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August 14, 2013 (Agenda)

August 14, 2013  
 Agenda Item 7

Contra Costa Local Agency Formation Commission (LAFCO)  
 651 Pine Street, Sixth Floor  
 Martinez, CA 94553

**Northeast Antioch Monthly Update**

Dear Commissioners:

On February 9, 2011 the Commission approved the extension of out of agency service by the City of Antioch and Delta Diablo Sanitation District to the NRG Energy property (formerly GenOn) located in unincorporated Northeast Antioch. The Commission’s approval requires that the City and County provide LAFCO with monthly updates regarding the status of the Northeast Antioch annexation and tax transfer negotiations efforts. A subcommittee was formed to address these and other issues.

LAFCO representatives participated in monthly subcommittee meetings from April to October 2011. In October 2012, the subcommittee resumed meeting, and last met on January 28, 2013. The City and County have continued to provide LAFCO with regular updates.

As previously reported, there have been three community meetings with property owners and residents of Area 2b, where agency staff responded to questions and concerns regarding zoning/land use, water/sewer infrastructure and service, annexation/protest proceedings, and related issues.

On July 30<sup>th</sup>, the Antioch City Council held a special meeting at which time the Council approved the City’s CEQA document and pre-zoning relating to Areas 1, 2a and 2b. The City received public comments, including the attached letter from Jenny & Jenny, LLP representing one of the landowners in Area 2b, objecting to the proposed annexation of Northeast Antioch (Attachment 1). The City Council also discussed the tax transfer and infrastructure agreements. We understand that the City and County are currently finalizing the tax transfer and infrastructure agreements, and that the City Council will be asked to take action on these agreements in August, and the County Board of Supervisors will be asked to take action subsequently.

City and County staff will be available at the August 14<sup>th</sup> LAFCO meeting to provide additional information and respond to questions.

RECOMMENDATION - Receive the monthly update and provide comment and direction as desired.

Sincerely,

LOU ANN TEXEIRA  
EXECUTIVE OFFICER

Attachment – Letter Dated July 19, 2013 from Jenny & Jenny, LLP

c: Distribution

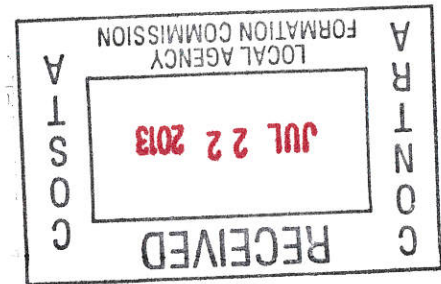
**JENNY & JENNY, LLP**  
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Eminent Domain  
Inverse Condemnation  
Real Estate Law

July 19, 2013



City Clerk's Office  
City Hall  
P.O. Box 5007  
Antioch, CA 94531-5007

**Re: Northeast Antioch Rezoning for the Northeast Antioch Area**

Dear City Council:

I represent John C. Mitosinka and Carey Mitosinka of 1277 St. Clair Drive in Antioch. I understand that on July 30, 2013, the City Council will hold a meeting regarding the North East Antioch Reorganization Annexation. On behalf of my clients, I offer the following objections to the North East Antioch Reorganization Annexation and any rezoning of those areas.

**I. THE LANDOWNERS ARE ENTITLED TO PROTEST PROCEEDINGS.**

The owners of property located within proposed areas of annexation are generally permitted to vote on whether or not to annex. This gives them the opportunity to choose for themselves which jurisdiction, the city or county, they will be part of. Annexation voting occurs through what is known as "protest hearing proceedings." The landowners affected by the Northeast Antioch Reorganization Annexation are entitled to protest proceedings and a vote thereon. As clearly stated in LAFCO's Northeast Antioch Monthly Update dated September 12, 2012, attached hereto as Attachment 1:

Since the June update, City, County and LAFCO staff received Attorney General (AG) Opinion No. 10-902 relating to island annexations. The opinion concludes that LAFCO may not split a larger island into smaller segments of 150 acres or less in order to utilize the streamlined annexation procedures set forth in

Government Code section 56372.3 and thereby avoid the protest proceedings that would otherwise be required.

