

**Service by Email:**

August 14, 2023

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Re: Notice of Violation and Invalid Action Under New Mexico Open Meetings Act and Request for Moratorium

Dear County Manager Shaffer and County Attorney Young:

This is a Notice, pursuant to Section 10-15-3(B) of the New Mexico Open Meetings Act (OMA).<sup>1</sup> The Notice alleges that the Board of County Commissioners (Board) and the County Planning Commission violated the OMA in meetings held on May 31, 2022 (Board), June 16, 2022 (Planning Commission), and July 12, 2022 (Board) when they took actions on the 2022 Community Solar Ordinance (Ordinance 2022-05).<sup>2</sup>

Over a series of three meetings in May-July 2022, the Board and the Planning Commission changed the then-current definition of Commercial Solar Energy Production Facility in the County's Sustainable Land Development Code (SLDC) to accommodate the battery storage facilities in the 96 MW 800 acre proposed Rancho Viejo Solar Energy Project. The then-current definition made solar photovoltaic (PV) projects eligible for Conditional Use Permits in certain zoning districts, including the district at issue here. But battery storage projects were not eligible. The SLDC defined a Commercial Solar Energy Production Facility as "a renewable energy production facility that uses sunlight to generate energy for sale or profit."<sup>3</sup>

The Board and the Planning Commission accomplished the definitional change by burying it in the unrelated Community Solar Ordinance which established siting standards for the much smaller 5 MW solar plants that qualify as Community Solar facilities. Without identifying the Ordinance's action as an amendment of the then-current definition of Commercial Solar Energy

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<sup>1</sup> NMSA 1978, Section 10-15-3(B).

<sup>2</sup> The Community Solar Ordinance, Ordinance No. 2022-05, is attached as Exhibit 1.

<sup>3</sup> See excerpt of 2016 SLDC, attached as Exhibit 2.

Production Facilities, the Community Solar Ordinance referenced the definition as “a renewable energy production facility that uses sunlight to generate, and may store, energy for sale or profit,”<sup>4</sup> adding the phrase “and may store” to the original definition. The Community Solar Ordinance was adopted most directly in response to the competitive process for the selection of a statutorily limited number of Community Solar projects recently established by the Public Regulation Commission (PRC) on March 30, 2022.

The published agendas for the Board and Planning Commission meetings provided notice to the public of only the newly established provisions relating to the Community Solar measures. No notice was provided of the revised definition of Commercial Solar Energy Production Facilities, which would make battery storage eligible as a Conditional Use. The County omitted the notice despite recent fires at battery storage facilities operated by AES Corporation (AES), the applicant for the Conditional Use Permit that the County was trying to accommodate. The AES incidents included an April 2022 fire at a 10 MW AES battery storage facility in Chandler, Arizona,<sup>5</sup> and an April 2019 explosion in a 2 MW battery storage facility in Surprise, Arizona.<sup>6</sup>

The ultimate result was that the approval of the Community Solar Ordinance made the battery storage facilities in the proposed Rancho Viejo Solar Energy Project eligible for approval through the County’s Conditional Use Permit process.

The County’s omission of notice violates the New Mexico Open Meetings Act and renders invalid the revised definition and the eligibility of battery storage facilities as a potential Conditional Use.

**Please bring this to the attention of the Board and the Planning Commission and respond as to the County’s intentions for further action within fifteen days as provided in Section 10-15-3(B) of the Open Meetings Act.**

Before the County considers further the siting of Commercial Solar Energy Production Facilities, it should review their fire risks in an open and transparent process that results in an ordinance with valid siting standards. In the meantime, the County should enact a moratorium on the approval of such facilities. The review during the moratorium should consider whether the risks associated with Commercial Solar Energy Production Facilities require that they be subject to newly developed siting regulations as Developments of Countywide Impact (DCIs) or be regulated as Electric Power Generation Facilities.

The following sections provide more detail about the violation. The final section requests the enactment of a moratorium on the approval of Commercial Solar Energy Production Facilities until the County establishes reasonable siting standards for such facilities in a process that provides for the public input that is required.

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<sup>4</sup> See Community Solar Ordinance, Exhibit 1, at section 2.

<sup>5</sup> AES investigating cause of “thermal runaway” at Arizona site, Energy Storage News, May 4, 2022, Exhibit 3.

<sup>6</sup> New reports look at 2019, Arizona battery explosion, PV Magazine, July 31, 2020, Exhibit 4; Report: Four Firefighters Injured In Lithium-Ion Battery Energy Storage System Explosion – Arizona, Fire Safety Research Institute, July 29, 2020, Exhibit 5.

**1. The timing of the County’s consideration of the AES request and the Community Solar ordinance led to the County’s burying an amendment to the definition of Commercial Solar Energy Production Facilities in the unrelated Community Solar ordinance. The amendment to the Community Solar ordinance facilitated AES’s request for a Conditional Use Permit for the Commercial Solar Energy Production Facility – despite the contemporaneous fire at AES’s battery storage facility in Chandler, Arizona.**

In the months of May through July 2022, two independent reviews by County staff involving solar energy projects in Santa Fe County intersected. The intersection also occurred almost immediately after AES’s April 2022 fire at its Chandler, Arizona battery storage facility and shortly after AES’s April 2019 fire and explosion at its Surprise, Arizona battery storage facility.

First, AES representatives had been engaging since September 2021 with the County staff in the “pre-application review” required by the Conditional Use process in the SLDC for the utility-scale 96 MW Rancho Viejo Solar Energy Project. AES and County staff conducted the Technical Advisory Committee (TAC) review on November 4, 2021, and, on March 29, 2022, the County staff issued the TAC summary letter based on the November 2021 meeting.

