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SANTA FE COUNTY

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TO: Board of County Commissioners

FROM: Jeff Young, County Attorney *JY*

DATE: August 24, 2023

RE: Notice of Open Meetings Act Violation

This memorandum is in response to the Notice of Open Meetings Act Violation sent by Mr. Ashley Schannauer on August 14, 2023 (the “Notice”). For the reasons stated below, we would recommend that the Board of County Commissioners (“BCC” or “Board”) deny the alleged violation. Copies of this memorandum will be made available to the public with the agenda for the August 29, 2023, BCC meeting.

Issues

Mr. Schannauer believes that the BCC meetings on May 31, 2022, and July 12, 2022, and the Planning Commission meeting on June 16, 2022, violated the Open Meetings Act because the agendas for those meetings did not identify specific items of business. Specifically, Mr. Schannauer argues that the title of Ordinance No. 2022-05 (the “Ordinance”) was defective because it did not specifically state that the Ordinance would amend the definition of “Commercial Solar Energy Production Facility” in the Sustainable Land Development Code (“SLDC”). The title of the Ordinance is “An Ordinance Amending the Sustainable Land Development Code (SLDC), 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.” Mr. Schannauer’s notice and exhibits are attached as Exhibit A.

The Open Meetings Act affords the BCC fifteen days from receiving the written notice to either deny or act on the claim. NMSA 1978, §10-15-3(B).

Analysis

The Ordinance amended the SLDC to adopt a definition of Community Solar, add standards for Community Solar, and prohibit Community Overlay Districts from restricting the location and procedures for installing Community Solar Facilities, which may store energy produced by such facilities. The Ordinance also amended the SLDC’s definition of Commercial Solar Energy

Production Facility to be consistent with the proposed definition of Community Solar Facility relative to energy storage.

Claimed violations of the Open Meetings Act. Mr. Schannauer's Notice relates to three public meetings held over one year ago. The crux of the Notice is that the agendas for the BCC meetings on May 31, 2022, and July 12, 2022, and the Planning Commission meeting on June 16, 2022, did not identify that the Ordinance would amend the "Commercial Solar Energy Production Facility" definition already a part of the SLDC. Mr. Schannauer requests that the BCC void the Ordinance as a result.

Section 10-15-3(B), NMSA 1978 provides as follows:

All provisions of the Open Meetings Act shall be enforced by the attorney general or by the district attorney in the county of jurisdiction. However, nothing in that act shall prevent an individual from independently applying for enforcement through the district courts, provided that the individual first provides written notice of the claimed violation to the public body and that the public body has denied or not acted on the claim within fifteen days of receiving it. A public meeting held to address a claimed violation of the Open Meetings Act shall include a summary of comments made at the meeting at which the claimed violation occurred.

We recommend that the BCC deny Mr. Schannauer's claimed violation for the following reasons.

The County complied with legal notice standards specific to County ordinances, and its agendas for the BCC meetings on May 31, 2022, and July 12, 2022, and the Planning Commission meeting on June 16, 2022, complied with the letter and the spirit of the Open Meetings Act.

County ordinances are subject to specific notice statutes requiring that the title and general summary of the ordinance be published before the ordinance is considered for final passage. *See, e.g.,* NMSA 1978, § 4-37-7; NMSA 1978, 3-21-14 (a majority of board members may order publication of title and general summary of a proposed ordinance in a newspaper of general circulation within the county at least once a week for two weeks prior to the meeting of the board at which the ordinance is proposed for final passage; the style and form of the ordinance shall be determined by the board). The style and form of the ordinance is determined by the BCC. *Id.* The date and time of the meeting at which the ordinance is to be considered shall also be published. *Id.*

It is a well-established principle of statutory construction in New Mexico that a specific provision relating to a particular subject will prevail over a more general statute, absent a clear expression of legislative intent to the contrary. *See State v. Santillanes*, 2001-NMSC-018, ¶ 7, 130 N.M. 464, 27 P.3d 456; *State v. Cleve*, 1999-NMSC-17, P17, 127 N.M. 240, 980 P.2d 23. Therefore, the specific statutes governing the noticing of county ordinances control over any general specificity standard that the general Open Meetings Act might otherwise impose. In other words, if the County's legal notice complies with the specific statutes governing the legal notice of proposed county ordinances, the County complies with the Open Meetings Act when it lists the title of the proposed ordinance about which it gave specific legal notice on relevant agendas.

