

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

**CLEAN ENERGY COALITION FOR
SANTA FE COUNTY,
Plaintiff-Appellant,**

v.

**No. D-101-CV-2025-03005
Judge Matthew J. Wilson**

**SANTA FE COUNTY BOARD OF
COUNTY COMMISSIONERS,
Defendant-Appellee,
and**

**RANCHO VIEJO LIMITED PARTNERSHIP,
RANCHO VIEJO SOLAR, LLC, AES CLEAN
ENERGY DEVELOPMENT, LLC,
Interested parties.**

STATEMENT OF APPELLATE ISSUES

Plaintiffs/Appellant Clean Energy Coalition for Santa Fe County (“CEC”), by and through their counsel of record, and pursuant to Santa Fe County Land Development Code, Chapter 150(A), §4.5, NMSA 1978 §§ 39-3-1.1 and NMRA Rule 1-074, submit this Statement of Appellate Issues in support of their Appeal of the Defendant/Appellee Santa Fe County Board of County Commissioners’ (“BCC”) decision of October 14, 2025 to approve the Conditional Use Permit application submitted by Rancho Viejo Limited Partnership, Rancho Viejo Solar, LLC, and AES Clean Energy Development, LLC.

I. STATEMENT OF ISSUES

I(a) – APPELLATE JURISDICTION ISSUES:

Appellants assert that each of the following BCC actions, inactions and/or omissions were arbitrary and capricious, not supported by substantial evidence, outside the scope of agency authority and/or not in accordance with law.

1. Whether the BCC’s decision constitutes a “Final Agency Decision” under the standards set forth in NMSA 1978, § 39-3-1.1 and Sustainable Land Development Code (“SLDC”)

§§ 4.4.13 and 4.5, and whether the BCC's failure to determine whether the CUP application satisfies the SLDC criteria for CUP approval renders the October 14, 2025, Order invalid.

2. Whether the BCC's decision to leave thirty-three permit conditions undecided and unresolved coupled with its failure to identify the procedures and/or methodologies necessary to address each of those issues conclusively and its failure to determine whether any form of resolution would satisfy the criteria set forth in SLDC § 4.9.6.5 renders that decision invalid.

3. Whether the BCC's decision to allow County Staff to make discretionary decisions regarding whether the CUP Application satisfies the SLDC criteria for a CUP constitutes an unlawful delegation of unilateral BCC authority.

4. Whether the BCC's decision to record Applicants' CUP prior to review and approval of a detailed water budget as required by Permit Condition No. 16, invalidates the CUP.

5. Whether the BCC's decision to record Applicants' CUP without conducting a pre-application Technical Advisory Committee ("TAC") review that would have subjected Applicants to updated permit requirements violates SLDC § 4.4.3.

6. Whether the BCC's decision to approve substantive amendments to the CUP Application without requiring re-notice, re-application and re-hearing violates SLDC § 4.6.

7. Whether the BCC's decision to approve Applicants' CUP application without requiring the Applicants' Environmental Impact Report (EIR) to (1) analyze safer battery technologies, (2) address the Applicants' history of BESS accidents, (3) analyze the environmental impacts associated with BESS fires, and/or (4) include any mitigation for these serious impacts violated SLDC §§ 6.3.11 & 6.3.1.

8. Whether the BCC's decision to allow Applicants to comply with less stringent application requirements than similarly situated applicants, in contemporaneous proceedings,

before the same tribunal, while both Applicants were vying for the same power purchase agreements with the Public Service Company of New Mexico is permissible.

9. Whether the BCC's decision violated the spirit and intent of the Sustainable Growth Management Plan ("SGMP") and the Sustainable Land Development Code ("SLDC").

I(b) – ORIGINAL JURISDICTION ISSUES:

Appellants assert that each of the following BCC actions, inactions and/or omissions violate the tenets of due process and fundamental fairness.

10. Whether the BCC violated Appellant's due process rights by denying Appellants and opposition parties any meaningful discovery throughout the proceedings and by consistently and systematically treating CEC differently than Applicants.

11. Whether the BCC violated Appellant's due process rights by directing Third-Party Reviewers to perform superficial and/or perfunctory evaluations, shielding County experts from public inquiry and scrutiny, allowing Applicants to redact pertinent and material safety data, and purposely hiding the nature and substance of crucial zoning reclassifications.

12. Whether the BCC violated Appellant's due process rights by allowing County Staff to comingle unauthorized duties, by permitting staff members to act simultaneously as advisors to the BCC, advocates for the Applicants and undelegated and unauthorized decision-makers throughout the proceedings, rather than objective technical evaluators.

13. Whether the BCC violated Appellant's due process rights by repeatedly allowing County Staff to engage in *ex parte* communications with the BCC and the Applicants throughout the proceedings and with the BCC during deliberations and Executive Session(s).

14. Whether the BCC violated Appellant's due process rights by delegating to County Staff the BCC's unilateral decision-making authority for post-Order reviews and approvals of the thirty-three permit conditions that must be resolved before CUP approval is complete without

granting Appellant a chance to object and be heard on issues that determine whether the CUP Application satisfies the SLDC criteria for a CUP.

15. Whether the BCC violated Appellant’s due process rights by approving numerous material changes to the CUP Application, made by the Applicants that substantively and irreparably change the application under review, without an opportunity for opposing parties to be heard or the modifications to be analyzed by experts in the field.

II. CASE SUMMARY

1. Nature of the Case. This is an appeal filed by the Clean Energy Coalition for Santa Fe County (“CEC”) of the October 14, 2025, Order establishing Findings of Fact and Conclusions of Law (“BCC Order”) issued by the Board of County Commissioners of Santa Fe County (“BCC”). The BCC Order approved the application for a Conditional Use Permit (“CUP”) for the Rancho Viejo Solar Project (“Project”) in the County’s Rural Fringe (“RUR-F”) zoning district.

CEC is an all-volunteer non-profit organization with more than 2,000 members based in the Eldorado subdivision of Santa Fe County. CEC’s mission is to “educate our communities about large-scale, renewable energy projects so together we can make informed decisions that protect our environment and keep our communities safe.” CEC’s members support the development of safe and reliable solar and renewable energy projects. CEC’s opposition to the AES project under appeal is based in large part on the utilization of battery energy storage system (BESS) technologies that employ lithium-ion batteries that are prone to thermal runaway and have a documented history of catastrophic failure, coupled with the decision to situate this project in close proximity to multiple residential areas.

The Project includes a 680-acre solar panel array, a one-acre collector substation, a three-acre battery energy storage system (BESS) enclosed in 38 40-foot containers (i.e., the shape and size of shipping containers) and a dedicated 2.3-mile high-voltage power line (“gen-tie” line) that would

connect the Project to the power grid of Public Service Company of New Mexico (“PNM”). *ROA, Pt. 1, 000034; ROA, Pt. 5, 000684*. The Applicants for the CUP include Rancho Viejo Limited Partnership, Rancho Viejo Solar, LLC and AES Clean Energy Development, LLC.¹

The BCC Order was recorded with the Santa Fe County Clerk on October 22, 2025, and the CEC timely filed its Notice of Appeal on November 20, 2025.

The appeal is filed pursuant to NMSA 1978, §39-3-1.1 and Rule 1-074 NMRA. In its capacity as Appellant, CEC raises issues under the District Court’s appellate jurisdiction. As Plaintiff, CEC also raises due process issues (U.S. Const. amend. V and amend. XIV, §1; N.M. Const. art. II, §18) under the District Court’s original jurisdiction (N.M. Const. art. VI, §13) and pursuant to the Rules of Civil Procedure for District Courts (Rules 1-074, 1-018(A) NMRA (“plaintiff . . . may join . . . as many claims either legal or equitable or both as he may have against an opposing party.”)).

The issues under the Court’s appellate jurisdiction are outlined fully below and are ripe for decision under the administrative record compiled to date. The due process issues raised under the Court’s original jurisdiction are identified below, but CEC submits that the administrative record compiled to date is not sufficient to fully address them. CEC submitted discovery requests to the BCC and each of the Applicants on December 3, 2025. The BCC and the Applicants filed motions for protective orders to avoid answering the requests. CEC has filed timely responses. And the movants have filed untimely replies.² The motions are scheduled for hearing on May 1,

¹ AES Clean Energy Development, LLC is the developer. Although unclear due to the lack of discovery, it appears that Rancho Viejo Solar, LLC is the limited liability corporation established to own and operate the Project. Rancho Viejo Limited Partnership is the owner of the land on which the Project is proposed to be built.

² The BCC filed its Motion for Protective Order on December 18, 2025. Rancho Viejo Solar, LLC and AES Clean Energy Development, LLC jointly filed a Motion for Protective Order and Award of Costs on December 23, 2025, and Rancho Viejo Limited Partnership filed a Motion for Protective Order on January 5, 2026. CEC filed responses to the respective motions on January 1, 6 and 16, 2026. Replies were filed by the BCC on January 16, 2026, and by Rancho Viejo Solar, LLC and AES Clean Energy Development, LLC on January 21, 2026.

2026. In view of the deadline for the current Statement of Appellate Issues and the still-to-be determined date of the Court’s disposition of the discovery motions, the original jurisdiction issues may need to be bifurcated from the Court’s consideration of the issues under the Court’s appellate jurisdiction.³

2. Conditional Use Review under the County’s Sustainable Land Development Code

The BCC has implemented its statutory authority to regulate zoning through ordinances codified in the County’s SLDC. Applications for Conditional Use Permits are processed in a quasi-judicial adjudicatory review conducted pursuant to the procedures in Chapter 4 of the SLDC:

The SLDC establishes the following procedural steps:

- (1) Pre-application review by the County’s Technical Advisory Committee (“TAC”) in which the TAC identifies environmental, fiscal impact and other studies and reports (from Chapter 6 of the SLDC) to be included in the developer’s CUP application (SLDC §4.4.3)
- (2) Pre-application neighborhood meeting with adjacent landowners (SLDC §4.4.4)
- (3) Formal application for CUP filed with County Staff (SLDC §§4.4.5, 4.9.6.3)
- (4) Determination of the application’s completeness by County Staff (SLDC §4.4.6)
- (5) Intervention by parties with standing (SLDC §4.7.2, which incorporates BCC Rules of Order, §V.B (Resolution 2009-02))
- (6) Hearing before the SLDC Hearing Officer and Recommended Order (SLDC §4.9.6.4)
- (7) Hearing before the Planning Commission and final decision unless appealed to BCC (SLDC §§4.4 Table 4-1; 4.4.10)
- (8) Appeal of Planning Commission decision to BCC for hearings and final action approving or denying the CUP (SLDC §4.5.4)

Chapter 4 of the SLDC and Section V.B of the BCC’s Rules of Order (Resolution No. 2009-02) provide parties the opportunity to provide testimony and cross-examine witnesses of County Staff, applicants, and other parties. The quasi-judicial proceedings are similar to judicial trials in which parties present evidence and the Planning Commission and BCC make decisions based upon the evidentiary record (i.e., adjudications).⁴

³ *Appellants’ Exhibit 14*, EMPAC v. Sandoval County D-1329-CV-2025-00731, re: original jurisdiction bifurcation.

⁴ SLDC §§ 3.2.1, 3.2.1.3, 4.3.2, 4.7.2.

The SLDC distinguishes between parties with standing and public commenters. Public commenters do not have the right to cross-examine witnesses, and courts have held that local agencies may limit the time allowed for each comment to 2-3 minutes.⁵

Further, the SLDC delineates clear roles for the BCC and Staff. Consistent with its statutory authority to regulate zoning, the BCC is authorized and retains the ultimate power to approve CUPs. The SLDC requires the BCC to determine whether an application satisfies the criteria required for the issuance of a CUP:

SLDC § 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.
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.

The SLDC authorizes the Planning Commission and the BCC to approve CUP applications with conditions (SLDC §§ 4.4.11; 4.9.66).⁶ But the permit conditions authorized in the SLDC do not delegate authority to County Staff to conduct further reviews and make final decisions on

⁵ SLDC §4.7.2.1, BCC's Rules of Order, Resolution No. 2009-02, §V.B.8; see, e.g., *Shook v. Governing Body of the City of Santa Fe*, 2023-NMCA-086.

