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2 **UNITED STATES DISTRICT COURT**
3 **NORTHERN DISTRICT OF CALIFORNIA**

4
5 **E&B NATURAL RESOURCES MANAGEMENT**
6 **CORPORATION, ET AL.,**

7 Plaintiffs and Petitioners,

8 vs.

9 **COUNTY OF ALAMEDA, ET AL.,**

10 Defendants and Respondents.

CASE NO. 18-cv-05857-YGR

**ORDER DENYING MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Re: Dkt. Nos. 59, 66

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

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

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

28 ¹ The Center for Biological Diversity, the appellant in the underlying administrative

1 **I. BACKGROUND²**

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

9 The GIG parcel is 55.8 acres, primarily consisting of agricultural land. The GIG parcel
10 also has an oil production site consisting of two oil production wells that occupy a 100-foot by
11 200-foot fenced-in area on the land. Oil production is conveyed by pipeline to the adjacent Nissen
12 parcel. The Nissen parcel is 143.75 acres of flat grassland with fenced-in oil production facilities
13 consisting of five wells and storage and production equipment. The Schenone parcel also has a
14 production area with two fenced-in production wells and a pipeline that conveys the production to
15 the Nissen parcel. The Schenone parcel’s permit is not at issue in this litigation.

16 In 1965, E&B’s predecessor, McCulloch Oil Corporation (“McCulloch Oil”), entered into
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18 process, filed a motion for leave to file an *amicus curiae* brief in support of defendants’
19 opposition. (Dkt. No. 66.) “The district court has broad discretion to appoint amici curiae.”
20 *Hoptowitz v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), abrogated on other grounds by *Sandin v.*
21 *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.

22 ² The facts cited herein are undisputed and derive from the parties’ separate statements of
23 undisputed material facts, exhibits 59 and 60 of plaintiffs’ request for judicial notice, and the
24 hearing on the motion. (Dkt. Nos. 59-6, 64.) With respect to judicial notice, both parties request
25 that the Court take notice of legislative enactments and official governmental documents and
26 records. (Dkt. Nos. 59-6, 63.) Such documents are “not subject to reasonable dispute” and “can
27 be accurately and readily determined from sources whose accuracy cannot reasonably be
28 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
Defendants’ dismissal motion.”). As such, the parties’ requests for judicial notice is **GRANTED**.

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

4 A few days later, the County adopted an interim ordinance permitting oil extractions on
5 certain land, including on the parcels at issue here, subject to issuance of a “use permit.” On
6 March 9, 1967, the County adopted a permanent ordinance to the same effect. Then, on June 13,
7 1967, the County adopted the “Regulation of Exploratory and Production Oil Wells in Alameda
8 County,” which formalized the conditions to be included in use permits issued for oil and gas
9 exploration and production. The regulation set expiration dates of two years for exploratory well
10 permits and 20 years for production well permits. Thereafter, the County approved McCullough
11 Oil’s applications for CUPs for exploratory wells and production facilities on the GIG and Nissen
12 parcels. Upon expiration of the use permits in 1987, McCullough Oil applied and obtained
13 approval from the County for CUPs to allow continued oil production operations on the parcels for
14 a renewed 20-year term.

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

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

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

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

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

10 **II. LEGAL STANDARD**

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

21 **III. DISCUSSION**

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

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

27 ³ Concurrent with the appeal proceedings before the Board, E&B raised the issue of its
 28 vested rights on July 5, 2018. (Dkt. No. 59-2, ¶ 14.) The County did not address plaintiff’s vested
 rights in either its hearing or decision to deny the CUPs. (*Id.*)

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

8 Whether an administrative decision substantially affects a fundamental vested right “must
9 be decided on a case-by-case basis.” *301 Ocean Ave. Corp. v. Santa Monica Rent Control Bd.*,
10 228 Cal.App.3d 1548, 1556, 279 Cal.Rptr. 636 (1991). Thus, “no exact formula exists by which
11 to make this determination,” but “courts are less sensitive to the preservation of purely economic
12 interests.” *Id.* Further, an entity acquires vested rights to continue its existing land use if it
13 performs substantial work and incurs substantial liabilities in good-faith reliance upon a permit
14 issued by a government agency. *Avco Cmty. Developers, Inc. v. S. Coast Reg’l Comm’n*, 17
15 Cal.3d 785, 791 (1976). “The ultimate question in each case is whether the affected right is
16 deemed to be of sufficient significance to preclude its extinction or abridgment by a body lacking
17 judicial power.” *Whaler’s Vill. Club v. California Coastal Com.*, 173 Cal.App.3d 240, 252, 220
18 Cal.Rptr. 2 (1985) (citation omitted, emphasis in original).

