

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

**CASE NOS. 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**

**RENEWED MOTION TO COMPEL DISCOVERY**  
**AND MOTIONS FOR CROSS-EXAMINATION DIRECTLY BY PARTIES AND TO**  
**ESTABLISH A SERVICE LIST**

These Motions ask the Board of County Commissioners (BCC) to (1) grant my renewed Motion to Compel Discovery Responses from Applicants, (2) authorize parties to ask cross-examination questions directly to opposing witnesses and (3) establish a mandatory service list that will require filings and communications between parties and the BCC to be served on all parties.

**1. Motion to Compel Discovery**

I submitted discovery requests to the Applicants on October 18, 2024, but AES refused to provide responses. AES cited the lack of rules providing for discovery process in the Sustainable Land Development Code (SLDC). I filed a Motion to Compel responses with a Brief on November 8 (both of which are attached as Attachment 1). The Hearing Officer orally denied the Motion at the Prehearing Conference held on November 14, 2024, citing the lack of SLDC rules providing for discovery.<sup>1</sup>

I am renewing the Motion to Compel now, because I learned only a few days before the deadline for appealing the Planning Commission's March 20 Order approving the Conditional Use Permit in this case, that the County's Sustainable Growth Management Plan states that discovery should be allowed in a Conditional Use Permit proceeding as a matter of due process:

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. The Quasi-Judicial Process will:

1. Afford the applicant with sufficient opportunity to present evidence supporting the application;
2. Afford potential protestants with timely notification of the Quasi-Judicial process;

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<sup>1</sup> Hearing Officer Prehearing Conference Tr. 8-9 (11/14/2024).

3. Afford both applicant and protestants sufficient time for discovery and other aspects of due-process;
  4. Insure that the County shall provide a Hearing Officer, hearing date or dates and sufficient time to hear arguments for and against the application;
- ... .<sup>2</sup>

Section 3-21-5(A) of the Municipal Code states that the “regulations and restrictions of the county . . . are to be in accordance with a comprehensive plan,” which in this case is the Sustainable Growth Management Plan.<sup>3</sup>

Thus, whether discovery is specifically authorized in the SLDC or not, the County’s SGMP recognizes it as a due process right, the County’s presiding officers in quasi-judicial proceedings have the inherent authority and duty to allow it, and parties have a right to it. This is particularly true where, as recognized by New Mexico courts, there is a compelling need for discovery under the circumstances of a specific case.

Indeed, there is a compelling need for discovery under the circumstances of the Rancho Viejo Solar case. Much of the evidence relevant to the SLDC criteria for a CUP in this case involves complex battery technology, fire safety engineering and financial information that is within the sole control of AES. The evidence includes information about the causes of AES’s accidents, information about the financial and other damages that have resulted, and even information about the identities of the applicants. AES has that information. The information is not publicly available.

Courts have stated the authority to order discovery is inherent in the authority of a quasi-judicial body to conduct a fair administrative hearing. Discovery may be appropriate where the rules provide for testimony and cross-examination, relevant evidence for those purposes is within the sole control of the opposing party, and the evidence cannot readily be produced through cross-examination or other means.<sup>4</sup>

## **2. Motion to allow parties to directly cross-examine witnesses**

Both the SLDC and the Board’s Rules of Order grant parties with standing the right to conduct cross-examination of Staff, applicant and opposing party witnesses. This right is also important to satisfy parties’ due process rights. The New Mexico Supreme Court has stated that

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<sup>2</sup> 2015 Santa Fe County Sustainable Growth Management Plan, p. 262 (emphasis added).

<sup>3</sup> NMSA 1978, 3-21-5; BCC Resolution 2015-155.

<sup>4</sup> The New Mexico Supreme Court, for example, said an order denying a request for discovery must be reasonable, even where an agency’s procedural rules do not provide for discovery. *Archuleta v. Santa Fe Police Dept., ex rel. City of Santa Fe*, 2005-NMSC-006, para. 20, 137 N.M. 161, 108 P.3d 1019 *Archuleta*, para. 20. (Footnote omitted.) (Procedural rules for Santa Fe’s Grievance Review Board were silent on discovery but provided for the presentation of “relevant documents, witnesses or other evidence” to support the grievant’s case.) The New Mexico Court of Appeals has also stated that, although there is not a general due process right to conduct discovery in administrative cases, due process might require that discovery be allowed to afford a party a meaningful opportunity to prepare. *Dente v. State Taxation & Revenue Dep’t*, 1997-NMCA-099, para. 8, 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. 8.

a party in an administrative hearing “is entitled to a full, fair, and impartial hearing which conforms to the fundamental principles of due process and which includes the right to confront and cross-examine witnesses.”<sup>5</sup>

I was denied the opportunity to conduct cross-examination at the December 4 hearing because I was not allowed to participate as a party with standing despite the Hearing Officer’s Oct. 16, 2024 order granting me standing. I was subsequently allowed to participate in the February 3-4 hearings before the Planning Commission. But County Staff ruled (without the authority to do so) that cross-examination in the Planning Commission hearings could be conducted only by the submission of written questions to the County Staff that would then be asked by the Chair of the Planning Commission. Furthermore, many of the cross-examination questions I submitted to Staff were not asked by the Chair, as detailed below.

