

Attachment 1

November 8, 2024 Motion to Compel Discovery Responses and Supporting Brief

-- Motion to Compel Discovery Responses from Applicants (November 8, 2024) with attached exhibits:

-- Exhibit 1: Discovery Requests to Applicants (October 18, 2024)

-- Exhibit 2: October 7, 2024 to November 7, 2024 email string between Schannauer and AES counsel

-- Brief in support of Motion to Compel Discovery Responses from Applicants (November 8, 2024)

BEFORE THE SUSTAINABLE LAND DEVELOPMENT CODE
HEARING OFFICER OF SANTA FE COUNTY

IN THE MATTER OF THE AUGUST 30, 2024)	
APPLICATION OF RANCHO VIEJO)	
SOLAR, LLC AND AES CLEAN ENERGY)	Case No. 24-5200
DEVELOPMENT, LLC FOR A)	
CONDITIONAL USE PERMIT FOR THE)	
RANCHO VIEJO SOLAR PROJECT)	
_____)	

MOTION TO COMPEL DISCOVERY RESPONSES FROM APPLICANTS

This Motion respectfully requests the Hearing Officer to issue an order compelling the Applicants in the above proceeding to provide responses to the attached Discovery Requests to Applicants dated October 18, 2024. In support of this Motion, I state as follows:

1. On October 18, 2024, I sent the attached Discovery Requests to the Applicants.
2. On October 21, 2024, counsel for the Applicants responded with the following

email:

After thorough review of the Santa Fe County hearing procedures, I find no right to discovery in County land use hearings. Our client is committed to providing all information necessary for the County to evaluate its application consistent with the Sustainable Land Development Code but will not be responding to your discovery requests.

3. On October 24, 2024, I sent an email, pursuant to Rule 1-037(A) NMRA, to make a good faith effort to resolve the issue with counsel for the Applicants prior to filing a motion to compel discovery. The email discussed the authority of the Hearing Officer to order discovery in a quasi-judicial proceeding even in the absence of a rule explicitly providing for it.

4. On October 31, 2024, counsel for the Applicants sent an email in which he set forth the Applicants' legal analysis on why discovery should not be allowed in an administrative proceeding. Counsel for the Applicants did not submit a formal pleading.

5. On November 4, 2024, I sent an email to Applicants' counsel offering to narrow the list of discovery requests from 35 requests to 11 requests. I said I continue to believe that the discovery requests are appropriate (i.e., that they seek relevant and probative evidence) and that they would be permitted in a normal civil proceeding. Responses would also shorten the time required for the hearing. But, in the interest of arriving at a good faith resolution of this issue and assuming there will be sufficient opportunity for the cross-examination of witnesses, I asked whether he would agree to respond to the narrower list of the original requests that are not readily answerable in cross-examination.

6. On November 7, 2024, counsel for the Applicants responded.

It is clear that there is no general right to discovery in a land use hearing under the Santa Fe County rules and I am not convinced that due process requires discovery in this case. My clients will not be responding to your requests without any legal requirement to do so.

7. The email string of October 18 through November 7 between myself and counsel for the Applicants is attached as an Exhibit.

8. After reviewing the Applicants' November 7 email, I have further reduced the number of requests I'm seeking to compel to ten, eliminating Discovery Request 1-23.

9. An analysis of the legal right to discovery in administrative proceedings is included in the Brief filed today in support of this Motion. The particularized reasons why the discovery requests at issue here should be ordered are discussed below.

**The health, safety and general welfare of the area
and the potential hazard for fire, panic, or other danger**

10. Section 4.9.6.5 of the Santa Fe County Sustainable Land Development Code (SLDC) states that a hearing on an application for a Conditional Use Permit is subject to a quasi-judicial hearing to determine whether the applicant has satisfied seven criteria:

4.9.6.5 Approval Criteria. CUPs may only be approved if it is determined that the use for which the permit is requested will not:

1. Be detrimental to the health, safety and general welfare of the area;
2. Tend to create congestion in roads;
3. Create a potential hazard for fire, panic, or other danger;
4. Tend to overcrowd land and cause undue concentration of population;
5. Interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements;
6. Interfere with adequate light and air; and
7. Be inconsistent with the purposes of the property's zoning classification or in any other way inconsistent with the spirit and intent of the SLDC or SGMP. (Emphasis added.)

11. Section 3.5.5 of the SLDC authorizes the Hearing Officer to exercise all powers necessary to conduct quasi-judicial hearings.

12. Section 4.7.2.1 of the SLDC and Section V.B of the County's Rules of Order (which are incorporated by Section 4.7.2.1) provide for "parties with standing" to present testimony and conduct cross-examination of witnesses. The legal analysis in the attached brief shows that discovery can be appropriate in administrative agency hearings to enable parties to prepare the testimony and cross-examination prescribed in the agency's procedural rules – even where discovery is not explicitly authorized in the rules. The power is inherent in the authority to conduct the quasi-judicial hearing. Whether discovery should be allowed depends upon a case-by-case analysis of the relevance and probative value of the information sought and the difficulty in obtaining the information through cross-examination. The discussion below provides a more detailed explanation of the relevance and probative value of each of the discovery requests.

13. Discovery in this case will also help provide for a complete record of the complex, factual issue of whether the project will be detrimental to the health, safety and general

welfare of the area and create a potential hazard for fire, panic, or other danger. It would also reduce cross-examination time and provide for a shorter, more efficient hearing.

14. I have made a good faith effort to resolve the issue with opposing counsel prior to filing a motion to compel discovery.

Discovery Requests 1-4 and 1-6:

1-4. Please provide copies of all lease and other agreements among AES, Rancho Viejo Solar, LLC, Warren Thompson, Rancho Viejo Limited Partnership and/or their affiliates pertaining to the proposed Rancho Viejo Solar Project.

1-6. Please provide a copy of the membership agreement among the members of Rancho Viejo Solar, LLC.

Relevance and probative value:

The “Conditional Use Permit Application Report for the Rancho Viejo Solar Project” states that the Report was prepared to support Rancho Viejo Solar, LLC’s Conditional Use Permit (CUP) application to Santa Fe County for compliance with Santa Fe County’s Sustainable Land Development Code (SLDC) and that Rancho Viejo Solar, LLC is proposing to build the Rancho Viejo Solar Project. The Environmental Impact Report similarly refers to Rancho Viejo Solar, LLC. However, AES Corporation or AES Clean Energy are commonly referred to as applicants. The Development Permit Application also names the Rancho Viejo Limited Partnership, of which Warren Thompson appears to be a general partner.

The discovery requests seek to identify the actual applicant(s) so that their ability to construct and operate the project can be examined and verified. Whether Rancho Viejo Solar, LLC is a corporate shell or whether it has the resources to safely construct and operate the project is relevant and probative of the risks it poses to the adjacent properties and their residents. This information is solely within the control of the applicants, and it is unlikely that any witness the applicants present at the hearing will be able to provide the requested documents through cross-examination.

Discovery Request 1-7:

1-7. Please provide a complete, **unredacted** copy of the Hazard Mitigation Analysis submitted with the Conditional Use Permit application for the Rancho Viejo Solar Project, including all exhibits and appendices.

Relevance and probative value:

Large portions of the Hazard Mitigation Analysis submitted with the August 30 Application are redacted as “Confidential Trade Secrets.” The Hazard Mitigation Analysis, however, is one of the key documents that the Applicants refer to in support of

their claim that the project 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 as required by the SLDC's CUP criteria.

AES has redacted key information about the results of the fire testing AES's consultant conducted for the Hazard Mitigation Analysis. The fire testing was performed to provide "a basis for the evaluation of thermal runaway fire propagation and the effectiveness of the fire protection strategy in mitigating potential harmful conditions arising from a thermal runaway event."¹

AES redacted portions of the consultant's summary, including the composition of the gases that were released during the test. And it redacted the entire test report that had been attached to the Analysis. AES provided no support for its trade secret claim.

