

Service by Email:

August 28, 2023

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102 Grant Avenue
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Re: Response to the County Attorney's August 24, 2023 Legal Memorandum regarding Notice of Violation and Invalid Action Under New Mexico Open Meetings Act and Request for Moratorium

Dear County Commissioners, County Manager Shaffer and County Attorney Young:

I wrote the Open Meetings Act Notice of Violation that is on your meeting agenda for tomorrow August 29, 2023. I am writing in response to the August 24, 2023 Legal Memorandum prepared for your consideration on this issue by County Attorney Jeffrey Young.

I first learned of the Rancho Viejo Solar Energy Project in May of this year from a news article in the *New Mexican*. I grew concerned because I knew of the fire risks of lithium ion battery storage facilities, based upon my 17 years of work as an attorney and hearing examiner at the Public Regulation Commission. The proposed siting of the project among three residential areas in dry, windy grassland could put the community of Eldorado, where I am a resident, at significant risk for fire.

Through public records requests, I learned that the County, over three meetings held in May through July of last year, changed the definition of Commercial Solar Energy Production Facility in the Sustainable Land Development Code to include storage facilities. The definition per the 2016 SLDC is as follows: “Commercial Solar Energy Production Facility: is a renewable energy production facility that uses sunlight to generate energy for sale or profit.” The revised definition as stated in the 2022 Community Solar Ordinance reads, “Commercial Solar Energy Production Facility: is a renewable energy production facility that uses sunlight to generate, *and may store*, energy for sale or profit.” (emphasis added). Because the County SLDC specifies that a Commercial Solar Production Facility may be permitted with a Conditional Use Permit in a Rural Fringe district, this change in the definition is significant because it made the Rancho Viejo Project newly eligible for permitting in the area at issue as a Conditional Use.

Yet despite the significance of this change, the notices in the County’s meeting agendas did not inform the public of the change. The process violated the Open Meetings Act because the notices that were provided in the meeting agendas were misleading. The notices were specific: they repeated the title of the Community Solar Ordinance, which identified specific measures the County was adopting for Community Solar projects and omitted any mention of commercial solar facilities:

ORDINANCE NO. 2022-_____
AN ORDINANCE
AMENDING THE SUSTAINABLE LAND DEVELOPMENT CODE, ORDINANCE NO.
2016-9, TO ADD A DEFINITION OF COMMUNITY SOLAR, TO ADD A NEW
SECTION 10.25 TO ADDRESS STANDARDS FOR COMMUNITY SOLAR
FACILITIES AND TO ADD A NEW CLAUSE TO SECTION 8.11.3.5.2 TO
PROHIBIT A COMMUNITY OVERLAY DISTRICT FROM RESTRICTING THE
LOCATION AND PROCEDURES FOR INSTALLING COMMUNITY SOLAR
FACILITIES

And because the notices pertained only to Community Solar projects, they were misleading. They suggested that **only** Community Solar issues would be addressed.

I disagree with the memo the County Attorney prepared for tomorrow’s meeting. The County’s change of the definition of Commercial Solar Energy Production Facility was, in fact, significant. Production facilities, such as photovoltaic solar arrays, are technologies that generate electricity. They are completely different from technologies that store it and later release it. They involve different risks and they deserve different siting considerations.

Utilities also recognize this difference. Even where solar facilities and battery storage facilities are located at the same site, utilities, such as PNM, enter into separate contracts for their output.

Because of these differences, the County’s 2022 change in the Production definition to include storage facilities deserved more attention than to be buried in the middle of an unrelated ordinance dealing with Community Solar facilities.

In addition, to comply with the Open Meetings Act, the change required more public notice than the Legal Notices published in the newspaper. The County Attorney's argument that the statutes that require the publication of Legal Notices in newspapers control over the requirement in the Open Meetings Act that notice be included in meeting agendas is based upon his assumption that the statutes are in conflict. They are not. The agenda notices required by the Open Meetings Act and the newspaper notices required by other statutes are separate and independent, and both are enforceable.

What I have not been able to learn, however, is why the change to the definition of Commercial Solar Production Facility was done in the way it was done. I hope your discussion tomorrow can answer several questions that I asked in my August 14 Notice:

Number one: In response to a public records request, I learned that the County staff and the developer of the Rancho Viejo Project, AES Corporation, had been engaged in discussions about the project since at least the Fall of 2021 and that the County was aware that the proposed project included battery storage facilities.

Did AES and the County discuss the need to change the SLDC's definition of Commercial Solar Energy Production Facility to make battery storage and the Rancho Viejo project eligible for a Conditional Use Permit? Was the County attempting to facilitate the Rancho Viejo Solar Energy Project, and, if so, why did it do so in such a covert fashion? Why not inform the public?

Number two: Perhaps more concerning, an AES battery storage facility in Chandler, Arizona experienced a fire in April 2022 just a few weeks before the Community Solar Ordinance was presented to the Board here. The fire required the evacuation of nearby businesses until it burned itself out two weeks later. The April 2022 fire followed a fire and explosion at an AES battery storage facility on April 2019 in Surprise, Arizona. Four firefighters were injured in that incident.

The County Staff appears to have met with AES representatives in mid-May, shortly after the April 2022 fire and shortly before they introduced the Community Solar ordinance, making the Rancho Viejo project eligible for a Conditional Use Permit.

Was the County staff aware of the April 2022 AES battery storage fire in Chandler, AZ that took place just weeks before it introduced the definitional change of Commercial Solar Energy Production Facility in the Community Solar Ordinance on May 31, 2022? Was it discussed in the May 18, 2022 meeting between County staff and AES -- before the staff introduced the Community Solar Ordinance to the Board on May 31, 2022?

If the County was aware of the AES incidents, why was there no discussion of the incidents at any of the meetings? Why was the public not informed?

Were you, the Commissioners, aware of the AES fires when you considered and approved the Community Solar Ordinance?

It is these questions that make the County’s failure to give adequate notice of the changed definition a significant Open Meetings Act violation.

Because of this violation and because of the significant risk that the Rancho Viejo battery storage project would pose to surrounding communities, the County should pause the application process now with a temporary moratorium to investigate the fire risks of battery storage proposals and determine appropriate siting regulations in an open and transparent process that is fully publicized and considers public input.

Such a pause is important. The SLDC contains no provisions that address the siting of Commercial Solar Energy Production Facilities, including facilities that contain battery storage units. The only standard the County has to rely on is the general standard for Conditional Use Permits that the proposed use will not “be detrimental to the health, safety and general welfare of the area” and will not “create a potential hazard for fire, panic, or other danger.”

By contrast, the Community Solar Ordinance contains detailed standards for much smaller 5 MW Community Solar facilities. The County has also adopted land use preferences to help guide the County in issuing letters of support for Community Solar projects as those projects are reviewed by the PRC. And the Rancho Viejo project even conflicts with several those preferences – that projects be sited in brownfield sites, built environment, degraded land, or rooftop locations and that projects should not be located on land with healthy, intact ecosystems.

Thank you for your time. I look forward to your discussion of these issues tomorrow.

Respectfully submitted,

/s/ Ashley C. Schannauer

Ashley C. Schannauer



cc: joselarra@santafecountynm.gov