

January 8, 2021

Board of Supervisors  
Cochise County  
c/o Mr. Robert Kirschmann  
Planner II, Development Services  
1415 Melody Lane, Bldg. F  
Bisbee, AZ 85603

Re: Applicant Response of Appeal of Special Use Authorization, Case Nos. SU-20-15 and SU-20-16.

Dear Board or Supervisors:

The Cochise County (“County”) Planning Commission (“Commission”) recently granted a special use authorization (“SUA”) to Babacomari Solar North, LLC and Babacomari Solar South, LLC (collectively “Babacomari” or “Applicant”) for two solar power generating plants (collectively the “Project”). The purpose of a SUA is to evaluate land uses that have potential impacts to the surrounding properties, and the Commission may only approve those uses that demonstrate they will not negatively impact their neighbors.<sup>1</sup> After thoughtful and careful consideration at a public hearing, the Commission approved the SUA a finding that Babacomari’s Project will not adversely affect the surrounding properties.

The Commission’s approval of the SUA was appealed (“Appeal”) by Maureen McBride (“Appellant”). The Appeal focuses on factors outside the scope of the SUA process and fails to demonstrate that the Commission erred in approving the SUA. Therefore, Babacomari requests that the Board of Supervisors (“Board”) uphold the Commission’s approval of the SUA and deny the Appeal.

### **I. Special Use Approval Background Facts.**

Babacomari desires to build the Project on approximately 1,200 acres lying within a 10,870-acre parcel on the Babacomari Ranch (the “Property”), located southwest of the intersection of State Routes (“SR”) 82 and 90. The Property is zoned RU-4, which permits solar energy power plants subject to the Commission’s SUA approval.<sup>2</sup> County Development Services Staff (“Staff”) scheduled Babacomari’s SUA application to be heard at the December 9, 2020 public hearing (“Hearing”). Prior to the Hearing, the Commission received numerous materials, including the Staff report, Babacomari’s SUA application, and written comments from the public including those submitted by the Appellant. Appellant’s written comments did not include concerns about the local impacts of the Project, and instead focused on the 2018 Arizona voter initiative Proposition 127 (“Prop. 127”), where voters rejected establishing statewide electric renewable energy standards within the Arizona Constitution. Appellant’s testimony also

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<sup>1</sup> County Zoning Regulations (“Code”) § 1716.01.

<sup>2</sup> Code § 607.51.

discussed a recent vote by the Arizona Corporation Commission (“ACC”) to adopt statewide electricity carbon emissions standards, and other broad commentary opposing solar and wind energy production.

The Commission held the Hearing to consider Babacomari’s SUA application. For an hour-and-a-half, the Commission listened to a detailed presentation given by Staff that recommended approval, Babacomari’s presentation, and testimony from numerous members of the public, including the Appellant. Most of the public testimony focused on the local impacts (positive and negative) of the Project. Appellant’s testimony echoed her written statement focusing on Prop. 127 and the ACC vote instead of local impacts. Her testimony ran long, and the Commission allowed her to speak beyond the five minutes given to all other members of the public. After considering the application, the written and oral Staff reports, and the public testimony, the Commission voted 4-3 to approve Babacomari’s SUA.

Appellant appealed the Commission’s decision on two grounds. First, she claims that her voice was not heard because she was not able to finish her statement to the Commission, despite being given extra time to talk and submitting written testimony. Second, Appellant claims the Commission did not consider the results of Prop. 127, which rejected statewide renewable energy standards, in making its decision on a local land use matter.

## **II. The Special Use Authorization should be upheld because the Appellant has failed to show the Commission erred in granting its approval.**

### *A. SUA Approval and Appeal Requirements*

The Commissions’ role in a SUA is to evaluate whether a land use will negatively impact surrounding neighbors and to approve the uses that do not significantly impact neighbors.<sup>3</sup> To help evaluate the local impacts of a project, the County created ten special use factors (“SUA Factors”) that the Commission must consider in approving a SUA.<sup>4</sup> The SUA Factors focus on how a proposed land use will impact its neighbors, including the effects on traffic, demand on County services, and whether the use creates offsite nuisances. Sec. III below details all the SUA Factors and describes how the Project meets these factors.

