of the site (an implied-in-fact dedication); or (3) through the conduct of the public in using the site as though it had a right to use it (an implied-in-law dedication). *Id.* § 361.01-361.03.

No matter how a site came to be dedicated to a public use, the property's fee owner (typically the public agency that has acquired title to the site) must use the property in ways that are consistent with the original dedication. *Id.* at 361.03; *see Spinks v. City of Los Angeles* (1934) 220 Cal. 366, 369; *Simons v. City of Los Angeles* (1976) 63 Cal.App.3d 455, 469-72.

B. Determining Whether Particular Activities Proposed to be Undertaken by a Public Agency Are Consistent With Public Park Uses.

The most frequently litigated issue in this field of real estate law is whether a proposed use of a portion of the surface area of property dedicated to public use would be consistent with the purposes for which the property was dedicated. *See, e.g., Spires v. City of Los Angeles* (1906) 150 Cal. 64, 70 (public library could be built within a public park); *Slavich v. Hamilton* (1927) 201 Cal. 299, 307-09 (veterans' memorial hall could be built in a public park where the land so used was a relatively small portion of the park); *Humphreys v. City and County of San Francisco* (1928) 92 Cal.App. 69, 78 (street railway could be built in a small portion of a public park); *Vale v. City of San Bernardino* (1930) 109 Cal.App. 102, 106-09 (replica of historic log cabin could be maintained in public park); *Los Angeles Athletic Club v. City of Long Beach* (1932) 128 Cal.App. 427, 431 (municipal auditorium could be built in public park); *Bader v. Coale* (1941) 48 Cal.App.2d 276, 277-80 (firehouse could be built in public park where the deed allowed use of the park for "any public benefit," but forbid construction of jails, hospitals and other uses of "like character"); *Griffith v. City of Los Angeles* (1959) 175 Cal.App.2d 331, 336-42 (municipal waste landfill could be developed in public park where over the years the designated site would be filled and the ultimate new level surface would then be used for recreational purposes); *Big Sur Properties v. Mott* (1976) 62 Cal.App.3d 99, 106 (private easement could not be granted to a logging company through a public park acquired by gift deed where the deed explicitly forbade such private easements).

C. Compatibility of Subsurface Activities, Including Oil and Gas Extraction, with Public Park Uses at the Surface.

Where proposed activities will be undertaken *below the surface* of dedicated parkland, California's courts have repeatedly and uniformly found that the proposed subsurface uses are compatible with public park dedication at the surface, so long as the subsurface uses – together with any "incidental" surface uses – do not materially impair the surface public park uses. With respect to oil and gas extraction, California statutory authority explicitly confirms this basic principle.

1. <u>Subsurface Parking Garages.</u>

In *City and County of San Francisco v. Linares* (1940) 16 Cal.2d 441, the City proposed to build an underground parking garage for automobiles under Union Square in San Francisco's downtown area. Union Square had been a public park since California entered the Union in 1850. The top of the new underground garage would be resurfaced as a public park, while the entry and exit access ramps to the underground garage would take up approximately six and a half percent of the total park surface area. The California Supreme Court upheld the proposed *subsurface* use, concluding that the dedication of the land to public park uses related only to the *surface* uses on the land. The temporary disruption of surface uses during construction of the subsurface garage was simply an "unavoidable incident" of the proposed project, and the relatively small surface area that would permanently be changed to non-recreational use in order to provide on-going access to the underground garage was also "*incidental*" and was not

"*materially detrimental*" to the remainder of the surface public park uses. Nor did it matter that the proposed underground parking garage was to be operated by a for-profit private entity that would pay an annual rent to the City. *Id.* at 446-47.

Similarly, in *Best v. City and County of San Francisco* (1960) 184 Cal.App.2d 396, the City proposed to construct an underground parking garage on a hilly park location. A portion of the garage would be built underground, but another portion would rise above the surface by three stories. Again, the top of the parking garage would be resurfaced as a level public park, while the access and elevator shafts would take up approximately five percent of the overall reconstructed park surface. The Court of Appeal again upheld the proposed subsurface and related surface parking garage uses, because they would not materially detract from the public's use and enjoyment of the reconstructed park surface uses. *Id.* at 400-01.

2. Drilling for, and Production of, Subsurface Oil and Gas Resources.

In *City of Long Beach v. Marshall* (1938) 11 Cal.2d 609, the California Supreme Court considered a situation somewhat analogous to the facts here. There, the State had deeded its fee simple interest in certain coastal and tidelands to the City of Long Beach in 1911, with the lands to be used "solely" for development of a harbor. About 25 years later, oil was discovered under the subject parcel and the adjoining area. An adjacent landowner had already commenced drilling from the pool underlying the entire area, and the City thereupon also undertook to drill wells. The Supreme Court first concluded that the State had intended to convey a full fee simple title, and that the limitation of the use of the land only for harbor purposes was entirely consistent with that intent. The Court then ruled that, so long as the drilling did not "impede the use of the harbor," the proposed oil drilling operations would not be inconsistent with harbor uses. The fact that the revenues from drilling the "hidden treasures" below would go only to the City, rather than to the State as a whole, was to be given "no weight." *Id.* at 620-21.

