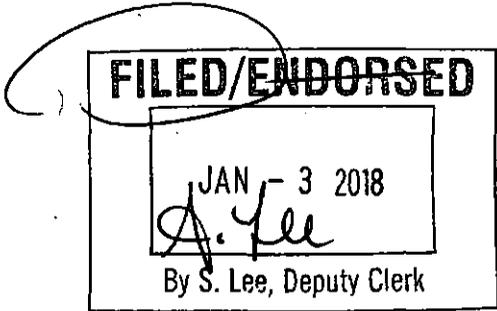


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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

PETROVICH DEVELOPMENT COMPANY, LLC, a California limited liability company; PDC CONSTRUCTION, CO., INC., a California corporation; and CALVINE & ELK GROVE-FLORIN, LLC, a California limited liability company,

Petitioners/Plaintiffs,

v.

CITY OF SACRAMENTO, a California municipal corporation; MAYOR AND CITY COUNCIL OF THE CITY OF SACRAMENTO; and DOES 1-100,

Respondents/Defendants,

ERIC JOHNSON, ANDREA ROSEN, SIERRA CURTIS NEIGHBORHOOD ASSOCIATION, and ROES 1-100,

Real Parties In Interest.

Case No. 34-2016-80002289-CU-WM-GDS

**RULING ON SUBMITTED MATTER:
PETITION FOR WRIT OF MANDATE
AND FOR DECLARATORY AND
INJUNCTIVE RELIEF, MOTION TO
STRIKE AND OBJECTIONS TO EXTRA
RECORD EVIDENCE**

This matter came on regularly for hearing on December 15, 2017. The parties appeared and presented oral argument, after which the Court took the matter under submission. The Court now issues its ruling on submitted matter.

///

1 **MOTION TO STRIKE/EVIDENTIARY OBJECTIONS**

2 Respondents have filed a motion seeking to strike evidence submitted by Petitioners, or in
3 the alternative specific evidentiary objections. Petitioners have filed an opposition. The Court has
4 reviewed the declarations and the arguments presented by the parties.

5 With regard to the Petrovich declarations, the Court **SUSTAINS** Respondent’s evidentiary
6 objections 1-58.

7
8 With regard to the Heede declaration, the Court will consider Exhibit B. Accordingly, the
9 Court **SUSTAINS** Respondents’ evidentiary objections 59-63, and 65-70. Evidentiary objection
10 64 is **OVERRULED**.

11 With regard to the Earl declaration, the Court **SUSTAINS** Respondents’ evidentiary
12 objections 72, 76, 78-83. Evidentiary objections 71, 73-75, and 77 are **OVERRULED**.

13 With regard to the Smith declaration, the Court **SUSTAINS** Respondents’ evidentiary
14 objections 84-87.

15
16 With regard to the Cox declaration, the Court **SUSTAINS** Respondents’ evidentiary
17 objections 93, 94, 98-104, 105 (as to subdivision (a) only), 109-112, 115-117. Evidentiary
18 objections 89-92, 95-97, 105 (as to all remaining subdivisions), 106-108, and 113-114 are
19 **OVERRULED**.

20 With regard to the Supplemental Cox declaration, the Court **SUSTAINS** Respondents’
21 evidentiary objections 118-130. Evidentiary objection 131 is **OVERRULED**.¹

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28 ¹ The Court notes, having reviewed all of the proffered evidence, even if the Court were to sustain or overrule all
evidentiary objections, its decision on the merits of this matter would not change.

1 Shopping Center (SC-PUD) Zone in the Curtis Park Village Planned Unit Development.” (AR,
2 4603.) The staff recommendation stated,

3
4 “Staff recommends the Planning and Design Commission approve the
5 requested entitlements with the findings of fact and conditions of approval
6 provided in Attachment 1. The Commission has final approval and authority
7 over items A through D above. The Commission’s decision can be appealed to
8 the City Council. **This item is considered to be controversial. Staff has
9 received comments on this project related to traffic, health related
10 impacts, consistency with the General Plan and the Curtis Park Village
11 PUD, and aesthetics.**” (AR 4603)(emphasis in original.)

