# Memorandum
OFFICE OF THE COUNTY COUNSEL

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TO: Planning Department

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SUBJECT: Issues Related to Solar Energy Plant Development

## I. INTRODUCTION AND BACKGROUND

The purpose of this memorandum is to identify and discuss the legal issues that we anticipate will arise in connection with two large scale solar energy projects proposed for the eastern unincorporated area of the County.

The two proposed projects are (1) a 2000 acre project proposed by Pegasus Energy for the Mountain House area of the County; and (2) a 100 acre project proposed by Cool Earth Solar.

As discussed in more below, the primary legal issues involve whether the projects are consistent with the County General Plan, and specifically the East County Area Plan, as amended by Measure D ("ECAP"). Four aspects of ECAP are relevant :

- Whether a solar project is allowed by the Large Parcel Agriculture land use designation?
- Would the projects be consistent with Policy 13, allowing development outside the 2 acre envelope?
- Would the projects meet the building intensity/FAR requirement?
- Would the projects be generally compatible with other ECAP goals and policies?

Other legal issues discussed below are (a) Whether the projects would be allowable use on any parcels that are subject to Williamson Act contracts; (b) Whether the County's review and approval of the project would be restricted by the Solar Rights Act (Government Code Section 65850.5); (c) Whether the solar projects are allowed on parcels subject to Williamson Act contracts; and (d) Issues related to mitigation of loss of farmland.

## II. GENERAL PLAN: ECAP AND MEASURE D

The primary legal question will be whether a large scale solar project is consistent with the County's General Plan. The projects are proposed for areas governed by the East County Area Plan ("ECAP"). The ECAP was originally adopted in 1994, and amended significantly with the passage of Measure D in 2002.

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Large Parcel Agriculture Land Use Designation/Allowable Uses

The solar projects are proposed for parcels designated Large Parcel Agriculture ("LPA") by ECAP. This land use designation creates several consistency issues for the projects. The threshold question is whether the solar project is an allowed use under the LPA designation.

The ECAP provides that the following uses are described as permitted in the LPA land use designation:

> agricultural uses, agricultural processing facilities (for example wineries, olive presses), limited agricultural support service uses (for example animal feed facilities, silos, stables, and feed stores), secondary residential units, visitor-serving commercial facilities ( by way of illustration, tasting rooms, fruit stands, bed and breakfast inns), recreational uses, public and quasi-public uses, solid waste landfills and related waste management facilities, quarries, windfarms and related facilities, utility corridors, and similar uses compatible with agriculture.

Although there is no specific reference to solar facilities or solar farms in the LPA land use designation, the Planning Department staff and the Planning Commission have determined, as part of the review and approval of another solar energy facility application, that such a use is allowed in that it would constitute a quasi-public use consistent with "windfarms and related uses, utility corridors and similar uses compatible with agriculture."[1]

For the Greenvolts project, the Planning Department and Planning Commission also determined that the solar facility was a conditional use allowable by reference in the A Zoning District because the solar use was similar to other conditionally permitted uses in the A District, including wind farms, public utility buildings and uses, oil or gas drilling facilities, and accessory uses which do not "alter the essential characteristics" of the principal use of the lot. Although the Pegasus and Cool Earth projects are larger than the Greenvolts project, the rationale for concluding that the projects are allowable as a conditional use under the LPA designation and the A zoning district is the same.

As they did for the Greenvolts project, we would expect the Sierra Club to disagree. Their argument is that these projects are more like an industrial use and that Measure D specifically excluded industrial uses as an allowable use from the previous language of the LPA land use designation. This is not a frivolous argument, and to some degree this argument is bolstered by the larger size of the new projects.

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[1] The project was the Greenvolts, Inc. solar field project, located on a 20.5 acre portion of a larger 62 acre parcel, also in the Mountain House area of the County.

Two Acre Development Envelope/Policy 13

The second question is whether the proposed projects would be consistent with the requirement that all buildings be located on a contiguous development envelope, not to exceed 2 acres. The LPA makes an expection to the building envelope requirements for "infrastructure under Policy 13."