In this case, the County published notice of the Ordinance *six* times prior to final adoption by the Board. In addition to including the title of the Ordinance, each of the legal notices stated that the Ordinance “would also amend Appendix A, Part 2, Definitions, of the SLDC to amend the Commercial Solar Energy Production Facility definition” (Exhibit B.) This put anyone interested in Commercial Solar Energy Production Facilities on notice to inquire further. *Miles v. Bd. of County Comm’r*, 1998-NMCA-118, ¶ 18, 125 N.M. 608, 964 P.2d 169, cert. denied, 126 N.M. 107, 967 P.2d 447 (“we can infer from the statute that a ‘general summary’ need only inform the public generally, without specific conditions or any particular detail, and that, within reasonable limits, it is incumbent upon the public to exercise diligence to apprehend what might be included in the body of the proposed ordinance and take appropriate action to educate itself”).

We did not locate any New Mexico cases establishing a standard to judge the specificity of items of business on the agenda of public meetings subject by the Open Meeting Act.¹ The text of the Open Meetings Act itself does not go into detail on how specific an agenda must be. Rather, the Act simply states that “[m]eeting notices shall include an agenda containing a list of *specific items of business* to be discussed or transacted at the meeting or information on how the public may obtain a copy of such an agenda.” NMSA 1978, § 10-15-1(F) (Emphasis added.)

The Office of Attorney General’s Open Meetings Act Compliance Guide (2015) does provide guidance, as follows: “The requirement for a list of specific items of business ensures that interested members of the public are given *reasonable notice about the topics a public body plans on discussing or addressing at a meeting*. A public body *should avoid describing agenda items in general, broad or vague terms*, which might be interpreted as an attempt to mislead the public about the business the public body intends to transact.” (Emphasis added.) The Compliance Guide offers the following example.

“The agenda for a school board meeting contains the following items of business:

1. Old Business
2. New Business
 - a. vending machines in the cafeteria
 - b. personnel matters

Under item 1, the board discusses and acts on three contracts. Under item 2(a), the board discusses and votes to allow vending machines in the middle school cafeteria. Under item 2(b), the board dismisses the director of the district’s administrative office and reorganizes the remaining staff positions. The board’s vote under item 2(a) is proper. In contrast, the board’s actions under items 1 and 2(b) violate the Act because those items were not listed as “specific items of business” on the

¹ Mr. Schannauer cites to the case of *State ex rel Salazar v. Humble Oil & Ref. Co.*, 1951-NMSC-059, 55 N.M. 395, 234 P.2d 33, to support his request that the County void Ordinance No. 2022-05; however, this case deals with a constitutional provision that applies to the Legislative Department, Article IV, Section 16, and does not address the Open Meetings Act or its requirements. The Supreme Court of New Mexico has made clear that Article IV, Section 16 of the New Mexico Constitution does not apply to local public bodies. In *City of Clovis v. North*, 1958-NMSC-077, 64 N.M. 229, 327 P.2d 305 and *State ex rel. Ackerman v. City of Carlsbad*, 39 N.M. 352, 47 P.2d 865, the Supreme Court of New Mexico explicitly held that municipal ordinances, and by extension county ordinances, need not be entitled under the provisions of Article IV, Section 16 of the New Mexico Constitution. *Salazar* is further distinguishable because, unlike Article IV, Section 16, the statutes governing legal notice of proposed County ordinances requires a general summary of the proposed ordinance’s content in addition to its title. Here, the pre-adoption notice specifically notes that the Ordinance would amend the definition of Commercial Solar Energy Production Facility.

agenda, as required by the Act. Items 1 and 2(b) are described in such general and vague terms that they do not give the public a reasonably clear idea about the actions the board intended to take at the meeting.”