⁶ SLDC §4.9.6.6 states that, in approving a CUP, the Planning Commission may impose reasonable standards, conditions, or mitigation requirements, and it lists the following additional standards, conditions, or mitigation requirements as examples:

a) financing and availability of adequate public facilities or services; b) reservations and dedications; c) payment of development fees; d) establishment of assessment and public improvement districts; e) adoption of restrictive covenants or easements; f) special buffers or setbacks, yard requirements, increased screening or landscaping requirements; g) development phasing; h) standards pertaining to traffic, circulation, noise, lighting, hours of operation, protection of environmentally sensitive areas, or preservation of archaeological, cultural and historic resources; and i) provision of sustainable design and improvement features, solar, wind or other renewable energy source, rainwater capture, storage and treatment or other sustainability requirements.

behalf of the BCC on whether an application satisfies the SLDC criteria for a CUP – especially when participation by the parties with standing in the quasi-judicial hearings is prohibited.

Instead, the SLDC assigns only ministerial authority to the County Staff.⁷ Ministerial reviews and decisions – commonly referred to as “check-the-box” reviews – involve the “nondiscretionary application of the standards of the SLDC to an application.”⁸ Indeed, SLDC §6.3.10.2 requires the BCC to identify mitigation measures that might impact SLDC criteria approvals during the BCC’s discretionary application review process, not during the post-hearing ministerial development process: “Formulation of mitigation measures shall be identified at the first discretionary approval and under no circumstances deferred until the ministerial development process.” Staff’s only decision-making authority is to initially determine whether an application is complete, and its determination is subject to appeal to the Planning Commission.⁹ Otherwise, the SLDC authorizes County Staff only to make recommendations to the Hearing Officer, Planning Commission and BCC.¹⁰

Despite County Staff’s limited authority under the SLDC, Staff in this case exercised multiple additional roles for which it had no authority. Staff acted as a party/advocate for the Applicants, Project evaluator and, at times, final decision-maker. The simultaneous exercise of those roles is impermissible and created confusion among all parties, including County Staff, and denied CEC and the other parties their rights to due process.

⁷ SLDC §§4.3.3, 4.7.2, 4.8.

⁸ SLDC §§4.3.3, 4.8.

⁹ SLDC § 4.4.6.

¹⁰ SLDC § 4.7.2.1.1 provides: The Administrator, or other County staff member designated by the Administrator, shall present a description of the proposed development, the relevant sections of the SGMP, area, district or community plans, the SLDC, and state and federal law that apply to the application, and describe the legal or factual issues to be determined. The Administrator or County consultant or staff member shall have the opportunity to present a recommendation and respond to questions from the Board, Planning Commission or Hearing Officer concerning any statements or evidence, after the owner/applicant has had the opportunity to reply.

3. Conditional Review for the Rancho Viejo Solar Project CUP application

a. August 30, 2024, CUP application and the SLDC's pre-application requirements

Rancho Viejo Limited Partnership, Rancho Viejo Solar, LLC and AES Clean Energy Development, LLC filed their Application for a CUP for the Rancho Viejo Solar Project on August 30, 2024. Prior to the filing, the Applicants conducted the required pre-application neighborhood meeting on August 22, 2024. The Applicants, however, failed to seek the TAC review required by SLDC §4.4.3. The Applicants relied upon a TAC review conducted almost three years earlier on November 4, 2021, for a prior CUP application that was filed in January 2023, and ultimately deemed incomplete by County Staff and withdrawn by the Applicants. The TAC review in question was based on standards that pre-dated the August 30, 2024, Application. (TAC review standards were subsequently revised and updated, including in August and December 2023, but those new standards were never applied to Applicants' submission under review in this case). *ROA, Pt. 24, 002700; ROA, Pt. S03, 012917.*

Additionally, and even more concerning, during the November 2021 TAC meeting AES formally stated that a battery storage facility would be proposed as part of the AES project even though it was prohibited within the RUR-F zoning district upon which the AES project was to be situated. To combat this obvious problem, County Staff proposed a "Community Solar Ordinance" (Ordinance 2022-05) to amend the existing definition of a "Commercial Solar Energy Production Facility" under the guise of aligning the SLDC with the state's newly created 2021 "Community Solar Act". The new Ordinance was presented to the public as a way to regulate small "Community

Solar” facilities (up to 5 MW), when in fact the definitional changes made utility-scale battery systems eligible within the RUR-F zoning districts.¹¹ *Appellants’ Exhibit 3*.

b. The December 4, 2024, SLDC Hearing Officer hearing

County Staff never issued a formal determination that the Application was complete, but the SLDC hearing was nevertheless scheduled for December 4, 2024.¹² The Hearing Officer held a prehearing conference on November 14, at which she heard requests from individuals and groups seeking party status and denied a motion to allow discovery upon the Applicants. *ROA, Pt. S01, 012215*. On November 18, the Hearing Officer issued an Order on Requests for Standing granting party status to two community groups, CEC and the San Marcos Association, representing landowners in Eldorado and San Marcos located adjacent to the proposed Project. *ROA, Pt. 16, 001016*.

The Hearing Officer conducted an evidentiary hearing on December 4 at which parties were allowed to present oral testimony in the amounts of time each requested and cross-examine witnesses of opposing parties, including County Staff, without any pre-established time limits.

On December 23, the Hearing Officer issued a Recommended Order to deny the CUP. *ROA, Pt. 40, 00504*. The Hearing Officer, an attorney with many years of experience in regulatory matters, found that the Applicants failed to satisfy the SLDC criteria for a CUP:

“The Applicant in this case, fails the following criteria to be granted the requested CUP: i) will not be detrimental to the health, safety and general welfare of the area; iii) will not create a potential hazard for fire, panic, or other danger; and vii) will not be inconsistent with the

¹¹ The Ordinance (2022-05) proposal was introduced almost immediately after County Staff were informed about a thermal runaway fire that occurred at a much smaller scale AES battery storage facility (10 MW) in Chandler Arizona, implementing the same lithium-ion technology.

¹² 4.4.6.2 Completeness Review Determination. The Administrator shall issue a written determination on completeness after review of an application and attachments within fourteen (14) days, which may be extended an additional ten (10) days if determined to be necessary by the Administrator due to the complexity of the application. 4.4.6.4 Determination Constitutes a Final Development Order. The final determination of the Administrator on completeness of an application constitutes a final development order and is appealable to the Planning Commission.

purposes of the property’s zoning classification or in any other way inconsistent with the spirit and intent of the SLDC and SGMP”. (Finding No. 40.) **ROA, Pt. 40, 005418.**

The Hearing Officer supported her recommendation with the further factual findings:

“The consequences of a fire from the Project could be catastrophic because of its proximity to the surrounding communities of Eldorado, Rancho San Marcos, and Rancho Viejo - an area with an estimated 10,000 homes and approximately 25,000 residents”. (Finding No. 45.) **ROA, Pt. 40, 005419.**

“At the hearing when asked if there was any commercial or industrial facility in the County that posed a comparable degree of hazard as the proposed Project, Staff responded that it was not aware of any past, present, or future projects that posed such hazard as the proposed Project”. (Finding No. 48.) **ROA, Pt.40, 005420**

“The scale of the Project, over 200,000 panels and 570,000 lithium-ion batteries, together with the proximity to residential communities with homes as close as 500 feet from the Site boundary creates an unreasonable risk to the safety and welfare of the communities. The risk is compounded by the distance of these areas from County fire fighting stations, none of which has a hazardous material team”. (Finding No. 49.) **ROA, Pt. 40, 005420.**

“ . . . Unrebutted testimony was presented that solar battery storage systems are evolving to ever safer forms, but the system proposed for this Project are of an older less safe type”. (Finding No. 41.) **ROA, Pt. 40, 005418.**

“ . . . The remote monitoring for this Project, which would be the only monitoring outside of the normal work week of onsite personnel, is located in Salt Lake City, Utah and is dependent on telecommunications capabilities. The potential for a catastrophic fire from failure of individual cells is vastly increased with over one-half million battery cells”. (Finding No. 42.) **ROA, Pt. 40, 005419.**

“The County does not have a hazardous material team/unit and utilizes the unit of the City of Santa Fe, which is approximately 16 miles away from the Site. . . . [At] a wind speed of eight miles an hour and low moisture conditions, a wildfire could be expected to cover one mile in 26 minutes; under the same conditions with a wind speed of 16 miles an hour, the fire would travel that mile in 13 minutes”. (Finding No. 44.) **ROA, Pt.40, 005419.**

“ . . . In the event of a fire escaping from enclosed cells, there would be potential for PFAS-laden fire suppressant together with massive amounts of water used to extinguish the fire could contaminate the groundwater in areas with a shallow aquifer and residents reliant on domestic wells”. (Finding No. 46.) **ROA, Pt. 40, 005420.**

c. The February 3-4, 2025, Planning Commission hearing

On January 16, 2025, the Planning Commission, comprised of seven members, with three members specifically requested by County Staff and approved by the BCC,¹³ held a prehearing conference to act on requests from individuals and groups to participate in its hearings to address the Hearing Officer’s Recommended Order. In addition to CEC and the San Marcos Association, a Rancho San Marcos-based organization (New Mexicans for Responsible Renewable Energy), and two residents, Ashley Schannauer (Eldorado) and Camilla Brom (Rancho San Marcos) were granted party status. Four non-government organizations (“NGO’s), supportive of the CUP, were granted party status – 350 Santa Fe, Inc., Sierra Club Rio Grande Chapter, Santa Fe Green Chamber of Commerce and The Global Warming Express –despite having no viable connection to the affected communities and not specifically representing any adjacent landowners (the NGOs generally supported the Project to combat climate change and promote economic development). **ROA, Pt. 24, 002772 - 002781.**

On January 27, County Staff issued an order, purportedly on behalf of the Planning Commission, reporting on the Planning Commission’s January 16 decision on parties of standing. But County Staff’s Order went further than the Planning Commission’s action. It limited parties’ testimony to 30 minutes each and required that parties could only cross-examine witnesses indirectly through questions submitted to County Staff and asked at the hearing by the Chairperson. **ROA, Pt. SO3, 013035.** The Planning Commission held hearings on February 3-4, 2025¹⁴. Chairman Aaboe enforced 30-minute time limits for presentations by parties with standing but allowed County Staff 55 minutes for its presentation and the Applicants more than two hours for their presentations. The Chair asked only one part of one of CEC’s six multi-part cross-

¹³ January 28, 2025, Memo to BCC re: appointments to Planning Commission. **Appellants’ Exhibit 7.**

¹⁴ The Chair of the Planning Commission, Erik Aaboe, had a conflict of interest due to his position as the Deputy Director of the New Mexico Renewable Energy Transmission Authority and was openly hostile to parties opposing the project. **ROA, Pt. 67, 010288.**

examination questions. In fact, the one question he did ask was specifically redirected from the Applicant (intended recipient) to Atar Fire (County's expert), in direct contravention of the spirit and intent of the examination process. **ROA, Pt. SO2, 012554 - 012556 and 012627 - 012628.**

After an executive session at the end of the hearings on February 5, the Planning Commission voted 6-1 to approve the CUP application with 19 conditions, with the lone vote to deny approval coming from the Commissioner who actually lives in an impacted community. **ROA, Pt. SO2, 012270.** And on March 20, the Planning Commission finalized the approval. The March 20 Order included no discussion of the Hearing Officer's findings and no specific findings of fact of its own except the conclusory finding that "[b]ased on evidence presented at the hearing, the Commission concludes that the Applicant has satisfied the Code criteria for approval of a Conditional Use Permit to allow a 96-megawatt solar facility on 684+/- acres of an 828-acre tract." March 20, 2025, Order, ¶12. **ROA, Pt. 41, 005641.**

d. The May 2, 2025, appeals and the August 11-13 and 26, 2025 BCC hearings

CEC and the other parties opposing the Project filed appeals of the Planning Commission's March 20 Order on May 2. In its filing, CEC raised the following issues.

Project is inconsistent with the spirit and intent of the SLDC and SGMP.