Taylor v. Continental Southern Corp. (1955) 131 Cal.App.2d 267 posed the question of whether a local government had authority to lease underground oil production activities beneath a public park to a private oil company. There, in a litigation settlement entered into almost 75 years earlier, the City of Long Beach had acquired the subject property from a water company on the express condition that the site be "used *exclusively* for a public park," and for many years the public had, in fact, used the land as a park. The deed conveying the land, however, included the possibility of reverter, a "condition subsequent" providing that, if the land ceased being used as a public park, then the land would revert to the water company. The water company then conveyed that contingent reverter interest to the plaintiff's predecessor-in-interest. The City then entered into an oil and gas lease allowing the defendant oil company to drill for, and produce, oil and gas found under the surface of the public park. The defendant oil company then began paying royalties exclusively to the City. The plaintiff sued, claiming that she, too, had entered into a lease with the oil company, by which (under her contingent reversionary interest) she had authorized it to drill for oil and gas so long as she was paid royalties from the oil and gas produced. Plaintiff sued the oil company claiming that, given the circumstances, it should have

been paying royalties to plaintiff under her contingent interest. The trial court ordered that plaintiff bring the City into the case.

In a sweeping opinion, the Court of Appeal ruled that plaintiff was not entitled to any relief. The appellate opinion first proclaimed the "general rule" under real property law that "a dedication for park purposes passes a fee simple to the grantee . . . and a *conveyance for park use not only carries all oil and mineral [rights], but also the right to develop same in any manner not inconsistent with use of the surface of the land for park purposes*." *Id*. at 274. According to the Court, "[i]t is clear that a public agency, such as a municipality, which takes a grant of land for park purposes acquires title to the minerals therein – being in the case of oil and gas the exclusive right of capture." *Id*. The appellate court favorably cited and relied on several California Attorney General Opinions concluding that, when a local government acquires a fee simple in land dedicated for public park use on the surface, the municipality can undertake slant drilling from an *off-site* location in order to extract oil and gas from beneath the park's surface. The Court of Appeals also favorably cited and relied on the leading out-of-state case, *Central Land Co. v. City of Grand Rapids* (1942) 302 Mich. 105, 4 N.W.2d 485. There, the defendant city had acquired land to be used solely as a public park, but proposed to use a relatively small *on-site* location to drill for gas and oil below the surface. The Michigan Supreme Court upheld the proposed oil drilling surface uses, concluding that, where the surface lands are dedicated as a public park, it is "settled" law that the municipality nonetheless also takes the right to exploit the underlying oil and gas deposits.[4]

People ex rel. State Lands Commission v. City of Long Beach (1962) 200 Cal.App.2d 609 represents the latest and most definitive appellate ruling approving oil drilling activities upon the surface of land dedicated to public park purposes. There, the City of Long Beach transferred fee simple title to the State of California in lands that later became Alamitos Beach State Park. The deed contained the express condition that the land could be used for only park and recreational purposes "and for no other purposes whatsoever."[5] The State nonetheless subsequently proposed to drill for oil beneath the surface both from a small portion of the surface within the park and from an off-site location. The Court of Appeal upheld the proposed oil drilling activities, observing that the purpose of the deed's limitation of the land to park uses appeared to be to protect the *surface* areas, and that this purpose was "not interfered with or defeated by the proposed drilling for and extraction of oil." *Id.* at 619. The Court cited and relied on *San Francisco v. Linares*, *City of Long Beach v. Marshall*, and *Taylor v. Continental Southern Corp.*,

[4] *See also Keaton v. Oklahoma City* (1940) 187 Okla. 593, 102 P.2d 938 (city's lease of a relatively small portion of the surface of Riverside Park to a private company to drill for oil located underneath the park was permissible and was not inconsistent with city's acquisition of property by a deed that dedicated the site to public park purposes); *City of Shreveport v. Kahn* (1939) 194 La. 55, 193 So. 461 (where city's proposed oil drilling would not substantially interfere with the public's use of the remainder of a park, the drilling activities would not violate a deed restriction limiting use of the land to park purposes only).

[5] Similarly, here, the Subject Property's deed restrictions "prohibit" uses that are "inconsistent" with open space, habitat restoration, and recreational purposes.

discussed above, as well as out-of-state authority. In particular, the Court followed *Central Land Co. v. City of Grand Rapids*, discussed above, and observed that, consistent with the *Grand Rapids* holding, proposed oil drilling activities are allowable within dedicated public parks so long as those activities do not cause any "*substantial interference with*" the use of the surface land for park purposes. *Id*. at 623.

D. California Legislation Confirms the Authority of Cities and Other Public Agencies to Lease Park Property for Oil and Gas Development.

In 1945, consistent with these longstanding real estate law principles, the California Legislature authorized public agencies, including cities and counties, to lease park property for the oil and gas development if, in the judgment of the governing body, the purposes for which the land was held by the agency could be protected by proper location of the wells or by slant drilling. *See* 22 Op. Cal. Att'y Gen. 109 (Oct. 2, 1953). With respect to the power of cities to lease parks for oil and gas development, Public Resources Code section 7057 provides:

> [Park] property of any city may be leased for the purpose of producing or effecting the production of minerals, oil, gas or other hydrocarbon substances . . . provided that the use of such property for park . . . purposes shall not be *substantially interfered with* thereby; provided, however, that if in the judgment of the governing body of any such park . . . drilling for oil or gas would not *substantially interfere* with the use of such property for park . . . purposes, then any such lease on any such property shall provide that drilling for oil or gas beneath the surface of such property shall be done by means of slant drilling from surface locations outside the outer boundaries of any such property, or from designated locations inside the outer boundaries of such property, which inside locations will not interfere substantially with the use of such property for such park . . . purposes.