**Rancho Viejo Solar Energy Project**

<b>April 19, 2019</b>	<b>AES battery storage fire and explosion, Surprise AZ</b>
September 2021	AES Corporation requests Technical Advisory Committee (TAC) review
November 4, 2021	AES-County TAC meeting
March 29, 2022	County issues TAC summary letter
March 30, 2022	AES-County Staff meeting
<b>April 18-May 1, 2022</b>	<b>AES battery storage fire, Chandler, AZ</b>

Second, the County was separately developing a Community Solar ordinance to determine siting regulations for the small (up to 5 MW) solar facilities authorized under the Community Solar Act of 2021 and the March 30, 2022 PRC regulations implementing the Act.

**Community Solar**

<b>April 19, 2019</b>	<b>AES battery storage fire and explosion, Surprise AZ</b>
April 5, 2021	Community Solar Act signed into law
March 30, 2022	PRC Community Solar Rule
<b>April 18-May 1, 2022</b>	<b>AES battery storage fire, Chandler, AZ</b>

The Community Solar and Rancho Viejo Solar Energy Project reviews converged in the Community Solar Ordinance. After a final meeting between AES and the County staff on May 18, 2022, County staff presented the proposed Community Solar ordinance to the Board of County Commissioners on May 31, 2022. The ordinance, which was ultimately adopted on July 12, 2022, established siting regulations for the small Community Solar facilities.

But, without notice, the County also included in the Community Solar ordinance an unrelated amendment to the SLDC that facilitated the Rancho Viejo Solar Energy Project. The amendment made newly eligible as a Conditional Use the inclusion of battery storage units with Commercial Solar Energy Production Facilities. The Community Solar ordinance, which applies to small solar facilities (up to 5 MW), changed the then-current definition of Commercial Solar Energy Production Facilities, which, at that time, did not allow the battery storage units AES was proposing in its much larger 96 MW utility-scale Rancho Viejo Solar Energy Project.

<b>April 19, 2019</b>	<b>AES battery storage fire and explosion, Surprise AZ</b>
<b>April 18-May 1, 2022</b>	<b>AES battery storage fire, Chandler, AZ</b>
<b>May 18, 2022</b>	<b>AES-County Staff meeting</b>
May 31, 2022	Introduction of Community Solar ordinance to Board of County Commissioners
June 16, 2022	County Planning Commission recommends approval of Community Solar ordinance
July 12, 2022	Board of County Commissioners approves Community Solar ordinance, which includes the revised definition of Commercial Solar Production Facility
October 4, 2022	“Pre-Application Meeting” between AES and San Marcos residents
January 2023	AES files Conditional Use Application for Rancho Viejo Solar Project with County

The May 18, 2022 meeting between AES and County Staff took place only weeks after the fire at AES’s battery storage facility in Chandler, Arizona. As is noted in the table above, the fire started on April 18 and was extinguished to the local fire department’s satisfaction on May 1. It is unclear whether the Chandler fire was discussed at the May 18 meeting, whether AES notified the County staff of the fire or whether the County staff learned of the fire independently. It is also unclear what County staff was told or knew about the April 2019 fire and explosion at the AES battery storage facility in Surprise, Arizona.

The inclusion of battery storage facilities at utility-scale solar farms represented a significant change to the definition of Commercial Solar Energy Production Facilities, especially given the history of fires at AES battery storage facilities and battery storage facilities of other companies. The changed definition was buried without explanation in the unrelated Community Solar ordinance and was adopted without adequate notice to the public in violation of the New Mexico Open Meetings Act.

After the definitional change of Commercial Solar Energy Production Facilities on July 12, 2022, AES proceeded with the “Pre-Application Meeting” required by the SLDC with residents on October 4, 2022 and filed an Application for a Conditional Use Permit for the Rancho Viejo Solar Energy Project in January 2023. AES omitted any mention in the Environmental Impact

Report submitted with its Application of AES's own history of battery storage fires or similar fires at other sites.

## **2. The County's violation of the New Mexico Open Meetings Act**

### **a. The County's amendment of the definition of a Commercial Solar Energy Production Facility in the new ordinance for Community Solar Facilities violated the New Mexico Open Meetings Act.**

The battery storage component of the Rancho Viejo Solar Energy Project should not be eligible for consideration as a Conditional Use because the language "and may store" was added to the SLDC's definition of Commercial Solar Energy Production Facility in violation of the New Mexico Open Meetings Act.

The New Mexico Open Meetings Act requires that meetings of public bodies, such as the Board and Planning Commission, provide public notice of meetings and that the notices shall include an agenda containing a list of specific items of business to be discussed or transacted at the meeting. The Act also requires that, except for emergency matters, a public body shall take action only on items appearing on the agenda.<sup>7</sup> Further, the Act states that "[N]o resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be valid unless taken or made at a meeting held in accordance with the requirements of NMSA 1978, Section 10-15-1."<sup>8</sup>

The Compliance Guide for the Open Meetings Act published by the New Mexico Attorney General states that each agenda must contain a list of specific items to be discussed or transacted at the meeting. The descriptions should not mislead the public about the business the public body intends to transact:

The agenda must contain a list of "specific items" of business to be discussed or transacted at the meeting. 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. This is an especially important consideration when a public body intends to act on an agenda item.<sup>9</sup>

The SLDC, as adopted in 2016, provided that a Commercial Solar Energy Production Facility could be sited in a number of zoning districts, including the Rural Fringe zone at issue here, if an

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<sup>7</sup> NMSA 1978, 10-15-1(F). The Open Meetings Act defines "emergency" as "unforeseen circumstances that, if not addressed immediately by the public body, will likely result in injury or damage to persons or property or substantial financial loss to the public body." Id.

<sup>8</sup> NMSA 1978, 10-15-3.