12 On June 11, 2015, the Planning Commission voted 8-3 to approve the Curtis Park Fuel
13 Center CUP and Site Plan and Design Review. (AR, 5238.) On June 19, 2015, the Sierra Curtis
14 Neighborhood Association, Eric Johnson, and Andrea Rosen (hereinafter, collectively “Real
15 Parties”) filed an application to appeal the decision premised on five concerns:

- 16 1. Approval of the Project is “detrimental to the public health, safety, convenience or
17 welfare of persons residing, working, visiting or recreating in the surrounding
18 neighborhood.”
- 19 2. The proposed Fuel Center is fundamentally inconsistent with the Curtis Park Village
20 Development Guidelines (P04-109) adopted by the City Council in 2010 and which
21 have the force of law.
- 22 3. The City’s reliance on a CEQA Addendum is legally deficient.
- 23 4. The CEQA Addendum itself is legally deficient.
- 24 5. The City’s approval of the Project would violate CEQA. (AR, 5948-5951.)

25 Ultimately², on November 17, 2015, the City Council heard Real Parties’ appeal. (AR,
26 6045.) Councilmember Schenirer spoke after the time for public comments, and concluded,

27 “...I just can’t support in any way, shape or form putting a gas station that
28 close to a residential area, and frankly if we never have a new gas station again
I would be okay with that, I would be okay with that...I want to move that we
reject the staff recommendation [sic] that we deny the conditional use permit to
construct and operate a gas station in the shopping center zone [sic] in the
shopping center zone in the Curtis Park Village Planned use development.”
(AR, 5414-5415.)

The City Council voted 7-2 in favor of Councilmember Schenirer’s motion. (AR, 5511.)

² The Court recognizes there are significant events that occurred between the parties subsequent to the filing of the appeal and the hearing of the issue at the City Council meeting. The Court will not summarize these events here, but will include them in its analysis of the claims to the extent those events are relevant.

1 During the hearing, when questioned about findings of fact to support the decision, a male voice
2 provided³ that,

3
4 “...there is enough of a record established to make the findings necessary if the
5 council’s inclined to vote to deny it. The findings would include issues
6 associated with the consistency of the applicable plans, the transit-oriented
7 development, the issues related to the safety and health, consistency with the
8 location of the gas station, there [sic] a number of issues that have been already
9 put on the record, so from a land use standpoint, there is a record available for
10 the council.” (AR, 5509.)

11 Via “DRAFT Minutes” the City provided that it rejected the CUP based on the following
12 findings,

13 “The proposed gas station and its operating characteristics are not consistent
14 with the General Plan policy 5.1.5 discouraging low-intensity and auto-
15 oriented uses around transit stations in that...the gas station is within a ¼ mile
16 radius of an existing City College Light Rail Station...in the City Council’s
17 view, interference with access to transit is not the only point of this policy in
18 this instance, and this larger size gas station required extra
19 consideration...vehicle miles travelled is still an issue to address...An auto-
20 oriented use around the transit station, which would be draw for additional
21 traffic and trips from outside the surrounding community is counter to that
22 policy and is not consistent with this policy to discourage auto oriented uses.
23 The City’s application for grant funding to build the pedestrian bridge
24 connecting the project to nearby light rail called the Curtis Park Village a high
25 density, mixed-use urban infill development project which embraced the
26 blueprint developed by SACOG. The gas station is inconsistent with City’s
27 overall goals and objectives for infill and sustainability, climate action, transit
28 oriented development, the regional blueprint, and the objectives of General
Plan Policy 5.1.5.

d. The proposed use and its operating characteristics are detrimental to the
convenience and welfare of persons residing, working, visiting, or recreating in
the surrounding neighborhood as the large scale of the gas station is
incompatible with the surrounding neighborhood, and it would increase
traffic.” (AR, 5257-5258.)

Petitioners subsequently filed this matter, challenging the CUP denial.

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³ The Court cannot identify the speaker, as the transcript only says “Male Voice 3.” The person speaking was in response to the mayor’s question of “the attorney?” However, the Court cannot confirm that the responding party was the City Attorney based solely on the record.

1 **III. Standard**

2 The instant petition's challenge to the City Council's decision is pursuant to Code of Civil
3 Procedure section 1094.5. A writ will issue if the Court finds a prejudicial abuse of discretion,
4 which is established if the respondent "has not proceeded in the manner required by law, the order
5 or decision is not supported by the findings, or the findings are not supported by the evidence."
6 (Cal. Code of Civ. Pro. § 1094.5(b).) Where it is claimed that the findings are not supported by
7 the evidence (and where, such as here independent judgment does not apply), abuse of discretion
8 is established if the court determines that the findings are not supported by substantial evidence in
9 light of the whole record. (*Id.* at subd. (c).)
10

