

**BEFORE THE BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY**

**CASE NO. 24-5200 & 24-5201**

**RANCHO VIEJO SOLAR, LLC CONDITIONAL USE PERMIT (CUP)**

**RANCHO VIEJO LIMITED PARTNERSHIP, RANCHO VIEJO SOLAR, LLC,**

**AES CLEAN ENERGY DEVELOPMENT, LLC, APPLICANTS**

**RESPONSE IN OPPOSITION TO APPELLANT ASHLEY SCHANNAUER’S RENEWED  
MOTION TO COMPEL DISCOVERY AND MOTIONS FOR CROSS-EXAMINATION  
DIRECTLY BY PARTIES AND TO ESTABLISH A SERVICE LIST**

Rancho Viejo Solar, LLC and AES Clean Energy Development, LLC (“Applicants”) through their attorney Luke Pierpont, respond in opposition to Ashley Schannauer’s *Renewed Motion to Compel Discovery and Motions for Cross Examination Directly by Parties and to Establish a Service List* ( the “Motion”). Mr. Schannauer’s motion is untimely, misstates the law governing discovery and cross examination in quasi-judicial land use hearings, and seeks to convert the quasi-judicial land use hearing process, as set out in the County’s Sustainable Land Development Code (SLDC), into a hearing under the New Mexico rules of civil procedure.

**1. Response in Opposition to Motion to Compel Discovery**

In his Motion to Compel Discovery Mr. Schannauer revives his request to conduct discovery on the Applicants into a range of matters with limited relevance to the Application. This matter was raised before the Santa Fe County Hearing Officer prior to the December 4, 2024, hearing on this matter, and Mr. Schannauer’s request was denied by the Hearing Officer at that time. Hearing Officer Hebert correctly recognized that the SLDC does not provide for discovery in a hearing on a Conditional Use Permit (CUP). Mr. Schannauer’s objection to this procedural ruling by the Hearing Officer should have been fully briefed in his Notice of Intent to Appeal, rather than by filing a motion ten days after the deadline for appeals had run.

As the basis for his revived motion Mr. Schannauer states that he discovered language in the County's Sustainable Growth Management Plan (SGMP) that "states that discovery should be allowed in a Conditional Use Permit proceeding as a matter of due process." Motion at p. 1. While Mr. Schannauer may have only recently discovered this section of the SGMP, the law presumes that Hearing Officer Hebert was aware of the SGMP, which was adopted by Resolution 2015-155 in 2015. *Morningstar Water Users Ass'n v. New Mexico Public Utility Com'n*, 1995-NMSC-62, ¶ 11, 904 P.2d 28, 120 N.M. 579 ("When an agency that is governed by a particular statute construes or applies that statute, the court will begin by according some deference to the agency's interpretation. (Internal citations omitted). Mr. Schannauer's statement that the SGMP requires discovery as a matter of due process misconstrues what the SGMP actually says and ignores New Mexico law on the matter.

The SGMP at Section 14.4.3.3 expressly states that "the Quasi Judicial process will be detailed in the SLDC to ensure that both the applicant and any protestant will have sufficient opportunity for discovery and have equal opportunity to present their case before a hearing Officer." (Emphasis added) The SGMP goes on to list, as goal #3 that the quasi-judicial process will "[a]fford both the applicant and protestants sufficient time for discovery and other aspects of due process."

As described below, the SGMP is a general plan, which is considered a guidance document, and does not have the force of law. However, pursuant to the guidance of the SGMP, the County has adopted rules for quasi-judicial proceedings that are set forth in the SLDC adopted by Ordinance 2016-9. SLDC Section 4.3.2. generally describes CUP application hearings, stating "[q]uasi-judicial discretionary proceedings require a public hearing consistent with the standards of procedural due process as established in Section 4.7.2." Section 4.7.2 goes

on to describe the procedural due requirements which include among other provisions the opportunity for public comment, cross examination through the Chair; presentations by County staff, the applicants, and parties opposing the application; as well as the order of presentations. It is clear that pursuant to the guidance of the SGMP, the County considered what level of discovery was sufficient for a quasi-judicial hearing and accordingly adopted hearing rules in SLDC Section 4.7.2. that accomplish the goals of the SGMP and satisfy the due process requirements of New Mexico law. The procedural rules adopted by the SLDC do not provide for the type of expansive and overbroad written discovery that Mr. Schannauer has propounded to the Applicant.