The Commission’s SUA decision may be appealed to the Board of Supervisors,<sup>5</sup> and the appeal must include:

- An explanation of why the Commission’s decision was “erroneous, arbitrary, capricious, or an abuse of discretion,” and
- A written presentation of additional evidence to be submitted, and an explanation of why this evidence was not presented to the Commission.<sup>6</sup>

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<sup>3</sup> Code § 1716.01.

<sup>4</sup> Code § 1716.02(A)-(J).

<sup>5</sup> Code § 1716.04.

<sup>6</sup> Code § 1716.04(B).

*B. Appellant has not shown the Commission's decision was in error.*

Appellant offers two grounds for her Appeal, neither of which show the Commission's decision was erroneous, arbitrary, capricious, or an abuse of discretion. Appellant's first claim - that she was not heard at the Hearing - is not factually accurate. The Commission notifies surrounding property owners that they may provide testimony in two ways: via a written statement and/or by testifying at a public hearing. Appellant availed herself of both, providing the Commission written and oral testimony that explained her position. The written statement, which the Commission received before the Hearing, focused on issues other than the local impact of the Project. Appellant made these same points at the Hearing and was permitted to speak longer than the five minutes allotted for the other speakers. Appellant was given a fair opportunity to provide her testimony, both written and oral form. The Commission attentively listened to her testimony, and Appellant's voice was heard.

Appellant's second claim is that the Commission did not consider the results of Prop. 127 when it approved the SUA. This, too, does not constitute an error by the Commission in its SUA decision. The Commission's role in evaluating the SUA is to focus on how the Project might negatively impact its surrounding neighbors and to approve the Project only if it finds no adverse impacts. Here, the Commission considered the ten SUA Factors that were detailed by Staff in its written and oral reports, factors that focus on the Project's local impacts. The Commission also heard Appellant's statements that focused on broader, statewide policy factors related to renewable energy standards. After thoughtful consideration, the Commission correctly based its decision on the local impacts of the Project and ultimately approved the SUA. The Commission correctly approved the Project by focusing on the local impact of the Project.

Appellant has not shown that the Commission erred in determining that the Project's uses are appropriate for the area. Therefore, the Board should uphold the SUA decision and deny this appeal.

*C. Appellant does not present any new evidence to overturn Commission decision.*

Appellant has not introduced any new evidence that should be considered by the Board. The Appeal simply includes a written transcript of the presentation that Appellant made to the Commission at the Hearing. This transcript is not new evidence, as Appellant was able to read approximately 80 percent of the transcript of her statement at the Hearing, and this transcript mirrored the initial written testimony she provided before the Hearing. The record in this case is complete and shows the Commission acted appropriately in granting the Project's SUA. Therefore, the Board should uphold the Commission's decision and deny this appeal.

**III. The Commission correctly granted Babacomari's SUA because it complies with all of the County's Special Use Factors.**

The Commission evaluated the Project against the County's SUA Factors in voting to approve the application. The Commission appropriately granted Babacomari's request because it meets these factors, as described below:

*A. Compliance with Duly Adopted Plans*

The County's Comprehensive Plan (the "Plan," revised in 2015) recognizes that the County is positioned well to help build its economy with local renewable energy production facilities like the Project.<sup>7</sup> The Plan supports the development of local renewable energy projects, specifically encouraging utility-scale renewable energy projects.<sup>8</sup> The Plan also supports flexible site development standards for these projects.<sup>9</sup> These Plan goals and policies directly support the approval of the Project.

*B. Compliance with the Zoning District Purpose Section*

The RU-4 purpose statement encourages non-residential and non-agricultural activities that provide services and that are compatible with rural living.<sup>10</sup> The Project is compatible with rural living in that after construction it will cause no appreciable traffic, noise or light pollution, will not block views nor use water, and will be significantly setback from the neighboring properties. The Project will cover approximately 1,200 acres of the 10,873-acre Property; the remaining Property will continue to be a ranch and will buffer the adjacent properties. The Project is compatible with and will have no impact on the surrounding rural area.