The Legislature also directed that all revenues accruing to a public agency from oil and gas development be deposited in the agency's "general fund." Section 7055 specifically states: "Any money accruing from leases under this chapter [Public Resources Code §§ 7051 – 7062] shall be paid into the general fund of the county or other public or quasi public corporation, body or agency for the use of the county or other public or quasi public corporation, body or agency, as the case may be." Pub. Res. Code § 7055.

E. Whittier's Legal Right to Extract Oil and Gas Underlying the Subject Property.

Under the longstanding common law and statutory principles of real estate law in California, Whittier has the right, as the owner of the fee simple, to extract the Subject Property's subsurface oil and gas resources. The fact that, in connection with its acquisition of the Subject Property, Whittier placed the covenants described above that restrict the property's use only to park purposes does not in any way preclude its right to develop the subsurface uses, so long as

the "incidental" surface uses for oil drilling and production equipment and activities do not "materially impair" or "substantially interfere" with the use of the property for park purposes (i.e., open space, recreation and wildlife habitat purposes).

Further, Whittier has broad discretion to determine whether the proposed project would materially impair or substantially interfere with park purposes. In making this determination, Whittier may consider the following factors:

- *Temporary Construction Impacts*. Whittier may take into account the length and magnitude of the project's construction impacts in relationship to the public's use of the property for park purposes. In evaluating those impacts, Whittier has significant discretion to conclude that temporary impacts are simply "incidental" and would not materially impair or substantially interfere with long-term park purposes, because those temporarily impacted lands would later be completely restored to their pre-construction park use. In fact, none of the cases cited above found that temporary construction impacts, which in some cases were severe, would materially impair or substantially interfere with long-term park purposes. *See, e.g., Linares*, 16 Cal.2d at 447 (construction of parking garage would not substantially interfere with park purposes; "Such a temporary interference would appear to be an unavoidable incident in carrying out the purposes of the plan"); *Best*, 184 Cal.App.2d at 398-399 (construction of three-story garage below newly elevated park surface would not materially detract from park purposes).

- *Amount of Surface Area Used for Oil and Gas Development*. Whittier may also consider the relatively small amount of surface area that would be utilized for oil and gas development compared to the amount of area that would remain dedicated to park purposes. Notably, the California Supreme Court held that the use of 6.5 percent of park property for parking garage ingress and egress would not materially impair park purposes. *See Linares*, 16 Cal.2d at 447; *see also Best*, 184 Cal.App.2d at 399 (holding that the use of 5.1 percent of park property for above-ground parking structures would not materially detract from park purposes). Here, less than three percent of the Subject Property would be used or temporarily disturbed for *surface* oil and gas production activities, and less than one percent of the 3,860-acre Preserve would be used or disturbed for such activities.

- *Aesthetic Features*. Whittier may also consider aesthetic features of the proposed project and whether they would interfere with park purposes. Some courts have ruled that this is a subjective question of fact for the decision-maker. *See Best*, 184 Cal.App.2d at 402 ("[T]he esthetic features which appellant stresses do not present questions of law. To determine what is pleasing or beautiful in the field of landscaping would be as foreign to the judicial function as would be a like fiat in the field of music or art."). Other courts have found that, if properly designed and landscaped, oil and gas production facilities would not materially impair or

substantially interfere with park uses. *See, e.g. Central Land Co.*, 302 Mich. at 110-111;[6] *City of Shreveport*, 194 La. at 75-76.[7]

- *Environmental Impacts*. Whittier may also consider whether the proposed project would degrade the environmental condition of the Subject Property to such an extent that it would materially impair or substantially interfere with park purposes. Although Whittier's determination in this respect may be informed by its CEQA environmental review, Whittier's ultimate determination is *not* inextricably tied to its CEQA findings. Under longstanding common law and statutory real estate law principles, the critical inquiry is whether the proposed project's impacts would materially impair or substantially interfere with park purposes. While "significant" CEQA impacts may have some bearing on this inquiry, the pertinent case law and Public Resources Code section 7057 are concerned more with the question of whether the park property will be able to continue to serve its intended purposes. Thus, the inquiry focuses more on overall purposes of the park, not on the particular individual impacts on air quality, biological resources, hydrology, noise, etc.

- *Public Trust Doctrine Related Issues*. In her January 27, 2011 ruling on respondents' demurrer, Judge Jones ruled that the recent appellate opinion in *Center for Biological Diversity, Inc. v. FPL Group, Inc.* ("*CBE*") (2008) 166 Cal.App.4th 1349 could be read to possibly support application of California's public trust doctrine to the Subject Property. Since California became a state in the mid-1800s, the public trust doctrine has been applied by the state courts to protect tidal and submerged lands and certain inland waterways. *See National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 433-437. In *CBE*, the Court of Appeals concluded that the doctrine's reach could potentially be further extended to protect wild birds flying in the sky from undue hazards created by County-permitted energy generating wind turbines. The appellate court noted, however, that the private company operating the wind turbines was not the appropriate defendant, and the plaintiffs should properly have sued the trustee government agency. *CBE*, 166 Cal.App.4th at 1367. Without determining whether the County that permitted the turbines was a proper trustee agency, the Court observed that, in carrying out its land use statutory obligations, the County had, consistent with public trust principles, attempted to strike a balance between

[6] In *Central Land Co*., the court found that "extraordinary care" had been taken to ensure that oil production activities would not materially impair park purposes. In particular, the court noted that storage tanks were maintained offsite, pipelines were placed mostly underground, and attractive, non-objectionable structures were maintained at the location of each well. 302 Mich. at 110-111.

