



T 510.836.4200
F 510.836.4205

1939 Harrison Street, Ste. 150
Oakland, CA 94612

www.lozeaudrury.com
brian@lozeaudrury.com

VIA EMAIL ONLY

March 13, 2021

San Diego County Board of Supervisors
Nathan Fletcher, Chair
Nora Vargas, Vice Chair
Joel Anderson
Terra Lawson-Remer
Jim Desmond
1600 Pacific Hwy, Room 335
San Diego, CA 92101
nathan.fletcher@sdcounty.ca.gov
nora.vargas@sdcounty.ca.gov
joel.anderson@sdcounty.ca.gov
terra.lawsonremmer@sdcounty.ca.gov
jim.desmond@sdcounty.ca.gov
publiccomment@sdcounty.ca.gov

**Re: REQUEST FOR RECUSAL OF SUPERVISOR ANDERSON
AGENDA ITEM 2 - March 17, 2021 (continued from March 3, 2021)
Gillespie Field - New 50-Year Ground Lease with SGCLMC-WELD
Investment Company, L.P.**

Dear Chair Fletcher and Honorable Supervisors of San Diego County:

I am writing on behalf of the **Supporters Alliance for Environmental Responsibility ("SAFER")** and its members living or working in and around the City of El Cajon and County of San Diego to respectfully request that Supervisor Joel Anderson recuse himself from participating in and voting on any matter, including the CEQA Addendum, regarding the Weld Boulevard Distribution Center Project and the associated new ground lease with SGCLMC-WELD Investment Company, L.P.

BACKGROUND

The Weld Boulevard Distribution Center Project ("Project") is a proposed development to construct a 141,360 square foot distribution facility near Gillespie Airfield in El Cajon. The Project is expected to serve as a "last mile" distribution center for Amazon.¹

¹ <https://www.sandiegouniontribune.com/communities/east-county/story/2021-03-01/supervisors-to-consider-proposed-amazon-distribution-center-in-east-county>

The Project first came before the San Diego Board of Supervisors (“Board”) as Agenda Item 8 on March 3, 2021 and the Board continued the matter until March 17, 2021. The Project is now back before the Board as Agenda Item 2 for the Board’s meeting on March 17, 2021. The Project contains two separate sets of decisions before the Board: (1) to make findings pursuant to the the California Environmental Quality Act (“CEQA”) regarding the Addendum to the 2009 Forrester Creek Industrial Park Project Environmental Impact Report (“EIR”) prepared for the Project² and (2) to decide whether to approve a new ground lease for the Project with SGCLMC-WELD Investment Company, L.P.³

LEGAL STANDARD FOR BIAS

When discussing bias and recusal for decisions of the Board, there is an important distinction between quasi-legislative and quasi-adjudicatory acts. (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482.) Under this distinction, “[q]uasi-legislative acts involve the adoption of rules of general application on the basis of broad public policy, while quasi-judicial acts involve the determination and application of facts peculiar to an individual case.” (*Id.* [quoting *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1188].) Where the decision of the Board involves the application of facts peculiar to an individual case (e.g. whether the County of San Diego, as a responsible agency under CEQA, has considered the environmental effects of the ground lease as shown in the 2009 Environmental Impact Report (“EIR”) the Forrester Creek Industrial Park Project and the associated CEQA Addendum for the Weld Boulevard Distribution Center Project), the Board’s decision is quasi-judicial and the principles of procedural due process apply. (*Id.*)

² The text of the recommended action is as follows:

In accordance with CEQA Guidelines section 15096, find that the County of San Diego, as a responsible agency under CEQA, has considered the environmental effects of County’s approval of a ground lease as shown in the Environmental Impact Report (EIR) prepared by the City of El Cajon for the Forrester Creek Industrial Park Project (SCH No. 2006011027) and the City’s associated CEQA Addendum for the Weld Boulevard Distribution Center Project, dated January 2021, before reaching its own conclusions as to whether and how to approve the ground lease.

Additionally, find that in the County’s review of the EIR and the associated 2021 CEQA Addendum, per Section 15162 of the CEQA Guidelines, there are no changes in the project or in the circumstances under which it is undertaken, in relation to the County’s discretionary action of issuing a new ground lease, that involve significant new environmental impacts which were not considered in the previously certified Environmental Impact Report and Addendum thereto, or a substantial increase in the severity of previously identified significant effects, and that no new information of substantial importance has become available since said EIR and Addendum thereto were prepared. Section 15162 Findings for this action, dated February 10, 2021, are placed in the administrative record for the lease issuance.

³ The text of the recommended action is as follows:

Approve and authorize the Clerk of the Board to execute, upon receipt, three copies of the new ground lease with SGCLMC-WELD Investment Company, L.P., a California Limited Partnership.