Policy 13 provides as follows:

> The County shall not provide nor authorize public facilities or other infrastructure in excess of that needed for permissible development consistent with the Initiative. This policy shall not bar 1) new, expanded or replacement infrastructure necessary to create adequate service for the East County, 2) maintenance, repair or improvements of public facilities which do not increase capacity, and 3) infrastructure such as pipelines, canals, and power transmission lines which have no excessive growth-inducing effect on the East County area and have permit conditions to ensure that no service can be provided beyond that consistent with development allowed by the Initiative. "Infrastructure" shall include public facilities, community facilities, and all structures and development necessary to the provision of public services and utilities.

The Negative Declaration approved for the Greenvolts project concluded that that project was consistent with Policy 13 because the solar facility (1) was a type of infrastructure that would improve electrical service to the East County without providing excess supply needed for permissible development and; (2) would represent new infrastructure for which there is a local, regional, and statewide need, but which would have no growth-inducing effects as it would primarily serve to reduce the use of existing non-renewable energy resources.

The same arguments can be made for the Pegasus and Cool Earth projects, although the much larger size would make it more difficult to support the conclusion regarding excess supply.[2] However, the County took a similar position with respect to the recent proceeding before the California Energy Commission regarding the Mariposa Energy Project ("MEP"), a natural gas fired electrical plant with a proposed capacity of 200 mw. The County' s position was based, in part, on the fact that the MEP was a "peaker" plant that is designed to serve existing power users within the regional network, and thus would not have excessive growth inducing impacts in the East County area. Thus, evidence that the Pegasus and Cool Earth projects would also serve existing users, or be designed to replace existing non-renewable energy sources, would help support a conclusion that these projects are consistent with Policy 13.

[2] The Greenvolts project is a 2 megawatt (MW) facility, while the Pegasus project is proposed to generate 350 – 400 MW.

Building Intensity/Floor Area Ratio

Thirdly, the LPA designation includes a limitation on building intensity. The maximum allowed building intensity is .01 FAR for non-residential buildings, but not less than 20,000 square feet. Unlike the first two issues, the question of building intensity was not addressed in the staff report or the environmental analysis of the Greenvolts project.

Both projects, although utilizing different technologies, would include a large field of solar devices and associated equipment that would collect and convert solar energy to electricity and transmit that electricity to the utility grid. Both projects also include construction of a maintenance office/workshop, and necessary access road and parking lots.

Although the traditional means of calculating allowable floor area could be applied to the maintenance buildings, such calculation and application of the FAR requirements is more difficult for the solar collectors and associated equipment. Given the large scale of the solar fields (2000 acres of a 2466 acre site for Pegasus and 100 acres of a 147 acre site for Cool Earth), if any significant portion of the solar devices counted towards allowable floor area, the projects would not appear to be able to meet the FAR requirements of ECAP. Therefore, in order for the projects to be permissible, the County would have to interpret the FAR requirement to not apply to the solar devices.

The County could make an argument for such an interpretation based on the language and definitions of the ECAP. The FAR requirement is stated as being applicable to non-residential "buildings". There is no definition of "buildings" in the ECAP, but there is a definition of "development". Development is defined as:

> The placement or erection of any solid material or structure; construction, reconstruction or alteration of any structure; change in the density or intensity of any use of land, including any division of land; grading, removing, extraction or deposition of any materials; and disposal of any waste. "Structure" includes but is not limited to any building, greenhouse, tower, utility line.

Based on the definition of development, the solar devices would clearly be included as a type of development, but because development is defined to include "buildings" that would suggest that there is some development (such as the solar devices) that are not considered buildings. Because the FAR restriction is written as being applicable to "buildings" rather than "development" generally, we could make the argument that the solar devices should not count towards the ECAP's building intensity requirement.

Because this is an interpretation of a General Plan provision, if challenged, a court will give the County's interpretation great deference. In reviewing a determination of consistency with the General Plan, a court should not "substitute [its] judgment for that of a local agency in making a determination of consistency; rather, the agency's determination comes to [the] court with a strong presumption of regularity. . . .[A]s long as the [agency] reasonably could have made a determination of consistency, the [agency's] determination must be upheld. (*California Native*

*Plant Society v. City of Rancho Cordova* (2009) 172 Cal. App.4th 603, 638 [citation and internal quotation marks omitted].)