<sup>9</sup> A Compliance Guide for New Mexico Public Officials and Citizens, Open Meetings Act, NMSA 1978, Chapter 10, Article 15, Eighth Edition 2015, at p. 17, Commentary 3, attached as Exhibit 6.

applicant could prove, on a case-by-case basis, that a project satisfies the standards for a Conditional Use Permit in Chapter 4 of the SLDC. But the SLDC, as enacted in 2016, defined “Commercial Solar Energy Production Facility” as “a renewable energy production facility that uses sunlight to generate energy for sale or profit.”<sup>10</sup> The SLDC definition did not include battery storage facilities.<sup>11</sup>

In May-July 2022, however, the County attempted to amend the definition to make battery storage facilities eligible for siting as a Conditional Use when combined with Commercial Solar Energy Production Facilities. But, instead of accomplishing the amendment in a straightforward process that identified the amendment as referring to the then-current definition of the term in the SLDC, the County attempted to bury the amendment in an independent and unrelated Community Solar Ordinance.

The County considered the proposed Community Solar Ordinance in three meetings:

-- The May 31, 2022 meeting of the Board in which the County staff presented the proposed ordinance to the Board and the Board referred the proposed ordinance to the Planning Commission for review;

-- The June 16, 2022 meeting of the County Planning Commission in which the Planning Commission heard a presentation from County staff and voted to recommend the proposed ordinance for the Board’s final approval; and

-- The July 12, 2022 meeting of the Board in which the Board finally adopted the Community Solar ordinance.

The agendas for each meeting included only the title of the Community Solar Ordinance,<sup>12</sup> which was specific but in fact limited in its description of what the Ordinance accomplishes. The title identified the subject matter of the Ordinance as pertaining solely to standards for Community Solar Facilities. The title indicated that it was adding a definition of “Community Solar,” but it did not mention any changes to the then-current definition of Commercial Solar Energy Production Facility.

The title described three specific purposes of the Community Solar Ordinance:

1. To add a definition of Community Solar to the SLDC;

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<sup>10</sup> The SLDC included the following definition: “Commercial Solar Energy Production Facility: is a renewable energy production facility that uses sunlight to generate energy for sale or profit.” It did not include “and may store.”

<sup>11</sup> The SLDC also flatly prohibited the siting of electric power generating facilities in Rural Fringe zoning districts. Electric power generation facilities were and are currently allowed only in rural and industrial zones and only as conditional uses in those areas. SLDC Use Matrix, Appendix B.

<sup>12</sup> See agendas for the May 31, 2022 Board meeting, the June 16, 2022 Planning Commission meeting and the July 12, 2022 Board meeting, attached as Exhibit 7.

2. To add a new Section 10.25 to address standards for Community Solar facilities;  
and

3. 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.

**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**

The specificity is misleading in that it suggests that those are the only topics to be considered. None of the agendas for these three meetings provided any indication that the Community Solar ordinance was amending an existing and unrelated Commercial Solar Energy Production Facility definition for the unrelated purpose of adding storage as a permissible component of a Conditional Use application.

The facts here rebut the presumption of validity that normally applies to the actions of public bodies.

Accordingly, based on the legal standards required in the New Mexico Open Meetings Act, the definitional change to the definition of Commercial Solar Energy Production Facility should be declared void.<sup>13</sup>

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<sup>13</sup> The New Mexico Supreme Court in *State ex rel Salazar v. Humble Oil & Ref. Co.*, 1951-NMSC-059, 55 N.M. 395, 234 P.2d 339, held that a legislative Act with a title that was explicit about the specific amendments it was making to existing statutes was invalid with respect to additional amendments that were not identified in the title:

{81} It is noted that the title of the amendment is not phrased in general or broad terms but is very restrictive and specifies it is to amend Secs. 1, 2 and 20 of Ch. 103 of the Session Laws of 1937. But the act itself goes further than the title and including a specific and important amendment to Sec. 4 of Ch. 103 of the Session Laws of 1937. This amendment, which is in no way shown or referred to in the title of the 1949 act, is the last section, that is, Sec. 4 of Ch. 65 of the Session Laws of 1949, which very materially amended Sec. 4 of the Session Laws of 1937.<sup>13</sup>

{82} The title of the amending act could have been in general terms and yet would have been sufficient but here there was an attempt to amend specifically by pinpointing in the title of the amending act of 1949 the sections in the 1937 act which were to be changed and amended. The title of the 1949 amending act certainly was misleading, because the act itself went far beyond anything revealed by the title when it amended Sec. 4.<sup>13</sup>

The decision in *State ex rel Salazar v. Humble Oil & Ref. Co.*, was based on a provision in the New Mexico Constitution which states that “The subject of every bill shall be clearly expressed in its title, and no bill embracing more than one subject shall be passed except general appropriation bills and bills for the codification or revision of the laws; but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not so expressed shall be void.” NM Const. Art. IV, section 16. The provision does not apply to ordinances, but the

**b. The Community Solar ordinance amended the definition of Commercial Solar Energy Production Facility without indicating that it was doing so.**

In addition to the misleading nature of the agendas for the meetings at issue here and the misleading nature of the title of the Community Solar Ordinance, the text of the Community Solar Ordinance was and is misleading. The text of the Ordinance does not clearly indicate that the ordinance is re-defining the term Commercial Solar Energy Production Facility to allow such facilities to include battery storage units. The County did not follow the standard practice of underlining amendments to ordinances and legislation or to specify word-for-word the language that is being amended. A person reading the ordinance would have to do historical research to determine what is being amended, whether the amendment is significant and what its impact might be.

The Community Solar Ordinance contained a statement of the definition of a Commercial Solar Energy Production Facility, and the definition, as stated, would operate to amend the then existing definition of such a facility – without actually saying so. Nothing in the ordinance – either its title or text – indicated that the Community Solar ordinance was amending the then-existing definition of Commercial Solar Energy Production Facility in Appendix A of the SLDC.