11 When a party raises allegations of a failure to provide a fair administrative hearing, "the
12 petitioner is entitled to an independent judicial determination of the issue... the court renders its
13 independent judgment on the basis of the administrative record plus such additional evidence as
14 may be admitted..." (*Pomona Valley Hosp. Med. Ctr. v. Superior Court* (1997) 55 Cal.App.4th
15 93, 101.)
16

17 **IV. Discussion**

18 A. Requests for Judicial Notice

19 *Petitioners' request in support of "new opening trial brief"*

20 Petitioners have filed a request for judicial notice regarding seven documents. The Court
21 has reviewed the subject documents and finds exhibits A-1, A-2, A-3, B-1, and B-2 are not
22 relevant. Accordingly, the request for judicial notice as to those documents is **DENIED**. With
23 regard to Exhibits C and D, the request is **GRANTED**.⁴
24

25 ///

26 _____
27 ⁴ The Court notes there are two tabs marked "exhibit c" on Petitioners' request. The first "Exhibit C" is a copy of an
28 email that appears to have been submitted as part of the request in error. For clarity, the Court specifies that judicial
notice is not granted as to this email, but is instead granted as to the "Exhibit C" that contains a copy of Sacramento
City Code section 17.216.510(B).

1. *Petitioners' request in support of reply*

2. Petitioners have filed a request for judicial notice concerning two sections of the
3. Sacramento City Code. They made this request in connection with the reply brief. It is not
4. generally appropriate for a party to request the Court consider evidence for the first time in
5. connection with a reply, and accordingly the request for judicial notice is **DENIED**.

6. *Petitioners' request filed at the hearing on this matter*

7. Petitioners also filed a request for judicial notice concerning one document at the hearing
8. on this matter. The request for judicial notice is **DENIED**.

9. **B. Fair hearing**

10. Petitioners first contend the CUP denial must be reversed because the Council failed to
11. provide a fair hearing. Specifically, Petitioners maintain Councilmember Schenirer engaged in
12. "out of public view" activities to deny the CUP and should have recused himself from
13. participating in the subject vote.

14. "Procedural due process in the administrative setting requires that the hearing be
15. conducted before a reasonably impartial, noninvolved reviewer." (*Nasha v. City of Los Angeles*
16. (2004) 125 Cal.App.4th 470, 483)(citations omitted.) "It is recognized that administrative
17. decision makers are drawn from the community at large. Especially in a small town setting they
18. are likely to have knowledge of and contact or dealings with parties to the proceeding. Holding
19. them to the same standard as judges, without a showing of actual bias or the probability of actual
20. bias, may discourage persons willing to serve and may deprive the administrative process of
21. capable decision makers." (*Id.*)(citations omitted.) Consequently, to prevail on a claim of bias
22. petitioners must establish an "unacceptable probability of actual bias" to be proven with "concrete
23. facts." (*Id.*) Bias cannot be implied. (*Id.*)(finding bias proven when a decisionmaker wrote an
24. article hostile to a project before deciding the appeal of the project's approval.)

1 Participation of a biased decisionmaker is sufficient to invalidate the decision. (*Woody's*
2 *Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1022.) In *Woody's*, a city
3 councilmember appealed a planning commission's decision, and then participated in the vote
4 granting the appeal. (*Id.* at 1017-18.) On appeal, the Court found it was improper for the city
5 councilmember to have participated, finding the notice of appeal showed the councilmember was
6 "strongly opposed to the planning commission's decision on Woody's application. That is, as in
7 *Nasha*, he took 'a position against the project.'" (*Id.* at 1022-23)(citations omitted.)
8

9 In voting on approval or rejection of the CUP, the city council was acting in a quasi-
10 adjudicatory manner. Accordingly, it was incumbent upon each member to remain unbiased and
11 open to all points of view at the November 17, 2015 hearing.
12

13 The Court recognizes that politics can be messy; and that politicians must necessarily be
14 active participants on behalf of those they represent. However, especially in a quasi-adjudicatory
15 setting, presenting the public with an unbiased panel of decisionmakers is crucial.
16

17 The evidence concerning Councilmember Schenirer's bias and involvement with the
18 Project can be summarized as follows⁵:
19

- 20 1. In the 1990s, prior to running for elected office, Councilmember Schenirer became a
21 lifetime member of the SCNA via payment of a \$25 fee.
- 22 2. In 1991, Councilmember Schenirer was a SCNA board member.
- 23 3. The relationship between Petitioners and Councilmember Schenirer during discussions
24 of the Project changed over time from one characterized as cooperative to one
25 described as strained.
26

27 ⁵ The Court acknowledges that it is not including *all* of the factual background between the parties, and is attempting
28 to merely summarize the evidence. The Court has considered all evidence before it in making this ruling.