*C. Development Along Major Streets*

The Project will use the existing access points to SR 90, and from those access points all traffic will use private roads. During construction, the Project will add construction traffic along SR 90, but once completed the Project will only have occasional maintenance traffic. Because over the long term the Project will generate almost no new traffic, it will not create unsafe traffic conflicts, traffic congestion nor obstructions on State Route 90.

*D. Traffic Circulation Factors*

As noted above, the Project will use the existing SR 90 access points and create private access roads from SR 90 to the Project site. Other than initial construction traffic, the Project will only have occasional maintenance traffic, much less than what would be generated by a single-family residence. This maintenance traffic will add minimal traffic to existing County roads, and it will have no traffic impact on the surrounding properties.

*E. Adequate Services and Infrastructure*

The Project will not require the County to provide or maintain any infrastructure or services. The Project will have no onsite personnel, so there will not be water or sewer/septic service. The only water required for the Project will be water for dust control during construction and occasional panel cleaning, and water for these will be trucked in from outside. All roads to the Project will be private and not maintained by the County, and once constructed the Project will generate almost no traffic to the site.

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<sup>7</sup> Plan, Art. 1, Sec. 102(E).

<sup>8</sup> Plan, Art. 1, Sec. 102(E)(1)(a).

<sup>9</sup> Plan, Art. 1, Sec. 102(E)(1)(d).

<sup>10</sup> Code § 601.02.

#### *F. Significant Site Development Standards*

The Project meets the County's significant site development standards, as follows:

- *Height*: Solar Energy Systems are exempt from the Code's height limits.<sup>11</sup> However, the Project's tallest structures will not exceed 15 ft., which is far lower than the RU-4 maximum height of 30 feet.
- *Setbacks*: The Project's setbacks will be well under the County's required setbacks, which are equal to the site's highest structure (here, a 75-foot utility line).<sup>12</sup> The Project's north setback will be 150 ft. to the adjacent property line, and the south setback will be 3000 ft. to the adjacent property line.
- *Lot Coverage*: The Project covers approximately 11 percent of the Property, which is well under the County's RU-4 maximum lot coverage of 25 percent.<sup>13</sup>
- *Lighting*: All lighting will be fully shielded and meet the County's Outdoor Lighting Code requirements.
- *Floodplain*: The Project is not within a mapped FEMA floodplain.
- *Site Plan*: Babacomari will submit a site plan showing compliance with all development requirements at the time of the non-residential permit submittal.

#### *G. Public Input*

Babacomari conducted significant public outreach regarding the Project. It mailed letters to all property owners within a mile of the Property to solicit questions and concerns. From this mailer, Babacomari made individual contact with 19 individuals to answer their questions and take comment. For the SUA hearing, the County sent notice to the same property owners within a mile of the Property, and received 12 responses: five in support, five in opposition, and two neutral.

#### *H. Hazardous Materials*

The Project will not utilize any hazardous materials.

#### *I. Off-site Impacts*

The Project will have little if any offsite impacts. Initially, construction will generate a slight increase in traffic to the Property, and construction noise during the day. Dust will be controlled by water trucks to comply with all County requirements. Post-construction, the Project will have essentially no impact on the surrounding areas. The Project will not generate noise, odors, light pollution, or stormwater runoff. The Project site will be dust controlled including revegetation of the graded areas. The only potential impact will be that the Project will be visible from some

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<sup>11</sup> Code § 1824.01.

<sup>12</sup> Code § 1823.02.

<sup>13</sup> Code § 604.04.

surrounding properties, but these views will be limited by surrounding topography and vegetation.

*J. Water Conservation*

The Project will utilize little if any water, except initially during construction for dust control. After construction, the Project may require water for occasional cleaning of solar panels, likely no more than once a year. The water for these cleanings will be trucked in, either from a Property well or from an offsite source.

**IV. Conclusion**

Based on the above, the Appellant has not offered any evidence that the Commission erred in granting the SUA. Furthermore, Babacomari's request meets the Special Use Factors established by the County, which the Commission carefully considered in reaching the decision. Therefore, we request the Board deny the Appeal and uphold the Commission's decision to grant the SUA.

Sincerely,

A handwritten signature in blue ink, appearing to read "Rory Juneman". The signature is stylized, with a large "R" and "J" and a horizontal line extending to the right.