- (1) BCC approval of Ordinance 2022-05, which included battery storage within the zoning ordinance's definition of "Commercial Solar Energy Production Facility," violated the Open Meetings Act.
- (2) Lack of specific siting regulations for utility-scale solar energy production facility with battery storage.
- (3) Failure to conduct adequate pre-application review.
- (4) Deficiencies in the Environmental Impact Report (EIR) and Hazard Mitigation Analysis (HMA)
- (5) Inconsistency with zoning classifications
- (6) Flawed permitting process and lack of transparency

The Project will be detrimental to the health, safety and general welfare of the area, and will create a potential hazard for fire, panic or other danger.

- (1) The Project poses a significant risk of fire, explosion, and toxic gas release

- (2) Inadequate water resources to fight BESS fires
- (3) AES's history of BESS accidents
- (4) Proximity to residential communities
- (5) Insufficient emergency response capabilities
- (6) Potential for rapid wildfire spread
- (7) Release of toxic gases/smoke plume containing heavy metals, water contamination from firewater runoff, health impacts and utilization of more dangerous battery chemistry

At the BCC's regular meeting on May 27, the BCC, after an executive session, consolidated the various appeals and ordered that all parties with standing, recognized in the Planning Commission hearings, would continue to be identified as such in the appeal proceedings. Additionally, the BCC offered an opportunity for additional groups and individuals to request participation as parties at the BCC's next prehearing conference.

The BCC scheduled the next prehearing conference for June 17 to discuss the date, time, location and other procedural details for the BCC's hearing on the appeals, and it ordered the parties to confer to reach agreement on the above details, including the time needed for the presentation of evidence and public comment. The BCC ordered that the parties submit a joint letter to County Staff by June 10 setting forth areas of agreement and disagreement and the parties' positions on the disputed issues. **ROA, Pt. 44, 006281.**

On June 10, the parties filed their joint letter with County Staff reaching agreement that that the hearings should be scheduled between the dates of August 7 and 15 in a venue that can accommodate 300 people or more; that the BCC establish a service list to prevent *ex parte* communications between the parties, Staff and BCC members; and that the BCC establish filing deadlines for testimony in advance of the hearings. The parties failed to reach an agreement on CEC's request for: two hours for its presentation; opportunities for discovery and cross-examination by each party of opposing witnesses (not through questions submitted to the BCC Chair); and County Staff's commingled roles of advocate, adviser and decision-maker. **ROA, Pt. 76, 011786.**

On June 17, after another executive session, the BCC issued an Order scheduling the appeals hearing for August 11 and 12 and set the following prehearing deadlines:

- July 21: Submittal and service of all reports, witness lists and substantive evidence
- July 25: Submittal of presentation materials
- July 31: Submission of public comment

The BCC approved Camilla Brom, a resident of Rancho San Marcos, as an additional non-appealing party with standing. It denied a renewed motion for discovery and required the parties with standing to select the materials they wanted to include in the administrative record to be submitted to a service list that includes County Staff. *ROA, Pt. 44, 006298 - 006304*. Communications by Applicants with County Staff and BCC members were exempted from the service list requirement as well as communications by any party that were not intended to be made part of the administrative record.

The BCC Order allowed County Staff, the Applicants and the appealing parties one hour each to present their evidence. Ms. Brom and the other non-appealing parties were each granted 30 minutes. The BCC allowed parties to directly cross-examine opposing witnesses but ordered that all time spent on cross-examination would be deducted from the time allowed to present their evidence. *ROA, Pt. S02, 012789*. For CEC, that meant that the time they would spend in cross-examination would be deducted from the 60 minutes allocated to them to present the testimony of five witnesses, thereby effectively eliminating all meaningful cross-examination. Public comments were limited to two minutes each.

The BCC conducted an evidentiary hearing on August 11 to hear presentations by County Staff, the Applicants, and the parties with standing. The Applicants' presentation included two new exhibits submitted on August 8 despite the BCC's July 21 deadline – a new noise study and a Smoke and Plume Model – on the Friday before the start of the August 11 hearing and almost three weeks after the BCC's deadline. *ROA, Pt. S03, 013161; ROA, Pt. 76, 011807, 011857*. The

noise study appears to have resulted from a private *ex parte* meeting on July 24 between County Staff and AES following the July 21 filing of the Project opponents' exhibits. **ROA, S03, 012151; ROA, Pt. S02, 012800-012801.**

On the first day of the hearings, the Applicants described the benefits of the Project and its safety features. But the Applicants also proposed a major amendment to the CUP Application, which had not been included in their August 30, 2024, filing or in a formal amendment prior to the August 11 hearing as required by SLDC §4.6. They proposed to retain the ranchland character of property adjacent to the solar and battery facilities by transferring the development rights (TDRs) in 5,706 acres of adjacent property owned by one of the Applicants, Rancho Viejo Development, LLC. AES described the amended Project as a "package." **ROA, Pt. 77, 011912.**

As in its presentations to the Hearing Officer and Planning Commission, County Staff testified that the Applicants' Environmental Impact Report ("EIR") was sufficient to satisfy the EIR requirements of SLDC §6.3 and the overall Application was sufficient to satisfy the SLDC §4.9.6.5 criteria for a CUP, subject to a list of conditions. **ROA, Pt. 44, 006308; ROA, Pt. 44, 006320.** Permit condition 16 was to be satisfied before the recordation of the CUP, and another 25 conditions were to be satisfied at various times in the future pursuant to further reviews by Staff and its consultants. **ROA, Pt. 44, 006323.**

Project opponents presented a partial accident history of the Project's developer, AES Clean Energy Development, LLC, and its affiliates, illustrating the impact of the resulting fires and explosion on adjacent communities and responding firefighters (including, April 19, 2019 explosion and fire in Surprise; Arizona, April 18-May 1, 2022 fire in Chandler, Arizona; --

September 5-6, 2024 fire in Escondido, California; January 16-17, 2025 fire (re-ignition February 18) in Moss Landing, California¹⁵). **ROA, Pt. 76, 011855.**

The accidents were so impactful that they prompted AES to include warnings in its Annual 10-K reports filed with the Securities and Exchange Commission about the “inherent risks” of its battery storage operations and the “significant personal injury or loss of life, severe damage to and destruction of property, plant and equipment, contamination of, or damage to, the environment and suspension of operations [which] may result in our being named as a defendant in lawsuits asserting claims for substantial damages, environmental cleanup costs, personal injury and fines and/or penalties.”¹⁶ **ROA, Pt. 41, 005560.**

Two of CEC’s expert witnesses – a fire protection engineer and a former utility executive responsible for solar and battery storage siting and procurements – testified about the hazards of battery storage systems and the inadequacies of the Applicants’ Hazard Mitigation Analysis and Smoke and Plume Model. **ROA, Pt. 73, 010884; ROA, Pt. 77, 011879.** CEC’s toxicologist, a Professor Emeritus from the University of California, Santa Cruz, testified about the potential health impacts of the emissions from the fire at the Moss Landing project. **ROA, Pt. 73, 01879; ROA, Pt. S02, 012805.** A Moss Landing resident testified about the impacts of the Moss Landing fires on his community. **ROA, Pt. 77, 011881.** And the CEC President testified about the particular risks the Project poses for Eldorado residents. **ROA, Pt. 77, 011883; ROA, Pt. S02, 012805.**

Additional evidence revealed more problems. The Applicants lacked a plan to supply the 150-acre feet of water required for the Project during the 12-18 month construction period; and the pipeline and water hauling options considered by the Applicants posed potential health issues

¹⁵ Fluence Energy, LLC (AES subsidiary) was engineering contractor for original Moss Landing project.

¹⁶ AES Corporation Annual Reports 2022-2024. AES’s corporate admission of Inherent risks violates SLDC 4.9.6.5(1)(3) as a matter of law.

and/or traffic congestion problems.¹⁷ **ROA, Pt. 76, 011785; ROA, Pt. 77, 011858, 011867.** The noise study submitted with the Application failed to accurately measure the anticipated impact of the Project’s noise on nearby residents; it incorporated estimates of the area’s ambient noise levels instead of any actual measurements.¹⁸ **ROA, Pt. 2, 000202; ROA, Pt. 76, 011827 – 011831, ROA, Pt. S02, 012778.** And, finally, uncontroverted evidence showed that the proposed route of the Project’s 2.3-mile gen-tie line would violate the zoning requirements of the County’s Community College District.¹⁹ **ROA, Pt. 77, 011894, 011898, 011906.**

At the end of the August 11 hearing, the BCC announced that it would allow County Staff and the Applicants to submit additional “evidence” and input at an *ex parte* exclusive closed-door session on August 13. The CEC and other parties were specifically excluded from these proceedings. **ROA, Pt. 77, 011919.**

The BCC re-convened on August 13 for testimony from the Applicants and Staff. At the end of that hearing, the BCC scheduled another *ex parte* evidentiary hearing on August 26 for further questioning of County Staff, including the County Manager and a witness of the Applicants. CEC and other parties were again excluded from participating. **ROA, Pt. 77, 011091.**

¹⁷ County Fire Marshal Blay testified about the potential for the poisoning of students at a nearby school as a reason to reject one of the water supply options being considered:

“One of the reasons why a water line for fire flow or fire protection is not recommended is first of all because that would become stagnant water. We would have three miles of stagnant water that would have to be constantly being flushed out and replenished which would be cost prohibitive for Santa Fe County or for -- anyway aside of the cost. The main risk would be that this line feeds the Turquoise Trail Elementary School. God forbid that the backflow preventor failed and all of that stagnant water made its way into the municipal water supply. All those kids could potentially be poisoned. So that is one of the reasons why I don’t think it would be a good idea to have a water line all the way to the end of fire hydrant all the way to their facility”.

Tr. (8/13/2025), p. 158-159 (emphasis added).

¹⁸ A revised noise study submitted by the Applicants three days before the hearing showed that the actual ambient noise levels in the area were significantly lower than the estimated values used in the study filed with the Application. When the operational noise from the Project, as calculated in the first study, is added to the actual measured levels of ambient noise, the increased noise caused by the Project will exceed the SLDC’s allowable noise limits. **ROA, Pt. 76, 011829.**

¹⁹ The gen-tie line will have to be re-located, evidence must be presented to justify the re-location, and a public hearing must be held to review, analyze and approve the new location.

As the apparent result of the issues raised by the Project's opponents during the BCC's hearings, the BCC, County Staff and Applicants negotiated several additional major amendments to the August 30 Application. **ROA, Pt. 77, 011972.** These included (1) increased spacing between battery containers, (2) additional water storage tanks, and (3) relocation of the 2.3-mile gen-tie line proposed to connect the Project to PNM's electric grid. **ROA, Pt. 77, 011906.** None of these changes had been noticed to the public prior to the August hearings, and no analysis of the environmental impacts of the changes had been performed.

On August 25, CEC filed a Notice of Objection to Due Process Violations, in which it objected to its exclusion from the post-August 11 proceedings and its inability to address the last-minute, late-filed studies submitted on August 8 and the Project changes proposed by the Applicants during the hearings.²⁰ **ROA, Pt. S03, 013169.** CEC requested that the proceedings be reopened so that the parties could properly review, scrutinize and evaluate the proposed changes and their impact on the SLDC criteria for a CUP. **ROA, Pt. S03, 013176.** CEC also stated that the Application amendments proposed during the hearing required the re-submittal and re-noticing of the Application pursuant to SLDC §4.6. **ROA, Pt. S03, 013170-013171.**

At the end of the hearings on August 26 and after an executive session for deliberations, the BCC voted 4-1 to approve the CUP Application with 14 new conditions in addition to the original Planning Commission conditions, bringing the total to 33 permit conditions. Seven of the conditions were delegated to County Staff and its consultants for resolution, transferring authority to County Staff and its consultants to resolve seven issues determinative of the SLDC criteria for

²⁰ The Applicants violated the July 21 deadline established in the BCC's June 17 Order for the parties' filing of "reports, witness lists and substantive evidence."

a CUP in a post-hearing ministerial process, without evidentiary hearings and without notice to the parties and an opportunity to be heard²¹. **ROA, Pt. 77, 011982.**

County Staff prepared formal Findings of Fact and Conclusions of Law for the BCC's final action on October 14. As with the March 20 Planning Commission Order, the BCC's Findings and Conclusions also failed to discuss the Hearing Officer's Recommended Order of denial on December 23, 2024. **ROA, Pt. 78, 012059.**

Commissioner Cacari Stone filed a lengthy Dissent, that included contrary Findings of Fact and Conclusions of Law, in which she concluded that the Applicants had not satisfied the SLDC's criteria for a CUP. She found that the proposed project fails to adequately protect the health, safety, and general welfare of residents; that the project presents unresolved fire and toxic emission hazards inconsistent with the purposes of the SLDC and the SGMP; that the lack of enforceable decommissioning, cultural resource protection, and emergency response planning renders the project inconsistent with County purposes and the intent of the SLDC; and that approval of the CUP sets a precedent that weakens Santa Fe County's health and safety protections for future renewable energy projects: **ROA, Pt. 78, 012086.**

“The record contains substantial community-based testimony and expert analysis that I reviewed as part of the findings of fact of the dissent including emails of 418 unduplicated opposers (280 supporters) and the record includes the testimonies provided during the hearings from 112 opposers (40 supporters). This evidence, drawn from residents, engineers, physicians, biologists, and other professionals, underscores the lack of public trust in the applicant/application as well as unresolved risks to public health, safety, welfare and the environment.”