[7] In *City of Shreveport*, the court held that an oil and gas company's operations in compliance with its lease terms would not impermissibly interfere with customary park purposes. The lease provided, among other things, that pipelines would be buried and that the ground around each well and the tanks would be landscaped and kept in as good condition as the surrounding terrain. 194 La. at 75-76.

the generation of energy and the protection of natural resources. The Court also noted that, to the extent that a local government may have independent public trust responsibilities, it nonetheless has broad discretion to balance protection of wildlife against other competing public trust needs and demands. Thus, for example, a trustee agency is often called upon to perform "[a] delicate balancing of the conflicting demands for energy and for the protection of other environmental values." *Id.* at 1369.[8]

Here, the Whittier City Council has not yet had the opportunity to act as the decision-making body exercising its regulatory authority (for example, pursuant to CEQA) over the CUP requested by Matrix/Clayton Williams. Assuming for the sake of argument that the public trust doctrine could theoretically be applicable here, when the Whittier City Council exercises its statutory and regulatory responsibilities to protect the environment, it will also, to some extent, carry out any applicable public trust doctrine responsibilities. Further, as it reaches its decision on whether to approve the requested CUP and on what environmentally protective conditions to impose, the City Council will also be exercising its authority to balance natural resource protection with other competing natural resource needs and demands. A key factor in this balancing will be whether the proposed oil drilling activities would materially impair or substantially interfere with the public's use and enjoyment of the park.

III. PROPOSITION A'S PROVISIONS GOVERNING USE OR DISPOSITION OF PARKLANDS ACQUIRED WITH ITS FUNDS DO NOT RESTRICT SUBSURFACE ACTIVITIES AND DO NOT CONTROL THE REVENUES THAT A RECIPIENT AGENCY LIKE WHITTIER MAY GENERATE FROM SUBSURFACE ACTIVITIES.

Proposition A does not expressly or implicitly override the well-established common law and statutory real estate law principles by which lands owned by a California city that are dedicated to public park purposes may be utilized by their owner for oil and gas development. As discussed below, while Proposition A imposes various restrictions regarding the *surface* parkland uses of properties acquired with Proposition A funds (and the revenues derived therefrom), nothing in Proposition A or the applicable Project Agreement purports to control the development and use of *subsurface* interests. To the contrary, under Proposition A and its implementing documents, Whittier must simply ensure that, to the extent that the *surface* park, open space or habitat uses would be changed due to the proposed drilling and production activities from the purposes for which they were acquired with Proposition A funds, the affected

[8] Notably, California's courts have repeatedly approved the use of public trust resources for a wide variety of commercial energy-related endeavors. *See, e.g., Boone v. Kingsbury* (1928) 206 Cal. 148, 181-94 (oil and gas development on tidal and submerged lands); *Carstens v. California Coastal Comm'n* (1986) 182 Cal.App.3d 277, 288-91 (nuclear power plant operations and access restrictions on beachfront land).

parkland would be replaced so that there is no net loss of parkland dedicated to the purposes specified in the section of Proposition A which earmarked the funds to Whittier.

A. The "Purposes" of Proposition A Relate Only to Acquiring and Improving Land for *Surface* Public Park, Open Space and Recreational Uses.

Proposition A has several expressed purposes, all of which relate only to the preservation and/or enhancement of *surface* uses of beach, park, recreation and natural lands within the District. Thus, Proposition A's preamble states that its "purpose" is to (i) improve the safety of recreation areas for children and senior citizens, (ii) prevent gangs by increasing the safety of neighborhood parks, (iii) plant trees, and (iv) acquire, restore and preserve beach, park, wildlife, and open space resources – all of which relate to *surface* use by the public. Proposition A, Preamble. Similarly, Section 4 explicitly states:

> It is the intent of this order and proposition to provide funds to benefit property and improve the quality of life in the District by preserving and protecting the beach, wildlife, park, recreation and natural lands of the District, providing safer recreation areas for all residents, preventing gangs, developing and improving recreation facilities for senior citizens, planting trees, building trails and restoring rivers and streams.

Proposition A § 4. Additionally, Proposition A's findings set out in Section 6 expressly describe the economic, environmental, and quality-of-life benefits that will result from restoration and enhanced safety of park, open space and recreational lands and facilities – all of which again relate to the *surface* use of the parklands to be acquired. *See* Proposition A § 6.