In addition to misreading the SGMP, Mr. Schannauer also misconstrues the legal effect of the SGMP and ignores New Mexico precedent that directly undermines his claims. *West Bluff Neighborhood Ass'n v. City of Albuquerque*, directly addresses whether a general plan, such as the SGMP, has the force of law, stating:

the legislature has assigned to the master plan the role of guide, enabling municipal planning commissions to use reasonable discretion in applying its provisions to the actual decision-making processes involved in municipal development.

*W. Bluff Neighborhood Ass'n v. City of Albuquerque*, 2002-NMCA-75, ¶ 12, 132 N.M. 433, 50 P.3d 182 (partially overruled on other grounds by *Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-5, 133 N.M. 97, 61 P.3d 806). *W. Bluff* goes on to state “such a plan was advisory, had no regulatory effect, and did not interfere with the City's final decision-making authority in regard to annexation or bind the City to any specific procedures.” Similarly, the SGMP does not bind the County to any specific procedures that are not enumerated in the SLDC. It is the SLDC that sets forth the County’s procedures for a quasi-judicial hearing and it is the SLDC that represents

the County's codification of a process that is sufficient to allow the parties to discover the relevant facts and provides sufficient procedural due process to the parties.

*W. Bluff* goes on to address the specific language relating to Section 3-21-5(A) that Mr. Schannauer relies on to claim that the SGMP creates the inherent authority and duty to allow discovery in this matter. Again, *W. Bluff* directly contradicts Mr. Schannauer's claim.

We understand the "in accordance with" language of Section 3-21-5(A) to require that land use planning regulations and decisions be guided by a city master plan and generally be consistent with a city master plan. However, we do not infer from that one phrase that the legislature intended master plans to be strictly adhered to in the same manner as a statute, ordinance, or agency regulation. *Id* at ¶ 15.

As a general plan in the same category as a master plan, the legislature did not intend the SGMP to be strictly adhered to in the same manner as an ordinance, like the SLDC.

Finally, written discovery is not required to satisfy due process. Quasi-judicial hearings need not follow "the same evidentiary and procedural standards applicable to a court of law, [but] must adhere to fundamental principles of justice and procedural due process." *W. Bluff*, 2002-NMCA-075, ¶ 46. In administrative proceedings due process is flexible in nature and may adhere to such requisite procedural protections as the particular situation demands. *State ex rel. Battershell v. City of Albuquerque*, 1989-NMCA-045, ¶ 17, 108 N.M. 658, 777 P.2d 386. The New Mexico Supreme Court has explained that "interested parties in a quasi-judicial zoning matter are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter . . . and to a record made and adequate findings executed." *Albuquerque Commons P'ship v. City Council of Albuquerque*, 2008-NMSC-025, ¶ 34, 144 N.M. 99, 184 P.3d 411 (internal citations excluded). "The issue is one of procedural fairness and predictability that is adaptable to local conditions and capabilities. The use of terms

such as cross-examination, fair and impartial tribunal, and the like, need not be interpreted in the same sense as it might be in an attempt to reform the judicial process.” *Id* ¶ 34.

Recently the New Mexico Court of Appeals held that a land use hearing that provided the public notice of the proceedings, allowed for two minutes of public comment, and did not allow for cross examination did not violate the public’s due process rights, holding that “[w]e agree with the City that over the course of the entire proceeding, including the Planning Commission hearings, Residents had a meaningful opportunity to be heard and that as a result, the procedures used by the Governing Body in these circumstances did not create a risk of erroneous deprivation of Respondents’ rights. *Shook v. Governing Body of City of Santa Fe*, 2023-NMCA-086, ¶ 31, 538 P.3d 466.

## **2. Response in Opposition to Motion to allow Parties to Directly Cross-Examine Witnesses.**

Like his motion to compel discovery, Mr. Schannauer’s motion to allow direct cross examination of witnesses seeks to impose more stringent procedural rules on the County’s conduct of its quasi-judicial hearings than are required by law. The Applicants do not dispute that cross examination is provided for in the SLDC hearing rules, however it is also clear that those same rules contemplate that cross examination questions will be “submitted to the chair of the Board... who will in turn direct questions to the witness.” SLDC Section 4.7.2.1. Mr. Schannauer’s argument to the contrary is not supported by the plain language of the SLDC, which does not make any mention of direct cross examination by the parties. Similarly, the Board’s Rules of Order cited by Mr. Schannauer do not specify the manner or conduct of cross examination, only the requirement that a party notify the chair of the board of its desire to examine a witness before that witness is excused.