The complete document, however, is relevant and probative of the project's compliance with the criteria for a CUP – whether the project will be detrimental to the health, safety and general welfare of the area and create a potential hazard for fire, panic, or other danger.

A similar issue arose with the January 2023 application for the Rancho Viejo Solar Project. The 2023 issue involved two Fire Risk Assessments -- one prepared by an AES consultant and the other by AES. In both assessments, AES redacted large amounts of information about the project's risks of fires, explosions and releases of toxic gases that are central to the Conditional Use review here and of critical interest to the public. The assessments redacted information about the chance of accidents and their consequences, including fires, explosions and the expected composition of toxic gases to be released.

In that case, however, AES originally filed unredacted information with the County, and, after a resident filed an IPRA request for the unredacted information, the County and AES collaborated to allow AES to replace its original unredacted filing with the redacted filing. AES claimed that the redacted information constituted trade secrets and sued the County in District Court to prevent the IPRA disclosure. The County did not contest AES's claim, and the District Court entered a preliminary injunction preventing the disclosure. A citizens group, Coalition for Clean Energy, thereafter intervened in the case challenging the trade secret claim, and AES withdrew its trade secret claim agreeing to the County's release of the original unredacted copies.

Several lessons should have been learned from the 2023 controversy.

The first is that it is likely that AES's trade secret claim is overbroad. Indeed, AES promptly agreed to the release of the redacted data in the 2023 materials when challenged in court. And, in the current case, AES has not even attempted to submit a justification for its claim of trade secret status.

¹ Draft Preliminary Hazard Mitigation Analysis, p. 9.

The second lesson is that the required proof of the project's safety must be made available to the public -- even if the information qualifies as a trade secret. The public's interest in transparency is greater than whatever private interests lie in the value of the alleged trade secrets.

Finally, regardless of any information found to constitute a trade secret, the County has the authority to require the disclosure of the information under Section 6.3.1 of the SLDC. Section 6.3.1 of the SLDC states that "[n]o EIR or SRA prepared pursuant to this Chapter that is available for public examination shall require the disclosure of a trade secret, except where the preservation of any trade secret involves a significant threat to health and safety." The redacted information relates to the risks (i.e., fire, explosion, toxic gas) to which the public would be exposed if the Conditional Use Permit is granted. The redacted information should be disclosed to the public.

The document is solely within the control of the applicants, and it is unlikely that any witness the applicants present at the hearing will be able to produce the document during cross-examination.

Discovery Requests 1-8 through 1-10:

1-8. Please provide copies of reports prepared by or for AES that investigate and report on the causes and impacts of the April 2019 and April 2022 fire and explosion incidents in Surprise and Chandler Arizona.

1-9. Please provide a list of claims (and amounts) **submitted** to Arizona Public Service Company (APS), Salt River Project, AES or their insurers for reimbursement or compensation by third parties in response to the April 2019 and April 2022 fire and explosion incidents in Surprise and Chandler Arizona.

1-10. Please provide a list of claims (and amounts) **paid** by Arizona Public Service Company (APS), Salt River Project, AES or their insurers for reimbursement or compensation by third parties in response to the April 2019 and April 2022 fire and explosion incidents in Surprise and Chandler Arizona.

Relevance and probative value:

The historical record of the applicant is an important factor in evaluating whether the project will be detrimental to the health, safety and general welfare of the area and create a potential hazard for fire, panic, or other danger.

The August 30 application, however, is completely silent on AES's record of accidents, including the 2019 explosion and 2022 fire at AES facilities in Surprise and Chandler Arizona. The nature, causes and damages caused by the Arizona accidents are relevant as evidence of the hazards here.

In public forums, AES representatives have minimized the risk that fires at lithium-ion battery storage systems will escape a facility's perimeter. News reports, however, describe personal

injuries to firefighters, business closings and impacts on neighboring residents. The dollar amount of the financial claims and compensation related to AES's accidents is relevant and probative of the potential harms to its neighboring businesses and residents in Santa Fe County.

The information is solely within the control of the applicants, and it is unlikely that any witness the applicants present at the hearing will be able to answer the above questions in detail through cross-examination.

Discovery Request 1-11:

1-11. Please provide Safety Data Sheets (or Material Safety Data Sheet) for the chemicals in the clean agent solution and in the lithium-ion battery units for the proposed Rancho Viejo Solar Project.

Relevance and probative value:

The Safety Data Sheets are federally required documents that describe the hazards associated with hazardous chemicals used and stored at facilities. Thus, the information is relevant and probative of whether the project will be detrimental to the health, safety and general welfare of the area and create a potential hazard for fire, panic, or other danger. The exact identities of the chemicals (and their chemical compounds) that will be used and stored at the proposed facility are solely within the control of the applicants, and it is unlikely that any witness the applicants present at the hearing will be able to produce the documents during cross-examination.

Discovery Request 1-17:

1-17. Reference the following statement on page 3 of the Hazard Mitigation Analysis submitted with the Rancho Viejo Solar Project application.

“2.3 LOCAL CLIMATE CONDITIONS

ASHREA data for the nearest airport at Albuquerque International shows a 1% extreme wind speed of 28.2 mph and 0.4% annual occurrence high temperature of 95.2° F.”

Explain the meaning of the following phrases:

“1% extreme wind speed of 28.2 mph”

and

“0.4% annual occurrence high temperature of 95.2° F.”

Relevance and probative value:

The information requested is included as site-specific data that AES's consultant considered in the Hazard Mitigation Analysis submitted with the August 30 Application.² The response will help indicate whether the data reflects actual conditions at the proposed site. The information is solely within the control of the applicants, and it is unlikely that any witness the applicants

² Draft Preliminary Hazard Mitigation Analysis, p. 3.

present at the hearing will be able to answer the above questions in detail through cross-examination.

Discovery Request 1-26:

1-26. Please provide the “Bespoke Fire and Deflagration” test results and updates referenced in Section 4.2, page 9, of the Draft Preliminary HMA Report.

Relevance and probative value:

Section 4.2 of AES’s Hazard Mitigation Analysis states that “Bespoke” fire and deflagration testing was conducted for the project:

Test results are being processed and updates will be provided in the final version of the HMA report. The results will be evaluated and compared to local ambient conditions.³

The term “bespoke” suggests that the testing incorporates some degree of project- and site-specific conditions. The results are relevant and probative for the same reasons as the fire testing results requested in Discovery Request 1-7.

Discovery Request 1-33:

1-33. Provide a copy of the contract with Terracon for the April 16, 2024 Geotechnical Engineering Report that is attached to the Environmental Impact Report as Appendix D and the contract for the preliminary geotechnical engineering report, dated December 21, 2022, that is referenced in the April 16, 2024 report.

Relevance and probative value:

The contracts sought in the Discovery Request are relevant and probative to show a tangled relationship between the applicants and Terracon Consultants, a consulting engineering company that was hired by both Santa Fe County and AES for work related to the January 2023 and August 2024 Conditional Use Permit applications. Terracon appears to have had a conflict of interest in the work that it has been simultaneously contracted to perform for the County and the applicants. The relationship taints the reliability of the information submitted in the application at issue here, and calls into question AES’s knowledge of the apparent conflict of interest.

In accordance with Santa Fe County Resolution 2023-093, Santa Fe County hired Terracon in May 2023 to prepare an *independent*, third-party, technical review of the Environmental Impact Report submitted with the January 2023 application for the Rancho Viejo Solar Project and to provide expert testimony in the CUP proceedings on the application. Terracon submitted a Draft report to the County on July 10, 2023. Terracon does not appear to have provided the expert

³ Draft Preliminary Hazard Mitigation Analysis, p. 9.

testimony under the May 2023 contract, but it is not clear whether or when the contract has been terminated.

Prior to the May 2023 contract with the County, Terracon performed for AES a preliminary geotechnical engineering report, dated December 21, 2022, for the January 2023 application. Then, in June 2023, while Terracon was performing its work for the County as a presumed independent reviewer and expert witness under the May 2023 contract, Terracon submitted a June 6, 2023 proposal to AES for additional geotechnical work.