To understand the principles of procedural due process under CEQA, a review of *Nasha v. City of Los Angeles*, *supra* 125 Cal.App.4th 470 (2004), is instructive. In *Nasha*, a mitigated negative declaration (“MND”) had been prepared pursuant to CEQA for a residential development in Los Angeles. (*Nasha*, *supra*, 125 Cal.App.4th at 474.) After the City Director of Planning certified the MND, the decision was appealed to the Planning Commission. (*Id.* at 475.) Prior to the Planning Commission hearing on the MND, Planning Commissioner Lucente authored a news update article in the Studio City Residents Association newsletter alerting readers to the Planning Commission hearing, stating that the Project site was “absolutely crucial habitat corridor,” and providing contact information for those interested in more information.⁴ (*Id.* at 476.) Subsequently, the Planning Commission voted 3-1 (with Lucente in the majority) to grant the appeal opposing the MND. (*Id.* 477-78.)

The court in *Nasha* explained that the Planning Commission’s decisions on the MND were “quasi-judicial in nature, rather than quasi-legislative, because the matter involved the determination and application of facts peculiar to an individual case, rather than the adoption of rules of general application on the basis of broad public policy. (*Nasha*, *supra*, 125 Cal.App.4th at 482.) Therefore, the principles of procedural due process applied.⁵ (*Id.*)

The *Nasha* court further explained that “[p]rocedural due process in the administrative setting requires that the hearing be conducted ‘before a reasonably impartial, noninvolved reviewer.’” (*Id.* at 483 [quoting *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219.] However, “the ‘standard of impartiality required at an administrative hearing is less exacting than that required in judicial proceedings.’” (*Id.*) Therefore, the court concluded, bias in a quasi-administrative setting cannot be implied, but rather must be established “with concrete facts.” (*Id.*)

⁴ The text of Commissioner Lucente’s news update as reproduced in *Nasha*, 125 Cal.App.4th at 476:

Multiview Drive Project Threat To Wildlife Corridor [¶]

A proposed project taking five legal lots totaling 3.8 acres for five proposed large homes with swimming pools served by a common driveway off Multiview Drive is winding its way through the Planning process. The Mulholland Design Review Board denied it unanimously. However, the Deputy LA City Planning Director overrode that denial. The Santa Monica Mountains Conservancy and the neighbors both appealed it to the South Valley Area Planning Commission. The Appeal hearing is set for June 28th after 4:30 pm in Van Nuys. (Please see Hearings/Meetings, Page Two.) [¶] After wildlife leaves Briar Summit heading eastward they must either head south towards Mt. Olympus or north to the slopes above Universal City. *The Multiview Drive site is an absolutely crucial habitat corridor.* Please contact Paul Edelman with the Conservancy at 310/ ... or Mark Hennessy who lives adjacent to the project at 323/ ... if you have any questions.

⁵ For legislative or quasi-legislative acts, procedural due process principles do not apply and elected officials are less constrained in their advocacy for or against a project. (*see, e.g., City of Fairfield v. Superior Court* (1975) 14 Cal.3d.768, 779-80 [pre-hearing statements of two city councilmembers opposed to project did not require recusal where decision involved “no specific standards” and “did not turn upon the adjudication of disputed facts or the application of specific standards to the facts found”].)

Looking to Commissioner Lucente's newsletter update, the court noted that "the newsletter article was not merely informational." (*Nasha, supra*, 125 Cal.App.4th at 484.) Rather, the article "characterized the project as a 'threat to wildlife corridor'" and "clearly advocated a position against the project." (*Id.*) Commissioner Lucente's article in and of itself "gave rise to an unacceptable probability of actual bias and was sufficient to preclude Lucente from serving as a reasonably impartial, noninvolved reviewer." (*Id.* [internal quotations omitted].) As such, the court vacated the Planning Commission's decision due to Commissioner Lucente's failure to recuse himself. (*Id.*)

More recently, in *Woody's Group, Inc v City of Newport Beach* (2015) 233 Cal.App.4th 1012, the court similarly vacated a decision of the Newport Beach City Council due to pre-hearing statements of one councilmember opposed to the project. In *Woody's Group*, Councilmember Mike Henn sent an email in which he stated he "'strongly believ[ed]'" the 'operational characteristics requested in the application and the Planning Commission's decision are inconsistent with the existing and expected residential character of the area and the relevant policies of the voter approved 2006 General Plan.'" (*Woody's Group, supra*, 233 Cal.App.4th at 1017.) At the city council meeting on the project, Councilmember Henn "gave an extraordinarily well-organized, thoughtful and well-researched presentation" opposed to the project, which "seemed unlikely to be extemporaneous." (*Id.* at 1019.)