The Community Solar Ordinance states that it is amending Appendix A of the SLDC to “include the following definition,” but it includes two definitions:

2. Appendix A of the SLDC is hereby amended to include the following definition:

**Community Solar Facility:** is a facility governed by the 2021 New Mexico Community Solar Act (as may be amended) that generates, and may store, electricity by means of a solar photovoltaic device; subscribers to the facility receive a bill credit for the electricity generated in proportion to the subscriber's share of the facility's kilowatt-hour output.

**Commercial Solar Energy Production Facility:** is a renewable energy production facility that uses sunlight to generate, and may store, energy for sale or profit.

While the ordinance is expressed in the singular, i.e., that it is adopting “the following definition,” the ordinance goes on to “include” what appear to be two definitions. The ordinance, however, does not acknowledge that the SLDC at the time already had a definition of Commercial Solar Energy Production Facility, nor does it state that the ordinance is amending that definition. The ordinance also does not state what the amendment entails. Since the ordinance establishes regulations for Community Solar facilities, the singular reference (i.e., “the

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analogy is clear. The specificity of the title of the Community Solar ordinance did not give the public any notice about the amendment to the definition of Commercial Solar Energy Production Facilities that added the opportunity to site storage facilities. The public was not made aware of the definitional change, and it lacked a meaningful opportunity to participate in the County's review of the change.



following definition . . .”) suggests that the Ordinance was establishing the Community Solar Facility definition, and likely that the definition of Commercial Solar Energy Production Facility was an existing definition that was being provided for comparison purposes. Indeed, the title of the ordinance states only that it is adding a definition of “Community Solar.” The title does not mention “Commercial Solar Energy Production Facility.”

By researching the history of the SLDC, however, a reader can eventually find that the SLDC included since 2016 a definition for Commercial Solar Energy Production Facility. Comparing the existing definition to the definition in the Community Solar ordinance, the reader could discern that the Community Solar ordinance includes the new phrase “and may store” that was not included in the then current definition in the SLDC.

**Definition per the 2016 SLDC:**

**Commercial Solar Energy Production Facility:** is a renewable energy production facility that uses sunlight to generate energy for sale or profit.

**Definition as stated in the 2022 Community Solar Ordinance:**

**Commercial Solar Energy Production Facility:** is a renewable energy production facility that uses sunlight to generate, and may store, energy for sale or profit.

A standard practice for amendments of ordinances and legislation is to set forth the new definition with the changes underlined to note the amendments. Thus, the County should have underlined the phrase “and may store” to note the amendment.

Further, the Community Solar ordinance’s failure to identify the phrase “and may store” as an amendment to an existing definition for a Commercial Solar Energy Production Facility contrasts sharply with the same ordinance’s treatment of a different amendment to the SLDC. The language in section 4 of the ordinance states specifically that it is amending Section 8.11.3.5.2 of the SLDC and it includes the exact language being added.

4. Section 8.11.3.5.2 is hereby amended by deleting “or” from subparagraph j; replacing the “.” in subparagraph k with “; or”; and adding the following new subparagraph l:
  - “l. location of and procedure for approving and installing a community solar facility.”

The Community Solar Ordinance’s obscure description of its attempt to amend existing provisions of the SLDC was misleading and suggests that the County was not interested in and possibly wished to avoid highlighting the Commercial Solar Energy Production Facility amendment.

I discovered the difference between the 2016 and 2022 definitions of Commercial Solar Energy Production Facility only by accident. I initially searched the internet for a copy of the SLDC and

found its original version as of 2016. The 2016 definition did not include battery storage. But later I read the March 20, 2023 letter from the President of the San Marcos Association to the SLDC Hearing Officer which referenced a different definition that included the language “and may store.”<sup>14</sup> Through a public records request and a review of County ordinances adopted since 2016, I eventually located the 2022 Community Solar Ordinance and found that the new definition appeared to have been adopted there. The public should not be required to conduct such a level of detective work to discover what its local government is doing.

**c. The notices published in the Legal Notices section of the newspaper’s Classified postings do not excuse the County’s failure to include a sufficient Open Meetings Act notice in the agendas for the Board and Planning Commission meetings.**

Section 3-17-3 of the New Mexico Municipal Code requires the County to publish a legal advertisement in a newspaper of general circulation in the county when it considers a proposed ordinance. The notice is required to include the title and subject matter of the proposed ordinance. The notice is required to be published at least two weeks prior to consideration of final action upon the ordinance, except in emergencies.<sup>15</sup>

Section 3-17-5 also requires, after adoption of an ordinance, that the ordinance be published in its entirety or by the title and a general summary of the subject matter contained in the ordinance. The ordinance is not effective until five days after it has been published.<sup>16</sup>

A Legal Notice for the proposed 2022 Community Solar ordinance was published in the Santa Fe New Mexican on June 9, 20 and 27 before the June 16 Planning Commission and July 12 Board meetings. A further Legal Notice was also published after the Board approved the Community Solar ordinance at the July 12 Board meeting. The second Legal Notice for the adoption was published in the Santa Fe New Mexican on July 26 and August 2. Both Legal Notices included the same limited title that was contained in the meeting agendas discussed above, but to comply with the notice requirement of the Municipal Code, it also included a “general summary.” The “general summary” stated that the ordinance, among other things, included an amendment to Appendix A, Part 2 of the SLDC (Definitions) “to amend the definition of ‘Commercial Solar Energy Production Facility.’”<sup>17</sup>

However, the newspaper notices required by the Municipal Code do not supersede or replace the Open Meetings Act requirement for notice in meeting agendas or excuse the County’s failure to provide notice in the agendas for the May 31 Board meeting, the June 16 Planning Commission meeting and the July 12 Board meeting. The Open Meetings requirement is a separate and independent requirement with its own purpose.