Comparing the Attorney General’s example with the instant case, the Planning Commission and BCC agendas at issue do not contain broad characterization of business, such as “Old Business” or “personnel matters”. Rather, each of the agendas provided the specific title of the Ordinance under consideration by the public bodies, legal notice of which was published six times prior to final consideration. The fact that the Ordinance’s title appeared on the agendas for the May 31, 2022, July 12, 2022, and June 16, 2022, meetings is sufficient to comply with Section 10-15-1(F).

The Notice’s challenge to the title and required legal notice of the Ordinance misses the mark in several other respects.

First, while not specifically mentioning the amendment to the Commercial Solar Energy Production Facility definition, the Ordinance’s title gives clear notice that the ordinance concerned solar facilities. Anyone interested in solar facilities – which increasingly include battery energy storage systems (“BESS”) – was thus on notice to inquire further.

Second, any member of the public exercising the diligence our courts have held is required would have readily obtained additional information about the proposed amendment to the definition of Commercial Solar Energy Production Facility. The materials attached to the agendas for the BCC meetings on May 31, 2022 and July 12, 2022, and the Planning Commission meeting on June 16, 2022, did, in fact, identify the amendment to the “Commercial Solar Energy Production Facility” definition. These materials included the clean drafts of Ordinance 2022-05 (Exhibits C, E, and G), the redline versions of the Ordinance 2022-05 (Exhibits D, F, and H), and the staff slide presentations attached to the agendas for the June 16, 2022 Planning Commission meeting and the May 31, 2022 BCC meeting (Slide #5 on Exhibits I and J).

Why was the commercial solar definition changed?

While not related to the Open Meetings Act, Mr. Schannauer raises a question about why the commercial solar was changed, implying that the amendment was motivated to benefit a specific conditional use permit application. That is not the case.

Renewable energy projects frequently include BESS as a component. Accordingly, County staff recommended that the definition of both Commercial Solar Energy Production Facility and Community Solar Facility include language to the effect that such facilities “may store” electricity. This language was included to avoid any arguable ambiguity over whether either type of facility could include storage.

Ultimately, the amendment to Commercial Solar Energy Production Facility may be much ado about nothing. Even if the “and may store” language was stricken from the definition of Commercial Solar Energy Production Facility, the Land Use Administrator’s opinion is that storage would be allowed under the prior definition. BESS are often an integral element of a solar production facility, as are fire suppression systems, roads, security systems, electrical lines, and other elements, none of which need to be included in the definition to be allowed as part of a facility.

Recommendation

Deny the claimed violation of the Open Meetings Act. For the BCC's convenience, below is a potential motion:

Proposed Motion for Agenda Item No. 11(B): With regard to the regular meetings of the Board of County Commissioners held on May 31, 2022 and July 12, 2022, and the Planning Commission meeting held on June 16, 2022, I move to deny Mr. Ashley Schannauer's claim that the meetings violated the Open Meetings Act for the reasons stated in the County Attorney's August 22, 2023 memorandum to the Board and direct the County Attorney to inform Mr. Schannauer of this decision.

Exhibits

- Exhibit A – Notice of Open Meetings Act Violation and Exhibits
- Exhibit B – Legal Notices for the Ordinance
- Exhibit C – Draft Ordinance attached to agenda for May 31, 2022 BCC meeting
- Exhibit D – Redline of Draft Ordinance attached to agenda for May 31, 2022 BCC meeting
- Exhibit E – Draft Ordinance attached to agenda for June 16, 2022 Planning Commission meeting
- Exhibit F – Redline version of Draft Ordinance attached to agenda for June 16, 2022 Planning Commission meeting
- Exhibit G – Draft Ordinance attached to agenda for July 12, 2022 BCC meeting
- Exhibit H – Redline version of Ordinance attached to agenda for July 12, 2022 BCC meeting
- Exhibit I – Staff Slide Presentation attached to agenda for May 31, 2022 BCC meeting, specifically for Item 4.B in the agenda
- Exhibit J – Staff Slide Presentation attached to agenda for June 16, 2022 Planning Commission meeting, specifically for Item 6.E in the agenda