²¹ Permit condition 1 – BESS hazards (SLDC Criteria 1 and 3); Permit condition 17 – Smoke and Plume Model (SLDC Criteria 1 and 3); Permit conditions 16, 22 and 23 – Water and traffic congestion (SLDC Criteria 1, 2 and 5); Permit condition 21 – Noise (SLDC Criterion 1, SLDC §§6.3.10.1 and 7.21.4); Permit Condition 25 – Relocation of 2.3-mile gen-tie line (SLDC Criterion 7)

ROA, Pt. 78, 012089, quoting from the BCC Order, at p. 31.

County Staff recorded the BCC Order with the County Clerk on October 22. *ROA, Pt. 78, 012085*. But Staff did so prior to the Applicants' filing of a water budget for the Project and prior to its review and approval by Glorieta Geoscience and Santa Fe County Utilities Division in direct violation of Permit Condition 16. *Appellants' Exhibit 10*.

4. Additional facts related to due process. In light of the dispute over outstanding discovery requests (scheduled for hearing on May 1, 2026), CEC is not currently able to fully describe the facts that form the basis for its due process issues. The portions of the administrative record described above are relevant to all of CEC's due process claims. CEC's outstanding discovery requests, for which the County and the Applicants request a protective order, seek additional evidence relevant to these and CEC's other due process claims. *See Appellants' Notice of Discovery, Filed December 3, 2025 (hearing set for May 1, 2026)*.

Nevertheless, the following communications between Staff and the County's decision-makers and between County Staff and the Applicants (obtained through Inspection of Public Records Act responses and photographs) are also in the current administrative record and are relevant to CEC's due process claims.

Private communications between County Staff and County decision-makers:

(1) County Staff interceded privately with the Hearing Officer to change the October 16, 2024, Order, that would have granted standing to a potential party.²² *Appellants' Exhibit 7*.

²² The Hearing Officer issued an Order on Motion to Intervene on October 16 granting party status to Ashley C. Schannauer. The Hearing Officer found that Mr. Schannauer's intervention "could be beneficial to the process." She noted he "is an attorney who has presided over and participated in many administrative adjudicatory hearings, some involving battery energy storage systems and utility facility siting" and that "while only representing his own interests, he would likely pose many of the inquiries that would be submitted by other Eldorado residents making the process more efficient." Order on Motion to Intervene, ¶¶ 5-8. However, in response to the *ex parte* requests of Staff, the Order was never distributed, and the November 18 Order excluded Mr. Schannauer from party status. Mr. Schannauer filed a Motion on November 20 asking that the December 4 hearing date before the Hearing Officer be rescheduled until the *ex parte* issues were resolved, and that a service list be established to ensure that all parties are informed of and provided with communications between parties and the Hearing Officer, but it was never acted upon. Motion Requesting Order Addressing *Ex Parte* Communications and County Staff's Blocking of the Hearing Officer's October 16, 2024 Order on Motion to Intervene, November 20, 2024. *ROA, Pt. S03,12994-13018*.

- (2) County Staff vetted current Planning Commission members for reappointment in January 2025 and potential candidates to replace current Planning Commission members' expiring terms. **ROA, Pt. S02, 0012872.**
- (3) The same Staff attorney who advised County Staff during its review of the CUP Application and at the evidentiary hearings submitted a confidential January 31 memorandum to the Planning Commission arguing against the position of a project opponent (San Marcos Association). **ROA, Pt. 72, 010844 – 010846.**
- (4) The same Staff attorney also participated in the February 4 executive session in which the Planning Commission deliberated on the case. **ROA, Pt. S03, 013023 – 013025.**
- (5) The same Staff attorney drafted the Planning Commission's March 20 Order approving the Conditional Use Permit. **ROA, Pt. 41, 005628.**
- (6) Several BCC members submitted advance questions on an *ex parte* basis to County Staff during the BCC hearings. The BCC members asked that the questions be answered by the Applicants and County Staff. **ROA, Pt. S03, 013163-013166.**
- (7) Photographs show that the County Manager presented evidentiary testimony during earlier portions of the BCC hearing and then improperly participated in the BCC's executive session on August 26 in which the BCC deliberated on its final decision. **Appellants' Exhibits 8 and 9.**

Private communications between County Staff and the Applicants (obtained through multiple IPRA requests to the County):

- (1) Before and during the Hearing Officer hearings: County Staff communicated privately with the Applicants on the hazards of Applicants' proposed lithium-ion batteries and other issues raised by project opponents, and the Staff's testimony downplayed the hazards. **ROA, Pt. 16, 1022, 1024-25, 1033; Pt. 32, 003868.**
- (2) Before and during the Planning Commission hearings: Private discussions between Staff and the Applicants to resolve the negative findings made by the Hearing Officer; County Staff's testimony downplayed the hazards. **ROA Pt. S02, 012597-012605, 012822-012836, 012615; Pt. S03, 012978-012990; Pt. 24, 002809.**
- (3) Private discussions between Staff and the Applicants addressed environmental issues regarding the project's water supply; County Staff's testimony did not mention these issues. **ROA, Pt. S02, 012606-012612, 012834-012836; Pt. 44, 006307-006323; Pt. 76, 011783.**
- (4) After the Planning Commission hearings and during the BCC hearings: County Staff continued to discuss privately with the Applicants the project's battery hazards and water supply issues. As two examples, on July 24 (after the BCC's deadline for filing exhibits), they met to discuss the Project opponents' concerns on noise, resulting in a new noise study, which was submitted to the BCC and the parties on Friday August 8, before the start of hearings on Monday August 11. **ROA, Pt. S02, 012800 -012804; Pt. 44, 006307-006323; ROA, Pt. 76, 011783.** On August 6, County Staff privately forwarded to AES and the Rancho Viejo Limited Partnership a memo from the County Public Utilities Department denying the Partnership's request to supply water from County bulk water station and fire hydrant. **ROA, Pt. S03, 013159 – 013160.** On August 21, AES privately submitted to Staff a response to BCC members' questions about the anticipated number of construction workers and their wages. AES included a link to a Sandia National Laboratories presentation on sodium ion battery safety, and information disputing CEC's

testimony about the availability of water for fire fighting in the western neighborhoods of Eldorado. *ROA, Pt. S02, 012806; ROA, Pt. S03, 012808.*

III. ARGUMENT

A. The BCC’s Decision to Issue Applicant’s CUP did not constitute a “Final Decision” as a matter of law, or in the alternative, was invalid under the SLDC.

Non-final decision. Before addressing the numerous arguments under this Court’s appellate jurisdiction, we must first determine whether issuance of the BCC’s October 14, 2025, Order constituted a “final decision” as a matter of law. And, secondarily, whether the BCC’s Order is appealable and properly before this Court. The BCC’s Order states as follows:

“As required by NMSA 1978, Section 39-3-1.1, and Section 4.4.13 of the Sustainable Land Development Code, Ordinance No. 2016-09, as amended (hereinafter “SLDC”), the BCC hereby documents its final decision with written findings of fact and conclusions of law”. *ROA, Pt. 78, 012059*

NMSA 1978, §39-3-1.1 and Rule 1-074 NMRA provide the legal basis and proper procedures for aggrieved parties to appeal final agency decisions to the District Courts. Within that structure the District Court is vested with jurisdiction if, and only if, that decision is final.

To qualify as a “final decision”, however, Subsection (H)(2) of §39-3-1.1 states:

(2) "final decision" means an agency ruling that as a practical matter resolves all issues arising from a dispute within the jurisdiction of the agency, once all administrative remedies available within the agency have been exhausted. The determination of whether there is a final decision by an agency shall be governed by the law regarding the finality of decisions by district courts. ...

The New Mexico Supreme Court states that a final decision “as a practical matter resolves all issues arising from a dispute within the jurisdiction of the agency” and that finality must be determined on a case-by-case basis. The Court adopted the following general principle that, when applied here, indicates that the BCC’s Order does not constitute a “final decision”:

{20} To distill from all of this a general principle that will provide an easy answer to the question of when a judgment is final and when it is not is probably a hopeless undertaking. We agree with the United States Supreme Court that it is impossible to devise a formula to resolve all marginal cases coming within the twilight zone

of finality. One formula, not yet mentioned in this opinion, has been phrased by our court of appeals as follows: "The test of whether a judgment is final so as to permit the taking of an immediate appeal lies in the effect the judgment has upon the rights of some or all of the parties." Bralley v. City of Albuquerque, 102 N.M. at 718, 699 P.2d at 649. But this, of course, fails to explain what kind of effect upon the rights of the parties is necessary for an order to be considered as final.

{21} We probably can do little better than to propose the following guidelines, which may answer some but undoubtedly will not answer all of the difficult questions falling into the twilight zone: Where a judgment declares the rights and liabilities of the parties to the underlying controversy, a question remaining to be decided thereafter will not prevent the judgment from being final if resolution of that question will not alter the judgment or moot or revise decisions embodied therein. See Budinich v. Becton Dickinson & Co., 486 U.S. at 199. Where a post judgment request, such as one for attorney's fees, raises issues "collateral to" and "separate from" the decision on the merits, such a request will not destroy the finality of the decision, see id. at 199-200; proceedings to carry out or give effect to the judgment do not render the judgment nonfinal, because the trial court always retains jurisdiction to enforce its un-superseded judgment, see Prudential Ins. Co. of America v. Anaya, 78 N.M. at 107, 428 P.2d at 646; Armijo v. Pettit, 34 N.M. at 561, 286 P. at 828.²³

The issues deferred and/or delegated to County Staff here are not collateral to the Applicants' satisfaction of the SLDC criteria for a CUP. The issues are central to that determination and the ensuing County Staff decisions will result in profound changes to the Application that will *"alter the judgment or moot or revise decisions embodied therein"*. (Emphasis added.)²⁴

Furthermore, the administrative remedies relating to County Staff's ultimate development order are not exhausted at this time because those decisions have not been made. CEC and the other parties have the due process rights to participate in the review of the additional filings made by the Applicants to satisfy the permit conditions and to present evidence to refute those presentations. Moreover, SLDC §4.5 provides parties with the right to appeal development orders

²³ *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶¶20-21, 113 N.M. 231, 824 P.2d 1033 (S. Ct. 1992). (Emphasis added.)

²⁴ Id.

to the Planning Commission and BCC.²⁵ Most notable are the pending decisions that will drastically change the configuration and operations of the facility, access to water for construction and hazard control, traffic congestion, air quality, noise prohibitions and the relocation of the Gentie transmission line that currently violates the Community College District's zoning restrictions. Each decision represents a properly appealable issue. **ROA, Pt. 78, 012080.**

Since the County Staff's decision will be made under the authority properly exercised by the BCC, the requirement in SLDC §4.4.13 that findings of fact and conclusions of law related to the BCC's final action be approved by the BCC would equally apply to the findings and conclusions in any subsequent development order issued by County Staff on behalf of the BCC.²⁶

The BCC's Order authorizing the issuance of the CUP cannot be construed as a final decision because substantive issues remain unresolved. As a result, the CUP for the Project that is purportedly authorized by the BCC's Order is neither final nor valid.