On July 10, a Terracon report, which was prepared for the County, suggested the need for a geotechnical study:

Has a geotechnical investigation and report been completed for the project?

While a brief statement describing the geologic conditions in the analysis area is provided, no geotechnical investigation or report has been completed for the Project. It is noted in the EIR that geotechnical investigations will be conducted to determine subsurface conditions, soil properties, and thermal and electric resistivity prior to construction, as the design process evolves.⁴

AES thereafter hired Terracon to prepare the April 16, 2024 geotechnical study that is included in the Environmental Impact Report for the August 2024 Conditional Use Permit Application. The Applicants also included in the Application an 11-page table that lists each of the comments in Terracon's July 10, 2023 report on the January 2023 Application and provides the Applicants' responses to each comment.

The contracts requested in the Discovery Request are relevant to and probative of the conflicted relationships among Terracon, Santa Fe County and AES. They will show the dates each contract was executed and the amounts. The results may show where Terracon's primary loyalty lay and the extent and direction in which Terracon's work is tainted. They may also show the extent of AES's knowledge of the conflicts. The contracts will not be available on cross-examination.

⁴ Draft Technical Review of Environmental Impact Report for Rancho Viejo Solar Project, Terracon Consultants, July 10, 2023, p. 4.

WHEREFORE, for the foregoing reasons, I respectfully request that the Hearing Officer issue an order granting the above Motion and requiring the Applicants to promptly answer the attached Discovery Requests to Applicants and for such other and further relief as the Hearing Officer deems just and proper.

Date: November 8, 2024

Respectfully submitted,
/s/ Ashley C. Schannauer
ASHLEY C. SCHANNAUER

12 Mariano Road
Santa Fe, NM 87508
Schannauer21@outlook.com
(505) 920-0326

Attached Exhibits:

Discovery Requests to Applicants, October 18, 2024
Email string October 18 – November 7, 2024

SELF AFFIRMATION

I, Ashley C. Schannauer, upon penalty of perjury under the laws of the State of New Mexico, affirm and state that the foregoing Motion for Leave to Intervene is true and correct based on my personal knowledge and belief.

DATED November 8, 2024.

/s/ Ashley C. Schannauer
ASHLEY C. SCHANNAUER

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion to Compel Discovery

Responses from Applicants to the following by email on this date:

Hearing Officer Marilyn Hebert	lynhebert@q.com
County Attorney Jeffrey S. Young	jyoung@santafecountynm.gov
Roger Prucino, Esquire	rprucino@santafecountynm.gov
Dominic Sisneros, Case Manager	djsisneros@santafecountynm.gov
Luke Pierpont, Esquire	Luke@EgolfLaw.com
Brian Egolf, Esquire	Brian@EgolfLaw.com
Selma Eikelenboom	s.eikelenboom@ifscolorado.com

Date: November 8, 2024

/s/ Ashley C. Schannauer
ASHLEY C. SCHANNAUER
12 Mariano Road
Santa Fe, NM 87508
Schannauer21@outlook.com
(505) 920-0326

BEFORE THE SUSTAINABLE LAND DEVELOPMENT CODE
HEARING OFFICER OF SANTA FE COUNTY

IN THE MATTER OF THE AUGUST 30, 2024)	
APPLICATION OF RANCHO VIEJO)	
SOLAR, LLC AND AES CLEAN ENERGY)	Case No. 24-5200
DEVELOPMENT, LLC FOR A)	
CONDITIONAL USE PERMIT FOR THE)	
RANCHO VIEJO SOLAR PROJECT)	
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TO: Luke Pierpont, Esq.
Brian Egolf, Esq.
123 W. San Francisco Street, Second Floor
Santa Fe, New Mexico 87501
(505) 986-9641
Luke@EgolfLaw.com
Brian@EgolfLaw.com
Counsel for Applicants

DISCOVERY REQUESTS TO APPLICANTS
SET ONE

Instructions and Definitions

INTRODUCTION.

These Discovery Requests ask you to answer the following Interrogatories and produce all documents which are responsive in any way to the Interrogatories or to the Requests for Production. If you have any questions about any of the Interrogatories or Requests for Production or Inspection, please contact the undersigned.

DEFINITIONS:

1. Unless more specifically noted, **“AES”**, refers to AES Corporation, AES Clean Energy Development LLC, Rancho Viejo Solar, LLC, Fluence Energy, Inc, and all their parent, subsidiary, affiliate and predecessor corporations and partnerships, departments and divisions, and includes, but is not limited to all attorneys, officers, consultants, agents, employees, directors, representatives, and officials of such entities.
2. **“And/or”** will be construed disjunctively or conjunctively as necessary so that the scope of these interrogatories is as broad as possible and includes any information which might be construed to be outside their scope.
3. **“Agreement”** means any contract, written or oral, or any non-contractual understanding.

4. **“Communication”** is to be construed broadly and includes, but is not limited to any oral statement, dialogue, telephone conversation, discussion or any conversation between or among persons by any means whatsoever.

5. To **“describe”** means to relate as completely as possible each and every act, omission, incident, event, condition, circumstance, or thing relating directly or indirectly to the subject of the description, including all pertinent dates.

6. The term **“document”** is to be construed broadly and liberally, includes **“correspondence,”** and means every recording or reproduction, including visual or auditory recordings or reproductions, of any information including, but not limited to letters, messages, notices, memoranda, photographs, drawings, telegrams, handwritten notes, books, periodicals, pamphlets, exhibits, pleadings, calendars, canceled checks, schedules, tax returns, telegrams, telexes, charts, maps, minutes, logs, graphs, financial statements, computer tapes, computer printouts, computer disks, and microfilm, and any other records of conversations, meetings, conferences or other communications as well as reproductions or copies of the documents if the original is not available so long as the copy is an identical duplicate of the original document.

7. **“Employee”** includes your employees, consultants or agents, including but not limited to independent and/or consulting firms retained by you, before and after the time this case was docketed by the Commission.

8. **“Explain”** means to make known in detail, to make clear the cause or reason of and account for each, act, omission, incident, event, condition, circumstance, decision and/or thing relating directly or indirectly to the subject of the explanation, including all pertinent dates.

9. **“Identification of a document”** means to state, with respect to each document as appropriate: (a) the date of the document, (b) the title of the document, (c) by whom and for whom the document was written or prepared, (d) to whom the document was addressed or delivered, (e) the general subject matter of the document, (f) the identity of the person having custody of the original of the document if a copy is provided and (g) if any document was once in your possession but is not now, the present location of the document and the name and address of the person who has possession of the original of the document.

10. **“Identification of a person”** means stating his full name, business address, telephone number, present position and prior connection or association with any party to the proceeding.

11. **“Person”** means every natural person, corporation, partnership, association, joint venture, cooperative, municipality, commission, governmental body, agency or other applicable entity.

12. **“Records”** includes the singular and the plural and means any regular, formal or informal, official or unofficial, memorandum, document or written preservation of any events, actions taken or rejected, decisions, and details relating to the subject matter of the interrogatory and your response. A reproduction or copy of the original will suffice only if the original is not

available and if the copy is an identical duplicate of the original. A statement of the substance of the record will suffice only if a copy of the original is not available. If you submit either a copy of the original or a statement of the substance of the record, please explain in detail why the original or a copy is not available.

13. Whenever appropriate in order to bring within the scope of each Interrogatory or Request for Production all responses which might otherwise be considered beyond the scope of the Interrogatory or Request for Production: (a) the singular form of a word should be interpreted as plural and the plural form of a word should be interpreted as singular, (b) the use of the verb in any tense will be construed as the use of the verb in any other appropriate tense, and (c) the masculine will be deemed to include the feminine and/or neuter and the feminine and/or neuter will be deemed to include the masculine.

INSTRUCTIONS:

1. Responses shall be served under oath within fifteen (15) days after service of these Discovery Requests.

2. Responses must be signed by the person upon whose personal knowledge responses are based or who helped in any way in formulating the response.