The way the Planning Commission conducted cross examination during the hearing on the Application comports both with SLDC Section 4.7.2.1 and due process. As described in *Albuquerque Commons* “[t]he issue is one of procedural fairness and predictability that is adaptable to local conditions and capabilities. The use of terms such as cross-examination, fair and impartial tribunal, and the like, need not be interpreted in the same sense as it might be in an attempt to reform the judicial process.” *Albuquerque Commons P’ship* at ¶ 34. The parties to this matter and the public have all had multiple opportunities to be heard, to present evidence, and to cross examine both the County staff and the Applicant. *Id.* The process adopted by the Planning Commission was a reasonable application of the SLDC that balanced the requirements of procedural fairness with the demands of the particular situation. Notably, the Planning Commission ran an orderly and efficient hearing over the course of two days, especially considering the number of parties who presented testimony and evidence, the hundreds of members of the public who provided public comment, and the complexity application.

Mr. Schannauer’s complaint that the “procedure did not provide a reasonable or fair opportunity to conduct cross-examination” does not recognize the due process standards that have been articulated by New Mexico Courts and disregards the fact that the Planning Commission was the fact finder and decisionmaker in that hearing. Mr. Schannauer was granted the right to participate as a party in interest, presented testimony, and was entitled to submit cross-examination questions to the Chair of the Planning Commission. Mr. Schannauer’s claims that the Planning Commission did not adequately ask or follow up on his questions seeks to supplant his own view of the evidence for that of the Planning Commission. Motion at p. 4. The Motion lists several questions where the Chair of the Planning Commission either “did not ask the question” or did not follow up on Mr. Schannauer’s question to his standards. None of the

questions listed in the Motion are directly relevant to the Application or the CUP criteria but rather seek information that is outside the scope of the CUP criteria. Rather than a flaw in the process, directing cross examination through the Chair of the Planning Commission allowed the Chair to limit the questioning of the parties to matters that are directly relevant to the CUP Application. The Applicant requests that the Board adopt a similar procedure as the Planning Commission.

Like with the issue of discovery, Mr. Schannauer's objection to the procedures of the Planning Commission are untimely and should have been raised and fully briefed in his Notice of Intent to Appeal, rather than by filing the Motion ten days after the deadline for appeals had run.

The New Mexico Court of Appeals recently held that the lack of direct cross examination in another high-profile land use case before the City of Santa Fe did not violate the public's due process rights. "We disagree that these cases support a conclusion that in order to satisfy due process in all cases, interested parties must be permitted to directly cross-examine witnesses." *Shook*, 2023-NMCA-86, ¶ 28. Like in *Shook*, the interested parties in this case have had multiple opportunities to present evidence and rebut the testimony of others, which New Mexico courts have expressly stated provides adequate procedural protections for interested parties to a land use hearing.

Finally, Mr. Schannauer alleges in his Motion that "County Staff, without the authority to make a decision on behalf of the Planning Commission, decided that cross-examination would be conducted by the Chair of the Planning Commission." Motion at p. 4. Mr. Schannauer offers no evidence or citation to the record to support this claim, and as such it should be rejected without further consideration.

### **3. Response in Opposition to Motion to Establish Mandatory Service List.**

The Applicants are opposed to establishing a service list for this matter. The County's land use hearing process does not adhere to the rules of Civil Procedure as cited by Mr. Schannauer but rather follows the Board's Rules of Order. SLDC Section 4.7.2.1. The Applicant has followed the rules of Santa Fe County governing CUP applications, including producing additional reports and responding to the reports of third-party reviewers, and has delivered all relevant materials to County staff as required. Once delivered to the County staff, the materials have been available to the public, as demonstrated by the Motion itself. As Mr. Schannauer notes he was able to obtain a complete record of the Application, and correspondence of County staff through public records requests. The availability of the records undermines Mr. Schannauer's claims that these filings or communications were "private." Motion at p. 5.

For the foregoing reasons, the Applicants respectfully request that the Board of County Commissioners for Santa Fe County deny Mr. Schannauer's Motion and proceed to conduct the hearings on the Application according to the rules adopted by the County in the SLDC and its Rules of Order as it has done with all other land use applications before it.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Luke Pierpont', with a horizontal line drawn underneath it.

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CERTIFICATE OF SERVICE

I hereby certify that on this date of May 27, 2025, I caused a copy of this Response to be served on the following parties via email:

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