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<sup>14</sup> See March 20, 2023 letter from Dennis D. Kurtz to Santa Fe County Hearing Officer, attached as Exhibit 8.

<sup>15</sup> NMSA 1978, 3-17-3.

<sup>16</sup> NMSA 1978, 3-17-5.

<sup>17</sup> The Legal Notices are attached as Exhibit 9.

It is reasonable to ask why the County more specifically described in the Legal Notices that the Community Solar Ordinance was amending the current definition of Commercial Solar Energy Production Facility when it considered it unnecessary to do so in the meeting agendas. It is also reasonable to ask why the County did not revise the agenda notices for the June 16 Planning Commission meeting and the July 12 Board meeting after it published the first Legal Notice that mentioned the amendment to the Commercial Solar Energy Production Facility definition. Agenda notices with the titles of proposed ordinances are more likely to be noticed by interested members of the public than the legal notices in the classified sections of a newspaper.

In addition, the General Summary in the Legal Notice still leaves a reader with the task of figuring out what the amendment to the definition of Commercial Solar Energy Production Facility is. As noted above, neither the Legal Notice nor the text of the Community Solar ordinance identifies what the amendment is.

**d. I have not been able to learn why the County included a change to the definition of Commercial Solar Energy Production Facility in the Community Solar Ordinance.**

I filed a public record request with the County on July 16, 2023 (Request 23-594) to learn why the County included the definitional change for Commercial Solar Energy Production Facilities in the Community Solar Ordinance, but I have not received any responsive documents. On July 26, I was informed that my request was “excessively burdensome and broad,” that the County needs additional time to respond and make available records in response to the request, that a “rolling production will occur,” and that a County representative will be in touch with me within the next 2 weeks to update me on the status of my request. On August 7, I wrote to request information on the status of the County’s response. On August 11, I received 10 non-responsive documents, mostly emails, and was told again that a County representative will be in touch with me within the next 2 weeks to update me on the status of my request.

I have the following questions:

1. Why did the County obscure its attempt to change the definition of Commercial Solar Energy Production Facility to make battery storage facilities eligible for a Conditional Use Permit? Was it attempting to facilitate the Rancho Viejo Solar Energy Project, and, if so, why did it do so in such a covert fashion?
2. What was discussed between AES and County staff in their meetings of November 4, 2021, March 29, 2022 and May 18, 2022? Did AES inform the County of its battery storage fires in April 2019 and April 2022? Did they discuss the need to change the SLDC’s definition of Commercial Solar Energy Production Facility to make battery storage eligible for a Conditional Use Permit?
3. 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?

4. Did AES discuss the April 2022 Chandler battery storage fire with County staff in their May 18, 2022 meeting with County staff before the staff introduced the Community Solar Ordinance to the Board on May 31, 2022?

5. If the County was not aware of the April 2022 AES battery storage fire before the County approved the Community Solar Ordinance in July 12, 2022, why should the County not pause the process now with a 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?

6. Why did AES omit any mention of its history of battery storage fires and explosion in the Environmental Impact Report it submitted with its January 2023 Application?

**3. The County should enact a moratorium on the issuance of Conditional Use Permits for Commercial Solar Energy Production Facilities.**

**a. The ongoing Conditional Use process is not a substitute for the review the County should undertake to develop siting standards Commercial Solar Energy Production Facilities.**

The most important issue here – and the question the County never addressed – is whether battery storage units should be eligible for a Conditional Use Permit in a Rural Fringe zone or whether the fire risks of a solar facility with battery storage units require that such projects be regulated as Developments of Countywide Impact (DCI) under Chapter 11 of the SLDC or as Electric Power Generation Facilities which are allowed only in industrial districts. The piecemeal Conditional Use review process the County is currently undergoing is not a substitute for the review that the County should have conducted before it made battery storage eligible as a Conditional Use as a component of a Commercial Solar Energy Production Facility.

The County should adopt a moratorium on the approval of Conditional Use Permits for Commercial Solar Energy Production Facilities to consider this question. The result could be either a determination that Commercial Solar Energy Production Facilities with battery storage units should be designated as DCIs, similar to Oil and Gas Drilling and Production activities and Mineral Resource Extraction and Processing activities, or a determination that Commercial Solar Energy Production Facilities should be regulated and sited as Electric Power Generation Facilities.

Commercial Solar Energy Production Facilities certainly have the attributes that the SLDC finds as warranting DCI designation:

Developments of Countywide Impact (DCIs) are those developments that have potential for far-reaching effects on the community, place major demands on public facilities and the County's capital improvement plan and budget, and have the potential to affect the environment and public health, safety, and welfare beyond the impacts on immediately neighboring properties, including adverse

noise, light, odor and vibration; explosive hazards; traffic congestion; and burdens on County emergency response services.<sup>18</sup>

Designation of an activity as a DCI enables the County to develop activity-specific siting and other regulations to protect the public interest.

Commercial Solar Energy Production Facilities with battery storage units also have fire risks similar to those of Electric Power Generation Facilities. Those fire risks should warrant subjecting them to the same siting criteria as Electric Power Generation Facilities and make them eligible for Conditional Use Permits only in zoning districts (mostly industrial zones) where Electric Power Generation Facilities are potentially permitted.

**b. The County lacks siting regulations for Commercial Solar Energy Production Facilities.**

The SLDC contains no provisions that address the siting of Commercial Solar Energy Production Facilities, including facilities that contain battery storage units. The amendment to the SLDC that attempted to authorize the inclusion of storage units with Commercial Solar Energy Production Facilities did not include any standards to consider when reviewing applications for conditional use permits. The SLDC excludes Commercial Solar Energy Production Facilities from residential zoning districts, but it provides for their siting in other districts on a case-by-case basis as a Conditional Use. The only standard, however, that the County has to rely on in the Conditional Use process 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.”<sup>19</sup>

By contrast, with the adoption of the Community Solar Ordinance, the County has more detailed standards for 5 MW Community Solar facilities than for much larger Commercial Social Energy Production Facilities such as the 96 MW project of the AES proposal.