Attorney General (AG) Opinion No. 10-902 discusses the annexation process. The AG defines an "island" as unincorporated property that is completely surrounded, or substantially surrounded, by the city to which annexation is proposed or completely surrounded by the city to which annexation is proposed and adjacent cities.

To reduce the cumulative environmental impacts of the Project, the City has broken up the 678 acre project into Subareas 1, 2a and 2b. Subarea 1 consists of 481 acres; Subarea 2a consists of 94 acres; and Subarea 2b consists of 103 acres. This is an improper method of breaking up the subject property into smaller islands which avoids the protest reviews. Dividing islands into smaller segments of 150 acres or less, avoiding the landowner/voter protest proceedings, is not permitted. Areas 2a and 2b do not qualify as islands and the landowners are entitled to protest proceedings. The three subareas must be considered a single area exceeding 150 acres, and therefore the provisions of Section 56375.3 are not permitted. LAFCO lacks discretion or authority to use streamlined procedures to annex an island that exceeds 150 acres in area. Thus, LAFCO lacks discretion or authority to use the streamlined procedures to annex subareas 2a and 2b without the protest procedures.

The Attorney General concludes:

A Local Agency Formation Commission may not split up an unincorporated island that exceeds 150 acres into smaller segments of 150 acres or less in order to utilize the streamlined "island annexation" procedures set forth in Government Code section 56375.3 and thereby avoid the landowner/voter protest proceedings that would otherwise be required.

Subareas 2a and 2b must be considered as a part of the 678 acres and not broken into islands. Thus, the City and LAFCO must present an annexation application for the entire 678 acres, prezone the entire 678 acres, and consider the entire 678 acres in the appropriate CEQA document. To date this has not occurred as the 678 acres has been approached piecemeal, which is not permitted under the AG's opinion, and is therefore illegal. Then, landowner protest and voting procedures must be permitted for the landowners of all 678 acres.

## **II. A MITIGATED NEGATIVE DECLARATION IS IMPROPER.**

My clients object to the project being adopted by way of a Mitigated Negative Declaration rather than a formal Environmental Impact Report. To reduce the cumulative environmental impacts of the Project, the City has broken up the 678 acre project into Subareas 1, 2a and 2b. Subarea 1 consists of 481 acres; Subarea 2a consists of 94 acres; and Subarea 2b consists of 103 acres. This is an improper method to review such a project. By breaking the project into different sub-parts, the environmental impacts are lessened.

California law defines the "Project" as "the whole of an action." In *City of National City v. State of California* (1983) 140 Cal. App. 3d 598, the court defined a project. In footnote 2 on page 603, the *National City* court stated:

In determining what is a project within CEQA, California Administrative Code, title 14, section 15037 provides:

(a) Project means the whole of an action, which has a potential for resulting in a physical change in the environment, directly or ultimately, that is any of the following:

(1) An activity directly undertaken by any public agency including but not limited to public works construction and related activities, . . .'

More specifically, subdivision (c) states:

The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval." (Emphasis added & some internal quotes omitted)

In *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal. App. 3d 577 the court stated (p. 592, emphasis added):

CEQA mandates that environmental considerations not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences. (*City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1452 [263 Cal.Rptr. 340].) CEQA attempts to avoid this result by defining the term "project" broadly. (*Ibid.*) A project under CEQA is the whole of an action which has a potential for resulting in a physical change in the environment, directly or ultimately, and includes the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1143 [249 Cal.Rptr. 439].)" (Emphasis added)

Thus, the "project" is defined by the environmental documents, and cannot "become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences." This is exactly what the City of Antioch is doing in this annexation process.

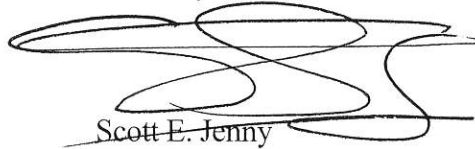
City of Antioch  
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### III. CONCLUSION.

For the foregoing reasons, my clients object to the Northeast Antioch Reorganization Project and Mitigated Negative Declaration and any efforts to prezone the affected properties. Please make this letter a part of the administrative record, and please copy me with future actions taken on this Project.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to be "Scott E. Jenny", written over a horizontal line.

/SEJ

cc: Clients  
LAFCO