Notably, the 1992 Engineer's Report underlying Proposition A focused exclusively on the benefits that the property owners who would be assessed to pay for Proposition A's park and open space acquisitions would derive from the *above-ground* uses of the acquired parklands. This Engineer's Report provided Proposition A's necessary foundational support by describing the nexus between the *costs* to be imposed on the assessable lots or parcels within the District and the *benefits* that they would receive from the proposed acquisitions and improvements. *See* Proposition A §§ 1, 25 and 26. Pursuant to the Landscaping and Lighting Act of 1972, the County needed to make this nexus determination in order to fairly allocate assessments among the lots or parcels in the District. *See* Sts. & High. Code § 22573; *see also* Pub. Res. Code § 5539.9. The Engineer's Report concluded that the proposed uses of the park and open space *surfaces* would sufficiently benefit the various categories of properties to justify their respective assessments. Thus, the Report's list of "benefits to property in the District" are all related to improvements *on the surface*: increased aesthetic "attractiveness" of natural resources; improved environmental quality of beaches, parks, mountains and open space; improved public recreational opportunities; and increased public safety and usability of park and recreational facilities. *See* Engineer's Report at 23.

B. Proposition A's Provisions Relating to Sale, Disposal or Change of Use of Acquired Park Property Are Designed to Ensure that There Is No Net Loss of Parklands Within the Region of the Acquired Property Resulting from Sales or Dispositions of Surface Area or from Changes of Surface Use.

Section 16(a) of Proposition A expressly obligates recipients of Proposition A funds to retain and use the acquired properties for the above-described *surface-related* public park and recreational purposes. Thus, a recipient of Proposition A funds must agree to "manage and operate in perpetuity" the acquired parklands and to "use the property only for the *purposes* of [Proposition A] and to make no other use, sale, or disposition of the property, except as provided in subdivision (b) of this Section 16." Proposition A § 16(a). Subdivision (b) then provides:

> If the *use* of the property acquired through grants pursuant to this order *is changed* to one other than a use permitted under the category from which the funds were provided, or the property is *sold or otherwise disposed of,* an amount equal to the (1) amount of the grant, (2) the fair market value of the real property, or (3) the proceeds from the portion of such property acquired, developed, improved, rehabilitated or restored with the grant, whichever is greater, shall be *used by the recipient . . . for a purpose* authorized in that category *or* shall be *reimbursed* to the Parks Fund and be available for appropriation only for a use authorized in that category.
>
> If the property sold or otherwise disposed of is less than the entire interest in the property originally acquired, developed, improved, rehabilitated or restored with the grant, an amount equal to the proceeds or the fair market value of the property interest sold or otherwise disposed of, whichever is greater, shall be *used by the grantee . . . for a purpose* authorized in that category *or* shall be *reimbursed* to the Parks Fund and be available for appropriation only for a use authorized in that category. . . .

Proposition A § 16(b).

Subdivisions 16(a) and 16(b) must be read together in order to ascertain their purpose. Subdivision (a) seeks to ensure that any acquired property will be used as parkland "in perpetuity" in a manner that accords with Proposition A's "purposes" – all of which relate to the continued surface park and recreational use of the acquired lands. Section 16 provides, however, that a recipient may change the Proposition A-compliant uses of the acquired land to a non-Proposition A use by complying with the provisions of subdivision (b). Subdivision (b) provides recipient agencies the flexibility to later change the use or dispose of acquired parklands, so long as they make provision to replace that land. Thus, if a recipient agency changes the use, sells, or disposes of the parkland such that it can no longer be used for Proposition A purposes, under subdivision (b), there will be *no net loss of parklands* dedicated to those purposes, because the recipient will either itself replace the lost parkland or will reimburse the District's Parks Fund so that the District can replace the lost parkland.

Looking more closely at the specific language of subdivision (b), its "change of use" language in the first paragraph specifically relates only to changes in the use of an *entire* parcel to a use that is *not permitted* by Proposition A.[9] The remainder of the first paragraph sets out what must occur if a recipient agency proposes to sell or dispose of the *entire* acquired parcel. In all of these situations, the recipient agency must commit an amount equal to (1) the amount of the grant, (2) the fair market value of the real property, or (3) the proceeds it obtains from the parcel's sale, disposition, or change of use, whichever is greater, for the specific purpose for which the Proposition A grant funds were originally granted *or, alternatively*, reimburse the District's Parks Fund in an equivalent amount.

The second paragraph of subdivision (b) describes what must take place if the recipient agency sells or disposes of *less than the entirety* of its interests in the acquired property. For purposes of this analysis, we assume that, although the second paragraph expressly refers only to "sales" and "dispositions" of a portion of the acquired land, it is also intended to control what must occur if the recipient agency also "changes the use" of less than the acquired property's entire surface area. Under the second paragraph, similar to the first paragraph, the recipient agency must commit "an amount equal to the proceeds or the fair market value of the property interest sold or otherwise disposed of, whichever is greater," for the specific purposes provided in Proposition A *or, alternatively*, reimburse the Parks Fund in an equivalent amount.

The two key points to be taken from this analysis of the specific language of subsections (a) and (b) are that:

- Although a recipient agency promises to use the surface areas of parklands acquired with Proposition A funds in perpetuity for Proposition A purposes, the agency may change those uses to non-Proposition A purposes, or sell or dispose of the land, so long as it provides sufficient replacement parkland to assure no net loss of Proposition A parklands.

- Subdivision (b) focuses exclusively on ensuring that there will be *no net loss* of acquired parklands for Proposition A purposes – i.e., *surface* park-related purposes; it says nothing to indicate that it seeks to control the recipient agency's right to use and control the disposition of *subsurface* resources. It certainly says nothing to indicate that it proposes to overturn the long-standing California common law and statutory real estate principles that give the public agency owner of dedicated public park properties the right to utilize underlying subsurface resources, so long as the surface activities would not substantially interfere with park purposes.

