STATE CAPITOL
SACRAMENTO, CA 95814
(916) 651-4037

California State Senate

SENATOR
DAVE MIN
THIRTY-SEVENTH SENATE DISTRICT

November 30, 2021

The Honorable Farrah N. Khan, Mayor
The Honorable Tammy Kim, Vice Mayor
Irvine City Councilmembers
City of Irvine
1 Civic Center Plaza
Irvine, CA 92606

Re: All American Asphalt Plant

Dear Mayor Khan, Vice Mayor Kim, and Councilmembers Agran, Carroll, and Kuo,

Thank you for sending me your letter dated November 8, 2021 and suggesting different state legislative options for how to address the problems created by the emissions produced by the All American Asphalt plant ("AAA plant") in Irvine. I appreciate your outreach and your concern about this issue, which is affecting thousands of Irvine residents.

My office has researched your suggestions to address these emissions and has determined that the City of Irvine is much better situated and has much better options at its disposal than the State for addressing this local issue, and I urge you to act accordingly.

As you note, I am deeply concerned about the odors being generated by the Irvine AAA plant and their impacts on local residents. But while I am eager to explore any and all solutions that might help alleviate this problem, I remain convinced that the most effective and timely solutions must come from the City of Irvine and your City Council. There are three reasons for this. First, any action from the state legislature would be significantly delayed due to both the complexity of researching and developing statewide actions, and the fact that our legislative calendar does not allow any of the legislative actions you have requested to become law until 2023 at the earliest. Second, contrary to the assertions made in your November 8 letter, the City of Irvine already possesses broad and sweeping authority to act immediately and decisively in addressing the problems created by the AAA plant, and does not need new legislation. Third, any

action from the state legislature would be incredibly broad and impact all of the nearly 40 million Californians (and businesses) under our jurisdiction, whereas the City of Irvine can take a targeted and tailored approach that only impacts one local business. I discuss each of these points below.

**It is Impossible for the State Legislature to Act Quickly**

As you know, the state legislative process takes significant amounts of time, and a guiding principle for the State Legislature is that we must write laws of general applicability that apply fairly and equally to each of the nearly 40 million residents of California. Thus, in considering any new legislation, we must carefully research and assess not only how this might impact residents of Irvine, but also how such legislation might impact Californians as a whole. Before proposing any legislation, we would want to engage potential stakeholders and make sure we are understanding any and all collateral consequences of such legislation, making this a very time-consuming process.

Moreover, the 2021 legislative year has ended, which means that even if we were comfortable proposing your bill ideas immediately, any new state legislation could not be proposed until 2022, and would not take effect until January 1, 2023 at the earliest. To be clear, my staff and I are closely reviewing your proposals for state action, but should we decide to undertake any of these items, they will not be simple or timely.

**The City of Irvine Can Act Immediately and Aggressively**

In your November 8 letter, you appear to take the position that you lack the legal authority to meaningfully address the problems created by the AAA plant. This is reflected in Councilmember Kuo's recent comment to the Orange County Register that "we have done our best within the city's authority to address [the odors created by the AAA plant], but… we just don't have the legal authority to shut them down."[1] After consulting with various attorneys and doing my own legal analysis, I do not believe your position accurately reflects the broad legal and regulatory authority available to the City of Irvine in dealing with public nuisances, which allows you to act immediately and decisively.

While you note that the City of Irvine has joined a private lawsuit against the AAA plant on a public nuisance cause of action, the City can act much more aggressively and proactively than this. The City of Irvine, like all local agencies in California, has significant and far-reaching police powers that allow it to enjoin the AAA plant or any other actor that creates a public nuisance. And while you have asked for a state legislative declaration that "repeatedly subjecting residents to foul odors from a single source constitutes a public nuisance," even a cursory review of California state law makes clear that no such declaration is necessary, as the law has long been

well settled that the scenario you describe—"repeatedly subjecting residents to foul odors from a single source"— constitutes a public nuisance and allows for local government agencies such as the City of Irvine to immediately pursue abatement and other forms of relief.