Further, the County has adopted land use preferences for Community Solar projects but not for Commercial Solar Energy Production Facilities. Under the Community Solar Ordinance, Community Solar projects are authorized in all zoning districts, but the County adopted further siting criteria in Resolution 2022-54 at the same time as it adopted the 2022 Community Solar Ordinance. The Resolution specifies the criteria the County will use to determine whether to send Letters of Support to the PRC to help influence the PRC in its selection process for the limited number of Community Solar projects authorized by the Legislature in the Community Solar Act of 2021.<sup>20</sup>

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<sup>18</sup> SLDC, section 11.1.

<sup>19</sup> SLDC, section 4.9.6.5.

<sup>20</sup> The ordinance determined that Community Solar projects would be a permitted use in all zoning districts (without the need for a conditional use permit) and established standards “to accommodate the needs of community solar development and to only require the minimum standards to attempt to minimize the adverse effects on neighboring properties.” The standards established restrictions on issues, such as fencing, access roads, reseeding of disturbed areas, the management of weeds and plant materials to reduce fire risks, setbacks and decommissioning.

Two of the Resolution's criteria include the land use preferences that projects should be sited on brownfield, built environment, degraded land, or rooftop locations and that projects should not be located on land with healthy, intact ecosystems.<sup>21</sup> The 96 MW AES commercial project, which far exceeds the maximum allowable 5 MW size of Community Solar facilities, conflicts with the siting preferences for the much smaller Community Solar facilities. In fact, there are no siting standards or preferences for Commercial Solar Energy Production Facilities.

**c. The County did not consider the fire risks of battery storage units when it adopted the Community Solar Ordinance in July 2022.**

Battery storage units were first authorized in the 2022 Community Solar Ordinance, but the presentations to the Board and Planning Commission and the ensuing Board and Planning Commission discussions did not discuss fire risks.

The County staff prepared memos that recommended approval of the Community Solar Ordinance for the Board's May 31, 2022 meeting, the Planning Commission's June 16, 2022 meeting and the Board's July 12, 2022 meeting. None of the memos mentioned the fire risks associated with battery storage facilities, including the recent battery storage fire at AES's Chandler, Arizona facility.

The Staff memos were substantially similar. They stated that the ordinance was implementing the 2021 Community Solar Act and the PRC's 2022 Community Solar Rule, that community solar projects help implement the County's goals for the development of solar energy and that the ordinance was being proposed to establish conditions for the siting of such projects. The initial memo for the May 31 Board meeting did not mention the proposed amendment to the definition of Commercial Solar Energy Production Facility. The memos for the June 16, 2022 Planning Commission meeting and the July 12, 2022 Board meeting each mentioned that the proposed ordinance included an amendment to the definition of Commercial Solar Energy Production Facility, but they did not provide any additional information. They did not describe what the amendment was, why it was being proposed, what its significance was and any risks that might be associated with the addition of storage facilities to the Commercial Solar Energy Production Facility definition in the SLDC. Significantly, too, although the presentations and discussions addressed permissible siting for Community Solar facilities, there was no discussion of siting for Commercial Solar Energy Production Facilities or the risks of battery storage in siting decisions.<sup>22</sup>

The transcripts of the May 31, 2022 Board meeting,<sup>23</sup> the June 16, 2022 Planning Commission meeting<sup>24</sup> and the July 12, 2022 Board meeting at which the Community Solar ordinance was

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<sup>21</sup> Santa Fe County Resolution 2022-54, attached as Exhibit 10.

<sup>22</sup> See Staff memos of May 12, June 16 and June 29, 2022, attached cumulatively as Exhibit 11.

<sup>23</sup> Excerpt of transcript for May 31, 2022 Board meeting, attached as Exhibit 12.

<sup>24</sup> Excerpt of transcript for June 16, 2022 Planning Commission meeting, attached as Exhibit 13.

approved<sup>25</sup> indicate that there was no discussion of the fire risks of battery storage facilities. There were only brief mentions of the change to the then-current Commercial Solar Energy Production Facility definition in the May and June meetings. The discussions focused instead on Community Solar issues.

The transcript of the June 16, 2022 Planning Commission meeting, however, does include a public comment from AES representative Jonathan Moore thanking the County staff for its cooperation with the ordinance. Mr. Moore did not mention the AES fires in Arizona or the change to the Commercial Solar Energy Production Facility definition which allowed AES to include battery storage facilities in its eventual application for a Conditional Use permit for AES's proposed Rancho Viejo solar project.<sup>26</sup>

**d. There was no public input on the fire risks associated with battery storage units during the May-July 2022 consideration of the Community Solar Ordinance.**

Finally, a moratorium is appropriate in view of the lack of notice provided to the public regarding the authorization of storage units for Commercial Solar Energy Production Facilities when the County adopted the Community Solar Ordinance. The discussion above indicates that the lack of notice violated the Open Meetings Act and invalidated the attempted definitional amendment to authorize battery storage for the commercial facilities.

**e. Legal authority for moratorium**

The County has the legal authority to enact a moratorium ordinance prohibiting approvals of applications for conditional use permits for Commercial Solar Energy Production Facilities. That authority exists under the County's general police powers to protect public health and safety – the same authority that supports the County's zoning regulations.

The test for whether any updated standards can be applied after the issuance of a moratorium is whether AES has a "vested right" by virtue of the filing of its January 2023 Application. And AES's January 2023 Application fails the test.