3. For each response, you must identify all persons, including and in addition to the person signing the response, upon whose personal knowledge the response is based or who helped in any way in formulating the response.

4. In making your responses, you must produce all relevant documents and data by attachment or by identifying the documents that relate to your answers. You must also clearly identify each Interrogatory to which the document relates.

5. Please provide an electronic copy of your interrogatory responses in Microsoft Word and responses to document requests in pdf format.

6. These Discovery Requests are continuing in nature, and in the event any information provided in an answer is changed or supplemented by future developments or other factors, you must file appropriate supplemental answers.

7. In answering these Discovery Requests you should furnish all information that is in your possession, custody or control including, but not limited to information from any files, records, or documents in the possession of your attorneys, consultants, staff, accountants, experts, employees, former employees, and other agents.

8. If after exercising due diligence you are unable to answer any Interrogatory or to produce any document requested, in whole or in part, you must explain your inability in detail and you must respond in part where possible.

9. If you object to any Discovery Request, you may serve written objections. An objection must identify the matter objected to and stating with particularity the reasons for the objections. An objection should include copies or complete restatements of the interrogatory or request objected to and a description of the facts and circumstances and the legal authority purported to justify the objection. The service of an objection will not excuse you from answering the remaining Interrogatories or responding to the remaining Requests for Production or any part thereof for which no objection is stated.

DISCOVERY REQUESTS

1-1. Please provide the correct and full legal name(s) of the Applicant(s) for the Conditional Use Permit at issue in this proceeding.

RESPONSE:

1-2. Please provide the most recent financial statements (income statement, balance sheet and statement of cash flows) for the Applicant(s).

RESPONSE:

1-3. Please provide an organizational chart that shows the relationship among AES Corporation, AES Clean Energy Development LLC, Rancho Viejo Solar, LLC., Warren Thompson, and Rancho Viejo Limited Partnership.

RESPONSE:

1-4. Please provide copies of all lease and other agreements among AES, Rancho Viejo Solar, LLC, Warren Thompson, Rancho Viejo Limited Partnership and/or their affiliates pertaining to the proposed Rancho Viejo Solar Project.

RESPONSE:

1-5. Please identify the manager, members and member interests of Rancho Viejo Solar, LLC.

RESPONSE:

1-6. Please provide a copy of the membership agreement among the members of Rancho Viejo Solar, LLC.

RESPONSE:

1-7. Please provide a complete, unredacted copy of the Hazard Mitigation Analysis submitted with the Conditional Use Permit application for the Rancho Viejo Solar Project, including all exhibits and appendices.

RESPONSE:

1-8. Please provide copies of reports prepared by or for AES that investigate and report on the causes and impacts of the April 2019 and April 2022 fire and explosion incidents in Surprise and Chandler Arizona.

RESPONSE:

1-9. Please provide a list of claims (and amounts) submitted to Arizona Public Service Company (APS), Salt River Project, AES or their insurers for reimbursement or compensation by third parties in response to the April 2019 and April 2022 fire and explosion incidents in Surprise and Chandler Arizona.

RESPONSE:

1-10. Please provide a list of claims (and amounts) paid by Arizona Public Service Company (APS), Salt River Project, AES or their insurers for reimbursement or compensation by third parties in response to the April 2019 and April 2022 fire and explosion incidents in Surprise and Chandler Arizona.

RESPONSE:

1-11. Please provide Safety Data Sheets (or Material Safety Data Sheet) for the chemicals in the clean agent solution and the lithium-ion battery units for the proposed Rancho Viejo Solar Project.

RESPONSE:

1-12. Please provide a list of AES battery storage facilities, including locations, size (MWs), battery types and customers.

RESPONSE:

1-13. Please provide a list of thermal runaway accidents and related damage claims at the AES facilities identified in 1-12, including accident descriptions and dates.

RESPONSE:

1-14. Provide a list of the insurance coverages and surety bonds/financial guarantys (and the sources thereof) that AES is providing for the proposed Rancho Viejo Solar Project.

RESPONSE:

1-15. Provide a list of the proposals, including dates, that AES has made to Public Service Company of New Mexico (PNM) in response to Requests for Proposals to sell the energy from the proposed Rancho Viejo Solar Project.

RESPONSE:

1-16. Provide the reasons PNM has provided for not accepting each of the proposals in 1-15.
RESPONSE:

1-17. Reference the following statement on page 3 of the Hazard Mitigation Analysis submitted with the Rancho Viejo Solar Project application.

“2.3 LOCAL CLIMATE CONDITIONS
ASHREA data for the nearest airport at Albuquerque International shows a 1% extreme wind speed of 28.2 mph and 0.4% annual occurrence high temperature of 95.2° F.”

Explain the meaning of the following phrases:

“1% extreme wind speed of 28.2 mph”

and

“0.4% annual occurrence high temperature of 95.2° F.”

RESPONSE:

1-18. Reference Discovery Request 1-17. Explain why you used data from the Albuquerque International Airport instead of a data source closer to the proposed site of the Rancho Viejo Solar Project.

RESPONSE:

1-19. Have the Applicants requested and conducted a pre-application meeting with the Santa Fe County Technical Advisory Committee pursuant to Section 4.4.3 of the Sustainable Land Development Code prior to filing the August 30, 2024 Application for a Conditional Use Permit? If yes, please provide a copy. If no, please explain why you have not done so?

RESPONSE:

1-20. Describe the change in the Rancho Viejo Solar Project from the January 2023 Application to the August 30, 2024 application that causes the project to lie within the 100-year floodplain (as indicated in the “Development Permit Application” for the Rancho Viejo Solar Project.

RESPONSE:

1-21. Provide a copy of the “Floodplain Development Permit” referenced in the “Development Permit Application” for the Rancho Viejo Solar Project.

RESPONSE:

1-22. Please identify the “Shared Well” (including Well Permit #) and “Community Water System.” referenced in the “Development Permit Application” for the Rancho Viejo Solar Project.

RESPONSE:

1-23. Provide a copy of the agreements that provide for the use of the “Shared Well” and the “Community Water System” referenced in the “Development Permit Application” for the Rancho Viejo Solar Project.

RESPONSE:

1-24. Please describe the “Bespoke Fire and Deflagration Testing” that is referenced in Section 4.2 , page 9, of the Draft Preliminary HMA Report.

RESPONSE:

1-25. Please explain what is meant by the following sentence regarding the “Bespoke Fire and Deflagration Testing” that is referenced in Section 4.2 , page 9, of the Draft Preliminary HMA Report: “The results will be evaluated and compared to local ambient conditions.”

RESPONSE:

1-26. Please provide the “Bespoke Fire and Deflagration” test results and updates referenced in Section 4.2 , page 9, of the Draft Preliminary HMA Report.

RESPONSE:

1-27. List and describe the site-, equipment- and project-specific factors that were included in the Bespoke Fire and Deflagration Testing referenced in Section 4.2, page 9, of the Draft Preliminary HMA Report that were not included in the Draft Preliminary HMA Report itself.

RESPONSE:

1-28. Please describe the process, remaining steps and anticipated schedule to achieve UL 9540 certification for the battery energy storage system proposed at the Rancho Viejo Solar Project. Include a list of the testing results (including the Bespoke Fire and Deflagration Testing results) that will be transmitted to UL.

RESPONSE:

1-29. Please provide the job descriptions and required qualifications for the on-site personnel referenced in Section 2.1.3 of the Environmental Impact Report.

RESPONSE:

1-30. Please provide the regular times and days of the week when the on-site personnel referenced in Section 2.1.3 of the Environmental Impact Report will be on duty at the Rancho Viejo Solar Project site.

RESPONSE:

1-31. Provide the dates on which AES entered into (i) the contract with Terracon Consultants, Inc. (“Terracon”) for the April 16, 2024 Geotechnical Engineering Report that is attached to the Environmental Impact Report as Appendix D and (ii) the contract for the preliminary geotechnical engineering report, dated December 21, 2022, that is referenced in the April 16, 2024 report.

