

LEIBOLD McCLENDON & MANN

A PROFESSIONAL CORPORATION

9841 IRVINE CENTER DRIVE, SUITE 230
IRVINE, CALIFORNIA 92618
(949) 585-6300
FAX: (949) 585-6305

November 10, 2017

Via email: OCEIToroProject@ocgov.com

Mr. Eric Hull
County of Orange – CEO/Real Estate/Land Development
333 W. Santa Ana Blvd., Third Floor
Santa Ana, CA 92701

Leon Page, County Counsel
333 W. Santa Ana Blvd.
P.O. Box 1379
Santa Ana, CA 92702
leon.page@coco.ocgov.com

Clerk of the Board of Supervisors
333 W. Santa Ana Blvd., Room 465
Santa Ana, CA 92702
response@ocgov.com

Re: November 14, 2017 Supplemental Agenda Item S38B -- Failure to Comply with CEQA
and Notice Public Hearing in Compliance of Planning and Zoning Law

Dear Mr. Hull, Clerk of the Board and Mr. Page:

I am writing on behalf of the Second Harvest Food Bank of Orange County, Inc. (SHFB). As you know, the SHFB has previously submitted written comments to the Draft Program Environmental Impact Report No. 620 for the El Toro 100-Acre Parcel Development Plan [State Clearinghouse No. 2014111019].

On Monday, November 6, 2017, the County uploaded the County Board of Supervisor's Supplemental Agenda for November 14, 2017. This caught us by surprise as we would have thought a project of this magnitude would have been a part of the Supervisor's regular agenda, typically published two weeks in advance. While recognizing that the belated supplemental posting nonetheless complies with the 72-hour notice requirements of the Brown Act, we believe the County's proposed consideration of S38B on November 14, 2017 must be postponed for two reasons.

First, the "Public Notice of Availability of the Final Environmental Impact Report SCH #: 2014111019" including the County's Responses to Comments (the "FEIR") was not provided to SHFB until November 6th and thus fails to satisfy the 10-day advance notice requirement under

Mr. Eric Hull
Mr. Leon Page
Clerk of the Board
November 10, 2017
Page 2

the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.: “CEQA”; CEQA Guidelines § 15088.)

Second, we have serious concerns that the current posting fails to comply with the notice and public hearing requirements of the Planning and Zoning Laws (Government Code § 65000 *et seq.*). Despite clear legislative policy that public participation is the hallmark of land use planning (see Government Code §§ 65033, 65351; 65353, 65355, 65453), the County neatly places the proposed El Toro 100-Acre Parcel Development Plan (the “Development Plan”) and FEIR as a Discussion Item on the Board of Supervisor’s November 14 Supplemental Agenda. Contrary to the County’s approach, we believe the proposed Development Plan requires consideration by the County’s Planning Commission and the Board of Supervisors – both at a noticed public hearing requiring 10-day advanced published notice.

As a point of beginning, the description of the “Development Plan” appears to readily fit within the description of a “specific plan” under the Planning and Zoning Laws.

The County staff report describes the Development Plan as follows:

The Development Plan serves as the guiding document for the planned development of the 100-Acre Parcel and contains detailed development standards and design guidelines that will be used to review and analyze future plans for implementing developments. The Development Plan identifies permitted land uses, development standards for streets, parking, building types, improvements and landscape, height and density limits, and establishes the overall framework for the development, occupancy, and use of the project site. The proposed uses in the Development Plan are generally consistent with the City's Trails and Transit Oriented zoning, which is the zoning designation of the properties surrounding the 1 00-Acre Parcel. The Development Plan also establishes the processes by which the County will evaluate proposals for future development to ensure consistency with the Development Plan and the Final Program EIR 620. [*Emphasis added.*]

Clearly, the Development Plan is a land use planning document that will regulate and guide future development of the 100-Acre Parcel. Its contents are equivalent to those of the Planning and Zoning Law’s specific plan:

A specific plan shall include a text and a diagram or diagrams which specify all of the following in detail:

- (1) The distribution, location, and extent of the uses of land, including open space, within the area covered by the plan.
- (2) The proposed distribution, location, and extent and intensity of major components of public and private transportation, sewage, water, drainage, solid waste disposal, energy, and other essential facilities proposed to be located within

Mr. Eric Hull
Mr. Leon Page
Clerk of the Board
November 10, 2017
Page 3

the area covered by the plan and needed to support the land uses described in the plan.