There are two prongs that must be met for a "vested right" to exist. First there must be approval by the regulatory body, and second, there must be a substantial change in position in reliance thereon. See *Brazos Land, Inc. v. Board of County Commissioners of Rio Arriba County*, 1993-NMCA-013, 115 N.M. 168, 848 P.2d 1095<sup>27</sup>; *Miller v. Board of County Commissioners of Santa*

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<sup>25</sup> Excerpt of transcript for July 12, 2022 Board meeting, attached as Exhibit 14.

<sup>26</sup> Exhibit 13 at p. 13.

<sup>27</sup> In *Brazos*, a developer submitted an application for preliminary plat approval to Rio Arriba County on June 4, 1985. The subdivision, "Lakes on the Chama," was, at that time, subject to regulations revised and promulgated as of October 8, 1982. On July 8, 1985, the State Engineer's Office rendered an adverse opinion finding that Brazos's water proposals did not conform with county regulations. The relevant statute stated that the Board of Commissioners then "shall hold a public hearing devoted solely to determining whether or not the subdivider's water proposals conform with county regulations." § 47-6-11(H)(3). Instead of holding a public hearing or issuing a decision on Brazos's plat, the Board, on October 5, 1985, enacted a moratorium on all subdivision approvals for which preliminary plat approval had not been received prior to the date the moratorium went into effect. Initially, the

*Fe County*, 2008-NMCA-124, 144 N.M. 841, 192 P.3d 1218. AES fails the “vested rights” test, because it has not yet received the County’s approval of its Application and it has not substantially changed its position based upon any approval.

Indeed, Santa Fe County has adopted moratorium ordinances in the past. In particular, the County adopted a series of moratorium ordinances starting in 1996, to deal with a water emergency in Eldorado. The first was Ordinance No. 1996-4: Ordinance Declaring a Water Emergency within the Service Area of Eldorado Utilities. The ordinance stated that “no applications for new land divisions, master plans and subdivisions will be accepted by the Santa Fe County Land Use Administrator or his staff and no pending applications for land divisions, master plans or subdivisions will be acted upon by the Santa Fe County Land Use Administrator, for any property within Eldorado Utilities’ Service Area.” Subsequent ordinances were later enacted which further limited development in the service area of Eldorado Utilities due to the water emergency. Those moratoriums were upheld against a property owner who claimed to have benefited from a subdivision approval, which the County determined had expired. *Miller v. Board of County Commissioners of Santa Fe County*, 2008-NMCA-124, 144 N.M. 841, 192 P.3d 1218.

The County has a sound legal and factual basis to adopt a moratorium on the approval of Conditional Use Permit requests for Commercial Solar Energy Production Facilities to conduct a review of the risks of such utility-scale facilities, and AES’s Application should be reviewed or re-filed under any new standards that address the potential fire risks of battery storage.

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moratorium was to run until March 31, 1986, but it was later extended until June 15, 1986, in order to allow the Board time to develop new, more restrictive county subdivision regulations, which addressed the issues of density controls and groundwater contamination.

The New Mexico Court of Appeals rejected Brazos challenge to the County’s actions and upheld the County’s moratorium, adopting the two-prong vested rights approach used in other jurisdictions:

{12} In other jurisdictions, the determination of whether a new zoning ordinance will be applied retroactively is analyzed under a vested rights approach. 1 Robert M. Anderson, *American Law of Zoning* § 6.06 (3d ed. 1986); *Raley v. California Tahoe Regional Planning Agency*, 68 Cal.App.3d 965, 137 Cal.Rptr. 699 (1977). There are two prongs that must be met for a vested right to exist. First there must be approval by the regulatory body, and second, there must be a substantial change in position in reliance thereon. *Id.* Here, Brazos received no assurance to expect approval and no actual approval of the application. Nor was there any substantial reliance or change in position. Therefore, Brazos had no vested right and is subject to the Board's 1986 Regulations.

\* \* \*

{30} Where the Board enacted a moratorium for the purpose of, inter alia, promulgating more stringent waste disposal requirements for subdivisions, and where such requirements and restrictions reasonably advanced a legitimate state interest in the safety and health of the inhabitants of Rio Arriba County, we hold that the Board's moratorium was a valid exercise of its police power and its express and implied authority. See *Abraham v. City of Mandeville*, 638 F. Supp. 1108 (E.D.La.1986) (city council's moratorium on issuance of building permits was a fair exercise of its police power), *aff'd*, 814 F.2d 657 (5th Cir.1987); see also *Sun Ridge Dev., Inc. v. City of Cheyenne*, 787 P.2d 583 (Wyo.1990) (moratorium on building permits was a reasonable response to drainage problems and city's use of a moratorium was a valid exercise of its police power).

*Brazos Land Inc.*, 1993 NMCA 013, at paras. 12, 30.



#### 4. Standing

My wife and I are residents of the Eldorado subdivision in Santa Fe County. Eldorado is located east of the site where AES seeks to build an 800 acre solar farm, a four acre complex of lithium-ion battery storage facilities, a substation and a gen-tie line connecting the solar farm, battery storage facilities, and substation to a transmission line of Public Service Company of New Mexico.<sup>28</sup>

Since the facilities AES seeks to build are not permitted as of right in the zoning district in which it wants to build the facilities, AES has filed an Application for a Conditional Use Permit with the County. Before issuing such a permit, the County's Sustainable Land Development Code (SLDC) requires AES to demonstrate and the County to determine 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."<sup>29</sup>

Utility-scale lithium-ion batteries as proposed by AES, however, create a demonstrated fire risk. In 2021, the Electric Power Research Institute (EPRI), an independent nonprofit organization that conducts research and development relating to the generation, delivery and use of electricity for the benefit of the public, published a report titled "Lessons Learned: Lithium Ion Battery Storage Fire Prevention and Mitigation – 2021." The report found that, over the four years preceding the report, at least 30 large-scale battery energy storage sites (BESS) with lithium-ion storage systems globally experienced failures that resulted in destructive fires.<sup>30</sup>