RESPONSE:

1-32. Provide the dollar amounts that AES paid to Terracon for the April 16, 2024 Geotechnical Engineering Report that is attached to the Environmental Impact Report as Appendix D and the contract for the preliminary geotechnical engineering report, dated December 21, 2022, that is referenced in the April 16, 2024 report.

RESPONSE:

1-33. Provide a copy of the contract with Terracon for the April 16, 2024 Geotechnical Engineering Report that is attached to the Environmental Impact Report as Appendix D and the contract for the preliminary geotechnical engineering report, dated December 21, 2022, that is referenced in the April 16, 2024 report.

RESPONSE:

1-34. Prior to the County entering into the contract with Terracon in May 2023 for an independent, third-party review of AES's January 2023 application for a conditional use permit, did AES or Terracon inform the County that Terracon had previously performed a preliminary geotechnical engineering report for AES for the Rancho Viejo Solar Project, dated December 21, 2022? If yes, provide the details on who informed whom at the County and when, including a copy of any written notifications?

RESPONSE:

RESPECTFULLY SUBMITTED,

/s/ Ashley C. Schannauer

Ashley C. Schannauer

12 Mariano Road

Santa Fe, New Mexico 87508

Schannauer21@outlook.com

(505) 920-0326

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Discovery Requests to

Applicants to the following by email on this date:

Luke Pierpont, Esquire
Brian Egolf, Esquire
County Attorney Jeffrey S. Young

Luke@EgolfLaw.com
Brian@EgolfLaw.com
jyoung@santafecountynm.gov

Date: October 18, 2024

/s/ Ashley C. Schannauer
ASHLEY C. SCHANNAUER
12 Mariano Road
Santa Fe, NM 87508
Schannauer21@outlook.com
(505) 920-0326

RE: Discovery Requests to Applicants (Rancho Viejo Solar Project)

From Luke Pierpont <luke@egolflaw.com>

Date Thu 11/7/2024 5:19 PM

To Ashley Schannauer <schannauer21@outlook.com>; Brian Egolf <brian@egolflaw.com>

Cc Jeff S. Young <jyoung@santafecountynm.gov>; Selma Eikelenboom <s.eikelenboom@ifscolorado.com>;
rlprucino@santafecountynm.gov <rlprucino@santafecountynm.gov>

Good afternoon Mr. Schannauer,

I hope you are enjoying the snow. It is clear that there is no general right to discovery in a land use hearing under the Santa Fe County rules and I am not convinced that due process requires discovery in this case. My clients will not be responding to your requests without any legal requirement to do so.

Thank you,

Luke Pierpont

From: Ashley Schannauer <schannauer21@outlook.com>

Sent: Thursday, November 7, 2024 1:48 PM

To: Luke Pierpont <luke@egolflaw.com>; Brian Egolf <brian@egolflaw.com>

Cc: Jeff S. Young <jyoung@santafecountynm.gov>; Selma Eikelenboom <s.eikelenboom@ifscolorado.com>;
rlprucino@santafecountynm.gov

Subject: Re: Discovery Requests to Applicants (Rancho Viejo Solar Project)

Good afternoon Mr. Pierpont,

I hope you're doing okay on this snowy day. But I have not received a response to the email I sent to you on Monday regarding the discovery issues we've been discussing. I would appreciate it if you would address my email as soon as possible.

Thank you,

Ashley Schannauer

From: Ashley Schannauer <schannauer21@outlook.com>

Sent: Monday, November 4, 2024 9:55 AM

To: Luke Pierpont <luke@egolflaw.com>; Brian Egolf <brian@egolflaw.com>

Cc: Jeff S. Young <jyoung@santafecountynm.gov>; Selma Eikelenboom <s.eikelenboom@ifscolorado.com>;
rlprucino@santafecountynm.gov <rlprucino@santafecountynm.gov>

Subject: Re: Discovery Requests to Applicants (Rancho Viejo Solar Project)

Good morning Mr. Pierpont,

I continue to believe that the discovery requests are appropriate (i.e., that they seek relevant and probative evidence) and that they would be permitted in a normal civil proceeding. Responses would also shorten the time required for the hearing. But, in the interest of arriving at a good faith resolution of this issue and assuming there will be sufficient opportunity for the cross-examination of witnesses, I'm asking whether you would agree to respond to the following, narrower list of the original requests. They are requests that are not readily answerable in cross-examination:

Discovery requests 1-4, 1-6, 1-7 through 1-11, 1-17, 1-23, 1-26 and 1-33.

Thank you,

They are listed below for your convenience:

- 1-4.** Please provide copies of all lease and other agreements among AES, Rancho Viejo Solar, LLC, Warren Thompson, Rancho Viejo Limited Partnership and/or their affiliates pertaining to the proposed Rancho Viejo Solar Project.
- 1-6.** Please provide a copy of the membership agreement among the members of Rancho Viejo Solar, LLC.
- 1-7.** Please provide a complete, unredacted copy of the Hazard Mitigation Analysis submitted with the Conditional Use Permit application for the Rancho Viejo Solar Project, including all exhibits and appendices.
- 1-8.** Please provide copies of reports prepared by or for AES that investigate and report on the causes and impacts of the April 2019 and April 2022 fire and explosion incidents in Surprise and Chandler Arizona.
- 1-9.** Please provide a list of claims (and amounts) submitted to Arizona Public Service Company (APS), Salt River Project, AES or their insurers for reimbursement or compensation by third parties in response to the April 2019 and April 2022 fire and explosion incidents in Surprise and Chandler Arizona.
- 1-10.** Please provide a list of claims (and amounts) paid by Arizona Public Service Company (APS), Salt River Project, AES or their insurers for reimbursement or compensation by third parties in response to the April 2019 and April 2022 fire and explosion incidents in Surprise and Chandler Arizona.
- 1-11.** Please provide Safety Data Sheets (or Material Safety Data Sheet) for the chemicals in the clean agent solution and the lithium-ion battery units for the proposed Rancho Viejo Solar Project.
- 1-17.** Reference the following statement on page 3 of the Hazard Mitigation Analysis submitted with the Rancho Viejo Solar Project application.
- “2.3 LOCAL CLIMATE CONDITIONS
ASHREA data for the nearest airport at Albuquerque International shows a 1% extreme wind speed of 28.2 mph and 0.4% annual occurrence high temperature of 95.2° F.”
- Explain the meaning of the following phrases:
“1% extreme wind speed of 28.2 mph”
and
“0.4% annual occurrence high temperature of 95.2° F.”
- 1-23.** Provide a copy of the agreements that provide for the use of the “Shared Well” and the “Community Water System” referenced in the “Development Permit Application” for the Rancho Viejo Solar Project.
- 1-26.** Please provide the “Bespoke Fire and Deflagration” test results and updates referenced in Section 4.2 , page 9, of the Draft Preliminary HMA Report.
- 1-33.** Provide a copy of the contract with Terracon for the April 16, 2024 Geotechnical Engineering Report that is attached to the Environmental Impact Report as Appendix D and the contract for the preliminary geotechnical engineering report, dated December 21, 2022, that is referenced in the April 16, 2024 report.
-

From: Luke Pierpont <luke@egolfaw.com>

Sent: Thursday, October 31, 2024 5:06 PM

To: Ashley Schannauer <schannauer21@outlook.com>; Brian Egolf <brian@egolfaw.com>

Cc: Jeff S. Young <jyoung@santafecountynm.gov>; Selma Eikelenboom <s.eikelenboom@ifscolorado.com>; rlprucino@santafecountynm.gov <rlprucino@santafecountynm.gov>

Subject: RE: Discovery Requests to Applicants (Rancho Viejo Solar Project)

Mr. Schannauer, thank you for your patience, I have had the opportunity to review with my client your request for a response to your discovery requests. Because the SLDC does not provide a right to discovery, the fact that discovery has not historically been allowed in land use hearings, and the existing New Mexico law regarding what due process requires in a land use hearing, my client respectfully declines.