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

1 had expired. *Id.* The city approved two back-to-back requests for three-month renewals of the
2 permit before denying the third request. *Id.* at 1523. On review, the court of appeal held that
3 owner had a fundamental vested right in the tavern’s continued operation, which would cease
4 absent renewal of the permit. *Id.* at 1529.⁴

5 *Goat Hill Tavern*, however, was decided based on “the unique facts presented.” *Id.* at
6 1529. This Court finds it distinguishable from the case at hand on at least three grounds. First,
7 *Goat Hill Tavern* involved a CUP for expansion of a legal nonconforming use that had existed for
8 over 35 years. This posture highlighted the “utter[] implaus[ibility] that [the tavern owner]
9 knowingly gave up all rights to continue operating Goat Hill Tavern in exchange for the
10 opportunity to keep his game room expansion open for six months.” *Id.* at 1529, n.4. Said
11 differently, “had Goat Hill Tavern never built its game room expansion, it would still be operating
12 as a legal nonconforming use.” *Id.* at 1531, n.5. Here, all of E&B’s and its predecessors’ oil and
13 gas operations on Livermore Oil Field were performed pursuant to limited-term permits. There
14 was no other legal nonconforming use of the land.⁵

15 Second, in *Goat Hill Tavern*, the court noted that the city had a “practice” of “do[ing]
16 nothing about ‘expired’ conditional use permits and [] allow[ing] businesses to continue.” *Id.* at
17 1530. Under those circumstances, businesses reasonably may have believed that permit renewal
18 was not required or important and may have invested in their businesses, with or without a permit,
19 accordingly. Said differently, the city’s past inaction rendered Goat Hill Tavern’s reliance
20 reasonable. The same cannot be said here, where defendants’ permit renewal process appears to
21 have been enforced consistently.

22 Third, a portion of the \$1.75 million investment made by the tavern owner was made “at
23 the city’s behest.” *Id.* at 1529. In contrast, there is no evidence that the County required or even
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26 ⁴ Although the CUP technically applied to the game room expansion only, the parties and
27 the court operated under the premise that denying renewal of the permit would put the tavern out
28 of business. *Id.* at 1529, n.3.

⁵ In its reply, plaintiffs contend that they are not claiming a fundamental vested right based
on a prior nonconforming use.

1 suggested that E&B make investments in Livermore Oil Field. Instead, plaintiffs' investments
2 appear to have been voluntary, and knowing, business decisions.

3 Defendants counter by citing to several cases that, while different in terms of scale, found
4 no fundamental vested right where business owners were granted limited CUPs. For example, in
5 *Metropolitan Outdoor Advertising Corp. v. City of Santa Ana*, 23 Cal.App.4th 1401, 1403, 28
6 Cal.Rptr.2d 664 (1994), a billboard owner received a CUP allowing it to erect a billboard. After
7 the city denied the owner's application for a subsequent CUP, the owner sued, claiming it
8 possessed a fundamental vested right in the continued use and maintenance of the billboard. *Id.*
9 The court rejected the claim, emphasizing that the owner agreed to be bound by the permit's
10 terms. *Id.* at 1404. The court reasoned that, given those terms, the owner must have "balanced the
11 costs of erecting, maintaining and removing the billboard against the economic benefits derived
12 from the sign over the life of the conditional use permit." *Id.* n.1. Similarly, in *Am. Tower Corp.*
13 *v. City of San Diego*, 763 F.3d 1035, 1057 (9th Cir. 2014), the Ninth Circuit found that a plaintiff
14 did not have a fundamental vested right to continued use of three cell tower facilities. The court
15 focused on the "plain language" of the original CUPs issued to the plaintiff, which "explicitly
16 required ceasing all activity at [plaintiff]'s facilities and returning the sites to their original
17 condition ten years after the permit was issued if new CUP applications were not timely submitted
18 and ultimately approved." *Id.* at 1057-58.