1 4. Councilmember Schenirer communicated via text messages with Eric Johnson,
2 president of the SCNA, concerning the CUP appeal.

3 a. On October 7, 2015, Councilmember Schenirer texted "CUP appeal still in
4 play." (AR, 29969.)

5
6 b. On November 1, 2015, Councilmember Schenirer texted "Can you get together
7 tomorrow night at 7. [sic] I'd like to put a few heads together to talk thru cpv.
8 Thinking you, mcKeevers [sic], Tina, joe [sic] and myself. Others?" (AR,
9 29970.)

10 c. On November 9, 2015, Councilmember Schenirer texted, "Are you all
11 planning any visits to council members? If so, I have suggestions." Eric
12 Johnson replied "Suggest away!" Councilmember Schenirer responded "I'll
13 call you later." (AR, 29971.) Then, on November 12 and November 13, Eric
14 Johnson sent identical emails to Councilmember Harris, Councilmember
15 Warren, and Councilmember Jennings concerning the Project fuel station. The
16 emails are similar to the November 10 "Talking Points" and November 17
17 Whyte "Talking Points" discussed below.

18
19 d. On November 15, and then November 17, Councilmember Schenirer and Eric
20 Johnson texted concerning how the hearing would proceed. Eric Johnson
21 texted, "Will pdc speak first on Tuesday, or us?" Councilmember Schenirer
22 responded, "You. First staff then you then pdc." Then followed two days later
23 with, "FYI. Just found out Paul will go before you. Probably good to be able to
24 respond." (AR, 29971.)

25
26 5. On November 10, 2015, Councilmember Schenirer sent an email titled "Curtis Park
27 Village Talking Points" to the mayor, and cc'd Scott Whyte and Joe Devlin. (AR,
28

1 29988.) The email provided a background of the gas station’s involvement in the
2 Project, and concluded “Bottom line – want to help Safeway be successful. Can we do
3 this without the fuel center. [sic] All entitlements are present and construction could
4 start immediately.” (AR, 29988.)

5
6 6. On November 17, 2015 a member of the mayor’s staff, Scott Whyte, sent an email to
7 himself with an attachment titled “Council Comments Talking Points.” (AR, 18905.)
8 The document included a section titled “Sequencing” and indicates, with regard to the
9 Project, “JS punches up to make motion, Hansen seconds: *I move to reject the staff*
10 *recommendation and to deny the conditional use permit for the Curtis Park fuel*
11 *center.*” (AR, 18906)(emphasis in original.) The document then goes on to list
12 “talking points” about the Project. These “talking points” are very similar to those
13 identified in Councilmember Schenirer’s November 10, 2015 email.
14

15 7. At the subject city council meeting, Councilmember Schenirer made a motion to reject
16 the staff recommendation and deny the CUP, and Councilmember Hansen seconded
17 the motion. (AR, 5415.)
18

19 Respondents assert Councilmember Schenirer’s pre-hearing activities do not rise to the
20 level of “concrete facts” demonstrating bias. The Court disagrees.

21 While Petitioners rely heavily on Councilmember Schenirer’s membership in SCNA,
22 membership alone is not evidence of bias. (See *Independent Roofing Contractors v. California*
23 *Apprenticeship Council* (2003) 114 Cal.App.4th 1330, 1334)(holding the inclusion of officials on
24 a council who are members of a group that filed administrative briefing does not of itself establish
25 sufficient bias to disqualify them.) With regard to Councilmember Schenirer’s mere association
26 with SCNA members, Petitioners do not cite to any authority that such association or friendship is
27 concrete evidence of bias. (While there is evidence that Councilmember Schenirer authored
28

1 articles for the SCNA newsletter, Petitioners have not identified any evidence that these articles
2 were hostile to the CUP as in *Nasha*.) (See also *Fairfield v. Superior Court of Solano County*
3 (1975)) (noting a Councilmember has an obligation to discuss issues of concern with constituents.)