There is no constitutional right to discovery in New Mexico administrative hearings, and discovery is only required where necessary to protect a party's due process rights. *Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe*, 2005-NMSC-006, ¶31, 137 N.M. 161. It is established law in New Mexico, that the due process required in land use hearings is not analogous to judicial proceedings, and that an administrative body may adopt such procedures as are appropriate to the circumstances. New Mexico courts apply the *Matthews* test to determine if such procedures adequately protect liberty and property rights of parties to a land use hearing, whether the procedure employed presents a risk of erroneously depriving a party of such a right, while balancing the interests of the administrative body. *Archuleta* ¶ 32, see also *W. Bluff Neighborhood Ass'n*, 2002-NMCA-075, ¶ 46.

The threshold issue in a due process claim is the determination of whether the claimant has a protected property interest. See *Mills v. N.M. State Bd. of Psych.t Exam'rs*, 1997-NMSC-028, ¶ 15, 123 N.M. 421, 941 P.2d 502 ("The threshold question in evaluating a due process challenge is whether there is a deprivation of liberty or property."). Protected property interests are those to which an individual has a claim of entitlement. See *N.M. Dep't of Workforce Sols. v. Garduño*, 2016-NMSC-002, ¶ 12, 363 P.3d 1176. As described in your motion to intervene, your interest in intervention in this land use hearing is "in the public interest" and that you live approximately one mile from the proposed Rancho Viejo Solar project location.

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 Neighborhood Ass'n*, 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. Our 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. "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.

Notably, no recorded New Mexico case holds that discovery is required to satisfy the due process rights of participants in a land use hearing. In fact, the *Archuleta* court declined to find a due process right to discovery even where the party seeking discovery was defending his employment status in an administrative hearing, a property right that the court properly weighed against the burden on the City in allowing such discovery.

It is clear that due process requires less in situations where the property interest that is being weighed is less immediate. Recently, our court of appeals found that lack of cross examination, strict time limits on public presentation, and the inability of the public to turn on their video screens or share documents in a land use hearing did not violate the public's due process rights as set forth in *Albuquerque Commons*

P'ship. See *Shook v. Governing Body of City of Santa Fe*, 2023-NMCA-086, ¶ 31 (“We 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. See *Skowronski*, 2013-NMCA-034, ¶ 40, 298 P.3d 469 (concluding that the procedures used did not create a risk of erroneous deprivation of rights)”).

Based on the foregoing, there is no right to conduct discovery in a land use hearing absent a compelling liberty or property interest. Your stated interest in this land use hearing is analogous to that which the court considered in *Shook* and does not require enhanced procedural protections to protect against the erroneous deprivation of that interest. My client reiterates that it welcomes public participation in the hearing, but we maintain that the procedures that Santa Fe County has consistently used in its land use hearings provide all parties with ample opportunity to be heard and to present and rebut evidence before the SLDC Hearing Officer, as required by New Mexico law.

Luke Pierpont

From: Ashley Schannauer <schannauer21@outlook.com>

Sent: Thursday, October 24, 2024 11:01 AM

To: Luke Pierpont <luke@egolflaw.com>; Brian Egolf <brian@egolflaw.com>

Cc: Jeff S. Young <jyoung@santafecountynm.gov>; Selma Eikelenboom <s.eikelenboom@ifscolorado.com>

Subject: Re: Discovery Requests to Applicants (Rancho Viejo Solar Project)

Good morning Mr. Pierpont,

Thank you for providing your objection to my discovery requests. I’m writing to you now to make a good faith effort, pursuant to Rule NMRA 1-037(A), to resolve the issue prior to filing a motion to compel discovery (see below). Please let me know whether you will reconsider your objection and provide substantive responses to the discovery requests.

Respectfully,
Ashley Schannauer

What follows is a review of a selection of New Mexico court cases involving the right to discovery in administrative hearings, and a summary of the reasons that the need for discovery is vital in this case.

The lack of a procedural rule in the Santa Fe County Sustainable Land Development Code (SLDC) expressly providing for discovery is not dispositive of the Hearing Officer’s authority to order discovery. There are several New Mexico cases involving the right to discovery in administrative hearings in which the right to discovery is not provided for in the rules of the administrative body. The cases involve two lines of authority – (1) the reasonableness of discovery in order to provide for a fair hearing and (2) the constitutional due process right to discovery.

In terms of the reasonableness of discovery for a fair hearing, courts have said that, where an administrative body’s rules provide for testimony and cross-examination, as here, discovery may be necessary to obtain facts needed to prepare a party’s testimony. The opportunity for cross-examination may also not be sufficient for a fair trial, since the opposing party might not present the persons with knowledge of the relevant facts as witnesses. A party cannot cross-examine a person who is not present at trial.

The New Mexico Supreme Court, in particular, in *Archuleta v. Santa Fe Police Dept., ex rel. City of Santa Fe*, 2005-NMSC-006, 137 N.M. 161, 108 P.3d 1019 said that, in a case where the

procedural rules for Santa Fe's Grievance Review Board provided for the presentation of "relevant documents, witnesses or other evidence" to support the grievant's case, an order denying a request for discovery must be reasonable:

{20} The Santa Fe Municipal Code and the SFPD Rules and Regulations are silent on whether employees are entitled to discovery in an administrative disciplinary proceeding. Section 29-14-6 of the Police Officers Act simply provides that "any peace officer . . . under investigation for an administrative matter, . . . shall be permitted to produce any relevant documents, witnesses or other evidence to support his case." Therefore, in initially determining whether the denial of discovery was proper, we must determine whether the ruling was reasonable.

Archuleta, para. 20. (Footnote omitted.)

The Court went on to address the probative value of the information sought and its relevance but concluded, in that case, that neither was sufficient to have required the requested discovery.

Second, the Court stated in *Archuleta* that, although there is no general constitutional due process right to discovery in an administrative hearing, there may be such a right based upon the particular need for discovery in a specific case:

We agree with the City that there is no constitutional right to pre-trial discovery in administrative hearings. *Lopez v. United States*, 129 F. Supp. 2d 1284, 1289 (D.N.M. 2000), *aff'd mem.*, No. 01-2090 (10th Cir. Nov. 15, 2001); accord *Dente v. State Taxation and Revenue Dep't*, [1997-NMCA-099](#), ¶ 6, [124 N.M. 93](#), [946 P.2d 1104](#), overruled on other grounds by *State Taxation & Revenue Dep't v. Bargas*, [2000-NMCA-103](#), [129 N.M. 800](#), 14 P.3d 358. This general rule, however, is not dispositive. See *Dente*, [1997-NMCA-099](#), ¶ 8 ("[I]n some cases, due process might require that depositions be allowed in order to afford a party a meaningful opportunity to prepare."). Administrative hearings that affect a property or liberty interest must comply with due process. The Mathews test determines what process is due in a particular hearing. *Chavez*, [1998-NMSC-033](#), ¶ 13. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)) (alteration omitted).

Archuleta, para. 31.

{32} "[C]onstitutional due process does not require an agency to afford a petitioner all elements of a traditional judicial proceeding." *Miller v. County of Santa Cruz*, 796 F. Supp. 1316, 1319 (N.D. Cal. 1992), *aff'd*, 39 F.3d 1030 (9th Cir. 1994). "In general, the right to due process in administrative proceedings contemplates only notice of the opposing party's claims and a reasonable opportunity to meet them." *Dente*, [1997-NMCA-099](#), ¶ 4 (emphasis added). The importance of the individual's and administrative body's interests, together with "the risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," dictates what additional process, if any, is due in an administrative proceeding. *Chavez*, [1998-NMSC-033](#), ¶ 14 (quoting *Mathews*, 424 U.S. at 335) (emphasis omitted).

Archuleta, para. 32.