(3) Standards and criteria by which development will proceed, and standards for the conservation, development, and utilization of natural resources, where applicable.

(4) A program of implementation measures including regulations, programs, public works projects, and financing measures necessary to carry out paragraphs (1), (2), and (3).

(Government Code § 65451, subd. (a).)

Pursuant to Government Code section 65453, a specific plan is to be approved in the same manner as a general plan. In turn, Government Code section 65355 regarding adoption of a general plan, provides that “[p]rior to adopting or amending a general plan, the legislative body shall hold at least one public hearing.” Review and recommendation by the Planning Commission is also required (Government Code § 65354). The County’s own Zoning Code Section 7-9-156(c) requires the Planning Commission and the Board of Supervisors to conduct a public hearing in accordance with the Government Code for all specific plans.

While the County does not call the “Development Plan” a “Specific Plan,” we would invoke the folk wisdom that if an object looks like a duck, walks like a duck and quacks like a duck, it is a duck. Telling in that regard is the County’s own reason for requesting the Development Plan and FEIR to be added to the Supplemental Agenda for November 14, 2017:

“Reason for supplemental: This project is a high-profile real estate matter and approval is time-sensitive due to a 10-day Public Notice requirement. This Staff Report and attachments were finalized after the filing deadline to the Clerk of the Board.”

Despite this stated justification and apparent acknowledgment that the Planning and Zoning Laws’ 10-day public notice requirements apply, no conforming public notice was published or posted in accordance with those requirements. The Notice of Availability alone does not satisfy these requirements.

We recognize that the County contends it is immune from the City of Irvine’s General Plan and zoning code under Government Code section 53090. We also note that the County has failed to include the 100-Acre Parcel in its own General Plan despite the legislative authorization to include extra-territorial land within that plan. (Government Code § 65300). The County’s manipulation of the 100-Acre Parcel such that it is allegedly orphaned from any general plan stands in stark contrast to the strong notice and public hearing paradigm that has been the hallmark of California land use law for half a century and embodied in the Planning and Zoning Laws.

Mr. Eric Hull
Mr. Leon Page
Clerk of the Board
November 10, 2017
Page 4

Finally, the County implies that County Zoning Code Section 7-9-20(i) which exempts land owned by or leased to the County from the County's own land use regulations is proper justification for avoiding land use notice and hearing requirements in its consideration of the Development Plan. However, in these circumstances where the 100-Acre Parcel will be leased by the County to a private entity for private development purposes, the claim of exemption is contrary to public policy and to the fundamental notice and hearing requirements underlying California's Planning and Zoning Laws.

Notably, this is precisely the type of brazen immunity "transfer" of Section 53090 to a private entity condemned by the California Attorney General. (See 68 Ops. Cal. Atty. Gen. 114.¹) In analyzing whether public lands leased to a private party for private development would be exempt from local building and zoning regulations, the Attorney General concluded that if the use of the property furthered the public entity's statutory duty (other than merely to raise revenue), the private development would be exempt from local building and zoning regulations. To the contrary, if the private development was solely for the private purposes of the developer (such as a housing project or a shopping center), local building and zoning ordinances would apply.

The County's deft avoidance of holding a noticed public hearing on such a critical land use matter ultimately results in a failure to accord the public the due process it deserves. Based on the foregoing, we respectfully request that Item S38B be taken off calendar until such time as the County has complied with the public notice and hearing requirements under the Planning and Zoning Law.

Very truly yours,

LEIBOLD McCLENDON & MANN, P.C.


By: Barbara Leibold

cc: Nicole Suydam, CFRE, CEO
Joe Schoeningh, Director of Public Affairs
Teresa Farrell, Esq.

¹ "In our opinion, this 'exception' presents the logical balance needed to ensure that an agency such as the Board herein does not transfer its 'section 53090 immunity' for purely private purposes and yet may still carry on its legislatively contemplated powers and duties with respect to conducting a state fair through lessees where a "delegation" of such may appropriately be made." (*Id.*, at p. 121.) The Attorney General goes on to write that "The boundaries or limit would appear to be (1) where the purpose of the lease clearly furthers the statutory duty of the Board to conduct 'an agricultural themed exposition' and a fair or fairs with respect to industrial and commercial products of California (Food and Agricultural Code, §§ 3301, 3331) vis-a-vis (2) when the purpose of the lease was purely for the private benefit of the lessee, such as a housing project or a shopping center." (*Id.*, at p. 121)