The SLDC provides the option for a presiding official to require cross-examination questions to be conducted through questions submitted to the presiding official or to allow cross-examination directly by parties. Section 4.7.2.1 states, first, that: “The hearing shall be conducted in accordance with the procedures set forth in the Board’s Rules of Order.” Section V.B.3 of the Board’s Rules of Order provides for cross-examination directly by parties with standing.

3. Cross Examination (if requested). A party to an administrative adjudicatory proceeding shall be afforded the opportunity to cross-examine any staff member who participates in the presentation of the staff report. The party seeking the cross-examination must notify the Chair that cross-examination is desired before the staff member is excused or such cross-examination shall be waived.

Section 4.7.2.1 then follows using the permissive term “may” when authorizing the presiding official to require cross-examination through the presiding official: “At any point, members of the Board, the Planning Commission or the Hearing Officer conducting the hearing may ask questions of the owner/applicant, staff, or public, or of any witness, or require cross-examination by persons with standing in the proceeding to be conducted through questions submitted to the chair of the Board, Planning Commission or to the Hearing Officer, who will in turn direct questions to the witness.” (Emphasis added.) The word “may” modifies both the word “ask” and the word “require.”

Hearing Officer Hebert addressed the appropriate cross-examination procedure in the Hearing Officer’s November 14 prehearing. After Hearing Officer Hebert initially raised the issue, Assistant County Attorney Prucino brought it up again, after which the Hearing Officer decided that parties would be allowed to conduct their own cross-examinations:

HEARING OFFICER HEBERT: If there are other parties to this, other than staff and the applicant, I think any other party would be entitled to cross examination

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<sup>5</sup> *N.M. Dep’t of Workforce Solutions v. Garduno*, 2016-NMSC-002, para. 39, 363 P.3d 1176. See also, *State ex rel. Battershell v. City of Albuquerque*, 1989-NMCA-075, citing *People ex rel. Klaeren v. Village of Lisle*, 781 N.E.2d 223, 234-235 (Ill. 2002).

of the individual and I think it would just be traditionally after that witness had testified while the testimony was still fresh in everyone's mind. I don't think that it would be as useful if the entire presentation by either the staff or the applicant is made and then there would be cross examination. So it would just be in the traditional manner of after the direct testimony there would be the cross examination by anyone who is admitted with standing.<sup>6</sup>

Despite the Hearing Officer's approach, 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.

The cross-examination procedure adopted by County Staff did not provide a reasonable or fair opportunity to conduct cross-examination. I submitted cross-examination questions to Staff to be asked by the Chair of the Planning Commission, but the questions I submitted were either not asked or were not pursued to obtain direct answers. A few examples follow:

**Causes of AES's accidents:**

In discovery prior to the Hearing Officer hearing and in proposed cross-examination questions I submitted to County Staff for the Planning Commission hearing, I asked whether AES has prepared any reports that investigate and identify the causes and impacts of the April 2019 and April 2022 fire and explosion incidents in Surprise and Chandler AZ; and, if so, whether AES willing to make the reports public. This was relevant to determine the extent to which AES's prior design, installation and operational practices may continue and affect the proposed project. The Chair of the Planning Commission did not ask the questions.

**Damages caused by AES's accidents:**

I asked about the dollar amounts of claims that have been made against AES, its subsidiaries and/or insurers for personal injury, property damage, business loss, costs of emergency response, or other damages related to the accidents in Surprise AZ, Chandler AZ, Escondido CA and Moss Landing CA. This question relates directly to the CUP criteria in Section SLDC Section 4.9.6.5, i.e., 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 dollar amount of damages that nearby residents and businesses have suffered from BESS accidents is a relevant measure of the harm caused by the accidents. The Chair of the Planning Commission did not ask the question.

**Applicants, Owners and Operators:**

There are three applicants for the CUP at issue here: Rancho Viejo Limited Partnership, AES Clean Energy Development, LLC and Rancho Viejo Solar, LLC. The CUP application indicates that Rancho Viejo Solar, LLC will build and operate the facility.