Invalid recording of CUP. If this Court determines that the BCC's October 14, 2025, Order in fact constitutes a "final decision" there exists an additional procedural flaw that renders that decision invalid. The BCC voted to approve the CUP Application on August 26, 2025, and unequivocally pre- conditioned approval upon the submission of a detailed water budget by the Applicants and the review and approval of that budget by County Staff and its third-party consultants *prior to recordation*. **ROA, Pt. 78, 012082.** Permit Condition No. 16 explicitly requires that: "A detailed water budget is to be submitted for review and approval by Glorieta

²⁵ "Any aggrieved person with standing may appeal a development order to the Planning Commission or Board, as designated in this chapter." SLDC 4.5.1.

²⁶ **4.4.13 Notice of Decision by the Planning Commission of the Board; Findings of Fact, Conclusions of Law.** Written notice of a final decision of the Planning Commission or the Board to approve, or approve with conditions, an application which can be in the form of a development order, shall constitute the issuance of the permit. Staff or the Hearing Officer, where one is used, shall prepare findings of fact and conclusions of law as required by NMSA 1978, section 39-3-1.1 to document final action taken on each application. Such findings and conclusions shall be approved by the decision-making body and filed with the County Clerk. (Emphasis added).

Geoscience and Santa Fe County Utilities Division *prior to the recordation of the CUP.*”
(Emphasis added.)

County Staff included the permit condition in its recommendations to the BCC in their staff reports dated July 23, 2025, and August 21, 2025. The BCC voted to include the permit condition at the end of the hearings on August 26, 2025. **ROA, Pt. 77, 011982** And the BCC voted again to approve it when it took final action on its final order on October 14, 2025.²⁷ **ROA, Pt. 78, 012090.**

Under SLDC § 4.4.13, the written notice of a final decision by the BCC that is approved and filed with the County Clerk "shall constitute the issuance of the permit". Because the SLDC legally equates the recordation of the October 22, 2025, Order with the actual issuance of the CUP, the permit is facially invalid because it was officially issued before the mandatory condition precedent was fulfilled. In other words, by recording the CUP prior to resolving the water budget, the BCC effectively bypassed its duty to determine whether the project actually meets the mandatory criteria for a conditional use.

Under SLDC § 4.9.6.5, a CUP may only be approved if the BCC definitively determines that the project will not "interfere with adequate provisions for schools, parks, *water*, sewerage, transportation or other public requirements". Because the project lacked a finalized water source, and the detailed water budget issue was completely unresolved at the time the permit was recorded, the BCC could not legally or factually make the required determination that the project would not interfere with adequate water provisions.

²⁷ The Planning Commission's March 20 Order also conditioned its approval of the CUP on the Applicants' submission of the same water budget followed by Staff's approval, but without specifying a deadline. March 20, 2025 Order (Planning Commission), Permit Condition "o".

This is not a mere technicality. Of all the permit conditions that established post-hearing reviews and approvals, Permit Condition No. 16 is the only one to have sufficient importance to require an immediate review. Because this special condition was not satisfied before the CUP was recorded, the CUP is procedurally and factually invalid.

Alternatively, if the District Court were to determine otherwise – that a *further Development Order* issued by County Staff will constitute the CUP, the Development Order would be deemed the County’s final action on the CUP application, and it would have to be recorded with the County Clerk. The Development Order/CUP would, at that future time, be subject to appeal to District Court within 30 days of the recording pursuant to SLDC §4.5.5 and NMSA 1978, section 39-3-1.1. Until that undetermined date, however, the Applicants do not possess a valid CUP, and jurisdiction has not vested for this appeal.

Perhaps the most glaring defect contained within the BCC’s Order, Findings of Fact and Conclusions of Law, is the approval of the CUP Application without determining whether the CUP fully satisfies the SLDC criteria for the issuance of a CUP, which is compounded by the BCC’s decision to knowingly and purposely disregard the plethora of evidence that explicitly required denial of this CUP. Make no mistake, the evidence presented by the CEC regarding the fact that a “potential hazard for fire” exists is irrefutable and unimpeachable, and to even suggest otherwise is an absolute fiction.²⁸ The parties can debate whether the risks are manageable, the hazards are containable, or the health and safety affects can be minimized and potentially remediated. But no one can assert, and no evidence was presented that the potential hazard does not exist. The Applicants have admitted that fact in their annual reports, the County Staff admitted it in open

²⁸ This potential hazard further escalates given AES’ choice to use NCA lithium-ion batteries which are twice as volatile as LFP batteries, and therefore more prone to cause a catastrophic thermal runaway event. **ROA, PT. 77, 011877.**

Court, the Hearing Officer identified it in her Recommended Order and the BCC described it in a set of Dissenting Findings. *ROA, Pt. 41, 005560; ROA, Pt. 40, 005418-005420; ROA, Pt. 78, 012089*. As such, the BCC Order violates SLDC § 4.9.6.5(7) by any interpretation. The fact that we are even going through the appellate process represents an administrative perversion.

Unlawful delegation of authority to County Staff. To further compound the malfeasance, the BCC has unlawfully abdicated their regulatory authority to unelected County Staff members and third-party consultants, with no authority whatsoever, to resolve substantive issues that materially affect facility configurations/operations, district zoning issues, hazard controls and mitigations, and health and safety concerns and protocols.

The respective authorities of the BCC and County Staff are specified in state law and implemented by County regulation by and through the SLDC. State law provides Santa Fe County with the statutory authority to “regulate and restrict within its jurisdiction the . . . location and use of buildings, structures and land for trade, industry, residence or other purposes.”²⁹ State law also vests the exercise of that authority explicitly in the BCC.³⁰

The BCC has implemented its statutory land-use authority by adopting a comprehensive land use ordinance, the SLDC.³¹ The SLDC requires a Hearing Officer to conduct a quasi-judicial evidentiary hearing on CUP applications and to issue a Recommended Order for the Planning Commission. The SLDC provides that the Planning Commission and the BCC, upon appeal of the Planning Commission’s decision, have the authority to issue Conditional Use Permits. That authority is exercised pursuant to quasi-judicial proceedings similar to judicial trials in which

²⁹ NMSA 1978, § 3-21-1(A) (2019).

³⁰ “The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners.” NMSA 1978, § 4-38-1.

³¹ Santa Fe County Ordinance No. 2016-09, as amended.

parties present evidence and the Planning Commission and BCC make decisions based upon the evidentiary record (i.e., adjudications).³²

The SLDC, by contrast, assigns ministerial authority to the County Staff.³³ Ministerial reviews and decisions involve the “nondiscretionary application of the standards of the SLDC to an application.”³⁴ Ministerial reviews are commonly referred to as “check-the-box” reviews.³⁵ Staff’s decision-making authority for Conditional Use Permit applications is limited to ensuring that applications are technically complete.³⁶ The SLDC also authorizes County Staff to make recommendations to the Hearing Officer, Planning Commission and BCC,³⁷ but County Staff’s only decision-making authority is whether an application is complete, and that authority is subject to appeal to the Planning Commission.³⁸

However, in this case, the BCC Order delegates to County Staff and its consultants the plenary authority to resolve issues determinative of the SLDC criteria for a CUP.³⁹ And the BCC Order directs that the issues be resolved in a ministerial process without evidentiary hearings and without notice and an opportunity to be heard. *ROA, Pt. 78, 012084*. Some of the delegated

³² SLDC §§ 3.2.1, 3.2.1.3, 4.3.2, 4.7.2.

³³ SLDC §§4.3.3, 4.7.2, 4.8.

³⁴ SLDC §§4.3.3, 4.8.

³⁵ SLDC §6.3.10.2 confirms the significance of the discretionary/ministerial distinction and requires that measures to mitigate impacts that might violate the SLDC criteria for a CUP be determined by the BCC in its discretionary review: “Formulation of mitigation measures shall be identified at the first discretionary approval and under no circumstances deferred until the ministerial development process.”

³⁶ SLDC §4.4.6.

³⁷ SLDC § 4.7.2.1.1 provides:

The Administrator, or other County staff member designated by the Administrator, shall present a description of the proposed development, the relevant sections of the SGMP, area, district or community plans, the SLDC, and state and federal law that apply to the application, and describe the legal or factual issues to be determined. The Administrator or County consultant or staff member shall have the opportunity to present a recommendation and respond to questions from the Board, Planning Commission or Hearing Officer concerning any statements or evidence, after the owner/applicant has had the opportunity to reply.

³⁸ SLDC § 4.4.6.

³⁹ See SLDC § 4.9.6.5(1-7)

decisions in the BCC’s Order appear to be such that they could be classified as ministerial.⁴⁰ But seven conditions listed in the Order directly address the SLDC’s criteria for the issuance of the conditional use permit. These reviews must properly be conducted in an evidentiary hearing before the BCC with input from the parties before issuing the CUP. The review may not be delegated to the Reviewing Agencies or County Staff in the guise of a “ministerial” review, and it cannot occur without an evidentiary hearing, and it most certainly cannot administratively exclude the parties representing the adjacent communities most affected by the resulting determinations.⁴¹

The BCC’s deferrals are significant, and the public is put at risk as the Applicants are allowed to proceed without a full evaluation of the Project’s safety. CEC and other opposing parties are also harmed as the deferrals effectively deny them the opportunities to participate in the deferred reviews and to challenge Staff’s ultimate decisions on these issues in an appeal. Consequently, Staff’s ultimate decisions on these issues will not be appealable.

Permit Condition No. 1 – BESS hazards (relates to SLDC Criteria 1 and 3)

Permit Condition No. 1 requires “compliance with all reviewing agencies’ requirements, including the 93 conditions imposed by Santa Fe County Fire Prevention”. The “Reviewing Agencies” in this case include the NM Department of Cultural Resources, NM Department of Transportation, NM Environment Department and the Santa Fe County Fire Department. The issues they initially addressed need to be reviewed again in light of the reconfigured facility

⁴⁰ Examples of ministerial conditions in the CUP issued in this case could include, for example, the prohibition against the use of individual and/or shared wells (permit condition 2), the provision of at least one access parking space (permit condition 11) and the requirement of a liquid waste permit from NMED (permit condition 12).

⁴¹ “Administrative bodies and officers cannot delegate power, authority and functions which under the law may be exercised only by them, which are quasi-judicial in character, or which requires the exercise of judgment.” *Kerr McGee Nuclear Corp. v. New Mexico Environmental Imp. Bd.*, 1981-NMCA-044, para. 52, citing *Anderson v. Grand River Dam Authority*, 446 P.2d 814 (Okla. 1968); *Burger v. Iowa High School Athletic Association*, 197 N.W.2d 555 (Ia. 1972); *Voth v. Fisher*, 241 Or. 590, 407 P.2d 848 (1965). See also *New Mexico State Investment Council v. Weinstein*, 2016-NMCA-069, ¶ 71.

locations, water supplies and potential traffic impacts addressed in the BCC Order. Also, the 93 conditions identified in the Fire Department's October 2024 review relate directly to the SLDC criteria. Instead of requiring that these issues be resolved before issuing the October 14 BCC Order, the order deferred the issues to County Staff and its consultants. **ROA, Pt. 78, 012080.**

Permit Condition No. 17 – Smoke and Plume Model (relates to SLDC Criteria 1 and 3)

Permit Condition No. 17 requires the Applicant to provide a Smoke and Plume Model. The final results of the Smoke and Plume Model will provide information required for the BCC to evaluate and determine whether SLDC criteria 1 and 3 are satisfied. The review should address the CEC's expert testimony refuting the incorrect terrain modeling and wrong sensitivity threshold used in the Applicants' study and, ultimately, the risks of exposures to adjacent landowners of toxic gases and heavy metals. Instead of requiring that the model be completed and made available to the public and parties of standing before issuing the October 14 BCC Order, the order deferred the issues to County Staff and its consultants. **ROA, Pt. 78, 012082.**

Permit Conditions No's. 16, 22 and 23 –Water and traffic congestion (relate to SLDC Criteria 1, 2 and 5)

Permit Conditions No's. 16, 22 and 23 address water sourcing, budgeting and impacts for the Project. The review will address the adequacy of the supply and the potential impacts on adjacent landowners, including the issue of traffic congestion if the supply relies on water hauling. **ROA, Pt. 78, 012082 – 012083.**

The evidence in this case indicated that the Applicants' original plan to provide water supplies during construction through water hauling would result in traffic congestion. **ROA, Pt. S02, 012834 - 012836; ROA, Pt. S03, 012934 – 012935, 012941 – 012943; ROA, Pt. 77, 011867 and ROA, Pt. 78, 012089.** This led to several different proposals for water supplies during the course of the proceedings, but, as of the date of the August 2025 hearings and the BCC's October

14 order, the Applicants had not secured a water supply for the Project. *ROA, Pt. 78, 012083*. Instead of requiring that the issue be resolved before issuing the October 14 BCC Order, the BCC deferred the issues to County Staff and its consultants with three related permit conditions.⁴²

As discussed above, Permit Condition No. 16 requires the Applicants to submit a detailed water budget for review and approval by Glorieta Geoscience and Santa Fe County Utilities Division prior to the recordation of the CUP, which did not happen. *ROA, Pt. 78, 012082*. Permit Condition No. 23 requires that “[w]ater sources must be identified prior to the recordation of the CUP site development plan.” *ROA, Pt. 78, 012083*. Permit Condition No. 22 provides that, if an alternate source of water is identified, the traffic, noise and air quality studies are to be re-evaluated by the Applicant to validate that the impacts disclosed in those reports have not changed. *ROA, Pt. 78, 012083*. The Applicant’s evaluation will then be subject to review and comments from Glorieta Geoscience prior to the recordation of the CUP site development plan.