19 Defendants also identify several cases in which courts found no fundamental vested right
20 where the loss of use of a particular asset was purely economic, rather than a loss which would
21 have resulted in the inability to continue operating a business. In *Hardesty v. Sacramento Metro.*
22 *Air Quality Mgmt. Dist.*, 202 Cal.App.4th 404, 416, 136 Cal.Rptr.3d 132 (2011), the court found
23 that requiring a permit for mining operations in a designated area did not implicate a fundamental
24 vested right because there was "nothing in the administrative record to indicate that [plaintiff]
25 w[ould] be driven out of business by the requirement[.]" Likewise, in *Standard Oil Co. v.*
26 *Feldstein*, 105 Cal.App.3d 590, 604 164 Cal. Rptr. 403 (1980), the court held a decision to require
27 Standard Oil Company to shut down certain refinery units did not affect a fundamental vested
28 right because there was "no contention that Standard [would] be driven to financial ruin," nor "a

1 contention that this particular facility [would] be forced to operate at a loss and close.” In *Mobil*
2 *Oil Corp. v. Superior Court*, 59 Cal.App.3d 293, 305, 130 Cal.Rptr. 814 (1976), the decision to
3 require two oil companies to install gasoline vapor recovery systems at their gas stations did not
4 affect a fundamental vested right where the court was “not presented with the enforcement of a
5 rule which effectively drives the Oil Companies out of business. At most it puts an economic
6 burden on them increasing the cost of doing business.” See also *Am. Tower Corp.*, 763 F.3d at
7 1058 (three cell phone towers comprised a portion of plaintiff’s telecommunications network, and
8 thus, the financial loss to plaintiff from denial of its permits were “purely economic interests that
9 d[id] not rise to the level of a fundamental vested right under California law”); *Metropolitan*
10 *Outdoor Advertising Corp.*, 23 Cal.App.4th at 1401 (permit denial required the owner to remove
11 only one of its many billboards, which would not significantly injure the owner’s business).

12 It is within this framework of authorities that the Court considers the evidence proffered in
13 this case. In doing so, the Court is mindful that a CUP does not bestow on the permit-holder a
14 fundamental vested right, but rather, the burden is on plaintiffs to establish such a right based on
15 specific facts. Here, each CUP granted by the County since 1967 contained an explicit temporal
16 limit. The 10- and 20-year terms were consistent with long-term use of the Livermore Oil Field
17 for oil and gas operations, but not necessarily permanent use. Although the CUPs did not require
18 the termination of oil production or the removal of production facilities at the end of the permit
19 period, they did require the cessation of oil operations on designated land. Plaintiffs cannot now
20 claim to be surprised that these permits, which were, by definition, limited in term, have now
21 expired.

22 Nor can plaintiffs claim that past permit renewals were equivalent to a guaranty that the
23 permits would be renewed in perpetuity. “[A] conditional use permit . . . is, by definition,
24 discretionary.” *Smith v. Cty. of Los Angeles*, 211 Cal.App.3d 188, 197, 259 Cal.Rptr. 231 (1989).
25 Record evidence offered by both parties shows that the administrative process for renewing CUPs
26 was anything but pro forma. Rather, the process involved, at a minimum, analysis and review by
27 the County’s Planning Department, the County’s Environmental Health Department, and the BZA,
28 as well as public hearings. Many opinions and recommendations were offered during the process.

1 If renewal of the CUPs was automatic, no need would exist for the County to enforce the permit
2 renewal process at all, let alone impose such a rigorous process.⁶ Moreover, it is notable that these
3 CUPs implicate sensitive and evolving issues related to the environment, public welfare, and
4 public need. Under the circumstances, the Court is especially reluctant to tie the hands of the
5 municipal government by finding that plaintiffs possess a fundamental vested right based on past
6 acts and conditions.