Subdivision (b)'s specific language is fully in harmony with Proposition A's fundamental intent – to ensure that recipient agencies will continue to own and operate their acquired parklands for

[9] Specifically, subdivision (b) is triggered if the use of the property is changed to a use not permitted under "the category from which the [Proposition A] funds were provided."

Proposition A related purposes in perpetuity. To the extent that a public agency decides to change the use of, or sell or dispose of, all or a portion of the surface of Proposition A acquired parkland, the agency must provide sufficient funds to ensure that an equivalent amount of replacement parklands is made available to guarantee that, within the region, there is *no net loss of parklands* devoted to Proposition A purposes.[10]

With respect to the Whittier situation, Proposition A's Section 16(b) language places no restriction at all on Whittier's disposition of the *subsurface* oil and gas resources. To the extent that the oil and gas project would "change the use" of a small, above-ground portion of the Subject Property (amounting to less than three percent of the total area and less than one percent of the entire Preserve) to a use not permitted by Proposition A, Whittier must either itself expend sufficient funds to replace those lost *surface* parkland resources or it must reimburse the District so that the District can do so. The analysis prepared by CCS provides a detailed review of the various "changes of use" contemplated by the proposed oil and gas project and quantifies the amount of changed use parkland that must be replaced pursuant to Section 16(b). Here, the applicable amount of Whittier's expenditure or reimbursement under Section 16(b) would be the current fair market value of the changed use parklands *surface* area identified in the CCS report.[11] The other possible Section 16(b) measures would not apply here: the current fair market value of the converted parkland doubtless exceeds the amount of the Proposition A grant that was initially expended to acquire that relatively small portion of the Subject Property whose surface use is to be changed, and, under the lease, no "proceeds" would be received by Whittier for the lease of the *surface* parklands. Arguably, the only lease proceeds relating to the use by Matrix/Clayton Williams of the surface area would be the "rental" fee, an amount which is doubtless less than the fair market value of the changed use acreage. The only other revenues Whittier would receive pursuant to the lease relate solely to the royalties paid for the sale of its *subsurface* mineral rights, a matter not addressed by Proposition A. Further, Subdivision 16(b)'s "no let loss" parklands replacement provisions have no relevant applications to Whittier's revenues from the sale or disposition of the *subsurface* natural resources, because Whittier's extraction of those subsurface resources will not result in any net loss of surface parklands.[12]

[10] Notably, Proposition A's "no net loss" provisions requiring recipient agencies to replace parklands whose use is changed or that are disposed of is similar to the longstanding provisions of the Public Park Preservation Act of 1971. Under that Act, whenever a public agency acquires parkland and intends to convert it to non-park uses, it must "replace" the converted parkland, using sufficient funds to acquire an "equal" amount of "substitute" parkland with "comparable characteristics" and "substantially equal size." *See* Pub. Res. Code §§ 5401, 5405.

[11] Whittier and the District may agree that a land swap would effectively accomplish the goals set forth in Proposition A. Land swaps are specifically authorized by Proposition A. *See* Proposition A §§ 16(b) (mandating that specified amount be used for a "purpose authorized" in the category from which the grant funds were provided); 8(b) (stating that grant funds must be used for, among other things, "acquisition" of park property); 17(b) (defining "acquisition" to include "the transfer or exchange of property of like value").

[12] In its February 5, 2009 letter, Special Counsel for Whittier wrote the Whittier City Manager regarding the City's legal rights in connection with the proposed Matrix/Clayton Williams lease and the

C. Under the District's "Procedural Guide" and the Applicable Project Agreement, Restrictions on Revenues Generated by "Non-Recreational" Activities At the Site Do Not Apply to Revenues Generated by Subsurface Activities.

Under Section 17 of Proposition A, when the District disburses funds to a public agency so that the agency can acquire parklands, the District and the recipient agency may enter into an agreement regarding the agency's acquisition of those lands. Accordingly, the District has published a "Procedural Guide" governing all such acquisition agreements, which the District refers to as "Project Agreements."[13] The Project Agreement for Whittier's acquisition of the Subject Property, Grant No. 58L1-94-0034, incorporates by reference the Procedural Guide, and any subsequent changes or additions thereto. *See* Project Agreement § L.[14] Notably, neither the Procedural Guide nor the Project Agreement contains any terms obligating Whittier to convey, assign or otherwise transfer its potential subsurface mineral rights to the District as a condition of receiving the acquisition funds.

Section III.B.7 of the Procedural Guide provides certain supplemental provisions relating to a matter that Proposition A does not expressly address. In particular, that Section sets forth various restrictions regarding revenues the recipient agency may obtain in the future from *ongoing recreational and non-recreational uses* of the acquired parklands.

City's obligations under Proposition A with respect to any proceeds obtained therefrom. That letter concluded (at pp. 4 to 5) that the "plain meaning" of Section 16(b)'s restrictions regarding sale or disposition of parklands acquired with Proposition A funds is that the agency must provide "replacement" of any lost parklands with an "equivalent amount" of parklands, so that the overall amount of Proposition A acquired parklands is not "diminished." That conclusion is consistent with this report's conclusion that Section 16(b) is designed to ensure that, as a result of Whittier's lease of the Subject Property's surface acreage to Matrix/Clayton Williams, there must be no net loss of parklands within the region.