However, there are legitimate arguments that this interpretation is not consistent with ECAP. The purpose of Measure D (which confirmed and amended portions of the ECAP), was to "preserve and enhance agriculture and agricultural lands, and to protect the natural qualities, the wildlife habitats, and the watersheds and beautiful open space of Alameda County from excessive, badly located, harmful development." (Measure D, Section 1.) One of the means used by the ECAP to accomplish these purposes is to limit the density of development on certain areas by imposing restrictive FAR limitations. If the County interpreted the FAR requirements to exclude the solar devices, this interpretation would allow significant development that could be considered contrary to these purposes.

Other ECAP Policies and Goals

Finally, the ECAP contains numerous goals and policies that opponents may argue are inconsistent with the proposed solar projects. Examples include:

- General Open Space Goal: To protect regionally significant open space land and agricultural land from development (p. 18.)
- General Open Space Policy 52: The County shall preserve open space areas for the protection of public health and safety, provision of recreational opportunities, production of natural resources (e.g., agriculture, windpower, and mineral extraction), protection of sensitive viewsheds, preservation of biological resources, and the physical separation between neighboring communities. (p.18.)
- Agricultural Goal: To maximize the long-term productivity of East County's agricultural resources. (p.22.)
- Agricultural Policy 72: The County shall preserve the Mountain House area for intensive agricultural use. (p. 22.)

Although the proposed projects are arguably inconsistent with these goals and policies, no project is required to be consistent with each and every policy in a General Plan. "State law does not require perfect conformity between a proposed project and the applicable general plan." (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807,816.) Rather, "[b]ecause policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes." (*Id.*)

The ECAP includes many additional policies that could be considered consistent with the proposed solar projects, particularly if the County (as discussed above) is interpreting the projects as quasi-public uses that are a compatible use under the LPA designation similar to landfills, quarries, windfarms and utility corridors. Relevant and potentially consistent policies could include the following:

- General Open Space Policy 54: The County shall approve only open space, park, recreational, agricultural, limited infrastructure, public facilities (e.g., limited

infrastructure, hospitals, research facilities, landfill sites, jails, etc.) and other similar and compatible uses outside the Urban Growth Boundary. (p.18)

- Windfarms Policy 168: The County shall recognize the importance of windpower as a clean, renewable source of energy. (p.43.)
- Infrastructure and Services Policy 218: The County shall allow development and expansion of public facilities (e.g., parks and recreational facilities; schools; child care facilities; police, fire, and emergency medical facilities; solid waste, water, storm drainage, flood control, subregional facilities; utilities etc.) in appropriate locations inside and outside the Urban Growth Boundary consistent with the policies and LandUse Diagram of the East County Area Plan. (p.59.)
- Utilities Goal: To provide efficient and cost-effective utilities. (p.68.)
- Utilities Policy 286: Policy 285: The County shall facilitate the provision of adequate gas and electric service and facilities to serve existing and future needs while minimizing noise, electromagnetic, and visual impacts on existing and future residents. (p.68.)

III. SOLAR RIGHTS ACT/GOVERNMENT CODE 65850.5

The Solar Rights Act was adopted in 1978 "to promote and encourage the widespread use of solar energy systems and to protect and facilitate adequate access to the sunlight which is necessary to operate solar energy systems." (Original Solar Rights Act legislation, 1978 Cal. Stat. ch. 1154 at Section 2(c).)

Among other provisions, this Act includes Government Code Section 65850.5, which discourages local governments from adopting an ordinance that would unreasonably restrict the use of "solar energy systems", and requires local governments to use a non-discretionary permitting process for solar energy systems.[3]

The Act defines solar energy systems as including "any solar collector or other solar energy device or any structural design feature of a building whose primary purpose is to provide for the collection, storage, and distribution of solar energy for space heating, space cooling, electric generation, or water heating." (Cal. Civ,. Code § 801.5(a)(1).) This definition could be read to include the solar devices that are part of the proposed projects. However, our review of commentary on the applicability of this section reveals that the legislative history of recent amendments to the Solar Right Act suggest that the intent was to apply the restriction only to small-scale consumer systems, and not to utility scale solar systems.