Permit Condition No. 21 – Noise (relates to SLDC Criterion 1, SLDC §§6.3.10.1 and 7.21.4)

Permit Condition No. 21 relates to the general welfare criterion for a CUP, as well as SLDC §§6.3.10.1 and 7.21.4, which address the issue of noise. SLDC Section 7.21.4 states that excessive noise levels projected to exceed allowable levels “shall be grounds for denial of a development application or imposition of noise mitigation efforts sufficient to ensure that the development will

⁴² The County Fire Marshal emphasized the risks to students at the nearby school of one of water supply options being considered by the Applicants:

“One of the reasons why a water line for fire flow or fire protection is not recommended is first of all because that would become stagnant water. We would have three miles of stagnant water that would have to be constantly being flushed out and replenished which would be cost prohibitive for Santa Fe County or for -- anyway aside of the cost. The main risk would be that this line feeds the Turquoise Trail Elementary School. God forbid that the backflow preventor failed and all of that stagnant water made its way into the municipal water supply. All those kids could potentially be poisoned. So that is one of the reasons why I don't think it would be a good idea to have a water line all the way to the end of fire hydrant all the way to their facility”.

BCC Minutes (8/13/2025), 158-159 (emphasis added).

not exceed the applicable noise limits.”

The “noise” issue was not addressed in the Planning Commission’s March 20, 2025, Order, but the BCC Order, for the first time, addressed it. The Applicant filed a third (*draft only*) noise study, which the County did not include as an Exhibit for the BCC on Friday, August 8, 2025 -- 18 days after the BCC’s July 21 deadline for the filing of exhibits and three days before the start of the BCC hearings on August 11. **ROA, Pt. 76, 011786.** Staff and its consultant (not to mention CEC and the other parties) had insufficient time to review, evaluate and present countervailing evidence regarding the study.

Instead of resolving the noise issue before issuing the CUP, the BCC deferred the issue to Staff and its consultant. The condition requires that the Applicants conduct a noise study, that it be reviewed by the County’s consultant, and that the Applicants address the consultant’s issues and incorporate mitigation measures prior to the recordation of the CUP site development plan. **ROA, Pt. 78, 012083.**

Permit Condition No. 25 – Relocation of 2.3-mile gen-tie line (relates to SLDC Criterion 7)

Permit Condition No. 25 relates directly to the Project’s consistency with the County’s zoning requirements. **ROA, Pt. 78, 012083.** Camilla Brom, a party opposing the Project, testified at the BCC hearing that a portion of the proposed route of the 2.3-mile gen-tie line conflicts with the zoning requirements of the Community College District. **ROA, Pt. 77, 011898.** After initially denying Ms. Brom’s claim, County Staff finally agreed and proposed deferring resolution of the issue with Permit Condition No. 25, which the BCC adopted.

The environmental impact of any new location and the actual length of line that needs to be relocated to avoid the Community College District may be larger (not likely smaller) than 1,600 feet. The BCC, however, simply deferred the issues to County Staff and its consultants.

The delegations to Staff to make non-appealable decisions effectively insulate the County's decisions on SLDC criteria from appellate review thereby denying CEC the right to challenge the County's decisions.⁴³

B. The BCC's decision to Issue Applicants' CUP failed to comply with the requirements of the SLDC by unlawfully allowing Applicants to by-pass mandatory pre-application processes; allowing impermissible application amendments; and allowing Applicants to violate the SLDC and SGMP.

As the regulating agency, Santa Fe County has a duty to protect and promote the health, safety and general welfare of the residents under its purview; to provide for objective and fair administrative and quasi-judicial processes; and establish and protect individual and community property rights.⁴⁴ Under SLDC Sections 4.4.2, 4.4.3, and 4.4.4, Applicants are required to meet with the County's Technical Advisory Committee (TAC) so that the County can review, evaluate and assess the proposed project in detail and provide a written summary identifying specific land use issues, detailing specific studies that will be necessary and highlighting the specific regulations that will govern and guide the application process.

Instead of conducting a TAC review for the current Application at issue in this case, the Applicants were allowed to re-use the TAC review letter issued by the County in March of 2022, which was based on a TAC review meeting held in November of 2021 and issued for an application filed in January 2023, that was eventually withdrawn. *ROA, Pt. 77, 011860*. Applicants had no

⁴³ N.M. State Investment Council v. Weinstein, 2016-NMCA-069, ¶71, 382 P.3d 923:

{71} "As a creature of statute, NMSIC functions solely within the powers granted by the Legislature. *Chalamidas v. Envtl. Improvement Div.*, [1984-NMCA-109](#), ¶ 13, [102 N.M. 63](#), [691 P.2d 64](#). NMSIC's powers are limited by Section 6-8-2(B) and Section 6-8-7(A) and (E). Under Section 6-8-2(B), '[a]ll actions of the council shall be by majority vote, and a majority of the members shall constitute a quorum.' (Emphasis added.) The only mention of NMSIC's ability to delegate its responsibilities states that '[t]he [NMSIC] may delegate administrative and investment-related functions to the state investment officer.' Section 6-8-7(A). Section 6-8-7(E) provides that NMSIC may 'form and use committees,' but only to 'study and make recommendations to [NMSIC].' Notwithstanding the Settlement Policy, these provisions do not permit NMSIC to delegate authority to settle litigation to a committee. Indeed, read together, they prohibit such delegation. *Cf. Kerr-McGee Nuclear Corp. v. N.M. Envtl. Improvement Bd.*, [1981-NMCA-044](#), ¶ 52, 97 N.M. 88, 637 P.2d 38

⁴⁴ SLDC § § 1.4.1, 1.4.2.9, 1.4.2.10 & 1.4.2.15

vested right to re-use this TAC letter and Santa FE County possessed no legal or factual basis to allow its usage.⁴⁵ By allowing the Applicants to bypass the 2024 TAC review, the County knowingly allowed the Applicants to evade newer, more stringent, safety regulations contained within Santa Fe County Ordinance 2023-09. This new ordinance incorporated strict fire safety standards (2023 edition of NFPA 855, including comprehensive fire mitigation standards) that would have created a compliance roadblock for the Applicants. **ROA, Pt. 67, 010454.**

Conveniently, the March 2022 TAC letter didn't include these updated, more restrictive, safety standards at a time when the Applicants sought to incorporate a highly volatile battery energy storage system (BESS), utilizing battery technologies with a known history of explosions, catastrophic thermal runaway fires, toxic gas releases and heavy metal impacts. **ROA, Pt. 77, 011877.** Santa Fe County attempted to justify this action by suggesting they were complying with an "internal" staff rule to alleviate application backlogs. **ROA, Pt. S03, 012916 – 012918.** However, this "internal" policy was never formally proposed or adopted by the BCC as a legal amendment to the SLDC, and never presented to the public for input or scrutiny. To suggest that an internal memo or policy can override the explicit codified mandates of SLDC § 4.4.3 is ludicrous. Consequently, the BCC's decision to approve the Applicants' CUP under these unsubstantiated, illegal and implausible justifications is not only arbitrary and capricious, but contrary to law.

Compounding the legal deficiencies of the TAC review, Applicants submitted an inadequate Environmental Impact Report (EIR). Under SLDC § 6.3.11, the EIR is legally required to describe,

⁴⁵ County Staff Dominic Sisneros stated: "So staff found that since the applicant had already applied for the pre-application meeting and met the Technical Advisory meeting, and since the use hadn't changed and the site layout hadn't really changed, we felt it not necessary for them to come back to a pre-application Technical Advisory meeting." And then stated: "And since then we have actually implemented an eight-month expiration date currently, but that was done after the fact that AES had reapplied for the application." Further evidencing that the 2022 TAC usage was an improper action that had to be rectified. **ROA, Pt. S02, 012720; ROA, Pt. S03, 012918.**

evaluate and compare a “range of reasonable alternatives to the project” that might “substantially lessen the adverse impacts or effects of the project”. The Applicants’ EIR provided absolutely no discussion or analysis of alternative, safer battery technologies. **ROA, Pt. S02, 012721**. In fact, throughout these proceedings opposition parties presented evidence that safer battery technologies exist **with 95% of the BESS industry moving to LFP batteries** that are significantly more stable, less prone to thermal runaway, as well as those that present no threat of thermal runaway whatsoever. **ROA, Pt. 70, 010737 - 010737; ROA, Pt. 41, 005483; ROA, Pt. 73, 010870**.

Lithium-iron phosphate (LFP) battery chemistry, for example, is more stable and less prone to thermal runaway than the Applicants’ proposed battery chemistry. **ROA, Pt. 41, 00583**. In response to a Planning Commissioner’s question, the County’s BESS expert testified that there is a range of risk that battery chemistries will go into thermal runaway. **ROA, Pt. S02, 012626**. He described lithium-iron-phosphate chemistry as “the calm, cool, Aunt Mabel who never gets excited” compared to other battery chemistries, such as AES’s chemistry, that are “the wild Uncle Frank who is always excited.” **ROA, Pt. S02, 12626**. For that reason, PNM uses lithium iron phosphate batteries in the storage projects that it builds and owns. **ROA, Pt. 41, 005483**. PNM’s Director of Generation Engineering testified in a 2023 Public Regulation Commission hearing that “[t]he chemistry that we’re proposing is lithium iron phosphate that has less -- it’s a more stable chemistry and less prone to fires.” Schannauer PowerPoint, August 11, 2025 (slide 53). **ROA, Pt. 41, 005483; ROA, Pt. 67, 010552**.

Additionally, under SLDC § 6.3.1 the Applicants are required to submit an EIR that specifically notifies the public of the “significant environmental impacts of the project”. In direct violation of that mandate, Applicants’ EIR purposely omitted any reference to the Applicants

extensive history of BESS accidents.⁴⁶ By omitting this accident history from the EIR report, Applicants knowingly and intentionally concealed the project’s actual, demonstrated risks from public scrutiny and the required regulatory oversight necessary to protect human health and the environment.

The potential impacts associated with BESS fires on the adjacent communities are significant. Consequently, these EIR omissions and concealments are not only legally impermissible, but from a regulatory perspective inherently negligent. They fail to evaluate and mitigate the risks associated with BESS fires. They do not mention the groundwater contamination from firewater runoff when the water streams used to cool adjacent containers intersect with the toxic plume. *ROA, Pt. 77, 011877*. They do not mention the inevitable release of highly flammable toxic gas plumes of carbon monoxide and toxic hydrogen compounds as well as heavy metal contamination released from the burning batteries in the smoke plume that travels for miles releasing these heavy metal nanoparticles representing a serious health risk and necessitating long-term environmental remediation. *ROA, Pt. 77, 011876; ROA, Pt. S02, 012805; ROA, Pt. 70, 011906*.