Several Courts of Appeals decisions preceding the Supreme Court's decision in *Archuleta* also recognized the need for discovery in appropriate cases. The first was *In re Miller*, which held that there is a constitutional due process right to discovery in administrative proceedings:

To deny the taxpayer the right to take depositions denies him the right to a fair hearing. Such denial constitutes a denial of due process under the Fourteenth Amendment to the Constitution of the United States. *Kaiser Co. v. Industrial Accident Commission*, 109 Cal. App.2d 54, 240 P.2d 57 (Ct. App., 1st Dist. 1952). The Lincoln County Protests Board erred in denying Miller the right to discovery in preparation for his hearing.

In re Miller, 1975-NMCA-116, 88 N.M. 492, 542 P.2d 1182 (Ct. App. 1975), para. 24 (overruled on other grounds in *El Castillo Retirement Residences v. Martinez*, 2015-NMCA-041, 346 P.3d 1164).

In a subsequent decision, the Court of Appeals decided not to follow the holding in *In re Miller* that there is a due process right to discovery in all administrative cases. It held, instead, that the right might exist in an appropriate case, such that the issue must be decided on a case-by-case basis:

{8} We note that in some cases, due process might require that depositions be allowed in order to afford a party a meaningful opportunity to prepare. Cf. *Silverman*, 549 F.2d at 33 (even though there is no constitutional right to pre-hearing discovery, the Due Process Clause does insure the fundamental fairness of a hearing in an individual case).

. . .

{11} . . . “We decline to follow *Miller*, however, in its apparent holding that depositions are constitutionally required even without a showing of particularized need.”

Dente v. State Taxation & Revenue Dep't, 1997-NMCA-099, paras. 8, 11, 124 N.M. 93, 946 P.2d 1104 (overruled on other grounds in *State Taxation & Revenue Dep't v. Bargas*, 2000-NMCA-103, 129 N.M. 800, 14 P.3d 538.). Para. 11.

These decisions establish that the right to discovery in administrative hearings may be granted by the hearing officer regardless of whether that right is expressly provided for in the administrative body's rules.

The need for discovery in this case:

In regard to the Rancho Viejo Solar Project, the criteria for the issuance of a conditional use permit include a determination of the extent of the project's fire, explosion and other risks. There are many facts involved in that determination. The facts are complicated and involve engineering, scientific and even financial facts and judgments. Many of the facts are within the sole possession and control of the applicants.

The SLDC and the County's Rules of Order provide for testimony and cross-examination, similar to the rules at issue in the *Archuleta* case. In this case, access to relevant facts within the possession and control of the applicants is necessary to prepare testimony required for a fair trial. The facts sought in the discovery requests are directly relevant to the criteria for the issuance of a conditional use permit, and the facts are within the sole possession and control of the applicants.

Cross-examination will also not be sufficient for a fair trial. Cross-examination depends upon the availability of a witness with knowledge of relevant facts. The representatives of the applicants who have knowledge of the relevant facts may not be presented as witnesses for the applicants, and thus they will not be available for cross-examination. Cross-examination is also not suitable for the production of documentary evidence. My discovery requests seek the production of documents that contain relevant facts.

Finally, the balancing of interests under the *Mathews* due process analysis favors reasonable discovery of the relevant facts sought in the discovery requests in this case. The need for the facts outweighs the burden on the County and the applicants.

From: Luke Pierpont <luke@egolflaw.com>
Sent: Monday, October 21, 2024 5:14 PM
To: Ashley Schannauer <schannauer21@outlook.com>; Brian Egolf <brian@egolflaw.com>
Cc: Jeff S. Young <jyoung@santafecountynm.gov>
Subject: RE: Discovery Requests to Applicants (Rancho Viejo Solar Project)

Good afternoon Mr. Schannauer,
After thorough review of the Santa Fe County hearing procedures, I find no right to discovery in County land use hearings. Our client is committed to providing all information necessary for the County to evaluate its application consistent with the Sustainable Land Development Code but will not be responding to your discovery requests.

Respectfully,
Luke Pierpont

From: Ashley Schannauer <schannauer21@outlook.com>
Sent: Friday, October 18, 2024 8:18 AM
To: Luke Pierpont <luke@egolflaw.com>; Brian Egolf <brian@egolflaw.com>
Cc: Jeff S. Young <jyoung@santafecountynm.gov>
Subject: Discovery Requests to Applicants (Rancho Viejo Solar Project)

Mr. Pierpont and Mr. Egolf,
I'm enclosing Discovery Requests to the Applicants in the Santa Fe County Conditional Use Proceeding for the Rancho Viejo Solar Project. I'm enclosing both a pdf and Word version for your convenience in responding.

Thank you,
Ashley Schannauer

BEFORE THE SUSTAINABLE LAND DEVELOPMENT CODE
HEARING OFFICER OF SANTA FE COUNTY

IN THE MATTER OF THE AUGUST 30, 2024)	
APPLICATION OF RANCHO VIEJO)	
SOLAR, LLC AND AES CLEAN ENERGY)	Case No. 24-5200
DEVELOPMENT, LLC FOR A)	
CONDITIONAL USE PERMIT FOR THE)	
RANCHO VIEJO SOLAR PROJECT)	
_____)	

BRIEF IN SUPPORT OF MOTION TO COMPEL DISCOVERY RESPONSES
FROM APPLICANTS

The following brief is filed in support of the Motion to Compel Discovery Responses from Applicants. The brief discusses a selection of New Mexico court cases involving the right to discovery in administrative hearings, the arguments submitted by the applicants opposing the discovery requests and a summary of the particular reasons that the need for discovery is vital in this case.

1. Summary

Discovery may be ordered in quasi-judicial administrative proceedings in the absence of a rule explicitly authorizing it. The authority is inherent where the rules provide for testimony and cross-examination. Discovery may be necessary for a fair trial and even due process where discovery is needed to prepare testimony and cross-examination, where the information sought is relevant and probative, where the information is within the sole control of the opposing party, and where the information cannot readily be produced through cross-examination or other means.

Counsel for the applicants refuses to provide the requested discovery on the basis of the lack of a rule in the County's Sustainable Land Development Code (SLDC) explicitly

authorizing it and the lack of reported cases in which an agency's refusal to provide discovery was reversed.

The SLDC grants to the Hearing Officer all powers necessary to conduct quasi-judicial administrative hearings. The SLDC and the Rules of Order provide parties with the rights to submit testimony and conduct cross-examination. Discovery, in particular cases, can be ordered to enable parties to prepare testimony and cross-examination where the information sought is relevant and probative, where the information is within the sole control of the opposing party and where the information is not likely to be within the knowledge of witnesses presented for cross-examination.

The Motion filed with this Brief provides the particularized reasons why the discovery requests in this case should be granted.

2. Authority for discovery in quasi-judicial administrative hearings when not explicitly authorized by the administrative agency's rules

The lack of a procedural rule in the Santa Fe County SLDC expressly providing for discovery is not dispositive of the Hearing Officer's authority to order discovery. There are several New Mexico cases involving the right to discovery in administrative hearings in which the right to discovery is not provided for in the rules of the administrative body. The cases involve two lines of authority: (1) the reasonableness of discovery in order to provide for a fair hearing and (2) the constitutional due process right to discovery.

a. Reasonableness of discovery for a fair hearing

In terms of the reasonableness of discovery for a fair hearing, courts have said that, where an administrative body's rules provide for testimony and cross-examination, as here, discovery may be necessary to obtain facts needed to prepare a party's testimony. The opportunity for cross-examination may also not be sufficient for a fair trial, since the opposing party might not

present the persons with knowledge of the relevant facts as witnesses. A party cannot cross-examine a person who is not present at trial.

The New Mexico Supreme Court, in particular, in *Archuleta v. Santa Fe Police Dept., ex rel. City of Santa Fe*, 2005-NMSC-006, 137 N.M. 161, 108 P.3d 1019 said that, in a case where the procedural rules for Santa Fe's Grievance Review Board provided for the presentation of "relevant documents, witnesses or other evidence" to support the grievant's case, an order denying a request for discovery must be reasonable:

{20} The Santa Fe Municipal Code and the SFPD Rules and Regulations are silent on whether employees are entitled to discovery in an administrative disciplinary proceeding. Section 29-14-6 of the Police Officers Act simply provides that "any peace officer . . . under investigation for an administrative matter, . . . shall be permitted to produce any relevant documents, witnesses or other evidence to support his case." Therefore, in initially determining whether the denial of discovery was proper, we must determine whether the ruling was reasonable.