Starting in 2019, EPRI collaborated with 16 participating utilities in the "Battery Storage Fire Prevention and Mitigation—Phase 1" collaborative project. EPRI concluded that proper design and maintenance can regularly prevent the persistency of failures due to certain causes, but "no currently available mitigation technology can prevent an internal cell defect from causing a thermal runaway event once that cell leaves the factory. Regardless of the cause, these incidents demonstrate the possibility of fire, release of flammable gases, and explosion."<sup>31</sup>

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<sup>28</sup> The exact distance between the perimeter of the battery storage area and Eldorado is unclear. Citizen measurements place the distance at one mile or less. The Environmental Impact Report submitted by AES with its January 2023 Application states that the Eldorado subdivision is located 1.9 miles east of the "main solar facility," but AES did not submit a clear map drawn to scale that showed the distance between the eastern perimeter of the 800-acre site and the edge of the Eldorado subdivision. The AES review also states that "the gen-tie [line] and substation border the subdivision to the north." Environmental Impact Report for the Rancho Viejo Solar Project, January 2023, at 3-69. A more recent map provided informally to a group of residents measures a 1.45 mile distance between the edge of the battery storage facilities and the nearest house in Eldorado. This more recent map also shows a closer distance between the project and the Gallina Arroyo which forms a greenbelt in Eldorado that would provide a fast corridor for a fire to reach additional homes in Eldorado. It has also been reported that above-ground natural gas facilities are present between the perimeter of the Rancho Viejo project and Eldorado.

<sup>29</sup> SLDC, section 4.9.6.5.

<sup>30</sup> Lessons Learned: Lithium Ion Battery Storage Fire Prevention and Mitigation – 2021, Electric Power Research Institute, at 2, attached as Exhibit 15.

<sup>31</sup> Id. (Emphasis added).

EPRI reported that there is no “silver bullet” to eliminate the risks of battery failures and fires and that the issue of safety depends upon the reviewer’s subjective willingness to accept the risks:

Testing for energy storage performance or failure modes is a quantitative, objective process, but safety combines objective probabilities with subjective assessment of the acceptability of ever-present hazards. As one of the site hosts indicated, there is no “silver bullet” to address battery energy storage fire and explosion hazards, but rather many solutions are needed. Though the risk of a fault in an ESS may be low, certain issues can never be truly eliminated, and the tolerance to such risk is up to the storage asset’s owner and operator. Interpreting objective test results and assigning a value to the severity of a failure incorporate the reviewers’ perspectives. In addition, different experts may focus on various threats and treat them with unique attention or concern based on their familiarity and personal experience.<sup>32</sup>

AES lithium-ion battery facilities have been involved in at least one fire since the 2021 date of the EPRI report and a previous fire and explosion in 2019. Both occurred in Arizona. And the Arizona facilities involved in the fires (i.e., a 10 MW Chandler facility and a 2 MW facility in Surprise) are much smaller than the 48 MW facility proposed here.

The risk of fire at the AES site proposed here creates an unacceptable risk to me, my wife and other residents of Eldorado. AES proposes to site the project in grass lands which can rapidly transmit a fire at the site to neighboring residents. According to the Western Fire Chiefs Association and others, wildfires, especially in grasslands, can travel at up to 14 miles per hour.<sup>33</sup> At 14 miles per hour, a grass fire starting at the battery site could reach homes 2 miles away in less than 10 minutes. The area is also notorious for its wind speeds, which can accelerate the progress of such a fire.

## **5. Conclusion and requests**

No one doubts that renewable energy and storage technologies are important to address the problems of global warming and climate change, and that New Mexico can contribute to this effort. But it is also important as these technologies are deployed to site them in a way that is open and transparent and that employs careful consideration of public safety and the local natural environment. An 800 acre project is large. It translates into a 1.25 square mile project, which, as a square, is slightly more than one mile on each side. The proposed siting is on dry, windy grassland shoehorned in among three residential communities that would be at risk if a fire breaks out at the battery storage facility. It is the county’s responsibility to consider these and other issues before approving the construction of Commercial Solar Energy Production Facilities.

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<sup>32</sup> Id., at 4 (Emphasis added).

<sup>33</sup> How Fast Do Wildfires Spread? Western Fire Chiefs Association, November 1, 2022, attached as Exhibit 16.

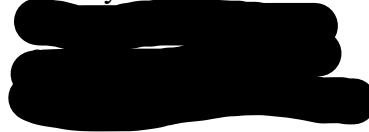
**The County should give the siting of utility-scale renewable energy projects at least as much careful consideration as it has given much smaller community solar projects.** It should take the opportunity to prevent a fire-risk problem that is clearly foreseeable. As the EPRI report discussed above concluded, the question is how tolerant we are willing to be of the risk that the Rancho Viejo project will create for the San Marcos, Eldorado and Rancho Viejo communities. AES’s battery storage fires at much smaller battery storage facilities in Arizona in April 2019 and 2022 suggest that the risk is substantial.

**The County should explain why it acted in a way that obscured the approval of the Commercial Solar Energy Production Facility definitional change just weeks after the April 2022 AES battery storage fire in Arizona.** The County’s addition of “and may store” to the SLDC’s definition of Commercial Solar Energy Production Facility in actions taken in May-July 2022, on which AES relies to include battery storage units within its Conditional Use request, is invalid as a violation of the New Mexico Open Meetings Act.

**The County should also adopt a moratorium on the approval of Conditional Use Permit requests for utility-scale Commercial Solar Energy Production Facilities.** The County should use the moratorium to conduct a review of the risks of such facilities and establish reasonable siting standards. AES’s Application should then be reviewed or re-filed under these more-considered standards.

Respectfully submitted,

*/s/ Ashley C. Schannauer*  
Ashley C. Schannauer

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