In discovery and in cross-examination questions, I asked about the identities and financial resources of the applicants, including Rancho Viejo Solar, LLC. This was important to determine whether the party directly responsible for any accidents will have sufficient assets to

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<sup>6</sup> Hearing Officer Prehearing Conference, Tr. 7 (11/14/2024).

remediate site contamination and compensate residents and business owners for damages. The question was asked, but the answer was vague and incomplete. Joshua Mayer stated that “the direct owner would be the Rancho Viejo Solar, LLC, which is wholly owned by AES,” but there was no follow-up to clarify and obtain a direct answer. Mr. Mayer also said the purpose of the ownership structure is to facilitate financing on the merits of each project.<sup>7</sup>

But another likely purpose of the ownership structure is to confine responsibility for any damages caused by the project to the direct owner – Rancho Viejo Solar, LLC – and to shield the upstream ownership. Unless Rancho Viejo Solar, LLC has sufficient resources, nearby residents and businesses who suffer harm will be at risk for not being compensated.

### **3. Motion to establish mandatory service list**

As a matter of fairness and to insure that parties do not engage in *ex parte* communications with decision-makers, parties in civil litigation, including quasi-judicial administrative proceedings, are required to serve copies of filings with all other parties.<sup>8</sup> And decision-makers likewise serve copies of the communications they make and decisions they issue with all parties. Service upon parties is accomplished with a mandatory “service list” that includes the names of all parties’ representatives and their contact information. Parties include with their filings a “certificate of service” that identifies the document being served, the representatives of the parties being served and the date of service.

A service list is important in this case. Because of the lack of a service list in this case, parties have not generally served or received copies of filings made by other parties. As a result, parties are generally unaware of formal requests made by other parties and lack the opportunity to respond. Such requests made without a service list constitute *ex parte* communications.

For example, AES and the other applicants have made filings with County Staff that appear to amend the Conditional Use Permit application without notice to other parties or the public. Most recently, AES filed with County Staff in January 2025 its plan for a revised water supply for the 12-month period of construction.<sup>9</sup> The filing was discovered only through an Inspection of Public Records Act (IPRA) request.

Staff’s private communications with the Planning Commission and Hearing Officer should also not have been private. As examples, these include Staff’s October 2024 emails to the Hearing Officer asking the Hearing Officer not to issue the Order she prepared granting my motion to intervene, and Staff’s January 31 memo to the Planning Commission urging the Commission’s rejection of San Marcos Association’s arguments regarding the appropriate zoning

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<sup>7</sup> Planning Commission Hearing, Tr. 52 (2/3/2025).

<sup>8</sup> See, e.g., Rule 1-005 NMRA “Service and filing of pleadings and other papers”; 1.2.2.10(B) NMAC “Service generally” (PRC Rules of Procedure).

<sup>9</sup> See, AES Response to the Third-Party Review of the Environmental Impact Report for the Rancho Viejo Solar Project in Santa Fe County, New Mexico, SWCA Environmental Consultants, January 2025 (Attachment 2) and related discussion on pages 21-23 of my May 2, 2025 Legal Authority and Testimony.

classification of the Rancho Viejo Solar Project.<sup>10</sup> These communications were also discovered only through the filing of IPRA requests.

Parties should not have to file requests under the Inspection of Public Records Act to obtain copies of such communications and filings.

**WHEREFORE**, the BCC is respectfully requested to issue an Order (1) granting my renewed Motion to Compel Discovery from Applicants, (2) authorizing parties to ask cross-examination questions directly to opposing witnesses and (3) establishing a service list that will require filings and communications involving parties and the BCC to be served on all parties.

Date: May 12, 2025

Respectfully submitted,

/s/ Ashley C. Schannauer  
ASHLEY C. SCHANNAUER

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**Attachments:**

- 1 November 8, 2024 Motion to Compel Discovery Responses and Supporting Brief
- 2 AES Response to the Third-Party Review of the Environmental Impact Report for the Rancho Viejo Solar Project in Santa Fe County, New Mexico, SWCA Environmental Consultants, January 2025

**SELF AFFIRMATION**

I, Ashley C. Schannauer, upon penalty of perjury under the laws of the State of New Mexico, affirm and state that the facts in the foregoing Motions are true and correct based on my personal knowledge and belief.

DATED: May 12, 2025

/s/ Ashley C. Schannauer  
ASHLEY C. SCHANNAUER

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<sup>10</sup> See discussion of these issues on pages 27-29 and 29-30 of my May 2, 2025 Legal Authority and Testimony.

## **CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing Motions to the following by email on this date:

Dominic Sisneros, Case Manager	djsisneros@santafecountynm.gov
Commissioner Camilla Bustamante	cbustamante@santafecountynm.gov
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Date: May 12, 2025

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