# MEMORANDUM

**(CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT COMMUNICATION)**

**Date:** **January 31, 2025**

**To:** **Santa Fe County Planning Commission; Alexandra Ladd, Growth Management Director; Jordan Yutzy, Land Use Administrator; Dominic Sisneros, Building & Development Supervisor**

**From:** **Roger L. Prucino, Assistant County Attorney II**

**Via:** **Walker Boyd, County Attorney**

**Subject:** **Planning Commission Meeting, February 3, 2025; Rancho Viejo Limited Partnership, et al.; Case No. 24-5200**

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## SUMMARY:

It is the opinion of the Santa Fe County Attorney's Office that the proposed AES Rancho Viejo solar energy project is properly treated as a "commercial solar energy production facility" and not as a "gas or electric power generation facility," as those phrases are used in the Sustainable Land Development Code (Ordinance No. 2016-09; hereafter "SLDC") Use Matrix (Appendix B), and as defined in Appendix A of the SLDC.

## BACKGROUND:

Rancho Viejo Limited Partnership, Rancho Veijo Solar, LLC, and AES Clean Energy Development, LLC (jointly, the "Applicants") have applied for a conditional use permit ("CUP") to construct and operate a 684-acre solar energy production facility, including a battery energy storage system ("BESS") on an 828-acre parcel of vacant land. The parcel lies to the east of NM Highway 14, to the west of the Eldorado community, and is approximately two miles south of the Rancho Viejo community. The parcel is within the Rural Fringe zoning district (RUR-F).

Applicants made their submittal as a CUP application because the use described as "commercial solar energy production facility" is identified as a conditional use in the Rural Fringe zoning district. The term "commercial solar energy production facility" is defined in the SLDC as "a renewable energy production facility that uses sunlight to generate, and may store, energy for sale or profit." SLDC,

Appendix A. County staff determined that the application was properly submitted for approval as a condition use.

The San Marcos Association ("SMA" or the "Association") has standing in this proceeding. SMA opposes the application. SMA has taken the position that the proposed project is a "gas or electric power generation facility" for the purpose of applying the SLDC Use Matrix, and that the project is therefore prohibited within the RUR-F zoning district. As explained below, we believe the Association's analysis is flawed, and that the project for which Applicants seek approval is most accurately described as a commercial solar energy production facility. For that reason, we believe staff is properly bringing this case to the Planning Commission as a CUP application.

**ANALYSIS:**

Within the SLDC Use Matrix, under the heading of "Utilities," there are two separate uses, one titled "gas or electric power generation facility" and the other "commercial solar energy production facility." We can conclude, therefore, that when adopting the SLDC, the County Board of County Commissioners ("BCC") affirmatively elected to treat solar facilities differently than other types of energy production facilities. There is no record to explain why the BCC made that decision. They might have felt that solar facilities are not as visually disruptive; or that solar facilities don't present the same risks/hazards as similar facilities utilizing fossil fuels; or maybe they just wanted to promote the adoption and use of solar energy production facilities as a matter of public policy, as identified in Chapter 7 of the Sustainable Growth Management Plan ("SGMP").

Ultimately, the BCC's reasoning is not germane. They made the affirmative choice to distinguish between solar and other energy production facilities; they incorporated that distinction into the SLDC through App. B; and that distinction is binding on all parties tasked with interpreting and enforcing the SLDC.

It may well be that the solar facility at issue is both a gas or electric power generation facility and a commercial solar energy production facility. The latter category appears to be a subset of the former[1]. This is not a unique circumstance that should cause any concern. It is relatively common that a general rule is in place, but with exceptions or modifications for specific situations or circumstances. In those instances, the longstanding and universally-followed legal doctrine is that the more precise and more specific guideline controls. In fact, New Mexico's appellate courts have addressed this very issue.

In *State ex rel. Dept. of Human Services v. Manfre*, 1984-NMCA-135, our Court of Appeals stated: "It is the rule in New Mexico that specific statutes control over general statutes." Id. at ¶10. Similarly, in *Lopez v. Barreras*, 1966-NMSC-209, our Supreme Court stated: "A statute enacted for the primary purpose of dealing with a particular subject prescribing terms and conditions covering the subject matter supersedes a general statute which does not refer to that subject although broad enough to cover it." Id. at ¶12.

So in this case, which involves a proposed solar energy production facility, staff properly applied the more specific standard in the Use Matrix for commercial solar energy production facilities, rather than

[1] See the Association's Exhibit 4 in its submittal package. Within the Land-Based Classification Standards of the American Planning Association (a system recognized by the SLDC, Gas or electric power generation facilities are assigned the code number 6400. A subcode – number 6460 – is assigned to solar and other forms of energy facility.

the more broad standard for gas or electric power generation facilities. It just makes sense, and it is the legally proper approach.

In an effort to avoid what we think is the obvious and correct conclusion, SMA argues that, because of its size, the proposed facility is not a "commercial solar energy production facility." The Association states that "[u]tility-scale facilities are prohibited in the Rural Fringe zoning district." That is a quote from its March 20, 2023 letter to the SLDC Hearing Officer (SMA Exhibit 8, Attachment 1). In fact, the SLDC does not address, or even mention, utility-scale facilities, and it certainly does not distinguish between utility-scale solar facilities and other commercial solar facilities. The SLDC definition of "commercial solar energy production facility" is quite broad: "a renewable energy production facility that uses sunlight to generate, and may store, energy for sale or profit." That definition makes no mention of the size of such facilities. If you are a renewable energy production facility; and if you utilize sunlight to generate energy; and you intend to sell or profit from the energy you are producing, you are a commercial solar energy production facility. And that definition very accurately applies the Applicant's proposed project. As stated above, a common-sense reading of the clear and unambiguous language of the SLDC leads to the unavoidable conclusion that the proposed project is, in fact, a commercial solar energy production facility

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Staff's position that Applicant's project is properly considered as a conditional use permit was supported by County Manager Shaffer's correspondence to Dennis Kurtz, President of the SMA, dated July 24, 2023 and Sept. 12, 2023. SMA Exhibit 8, Attachments 3 and 5.

The Association makes one more effort to avoid the conclusion that the proposed facility is a CSEPF by relying on notes incorporated into a worksheet used by staff in informal discussions with members of the San Marcos community back in 2019 and 2020. See page 7 of SMA's slide presentation. The Association's argument is that the County intended commercial solar energy production facilities to be "neighborhood-scale" facilities, even though the phrase "neighborhood-scale" – like the phrase utility-scale -- is not defined in the SLDC and appears exactly once throughout the entire Code (in reference to neighborhood-scale retail business; SLDC §8.9). Further, the phrase "Neighborhood-Scale renewable energy production facilities" appears in the "Notes" column of each and every use category on the page included in the slide presentation, including the use titled "Large scale wind facility." It is clear that the phrase "neighborhood-scale," in addition to being undefined and therefore meaningless within the SLDC, was not intended to be applied solely or specifically to commercial solar projects. SMA's reliance on a 5 or 6-year old informal worksheet (which has no binding effect whatsoever) in an effort to alter the clear and unambiguous language of the SLDC falls far short of a compelling argument, and staff believes this argument warrants no further consideration by the commission.

**CONCLUSION:**

The San Marcos Association has presented no legitimate basis for concluding that the proposed project – which is a solar energy production facility to be commercially operated – should not be treated as a commercial solar energy production facility for the purpose of applying the SLDC Use Matrix. It is our opinion that staff's determination in this regard is accurate, and that the Planning Commission can and should proceed with its consideration of the CUP application as presented by staff.