[13] The most recent version of the Procedural Guide, dated June 2009, is cited throughout this report. The District's initial 1993 Procedural Guide contained similar provisions to the 2009 Procedural Guide.

[14] The Project Agreement generally follows Proposition A's language regarding sales or dispositions of Proposition A acquired parcels. *See* Project Agreement § D.10. A key exception, however, relates to Section 16(b)'s provision that gives the recipient agency the *choice* of either (a) itself purchasing replacement parkland, or (b) reimbursing the District's Parks Fund for the amount needed to purchase that replacement land. The Project Agreement purports to *deny the recipient agency that choice*, and instead mandates that the recipient agency turn over such revenues to the District's Parks Fund, so that the District can control the purchase of the replacement parklands. *Id*. Because the Project Agreement provision is inconsistent with Proposition A's language providing the recipient agency with the choice of itself acquiring the replacement parklands, the provision in question is impermissible and must give way to the requirements set forth in Proposition A. In this respect, the Project Agreement specifically incorporates by reference Proposition A and states that, in case of conflicts between the Project Agreement and Proposition A, the District must give "precedence" to the provisions of Proposition A. *Id*. § L.

- As to "*any income*" that the recipient agency may obtain from "the *intended recreational uses* of the project," such as permit fees charged to a soccer league for recreational use of a ball field in an acquired parkland, under Section III.B.7, that income "may be spent at the [recipient agency's] discretion, consistent with the [recipient agency's] normal procedures."

- As to "*gross income*" obtained from "*non-recreational use*" of acquired parklands, the rules are more specific. Section III.B.7 specifies that "gross income" includes only income that is generated from "*non-recreational* activity *conducted on the land acquired* or developed." Section III.B.7 restricts the recipient agency's further use of that "gross income" to recreational development or operations "at the Project site, unless the District approves otherwise." Not only does Section III.B.7 explicitly use the term "*on* the land," thereby excluding revenues generated by *subsurface* activities from its restrictions, but it goes on to provide specific examples of the type of "non-recreational" surface uses to which the "gross income" definition applies, including "rental from agricultural or concession leases," such as the rent that a farmer would pay to the recipient agency to cultivate a portion of its parkland or the rent that a restaurant would pay to the recipient agency to operate within a park boundary.

These supplemental provisions make it clear that the Project Agreements are *not* intended to alter or modify the recipient agency's legal rights, under longstanding common law and statutory real estate law principles, to exploit the underlying subsurface natural resources of its acquired properties, including parklands, and to retain the income generated by those subsurface activities. To the contrary, these supplemental provisions place restrictions only on explicitly defined "*gross income*" derived by the recipient agency from *non-recreational* activities that occur "*on*" the acquired land's surface, such as farming, restaurant and other surface-related activities.

D. The Provisions of the Procedural Guide and the Project Agreement Directing Whittier to Submit Its Proposed Contracts and Leases With Private Parties for the District's Approval Do Not Give the District Authority to Impose Conditions of Approval that Are Inconsistent with Whittier's Substantive Property Rights or that Are Inconsistent with Proposition A.

The District's Procedural Guide contains numerous provisions relating to the detailed mechanics of how public agencies and other entities should apply to the District for specifically earmarked Proposition A funds and how the District should administer the distribution of those funds. These procedural provisions include Section III.B.6, which requires recipients of earmarked Proposition A funds to submit "for *prior District approval*" "any proposed operating agreement, lease, management contract, or similar arrangement with a non-governmental entity" that "relates to" the acquired parklands. Similarly, Section V.C.2 provides that any "change in use, sale, or disposal of Grant-funded property" must be "*approved in advance*" by the District. The Whittier Project Agreement restates these approval provisions. *See, e.g.*, Project Agreement §§ D.5 and J.1.

Certainly, these provisions are sufficiently broad to require Whittier to submit its oil drilling and production lease with Matrix/Clayton Williams to the District for its approval. The contemplated Matrix/Clayton Williams lease agreement is a "lease" with a "non-governmental entity" that "relates to" the Subject Property. Accordingly, the conditional lease agreement expressly requires as one of the conditions that the District must release the change use surface acreage from Proposition A protected status before it becomes operative.[15]

The District can appropriately use these approval procedures, however, only to ensure that the recipient agency's future activities at the surface of the parklands (for example, leasing a portion of the surface to a private entity to build and operate a restaurant) will comply with Proposition A's otherwise applicable substantive requirements. The District's limited legal authority to review and approve the proposed lease for consistency with Proposition A must be exercised within the purview of the District's own enabling legislation.[16] The Project Agreement approval provisions cannot be read to allow the District to restrict Whittier's *substantive* rights under either longstanding common law and statutory real estate principles or under Proposition A itself.[17] Thus, the District cannot unreasonably withhold its approval, and it cannot use its Project Agreement approval authority improperly to force Whittier to surrender or compromise its legal rights as owner of the Subject Property to exploit its subsurface oil and gas resources. Nor can the District use its procedural approval authority to impose substantive conditions of approval that are inconsistent with Proposition A's underlying provisions.