SLDC § 6.3.10.2 requires formulation of mitigation measures for these environmental impacts during the “first discretionary approval” (the CUP Application process), and “under no circumstances deferred until the ministerial development process” (post-application). This is exactly what the County allowed. The Applicants’ EIR and its attached Draft Preliminary Hazard Mitigation Analysis explicitly deferred final fire risk assessment, first responder planning and definitive mitigation measures to the post-approval detailed engineering phase. *ROA, Pt. 41,*

⁴⁶ Applicants and their affiliates have experienced multiple thermal runaway fires and explosions, including major incidents in Surprise, Arizona (2019), Chandler, Arizona (2022), Escondido, California (2024), and Moss Landing, California (2024).

005482. Consequently, the County violated SLDC §§ 6.3.1, 6.3.11 & 6.3.10.2, and knowingly, unnecessarily, arbitrarily and capriciously placed the adjacent communities they purportedly represent at significant risk without the evidentiary and procedural basis to support their reckless decisions.

Santa Fe County acknowledged, by administrative action, these violations of the SLDC by amending their administrative processes and applying stricter standards to another developer, Linea Energy, who was in the process of navigating the CUP application process for both its proposed Globemallow projects 1 and 2” commercial solar and BESS facilities. The County required Linea to comply with Ordinance No. 2023-09, follow Annex G of the NFPA 855, and submit a Fiscal Impact Assessment as part of their EIR – while Applicants were allowed to ignore each of these mandates, while openly competing with Linea for the same lucrative PNM contract. This disparate treatment should be viewed by the Court as an outright admission of the County’s violations or, at a minimum, a clear procedural statement acknowledging their regulatory failures as it relates to the Applicants in this case. This disparate treatment for similarly situated competitors was done arbitrarily and capriciously, in violation of law and the tenets of due process, fundamental fairness, and equal protection under the law.

Finally, the County has not only allowed the Applicants to openly circumvent proper regulatory procedure, but also permitted them to substantially and materially change their application after the administrative process was, for all intents and purposes, complete. At the close of the quasi-judicial hearings, and after the opposition parties had finished their presentation to the tribunal, the Applicants were permitted to reopen their presentations to address the glaring deficiencies in their application. These modifications include, 1) reconfiguration of the site’s fire water storage capacity from an inadequate 30,000 gallons to an equally inadequate 60,000 gallons,

while alluding to the procurement of *potential* permanent supplies *sometime in the future*⁴⁷, 2) reconfiguration of the placement, spacing and componentry of the BESS array, from an inadequate 3.5 feet between paired containers to an equally inadequate ten feet between containers⁴⁸, 3) reconfiguration and relocation of the Gen-tie transmission line⁴⁹, and 4) inclusion of a proposed Transfer of Land Development rights (TRD) in 5,760 acres of adjacent land to mitigate overcrowding concerns and permit potential agricultural use in the future. **ROA, Pt. 78, 012080.**

These changes do not constitute minor alterations, they are major modifications to the CUP. Under SLDC §§ 4.6.10, 4.6.11, 4.9.6.7, and 4.9.6.9 minor amendments may be authorized by the administrator, but major amendments must be approved in the same manner and under the same procedures as are applicable to the issuance of the original CUP development approvals. Essentially, major amendments require re-submission and re-hearing. Under the SLDC provisions “Minor Amendments” consist of amendments that do not:

§ 4.6.11.1 Increase the number of dwelling units, floor area, height, impervious surface development, or require any additional land-use disturbance; § 4.6.11.2 Introduce different land uses than that requested in the application; §4.6.11.3 Request consideration of a larger land area than indicated in the original application; §4.6.11.4 Request a greater variance than that requested in the application; § 4.6.11.5 Request any diminution in buffer or transition area dimensions, reduction in required yards, setbacks or landscaping, increase of maximum allowed height, or any change in the design characteristics or materials used in construction of the structures; or § 4.6.11.6 Reduce or eliminate conditions attached to a legislative or quasi-judicial development order unless a new application is filed.

The proposed amendments clearly fall within the “major Amendment” category. Therefore, based on the requirements set forth in the SLDC, the only proper administrative action

⁴⁷ Evidence submitted by the opposition shows that water utilization during thermal runaway fires requires millions of gallons of water, not thousands.

⁴⁸ No evidence was presented to support the contention that ten feet would somehow alleviate any of the fire hazard dangers that were presented ad nauseum.

⁴⁹After insisting several times that the gen-tie line did not cross into the CCD as the opposition party Camilla Brom testified, the County finally admitted later in the BCC hearing that the line location, as presently proposed violates the Community College District zoning prohibitions. **ROA, Pt. 77, 011898-011899), (ROA, Pt. 77, 011906**

with respect to these “Major Amendments” is re-submission and re-hearing. The BCC, County Staff and Applicants can attempt to fix the problems using the proverbial administrative putty, but these modifications are not only arbitrary and capricious, but patently impermissible.

C. BCC’s approval of the Applicants’ CUP fundamentally conflicts with the spirit and intent of the Sustainable Growth Management Plan (SGMP).

Under SLDC § 4.9.6.5(7), a CUP cannot be approved if the project is “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”. The BCC cherry-picked supportive provisions of the SGMP to green light the Applicants’ project, while simultaneously ignoring strict safety protocols and due process requirements of the SLDC and the SGMP that don’t fit their preferred narrative and political goals. This decision was both arbitrary and capricious, contrary to law, but also a violation of the tenets of due process and fundamental fairness. The BCC justified its actions based entirely on the general goal articulated in SGMP Chapter 7 regarding the renewable energy preferences “to establish Santa Fe County as a model in the efficient production and use of renewable energy and energy self-reliance through the development of a local green workforce and renewable energy infrastructure”.

In contrast, the BCC arbitrarily ignored the more specific public safety concerns outlined in Chapter 9 § 9.1.1, that clearly state, without equivocation, that the County has inadequate emergency response capabilities and cannot possibly service the affected communities in an emergency.⁵⁰ By the County’s own admission, they are ill-prepared to respond to a catastrophic

⁵⁰ 19.1. 1 KEY ISSUES

1. Several residential areas in the County have insufficient water to provide adequate fire flows. Deficiencies should be corrected where feasible and the County should require adequate fire flows and water infrastructure to improve Fire Department service delivery and Fire District ISO ratings.

3. Some rural residential development cannot adequately be served by County emergency services due to several factors including inadequate telecommunications capacity, distance from service points, inadequate emergency access, lack of fire protection water, and failure of property to meet life safety codes.

thermal runaway fire. Given these admitted deficiencies and fire history of the BESS technologies incorporated in this project the County is literally gambling with the lives of adjacent landowners and praying they can remedy these inadequacies at some future date. This is not a permissible procedural plan. It's wishful thinking with devastating repercussions.

Exacerbating this regulatory gamble, the BCC also ignored the procedural due process guarantees specifically detailed in SGMP Chapter 14 § 14.4.3, which mandates that the quasi-judicial process must provide "both Applicants and Protestants sufficient time for discovery and sufficient time to hear arguments for and against the application". The BCC denied CEC's multiple motions to compel critical discovery (such as unredacted safety data and reports on Applicants past BESS fires in Arizona and California) and severely restricted protestants' ability to conduct cross-examination of the Applicants' witnesses. **ROA. Pt. 44, 006298 – 006304.**

Compounding these due process violations, CEC's participation in the proceedings was forcibly "ceased" prior to the final BCC hearings on August 13 and 26, 2025. **ROA, Pt. 77, 011961.** This denied CEC the right to participate, effectively creating an imbalance in the presentation to the detriment of all parties opposing the project and preventing opposition parties from questioning the Applicants about last-minute project amendments that fundamentally and materially change the proposed facility, its operations and its functionality. Not to mention the hastily contrived water sourcing and safety protocol remediations and transmission line relocation that is still unresolved.

The County was so biased in their support for this project that they changed their regulations to allow the project to go forward. Section 14.1.2.2 of the SGMP dictates that the SGMP serves as the framework for all land-use regulations. According to the SLDC Use Matrix

4. The current emergency response system is not sufficient to service our population today. In the case of a large-scale emergency, where large numbers of County residents would have to be evacuated or hospitalized, the County and provider infrastructure and resources would be insufficient.

and the Land-Based Classification Standards (LBCS Structure Code 6400, subcode 6460), a "Gas or electric power generation facility"—which explicitly includes large-scale solar farms—is strictly prohibited in the Rural Fringe (RUR-F) zoning district. Instead of respecting this zoning prohibition, the County unlawfully circumvented it by covertly adopting Ordinance No. 2022-05, which amended the SLDC to add the phrase "and may store" to the definition of a "Commercial Solar Energy Production Facility." *Appellants' Exhibit 2.*

This definitional maneuver was improperly used to bypass the SGMP's zoning intent and force an industrial-scale battery storage project into an incompatible rural residential area. In fact, the Hearing Officer's analysis is particularly compelling on this subject. She highlighted the fact that the County ignored certain aspects of the SLDC to finesse a preferred outcome stating "the SLDC is intended to be consistent with the SGMP. See SLDC Chapter 1.4.1 Section 7.2.3.2 of the SGMP defines "utility scale" renewable energy generating facility as a facility generating more than 300 KW of electricity. Matrix-B Use Table of the SLDC lists under the "Utility" category of Uses "Gas or Electric Power Generating Facility" as a prohibited use in the RUR-F zone. The proposed Project is designed to produce 96 megawatts. The Applicant states that the Project could power the City of Santa Fe, which suggests that it would be classified as a utility-scale facility." This analysis clearly illustrates the lengths the County was willing to go, and how they were willing to subvert the process to meet their intended goal of rendering the rural fringe (RUR-F) zoning prohibition moot for siting purposes. *ROA Pt. 40, 005194; ROA, Pt.64, 009755.*

After hearing the evidence presented, and without allowing opposition parties to perform discovery on crucial safety and hazard issues, the Hearing Officer still concluded that "the evidence indicates the project would be detrimental to the health, safety and general welfare of the area; the Project would create a potential hazard for fire, panic, or other danger; and the Project is inconsistent with the purposes of the property's zoning classification and inconsistent with the

spirit and intent of the SLDC and SGMP” and that “the Applicant, in this case, fails to satisfy the following criteria to be granted the requested CUP: i) will not be detrimental to health, safety and general welfare of the area, iii) will not create a potential hazard for fire, panic, or other danger, and vii) will not be inconsistent with the purposes of the property’s zoning classification or in any way inconsistent with the spirit and intent of the SLDC and SGMP”. *ROA pt. 40, 005194 & 005196*

Perhaps most frightening, the Hearing Officer emphasized the County’s own admission regarding risk when she pointed out “At the hearing when asked if there was any commercial or industrial facility in the County that posed a comparable degree of hazard as the proposed Project, Staff responded that it was not aware of any past, present or future projects that posed such a hazard as the proposed Project”. *ROA, pt. 40, 005196*

These findings and analysis represent the observations of the only unbiased participant in these proceedings; an esteemed lawyer with an impeccable and unimpeachable reputation who is not driven by the prevailing political dynamics or ideologies. Not surprisingly, the Hearing Officer could not in good conscience approve this Project. Not because she is opposed to renewable energy. In fact, we all value and support alternative energy solutions as a viable means to decrease our collective carbon footprint, just not at the cost of community lives.

D. The BCC violated the tenets of due process, fundamental Fairness and equal protection under the law.

As noted in the Case Summary, the due process issues raised under the Court’s original jurisdiction are discussed below based upon facts available in the administrative record and in subsequently obtained IPRA responses (outlined in Section 4 of the Case Summary and attached hereto as exhibits). The further information sought in CEC’s outstanding discovery requests are necessary to complete CEC’s due process arguments.

Due process in quasi-judicial administrative proceedings. The New Mexico Supreme Court has determined that parties in administrative proceedings before administrative agencies and local governments have the right to procedural due process:

{7} At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case. In addition, our system of justice requires that the appearance of complete fairness be present. The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.