4 The same is true for the November 10, 2015 “Talking Points” email to the mayor’s office.
5 While background facts in *support* of the CUP are not discussed, Councilmember Schenirer does
6 not indicate that he is against the gas station or that he has predetermined his vote on the CUP. He
7 concludes, “Bottom line – want to help Safeway be successful. Can we do this without the fuel
8 center. [sic] All entitlements are present and construction could start immediately.” While the
9 document is suggestive that Councilmember Schenirer was considering voting “no” on the CUP,
10 it falls short of being “concrete facts” demonstrating “unacceptable probability of actual bias.”
11 With regard to the Scott Whyte email, there is no evidence that Councilmember Schenirer was
12 involved in the creation of this document or ever saw this document prior to the subject vote.
13 There is also no evidence that the document was circulated among the other Councilmembers.
14 The only evidence before the Court is that Scott Whyte sent an email to himself that contains an
15 outline of how the vote ultimately proceeded. While suspicious, the Court finds this again falls
16 short of “concrete facts” demonstrating “unacceptable probability of actual bias.”
17

18
19 However, when considering the facts before the Court as a whole, as it must do, the Court
20 finds Councilmember Schenirer, in the days before the November 17, 2015 hearing, demonstrated
21 an unacceptable probability of actual bias. As the Court has stated, it does not find that
22 membership in the SCNA and regular meetings with SCNA members to be sufficient evidence of
23 bias; however, Councilmember Schenirer’s authoring a “Talking Points” memorandum that
24 suggests he intends to vote “no” on the CUP, and his multiple text message exchanges with Eric
25 Johnson, SCNA president, go beyond mere exchanges of information with a constituent. Instead,
26 such activities suggest Councilmember Schenirer began coaching Eric Johnson on how to
27
28

1 prosecute the SCNA appeal. The message, "Are you all planning any visits to council members?
2 If so, I have suggestions," (followed by a text arranging for a later time to talk) clearly reflects
3 direction from Councilmember Schenirer on what to say and/or who to visit in the Real Parties'
4 efforts to convince Councilmembers to vote no on the CUP. Further, the emails sent from Eric
5 Johnson to Councilmembers bear a remarkable resemblance to the "Talking Points" document
6 authored by Councilmember Schenirer.⁶ These actions go beyond mere membership in an
7 organization (*Independent Roofing Contractors*) and instead are akin to advocating on behalf of
8 an appellant (*Woody's*)
9

10 The Court cannot ignore evidence that, in the days preceding the hearing, Councilmember
11 Schenirer was no longer a neutral, unbiased decisionmaker. As the Court has explained, the
12 interactions with Eric Johnson demonstrate the concrete facts necessary to establish bias.
13 Accordingly, Councilmember Schenirer should have recused himself from the vote on the
14 Project's CUP, and his failure to do so was a failure to proceed in the manner required by law.
15

16 **V. Conclusion**

17 The petition for writ of mandate is granted⁷. A writ shall issue directing Respondents to
18 rescind the decision entered on the Real Parties' appeal of the Project's CUP via the November
19 17, 2015 hearing. The writ shall further direct Respondents to hold a new hearing on the Project's
20 CUP. Pursuant to *Nasha* and *Woody's*, the writ shall direct Councilmember Schenirer to recuse
21 himself from participating in the new hearing.⁸
22

23 The Court finds Petitioners have not demonstrated bias by the other city Councilmembers
24

25 ⁶ The Court recognizes that the argument can be made that the emails are only similar to the Talking Points because
26 those are the issues the neighborhood and city council were concerned about in voting on the CUP. However, the
27 Court finds that the similarity, coupled with the communications between SCNA members and Councilmember
28 Schenirer demonstrates an unacceptable probability of actual bias.

⁷ In light of this ruling, the complaint for declaratory and injunctive relief is denied.

⁸ In *Nasha* the Court directed the new hearing needed to take place before an impartial panel. In *Woody's* the Court noted that if the case had involved bias alone, the Court would remand for a new hearing, "sans Henn."

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sufficient to find that remanding this matter back to the city council would result in an unfair and biased hearing. As the Court has vacated the subject CUP denial vote, the Court will not address the parties' arguments as to whether the reasons given for the subject vote were supported by substantial evidence or otherwise insufficient.

Respondents shall make and file a return within 60 days after issuance of the writ, setting forth what has been done to comply therewith.

Counsel for Petitioners shall prepare an order incorporating this ruling as an exhibit to the order, a judgment, and a writ; counsel for Respondents shall receive a copy for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit it to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

DATED: January 3, 2018





Judge MICHAEL P. KENNY
Superior Court of California,
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

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Superior Court of California,
County of Sacramento

Dated: January 3, 2018


By: S. LEE
Deputy Clerk