7 In addition, defendants have not proffered sufficient evidence to persuade the Court that
8 denial of the CUP renewal in this case will result in anything more than a “purely economic loss.”
9 Plaintiffs emphasize that as of November 2019, they had invested nearly \$5 million in acquiring
10 and operating Livermore Oil Field, with an estimated profit of approximately \$11 million still to
11 be recovered. Plaintiffs have not, however, proffered any evidence that the County’s prior denial
12 of the CUP renewal itself would have destroyed or even significantly impacted its overall
13 business. Nor have plaintiffs demonstrated that \$5 million in investments is significant in the
14 specific context of the capital-intensive oil and gas industry or relative to returns on investments
15 already earned during the permit period, especially in light of the knowledge of term limitations.
16 Without additional evidence regarding plaintiffs’ purported losses, the Court finds plaintiffs have
17 failed in their burden to show harm to their economic interests sufficient to confer a fundamental
18 vested right.⁷

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21 ⁶ The Court notes that this case involves non-renewal of CUPs, not revocation of an active
22 permit, and thus can be distinguished from cases like *Malibu Mountains Recreation, Inc. v.*
County Of Los Angeles, 67 Cal.App.4th 359 (1998) and *Trans-Oceanic Oil Corporation v. City Of*
Santa Barbara, 85 Cal.App.2d 776 (1948).

23 ⁷ *The Termo Co. v. Luther*, 169 Cal.App.4th 394, 86 Cal.Rptr.3d 687 (2008), another case
24 on which plaintiffs rely, also fails to persuade. In *Termo*, an owner and operator of 28
25 unabandoned oil wells in Huntington Beach, California sought to set aside a state order directing
26 the plugging and abandonment of those wells. 169 Cal.App.4th at 398-99. In holding that a
27 fundamental vested right existed, the court emphasized that oil was “an extraordinarily valuable
28 resource, especially in the current economic era,” and thus, the right to extract oil was
“fundamental considering its potentially massive economic aspect and its considerable effect in
human terms.” *Id.* at 407-08. Today, the economics of oil production are much different, and
moreover, at issue are seven wells rather than 28. As explained, plaintiffs have not proffered
evidence that denial of the permit renewal will have significant macro or microeconomic effects.

1 In sum, plaintiffs have not shown that they have a fundamental vested right in continued
 2 oil operations at Livermore Oil Field. Moreover, because no fundamental vested right exists, the
 3 Court need not reach the other issues raised in plaintiffs' motion, namely, whether the County is
 4 estopped to deny plaintiffs' vested right to operate the Livermore Oil Field and whether the Court
 5 must apply an independent judgment standard when reviewing the County's denial of the CUPs
 6 renewal. On the latter issue, absent a fundamental vested right, the substantial evidence test,
 7 rather than the independent judgment test, applies.⁸


8 **IV. CONCLUSION**

9 For the foregoing reasons, plaintiffs' motion for partial summary judgment is **DENIED**.
 10 Further, a Case Management Conference shall be set for **Monday, July 20, 2020 at 2:00 p.m.** in
 11 the Federal Building, 1301 Clay Street, Oakland in Courtroom 1. In light of the uncertainties with
 12 the ongoing coronavirus disease (COVID-19) pandemic, the parties are instructed to check the
 13 Court's scheduling notes to determine whether the conference will be held in person or by some
 14 alternate platform.

15 This Order terminates Docket Numbers 59 and 66.

16 **IT IS SO ORDERED.**

17 Dated: June 8, 2020

18 
 19 _____
 20 **YVONNE GONZALEZ ROGERS**
 21 **UNITED STATES DISTRICT COURT JUDGE**

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 24
 25 Moreover, *Termo* did not involve a CUP denial.

26 ⁸ Plaintiffs have filed objections to portions of the administrative record prepared by the
 27 County, arguing that it is, at various points, disorganized, improperly catalogued, incomplete, and
 28 incorrect. (Dkt. No. 70.) The issues identified by plaintiffs, however, do not impact the Court's
 decision on the instant motion. As such, the Court defers any decision on whether defendants
 must revise the administrative record to a later date when any such revisions may be necessary.