{8} These principles apply to administrative proceedings as well as to trials. When government agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. The rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed.⁵¹

The New Mexico Supreme Court has explained that “interested parties in quasi-judicial administrative matters 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.” *See Albuquerque Commons P’ship v. City Council of Albuquerque*, 2008-NMSC-025, ¶ 34, 144 N.M. 99, 184 P.3d 411 (internal quotation marks and citation omitted), quoted in *Shook v. Governing Body of Santa Fe*, 2023-NMCA-086, ¶ 21.⁵²

⁵¹See *Reid v. N.M. Bd. of Exam’rs*, 1979-NMSC-005, paras. 7-8, 92 N.M. 414, 589 P.2d 198 (citations omitted).

⁵² The *Mathews v. Eldridge* balancing test that allows flexibility in the due process required in administrative proceedings does not significantly reduce the due process required here. The test balances “(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976).

The interests of CEC’s members in the CUP decision and the Project’s risks relate to their health and safety as adjacent residents and property owners. The voluminous and complex facts relating to the Project’s safety justify discovery and expanded time for expert testimony and cross-examination. Finally, the additional process sought by CEC would not have created unreasonable fiscal and administrative burdens for the County.

Staff's roles as advocate, adviser and decision-maker. Under SLDC § 4.7.2.1, the County Staff's role is (1) to provide a description of the project, (2) to identify the relevant sections of the SGMP, area, district or community plans, the SLDC, and state and federal laws that apply to the application, (3) describe the legal or factual issues to be determined, 4) present a recommendation, and respond to questions from the Commission or Hearing Officer once the Applicants have had a chance to reply. The Hearing Officer stated during the November 14, 2024, pre-hearing conference that the County Staff are meant to be "working on behalf of the public" rather than acting in "the traditional sense of an adversary party". *ROA, Pt. S01, 012215*.

However, the County Staff's actual conduct was exactly as the Hearing Officer had forewarned, they actively assumed the role of an advocate for the Applicant and adopted an adversarial role against the opposition. This advocacy went far beyond merely making recommendations and responding to questions, they actively bolstered evidence favorable to the Applicants and downplayed, dismissed or excluded critical evidence from opposition parties regarding the inherently hazardous aspects of the project, including exposed natural gas lines near the western edge of Eldorado. *ROA, Pt. S02, 012822; ROA, Pt. 70, 010727 - 010729* They bent over backwards to accommodate the Applicants by actively shielding Applicants from public and administrative scrutiny with regard to flagrant regulatory code violations, concealing Applicants' disastrous BESS fire accident history, prohibiting opposition parties from communicating with third party reviewers about flawed and/or incomplete reports, and excluding discussion regarding the detailed Findings and Conclusions in the Hearing Officer's Recommended Order, which had advised denying the application.⁵³

⁵³ Further discussion of Staff's role as an advocate during the Hearing Officer and Planning Commission proceedings is included in Legal Authority and Testimony on Denial of Due Process, May 2, 2025, at pp. 9-24. Staff's role as a decision-maker in those proceedings is discussed on pp. 24-42. *ROA, Pt. S03, 12822-12855*.

The BCC has impermissibly allowed and/or directed County Staff to act as advocates for the Applicants, advisors to the Planning Commission and the BCC, and ultimately as decision-makers, with final authority over the completion and resolution of discretionary decisions on post-hearing matters explicitly delegated to the Commission. *See National Labor Relations Bd. V. Duval Jewelry Co.*, 357 U.S. 1, 78 S. Ct. 1024, 2 L. Ed. 2d 1097 (1956) (“ where the ultimate decision on the merits of the issue does not rest with the delegate, the delegation is impermissible”); *See also Kerr McGee Nuclear Corp. v. New Mexico Environmental Improvement Board*, 1981-NMCA-044, ¶¶ 52-53; *New Mexico State Investment Council v. Weinstein*, 2016-NMCA-069, ¶ 71 (“Administrative bodies and officers cannot delegate power, authority and functions which under the law may be exercised only by them, which are quasi-judicial in character, or which requires the exercise of judgment”).

Staff’s roles as advocate, advisor and decision-maker violated CEC’s due process rights to a fair and impartial hearing. *Kerr McGee Nuclear Corp. v. New Mexico Environmental Improvement Board*, 1981-NMCA-044, ¶ 46, 97 N.M. 88, 96 (agency staff’s advocacy for a proposed rule in an Environmental Improvement Board hearing and provision of legal advice to the Board deprived opponents of a fair and impartial hearing); *Addis v. Santa Fe County Valuation Protests Board*, 1977-NMCA-122, ¶ 18, 91 N.M. 165, 169 (Santa Fe County Valuation Protests Board may not obtain legal advice from attorneys representing County’s Property Tax Department).⁵⁴

⁵⁴ See also, *Botsko v. Davenport Civil Rights Comm’n*, 774 N.W.2d 841, 853 (Iowa S.Ct. 2009) (Executive Director of Civil Rights Commission violated due process when she provided testimony in evidentiary hearing and later participated in Commission’s executive session deliberating case); *Uhrich & Brown Limited Partnership v. Middle Republican Natural Resources District*, 315 Neb. 596, ¶32, 998 N.W.2d 41, 56 (2023) (Due process was violated when agency lawyers performed investigative and prosecutorial roles and participated in the agency’s deliberations; “[T]here was too high a probability of actual bias for it to be constitutionally tolerable to permit those same attorneys to be included in the decision making process of the Board to determine if those violations had been proved. Under such circumstances, the [agency] no longer enjoyed the presumption of honesty and integrity. The partisan nature of an advocacy role at the hearing is incompatible with the neutrality constitutionally required of an adjudicator.”) See

Unlawful delegation denied opportunity to be heard. SLDC § 4.9.6.5 strictly mandates that a CUP may only be approved if it is determined that the project will not be detrimental to health and safety, create a potential hazard for fire, or interfere with adequate water provisions. The authority to determine whether these criteria are met belongs exclusively to the adjudicatory tribunal (the BCC), not to County Staff or the Fire Marshal. However, the BCC's final Order delegated the resolution of seven critical permit conditions—including the detailed water budget and the final Smoke and Plume Model—to County Staff and third-party consultants to be reviewed *after* the public hearings concluded. **ROA, Pt. 78, 012080.**

By empowering Staff to unilaterally review and approve the project's final fire safety mitigations and water plans outside of the public eye, the BCC denied the CEC any opportunity to review the finalized data, consult subject matter experts, submit objections, or cross-examine the developers on the very issues that dictate whether the CUP satisfies the SLDC criteria. By pushing the formulation and review of these mitigations to the post-Order phase, the BCC also directly violated SLDC § 6.3.10.2, which explicitly states that the formulation of mitigation measures "shall be identified at the first discretionary approval and under no circumstances deferred until the ministerial development process".

Ex parte communications. When County Staff are acting as party/advocates, as they did throughout these proceedings, they are subject to the same prohibitions as the Applicants and other parties with respect to *ex parte* communications. *See Cummins v. Minster* 43 N.E.3d 902, 907, ¶13 (Ohio App. 1952) (“While the village may have the right to the advice of legal counsel, that counsel should not both act as the prosecutor for the claim and act as legal counsel to the Council discussing the validity of the claim [in an executive session] which he just prosecuted.”)

also the further discussion of relevant cases on pp. 2-7 of the Legal Authority and Denial of Due Process, May 2, 2025. **ROA Pt. SO2, 12815-12820.**

The BCC systematically violated the opposition parties' due process rights by permitting County Staff to engage in prohibited *ex parte* communications with the Applicants, the Hearing Officer, the Planning Commission and the BCC during critical adjudicatory phases, deliberations and executive sessions.

Although County Staff possess no adjudicatory authority to override a Hearing Officer's decisions, the record demonstrates they engaged in *ex parte* communications to unlawfully interfere with the Hearing Officer's duties. For example, on October 16, 2024, the Hearing Officer executed an Order granting Ashley Schannauer's Motion to Intervene. Following this, County Staff engaged in undisclosed private communications instructing the Hearing Officer not to distribute the executed Order, effectively blocking issuance of a judicial decision, thereby usurping the Hearing Officer's authority. ***ROA, Pt. S03, 012995.***

County Staff also engaged in *ex parte* communications to secretly influence the Planning Commission's decision on zoning prohibitions and actually vetted current Planning Commission members who were up for appointment. ***Appellants' Exhibit 7.*** To add insult to injury, County attorneys drafted the Planning Commission's March 20, 2024, Order that approved the CUP so that the Findings and Conclusions could refute the Hearing Officer's recommended denial. In fact, just days before the February 2025 hearings, Assistant County Attorney Roger Prucino submitted a "Confidential and Privileged Attorney-Client Communication" memorandum directly to the Planning Commission. This secret memo explicitly directed the Commission to reject an opposing parties' (SMA) legal argument that the solar project should be classified as a prohibited "gas or electric power generation facility" under the SLDC. This memorandum was withheld from the opposing parties, denying them any notice or opportunity to present a rebuttal to County Staff's legal assertions before the Commission voted. ***ROA, Pt. 72, 010844.***

Further, the BCC members privately submitted questions to Staff prior to the August 26 evidentiary hearing and photographs reveal that the County Manager participated in the August 26 executive session in which the BCC deliberated on its CUP decision, after he provided testimony in the evidentiary hearing. None of these actions are permissible when the County Staff is actively involved as an advocate and, in effect, a party to the proceedings. *ROA, Pt. S03, 013163 – 013164.*

Major modifications without notice and opportunity to be heard. The final insult occurred at the end of the proceedings when the BCC added last-minute modifications—such as the transfer of development rights of 5,760 acres of adjacent land, water storage changes, and transmission line relocations—to the application and substantively and irreparably altered the application under review. *ROA, Pt. S03, 013170 – 013176.* However, rather than halting proceedings to properly vet these changes, the BCC and County Staff accepted them on the fly and coordinated with the Applicants behind closed doors, once again violating the prohibition regarding *ex parte* communications. *ROA, Pt. S03, 013159-013165.* Not surprisingly, the Appellants were simultaneously informed that their formal participation in the case had "ceased". *ROA, Pt. 77, 011959 – 011961.* This cutoff completely stripped the CEC of any opportunity to review the late submissions, elicit necessary input from appropriate subject matter experts, evaluate the new water resource needs, or cross-examine the proponents on the viability of the reconfigured facility.

The quasi-judicial administrative process must provide a reasonable level of due process. Litigants must retain the freedom to present their case and the absolute right to develop a fair and balanced evidentiary record for review. Litigants must be assured that the tribunal will be free of bias and the trier of fact will not be predisposed to a specific outcome. In other words, the administrative process must retain the appearance of fundamental fairness, but the absolute absence of bias is sacrosanct. Unfortunately, the decision in this case could have been drafted

before the hearings began. If this proceeding does not illustrate the systematic deprivation of due process, then due process does not exist, at least not in quasi-judicial administrative proceedings before the BCC.

IV. Requested Relief

CEC requests that the District Court, under its appellate jurisdiction, reverse the County's grant of the Conditional Use Permit with instructions that the Project changes proposed by the Applicants require the re-submittal of an application with public notice of the changes and a new hearing process pursuant to SLDC §§4.6.10 and .11.

CEC also requests that the District Court, under its original jurisdiction, conduct further proceedings to address CEC's due process claims. *See Appellants' Exhibit 14* (applicable precedent, EMPAC v. Sandoval County D-1329-CV-2025-00731; Order Granting Plaintiffs/Appellants' Motion for Leave to Amend their Statement of Appellate Issues, December 9, 2025). The proceedings should be informed with responses to the CEC discovery requests that are the subject of the hearing on the motions for protective orders scheduled for May 1, 2026, filed by the County and the Applicants.

Respectfully submitted,

/S/ Robert A. Stranahan IV, Esq.
THE STRANAHAN FIRM LLC
R.A. Stranahan IV
4A Rancho Este
Santa Fe, NM 87506
(505) 577-0729
Attorney for Plaintiff-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing on the Court's electronic filing system and served it on the following parties via electronic mail on this 7th day of April 2026:

jwboyd@santafecountynm.gov
rlprucino@santafecountynm.gov
luke@harwoodpierpont.com
warren@ranchoviejo.com
markish@felkerishlaw.com

/S/ Robert A. Stranahan IV, Esq.
THE STRANAHAN FIRM LLC
R.A. Stranahan IV
4A Rancho Este
Santa Fe, NM 87506
(505) 577-0729
Attorney for Plaintiff-Appellants