The public nuisance doctrine is rooted in English common law dating back to the 16th century, and was historically defined as "offenses against, or interferences with, the exercise of *rights common to the public* [emphasis added]," such as public health, safety, peace, comfort or convenience.[2] To qualify as a public nuisance, the interference must be both substantial and objectively unreasonable.[3] The early common law categories of nuisance were codified in California in 1872 and remain applicable today.[4] "Anything which is injurious to health… or is indecent or *offensive to the senses* [emphasis added], or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property" is a nuisance.[5] Noxious odors have long been recognized in the state of California as a nuisance, providing a basis for either a private nuisance or public nuisance cause of action.[6]

A "public nuisance" is "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."[7] Causation is an essential element of a public nuisance claim. A plaintiff must establish a "connecting element" or a "causative link" between the defendant's conduct and the threatened harm.[8] Causation may consist of either " '(a) an act; or (b) a failure to act under circumstances in which the actor is under a duty to take a positive action to prevent or abate the interference with the public interest or the invasion of the public interest.' "[9]

Given the situation you describe, in which a business concern is "repeatedly subjecting" nearby residents to foul and noxious odors that prevent them from reasonably enjoying their homes, there would seem to be little doubt that the City of Irvine has a strong case to proceed with a public nuisance cause of action against the AAA plant.

Under the California Code of Civil Procedure, the City of Irvine has significant authority to enjoin a public nuisance, as it may direct its City Attorney to bring a civil action against the AAA plant seeking abatement of any public nuisance, including offending odors.[10] Indeed, you may look to the example set last month by your counterparts in the Carson City Council, which as reported in the Los Angeles Times, voted unanimously to declare a foul odor from the Dominguez Channel a public nuisance.[11] A similar finding by the Irvine City Council, with direction to its City Attorney to bring a legal action for public nuisance against the AAA plant, could bring much needed relief to the affected Irvine residents, not in 2023 or beyond, but immediately.

The City of Irvine could also look to California criminal law as a basis for enforcement. Under California law, anyone who "maintains or commits any public nuisance… or who willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor."[12] Upon receiving "reasonable notice in writing from a health officer, district attorney, *city attorney* [emphasis added], or city prosecutor to remove, discontinue, or abate the public nuisance," an offending party could be found guilty of a criminal misdemeanor.[13] Moreover, each day that the public nuisance was allowed to persist would constitute a separate and distinct criminal offense.[14] Notably, the statutory responsibility for charging these criminal offenses falls upon the "district attorney, or the *city attorney* [emphasis added] or city prosecutor… to continuously prosecute all persons guilty of violating this section until the nuisance is abated and removed."[15]

If the Irvine City Council were to declare the AAA plant a public nuisance and direct its City Attorney to proceed under the terms of these criminal statutes, it seems likely that the AAA plant would immediately cease or at least abate the emission of the offending odors. If it did not, then the City Attorney could proceed with criminal prosecution while also seeking to enjoin these activities.

Finally, while you state that your regulatory options "are limited because the [AAA plant] operates under a valid and vested land use permit which was issued by the County of Orange prior to annexation of the plant into the City[]," this is not an accurate statement of your regulatory powers. While it is well settled that a vested use—also known as a "lawful nonconforming use"—may not be taken away through zoning or other regulation without creating a constitutional taking, it is also well settled that any use—whether lawfully vested or not—that creates a public nuisance may be immediately curtailed, without any taking, by the police power of the state.[16] As California law clearly states, "it is elementary that an owner of property has no constitutional right to maintain it as a public nuisance."[17] The City of Irvine may not be able to rezone the AAA plant out of existence, but as described above, it has ample options available to it to stop the offensive omissions on a public nuisance cause of action.

In summary, the City of Irvine has ample legal authority under California state law to immediately act to protect its residents. It can find and declare the offending odors emanating from the AAA plant to be a public nuisance, and can then seek injunctive relief or other remedies (including criminal penalties) through a civil or criminal cause of action. Moreover, since the AAA plant, and all of the affected residents, are based in Irvine, it is clear that under California state law, the City of Irvine—not the South Coast Air Quality Management District, not Orange County, and not the State of California—is the party with the clearest standing and best options available to it to seek legal action against any public nuisance that might be posed by the AAA plant.