Archuleta, para. 20. (Footnote omitted.)

The Court went on to address the probative value of the information sought and its relevance but concluded, in that case, that neither was sufficient to have required the requested discovery.

b. Discovery as a due process right

Second, the Court stated in *Archuleta* that, although there is no general constitutional due process right to discovery in an administrative hearing, there may be such a right based upon the particular need for discovery in a specific case:

We agree with the City that there is no constitutional right to pre-trial discovery in administrative hearings. *Lopez v. United States*, 129 F. Supp. 2d 1284, 1289 (D.N.M. 2000), *aff'd mem.*, No. 01-2090 (10th Cir. Nov. 15, 2001); accord *Dente v. State Taxation and Revenue Dep't*, [1997-NMCA-099](#), ¶ 6, [124 N.M. 93](#), [946 P.2d 1104](#), overruled on other grounds by *State Taxation & Revenue Dep't v. Bargas*, [2000-NMCA-103](#), [129 N.M. 800](#), 14 P.3d 358. This general rule, however, is not dispositive. See *Dente*, [1997-NMCA-099](#), ¶ 8 ("[I]n some cases,

due process might require that depositions be allowed in order to afford a party a meaningful opportunity to prepare."). Administrative hearings that affect a property or liberty interest must comply with due process. The Mathews test determines what process is due in a particular hearing. Chavez, [1998-NMSC-033](#), ¶ 13. "Due process is flexible and calls for such procedural protections as the particular situation demands." Mathews, 424 U.S. at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)) (alteration omitted).

Archuleta, para. 31.

{32} "[C]onstitutional due process does not require an agency to afford a petitioner all elements of a traditional judicial proceeding." *Miller v. County of Santa Cruz*, 796 F. Supp. 1316, 1319 (N.D. Cal. 1992), aff'd, 39 F.3d 1030 (9th Cir. 1994). "In general, the right to due process in administrative proceedings contemplates only notice of the opposing party's claims and a reasonable opportunity to meet them." *Dente*, [1997-NMCA-099](#), ¶ 4 (emphasis added). The importance of the individual's and administrative body's interests, together with "the risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," dictates what additional process, if any, is due in an administrative proceeding. Chavez, [1998-NMSC-033](#), ¶ 14 (quoting *Mathews*, 424 U.S. at 335) (emphasis omitted).

Archuleta, para. 32.

Several Courts of Appeals decisions preceding the Supreme Court's decision in *Archuleta* also recognized the need for discovery in appropriate cases. The first was *In re Miller*, which held that there is a constitutional due process right to discovery in administrative proceedings:

To deny the taxpayer the right to take depositions denies him the right to a fair hearing. Such denial constitutes a denial of due process under the Fourteenth Amendment to the Constitution of the United States. *Kaiser Co. v. Industrial Accident Commission*, 109 Cal. App.2d 54, 240 P.2d 57 (Ct. App., 1st Dist. 1952). The Lincoln County Protests Board erred in denying Miller the right to discovery in preparation for his hearing.

In re Miller, 1975-NMCA-116, 88 N.M. 492, 542 P.2d 1182 (Ct. App. 1975), para. 24 (overruled on other grounds in *El Castillo Retirement Residences v. Martinez*, 2015-NMCA-041, 346 P.3d 1164).

In a subsequent decision, the Court of Appeals decided not to follow the holding in *In re Miller* that there is a due process right to discovery in all administrative cases. It held, instead, that the right might exist in an appropriate case, such that the issue must be decided on a case-by-case basis:

{8} We note that in some cases, due process might require that depositions be allowed in order to afford a party a meaningful opportunity to prepare. Cf. *Silverman*, 549 F.2d at 33 (even though there is no constitutional right to pre-hearing discovery, the Due Process Clause does insure the fundamental fairness of a hearing in an individual case).

. . .

{11} . . . “We decline to follow *Miller*, however, in its apparent holding that depositions are constitutionally required even without a showing of particularized need.”

Dente v. State Taxation & Revenue Dep’t, 1997-NMCA-099, paras. 8, 11, 124 N.M. 93, 946 P.2d 1104 (overruled on other grounds in *State Taxation & Revenue Dep’t v. Bargas*, 2000-NMCA-103, 129 N.M. 800, 14 P.3d 538.). Para. 11.

3. The applicants’ arguments

Counsel for the applicants declines to provide the requested discovery on the basis of the lack of an SLDC rule explicitly authorizing it and the lack of reported cases in which an agency’s refusal to provide discovery was reversed. He discusses the same cases as are cited above, and relies on the fact that the courts cited held only that the discovery requested in those cases was not warranted.

He includes no analysis of the particularized reasons that discovery should be ordered in this case.

4. The need for discovery in this case

The decisions cited above establish that the right to discovery in administrative hearings may be granted by the hearing officer regardless of whether that right is expressly provided for in the administrative body's rules. Indeed, the authority is inherent from the grant of authority in Section 3.5.5 of the SLDC, which provides that Hearing Officers shall have all powers necessary to conduct quasi-judicial hearings.

In regard to the Rancho Viejo Solar Project, the criteria for the issuance of a conditional use permit include a determination of the extent of the project's fire, explosion and other risks. There are many facts involved in that determination. The facts are complicated and involve engineering, scientific and even financial facts and judgments. Many of the facts are within the sole possession and control of the applicants.

The SLDC and the County's Rules of Order provide for testimony and cross-examination, similar to the rules at issue in the *Archuleta* case. In this case, access to relevant facts within the possession and control of the applicants is necessary to prepare testimony required for a fair trial. The facts sought in the discovery requests are directly relevant to the criteria for the issuance of a conditional use permit, and the facts are within the sole possession and control of the applicants.

Cross-examination will also not be sufficient for a fair trial. Cross-examination depends upon the availability of a witness with knowledge of relevant facts. The representatives of the applicants who have knowledge of the relevant facts may not be presented as witnesses for the applicants, and thus they will not be available for cross-examination. Cross-examination is also not suitable for the production of documentary evidence. My discovery requests seek the production of documents that contain relevant facts.

Finally, the balancing of interests under the *Mathews* due process analysis favors reasonable discovery of the relevant facts sought in the discovery requests in this case. The need for the facts outweighs the burden on the County and the applicants.

5. Conclusion

The cases discussed above establish that SLDC Hearing Officer has the authority to order the applicants to respond to the discovery requests at issue here even in the absence of a rule in the SLDC and the Rules of Order explicitly granting that authority. The authority is inherent in the SLDC's grant to the Hearing Officer in Section 3.5.5 of the SLDC all powers necessary to conduct quasi-judicial hearings. The particularized need for discovery and its reasonableness in regard to each of the discovery requests at issue here are described in the body of the Motion to Compel filed with this Brief.

Date: November 8, 2024

Respectfully submitted,
/s/ Ashley C. Schannauer
ASHLEY C. SCHANNAUER

12 Mariano Road
Santa Fe, NM 87508
Schannauer21@outlook.com
(505) 920-0326

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief in Support of Motion to Compel Discovery Responses from Applicants to the following by email on this date:

Hearing Officer Marilyn Hebert
County Attorney Jeffrey S. Young
Roger Prucino, Esquire
Dominic Sisneros, Case Manager
Luke Pierpont, Esquire
Brian Egolf, Esquire
Selma Eikelenboom

lynhebert@q.com
jyoung@santafecountynm.gov
rprucino@santafecountynm.gov
djsisneros@santafecountynm.gov
Luke@EgolfLaw.com
Brian@EgolfLaw.com
s.eikelenboom@ifscolorado.com

Date: November 8, 2024

/s/ Ashley C. Schannauer
ASHLEY C. SCHANNAUER
12 Mariano Road
Santa Fe, NM 87508
Schannauer21@outlook.com
(505) 920-0326