Nothing in Proposition A grants the District the authority to encumber a recipient agency's sale of *subsurface assets* or to otherwise require that such assets be shared with, or entirely turned over to the District. Moreover, if the District had intended to require that the agency convey, assign or otherwise transfer to it all or a portion of the subsurface mineral rights,

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[15] Whittier's lease with Matrix/Clayton Williams specifically prohibits the oil companies from conducting any surface operations on the Subject Property until after, *inter alia*, Whittier has obtained the District's "release from protected area status of that portion of the [Subject Property] upon which surface operations" would be conducted pursuant to a Conditional Use Permit. Oil, Gas, and Mineral Lease § 6.1.

[16] The District's enabling statute, Public Resources Code §§ 5500-5595, explicitly circumscribes its legal authority. Nothing in this statute grants the District authority to prevent Whittier from using its park property in a manner consistent with Proposition A. To the contrary, the statute specifically states that "[t]he board of directors of a district *shall not interfere with* control of any [public parks, natural areas, open space preserves, etc.] or other public property, that are existing, owned or controlled by a municipality . . . in the district, except with the consent of the governing body of the municipality, . . . and upon such terms as may be mutually agreed upon between the board of directors of the district and the governing body." Pub. Res. Code § 5541.

[17] Any attempt to exact a fee for purposes unrelated to Proposition A would be *ultra vires*. *See, e.g., Williams Communications, LLC v. City of Riverside* (2003) 114 Cal.App.4th 642, 656 (holding that fee imposed on telecommunications company for right to install fiber optic cable beneath city streets was inconsistent with state law and thus illegal). In addition, to the extent that the District were to require Whittier to pay a fee as a condition of approval, such a fee could be characterized as an unlawful exaction under the Mitigation Fee Act. *See* Gov't Code § 66001(b).

it could have attempted to do so in the Project Agreement. It did not.[18] Further, as discussed throughout this report, all of the provisions of Proposition A and its various related and implementing documents, including the Engineer's Report, uniformly support the reading that Proposition A focuses exclusively on controlling the *surface* park and recreational uses of the acquired parklands, not their *subsurface* resources. In the absence of any provisions in Proposition A or its implementing documents addressing *subsurface* uses of parklands, the longstanding common law and statutory real estate principles control.

Here, the vast majority of the parklands acquired by Whittier with Proposition A funds will continue to be used for park, open space, habitat and recreational uses. Only a very small portion of the Subject Property – less than three percent – will experience a change of use or even be temporarily disturbed and thus be subject to Section 16(b)'s "no net loss" parklands replacement provisions.[19] It is this proposed *surface* use alone that triggers the District's approval procedure. Because none of the proposed *subsurface* uses are implicated by Proposition A, the District has no power to control any revenues derived by Whittier therefrom.

E. Whittier Is Entitled to Extract Oil and Gas from the Subject Parcel Subject to Its Obligation to Compensate for Changed *Surface* Uses.

As discussed above, under section 16(b) of Proposition A, Whittier must acquire equivalent replacement parklands to replace the converted surface parklands, or Whittier may choose to reimburse the District's Parks Fund so that the District may acquire replacement parkland. Thus, Whittier must determine what particular surface parkland acreage will undergo a "change the use" "to one other than a use permitted under the category from which funds were provided" pursuant to Proposition A. Proposition A § 16(b). Generally, the permitted uses of the property are for park, recreation, and open space and natural lands. *See id.* §§ 8(b), 8(b)(2)(QQ). Here, the conversion of the proposed drilling site parklands to active oil and gas production and processing and related operations would clearly constitute a "change of use" from those permitted under Proposition A, and accordingly, that parkland acreage must be replaced so that there is no net loss of parkland.

It is less clear, however, whether other proposed drilling-related activities would constitute a "change of use." For example, although a small area near the drilling site would be graded, some of that area would then be re-vegetated with locally indigenous plant species. *See* Draft EIR at 8-9. In addition, an existing roadway would be used to access the production site, but this roadway requires some improvement and widening. To assist the City's review, CCS's analysis provides findings and conclusions on the quantification of the amount of parklands

[18] *See City of Long Beach v. Marshall*, 11 Cal.2d at 621 (if granting agency, "without knowledge of the hidden treasures," granted lands to a recipient agency without reserving an interest in the subsurface resources, it is "not within the power of the courts to nullify" the grant.

[19] As discussed above, Whittier has discretion to determine whether temporary disturbances should be considered merely "incidental" or should be "changes in use" that require replacement of the converted acreage through Section 16(b)'s no net loss provisions.

whose use is to be changed and thus needs replacement and on the use of the oil drilling revenues to acquire, restore and enhance other regional parklands in and around the Subject Property and within the County generally, consistent with Proposition A.

IV. CONCLUSION

Although Whittier has a strong legal position that it is entitled to proceed with the proposed oil and gas lease and that the District has no power to control any revenues derived from the subsurface activities, Whittier should be mindful of the fact that, when Whittier submits the conditional Matrix/Clayton Williams lease to the District for its approval, the District could nonetheless reach a different conclusion regarding Whittier's legal obligation pursuant to Proposition A. For example, the District may contend that Whittier is obligated to restrict its use of oil and gas revenues for certain park, open space or recreation purposes or even that Whittier is required to transfer certain revenues to the District's Parks Fund. Although the District and Whittier may disagree about some of these matters, both agencies may find that it would be prudent to negotiate a mutually beneficial compromise with the District in order to avoid the costs, delays and uncertainties of potential litigation.