Other counties in the state interpret this definition in the same way, and we have not heard of any project aplicants challenging this interpretation.

IV. The Williamson Act

We understand that Pegasus project (but not Cool earth) include some parcels subject to Williamson Act parcels.

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[3] Section 65850.5 does allow local governments to require a use permit under certain limited circumstances, but also restricts the ability to deny any such use permit.

The California Department of Conservation recently released an opinion regarding the placement of solar facilities on land subject to Williamson Act contracts. This opinion acknowledges that local rules play an important role in determining what is allowed under a local Williamson Act program, and that these facilities may be allowed as a compatible use, depending on local rules of compatibility.

The County is in the process of updating its Williamson Act rules, and the goal is to have those rules adopted by the Board of Supervisors within the next few months. The draft rules provide that solar facilities would be a compatible use, but only if limited to 10 percent of a parcel. Neither project could meet this 10% requirement and thus the project application would need to request cancellation of any Williamson Act contract.

Cancellation is permitted, upon approval of the Board of Supervisors, and a payment of a cancellation fee of 12.5% of the unrestricted value of the property.

The Board must also find that the cancellation is either (1) consistent with the purposes of the Williamson Act; or (2) in the public interest. To be consistent with the purposes of the Act, the Board must make findings that (a) a notice of non-renewal has been served; (b) cancellation would not lead to the removal of adjacent lands from agricultural use; (c) the cancellation is for a use consistent with the General Plan; (d) cancellation would not lead to scattered urban development; and (e) not other suitable not contracted land is available for the proposed use.

The County should be able to make the findings required for cancellation, although the question of consistency with the General Plan will raise again the issues discussed above regarding consistency with ECAP, as there is a specific ECAP policy regarding Williamson Act cancellations. Policy 86 provides that the County shall not approve a cancellation outside the Urban Growth Boundary unless the cancellation is consistent with Measure D, and the County shall not approve cancellations inconsistent with agricultural or public facility uses. (ECAP, p. 24.)

V. CEQA Review and Mitigation

Like all discretionary projects, the solar projects will require review under the California Environmental Quality Act ("CEQA"). We expect an EIR will be required for the Pegasus project, and that an EIR or Negative Declaration will be required for the Cool Earth project.

Among other impacts to analyze, the environmental documents will need to discuss the potential impact to agricultural resources. For the Greenvolts project, the Negative Declaration concluded that there was a potentially significant impact due to the conversation of 10.76 acres of Prime Farmland to non-agricultural use. A mitigation measure was imposed requiring the applicant to maintain and cultivate off-site or on-site areas designated as Prime Farmland at a 1:1 ratio.

Neither the Pegasus nor Cool Earth projects will involve Prime Farmland, so the County would not need to include any mitigation for conversion of such Farmland. However, the CEQA

checklist also includes the question of whether a project involves "other changes to the existing environment that, due to their location or nature, could result in conversion of Farmland to non-agricultural use."

Given the large amount of acreage that will be involved in these two projects, we expect that some level of mitigation should be required, although there is little guidance in the ECAP or elsewhere for what level of mitigation would reduce this impact to less-than-significant. The County may want to consider creating an agricultural mitigation policy for non-prime farmland that would guide the CEQA review for these projects, and similar projects that may come along.

A California court recently upheld Stanislaus County's "Farmland Mitigation Program" ("FMP"), which requires the replacement of agricultural land at a 1:1 ratio when land designated as agricultural is converted to a non-agricultural designation as part of a discretionary project approval. (*Building Industry Association v. County of Stanislaus* (2010) 190 Cal.App.4th 582.) Any such program should be upheld so long as the mitigation requirement bears a "reasonable relationship" to the impact of the project.