**The City of Irvine, Not the State of California, is Best Situated to Act**

It is important to reiterate the basic good governance point that there must be a balance between the state of California and local agencies when it comes to localized issues such as the AAA plant. When the State of California acts, whether through legislation or its budgetary appropriations, it must do so in a way that treats all of its nearly 40 million residents equally and fairly. This is why we have vested significant local control to cities like Irvine so that you are able to address uniquely local issues like this one. The City of Irvine already possesses the police power it needs to deal with this problem, and moreover, thanks to the possesses significant tools under existing state law to deal with this problem, whether it is in declaring the AAA plant a public nuisance, or seeking immediate injunctive relief, or in pursuing criminal penalties. California's strong legal emphasis on local control allows for a timely and targeted solution that is limited to the particular problem at hand and does not unfairly or unintentionally harm other California cities, businesses, or residents.

My office and I are here to assist you to the extent we can, and we look forward to discussing this matter further with you. Thank you for your public service and for your attention to this issue.

Humbly and faithfully yours,

Dave Min
California State Senator (37th District)

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[1] Alicia Robinson, *Irvine Leaders to Limit Trucks' Path to Asphalt Plant*, The Orange County Register, Nov. 26, 2021
[2] Italics in original; *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1103 (1997).
[3] *Id.* at 1104.
[4] *Ibid.*
[5] CA Civ. Code § 3479.
[6] *See Harmer v. Tonylyn Productions*, 23 Cal.App.3d 941, 943 (1972) (noting in dicta that where a community is "forced to submit involuntarily to vile odors," this is properly described as a public nuisance); *Freitas v. City of Atwater*, 196 Cal.App.2d 289 (1961) (finding that a cannery's dumping of wastewater which created foul odors was an enjoinable nuisance); *Willson v. Edwards*, 82 Cal.App. 564, 569-70 (1927) (holding that offensive odors can constitute both a public and private nuisance); *Dean v. Powell Undertaking Co.*, 55 Cal.App. 545, 548 (1921)

(stating that the doctrine of providing injunctive relief to abate the emission of "foul and noxious odors" is encoded in California Civil Code § 3479 (defining nuisance)); *Fisher v. Zumwalt*, 128 Cal. 493 (1900) (holding that the emission of "vile and noxious odors" is a nuisance that can be the basis for either a private nuisance or public nuisance action).

[7] CA Civ. Code § 3480.

[8] *In re Firearm Cases*, 126 Cal.App.4th 959, 988 (2005).

[9] *Ibid.* (quoting Restatement Second of Torts section 824(b), com. a, p. 116).

[10] CA Code of Civil Procedure § 731.

[11] Andrew J. Campa, *Noxious Odors in Carson Declared a Public Nuisance*, Los Angeles Times, Oct. 11, 2021, *available at* https://www.latimes.com/california/story/2021-10-11/carson-city-council-to-vote-on-nuisance-ordinance-for-lingering-smell

[12] California Penal Code § 372.

[13] California Penal Code § 373a.

[14] *Ibid.*

[15] *Ibid.*

[16] *See, e.g.*, *People v. Gates*, 41 Cal.App.3d 591 (1974) (upholding Santa Cruz County's decision to enjoin and abate a nonconforming use based on its finding that it was a public nuisance); *Leppo v. City of Petaluma*, 20 Cal.App.3d 712, 717-18 (1971), quoting 14 A.L.R.2d, sec. 8, p. 82 (" '[I]t is elementary that an owner of property has no constitutional right to maintain it as a public nuisance…[i]t is said that even at common law a city or town has power to abate a public nuisance' "); *San Diego County v. McClurken*, 37 Cal.2d 683, 690 (1951) (suggesting the rule that a lawful nonconforming use may be prohibited when it is a public nuisance); *Wilkins v. City of San Bernardino*, 29 Cal.2d 332, 340 (1946) (suggesting that existing uses may be regulated if they are nuisances); *Wright v. Best*, 19 Cal.2d 368, 382 (1942) (indicating that a prescriptive right of pollution does not give the easement holder any right to create a public nuisance); *Jones v. City of Los Angeles*, 211 Cal. 304, 311 (1930) (noting that if an existing nonconforming use constitutes a nuisance, "it can still be removed under the police power"). T

[17] *Leppo v. City of Petaluma*, *ibid.* (quoting 14 A.L.R.2d, sec. 8, p. 82).