The court first explained that "the rule against bias has been framed in terms of probabilities, not certainties. The law does not require . . . actual bias. Rather, there must not be 'an unacceptable probability of actual bias' on the part of the municipal decision maker. (*Woody's Group, supra*, 233 Cal.App.4th at 1021-22.) The court then held that Henn had established "an unacceptable probability of bias" because his email "showed he was strongly opposed to the planning commission's decision" and his speech at the hearing "had been written out beforehand." (*Id.* at 1022-23.) As such, Henn "should not have been part of the body hearing the appeal." (*Id.* at 1023.)

As discussed below, Supervisor Anderson's recent advocacy for the Weld Boulevard Distribution Center Project runs afoul of the procedural due process principles discussed in *Nasha* and *Woody's Group*. As such, Supervisor Anderson's recusal is necessary to eliminate the "unacceptable probability of bias" for this Project

SUPERVISOR ANDERSON'S ADVOCACY FOR THE PROJECT

On February 24, 2021, Supervisor Anderson sent an email to his listserv advocating in support of the Project. A true and correct copy of Supervisor Anderson's email (with identifying recipient information redacted) is attached as Exhibit A. Supervisor Anderson's email read:

**Sign the petition to let the Board of Supervisors know how you
feel about bringing 400 new jobs to East County**

At the March 3, 2021 Board of Supervisors meeting, a lease expected to allow

Amazon to locate a “last mile” distribution center in East County will be voted on.

The site on a County-owned airport parcel is located on property northwest of Gillespie Field, near the trolley station.

Environmental reviews were completed and approved by the City of El Cajon. Currently, all Amazon packages delivered to East County customers MUST be driven many miles using several vehicles from western San Diego, resulting in increased traffic and pollution.

400 New Jobs for East County

San Diego County has lost approximately 100,000 jobs in the last year as a result of the COVID-19 pandemic-related business shutdowns.

...

In addition to building an 141,300 square foot facility, the developer will construct a minimum of \$20 million in improvements plus pay the county \$420,000 a year, a minimum of \$21 million over 50 years.

The developer has committed that Amazon will accelerate the use of green electric vehicles beyond the State of California requirements.

Sign up now to join this common-sense crusade. It's good for East County. It's good for the economy. It's good for the environment.

Sign The Petition

Thanks,
[signature omitted]
Supervisor Joel Anderson
District 2 Supervisor

(Ex. A, pp.1-3.)

After reading the above email, there is no doubt that Supervisor Anderson is advocating for the Project. He claimed, “It's good for East County. It's good for the economy. It's good for the environment” and characterized support of the Project as a “common-sense crusade.” (Ex. A, p. 2.) Supervisor Anderson furthermore stated that, without approval of the Project, East County residents would be subject to “increased traffic and pollution.” (Ex. A, p. 1.) He encouraged recipients of the email three separate times to “Sign The Petition.” (Ex. A, pp. 1-2.) Just as in *Nasha*, Supervisor Anderson’s email was not “merely informational,” but rather “advocated a position.” (*Nasha, supra*, 125 Cal.App.4th at 477.)

Supervisor Anderson's advocacy for the Project is improper and constitutes "an unacceptable probability of actual bias." As explained above, procedural due process principles apply to quasi-judicial administrative decisions, which are those decisions which "involve[] the determination and application of facts peculiar to an individual case, rather than the adoption of rules of general application on the basis of broad public policy." (*Nasha, supra*, 125 Cal.App.4th at 482.) Because the Board's decisions here require the determination and application of facts for the Project pursuant to CEQA, the Board's decisions are quasi-judicial.

Specifically, the Board is tasked under CEQA to consider the particular facts of the Project and associated Addendum and to make specific findings pursuant to CEQA Guidelines sections 10596 and 15162.⁶ Specifically, the Board must find that it has considered the environmental effects of the Project from the Addendum and 2009 EIR prior to approving the ground lease and find that the Project does not involve significant new environmental impacts which were not considered in the 2009 EIR. The application of these specific standards from the CEQA Guidelines to the particular facts of this Project renders the Board's decisions quasi-judicial. Therefore, the principles of procedural due process apply and Supervisor Anderson's advocacy for the Project warrants recusal.

CONCLUSION

Supervisor Anderson's email advocacy in support of the Weld Boulevard Distribution Center Project violates the principles of procedural due process for the Board's upcoming quasi-judicial decisions for the Project. Procedural due process in the administrative setting requires that the hearing be conducted before a reasonably impartial, noninvolved reviewer. SAFER respectfully requests that Supervisor Anderson recuse himself from consideration of Agenda Item 2 at the March 17, 2021 Board of Supervisors Meeting to avoid improper bias.

Sincerely,



Brian B. Flynn
Lozeau Drury LLP

⁶ San Diego Board of Supervisors Meeting Agenda, March 17, 2021, p. 3 available at https://content.govdelivery.com/attachments/CASAND/2021/03/12/file_attachments/1722367/03172021%20Agenda%20FINAL.pdf