Rory Juneman, Esq.

January 20, 2021

Board of Supervisors  
Cochise County  
c/o Mr. Robert Kirschmann  
Planner II, Development Services  
1415 Melody Lane, Bldg. F  
Bisbee, AZ 85603

Re: Applicant Response Addendum, Case Nos. SU-20-15 and SU-20-16.

Dear Board or Supervisors:

We recently received Appellant's public comments for her appeal of Babacomari Solar North LLC and Babacomari Solar South LLC's (collectively "Babacomari" or "Applicant") two solar power generating plants (collectively the "Project"). Most of these comments continue to focus on factors outside the scope of the Special Use Authorization ("SUA") process and thus fail to demonstrate that the Commission erred in approving the SUA. There is one Appellant comment that we want to respond to, as she implies that the Project could negatively impact wildlife, specifically birds. This letter is to highlight that Babacomari has extensively studied the Project's impact on wildlife, including birds, and confirmed that the Project will not negatively impact wildlife.

**A. Arizona Game & Fish Recommendation.**

Early in the approval process, Babacomari proactively reached out to the Arizona Game and Fish Department ("Game & Fish") and asked it to review and provide comment on the Project. Game & Fish replied that it had no site-specific concerns about the Project. *See Enclosure 1*, Game & Fish Response. Game & Fish also provided four recommendations for the Project, summarized below, that Babacomari will implement:

1. If wildlife is encountered, Babacomari will coordinate with Game & Fish to relocate the wildlife.
2. Adjust lighting to be least impactful on nocturnal animals, including using narrow-spectrum bulbs and shielded light fixtures.
3. Implement design features for powerlines that are recommended by Game & Fish to minimize the impacts of powerlines on birds of prey.
4. Implement design features for power poles that are recommended by Game & Fish to minimize impacts and increase use of power poles by birds of prey.

In addition to implementing the above recommendations, Babacomari will continue to work with Game & Fish during construction of the Project to ensure its impact on wildlife is negligible.

## **B. Environmental Study of Protected Species**

In addition to consulting with Game & Fish, Babacomari engaged SWCA Environmental Consultants (“SWCA”) to identify the flora and fauna species near the Project that are protected by the Endangered Species Act of 1973, and assess the Project’s impact on those species. SWCA identified 22 such species, including four bird species, and concluded that the Project will have no or minimal effect on all these species. The minimal effects on the Project all relate to the period of construction, and once construction is complete the Project’s effects will become insignificant.

## **C. Lake Effect Not Found at other Babacomari Solar Plants**

While Appellant claims that photovoltaic (“PV”) solar-panel projects may cause a “lake effect” for migratory birds (i.e., birds confuse panels for bodies of water), SWCA has confirmed that the scientific research to date has shown no clear evidence supporting the lake effect. In addition, Babacomari’s parent company is conducting avian studies at two of its other PV panel projects in Merced County, California, and near Green River, Wyoming. At both sites, there has been no evidence to suggest that PV panels harm birds. Based on broad research and Babacomari’s own studies, the Project will not create a lake effect and not negatively impact migratory birds.

The Appellant also mentions several possible impacts to birds that do not apply to the Project, including birds striking wind turbines and birds being injured by solar mirrors. These are not applicable to the Project, which has no wind component and is a solar plant that uses PV panels to produce power and does not use mirrors.

## **D. Conclusion**

Babacomari has shown that the Project will have little to no impact on wildlife, especially birds. Both Game & Fish and a third-party consultant have analyzed the Project and concluded that the Project will not negatively impact wildlife. Babacomari will implement the suggestions made by Game & Fish to ensure the Project is safe for nearby wildlife, including birds of prey. In addition, the current scientific research and Babacomari’s experience is that solar projects using PV panels do not harm migratory birds.

We thank you for the opportunity to address Appellant’s claim, and we continue to respectfully request you deny the Appeal and uphold the Commission’s decision to grant the SUA.

Sincerely,

A handwritten signature in blue ink that reads "Rory Juneman". The signature is stylized, with the first name "Rory" written in a cursive-like font and the last name "Juneman" written in a more blocky, capital-letter style.

Rory Juneman, Esq.