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Re: Legal Analysis of Proposed Imperial County Public Benefit Program for Solar Projects (Agenda Item 10, Discussion/Action Regarding Approval of Resolution No. 2011-094, December 20, 2011 Imperial County Board of Supervisors Meeting)

Dear Mr. Rood:

On behalf of the Large-Scale Solar Association ("LSA"), we are writing to express our serious concerns with the proposed Imperial County ("County") Public Benefit Program for Solar Projects ("Program"), which would condition the issuance of required permits for solar power plants on the applicant's agreement to make substantial payments to the County under a Public Benefit Program Agreement. LSA represents 15 of the nation's largest developers and providers of utility-scale solar generating resources. Collectively, LSA's members have contracted with utilities in California and the West to provide more than 7 gigawatts ("GW") of clean, sustainable solar power. LSA and its individual member companies are leaders in the renewable energy industry, advancing solar generation technologies and advocating for policies that ensure environmentally appropriate solar generation facilities to meet the state's renewable and greenhouse gas goals.

We conclude that the proposed Program is unlawful for several reasons. First, the suggestion that participation in the Program would be voluntary is belied by public statements that participation will be required. The County offers superficial representations that the Program will be voluntary to overcome the fact that it has no authority to *require* developers to pay impact fees absent a demonstration of a nexus between the development and impacts on the County. Second, to the extent that the County intends to argue that the proposed assessments are not impact fees (to avoid the requirement of demonstrating a nexus), the payments then must be understood to be taxes, the imposition of which would violate Propositions 26 and 218 unless approved by a vote of the people. Third, state law exempting solar property from certain taxes preempts local governments, like the County, from using their local legislative authority to reinstate the same. Fourth, the requirement that developers commit to pay the County "a specified amount of the expected sales tax revenue" raises several issues under Federal and State constitutional law. Fifth, and finally, the Program cannot be adopted until the County conducts a review of its potential effect on the environment under the California Environmental Quality Act ("CEQA") (California Public Resources Code Section 21000 *et seq.*). In light of these issues, we strongly urge the Board of Supervisors ("Board") to reject the Policy.

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Background

At its December 6, 2011 meeting, the Board was asked to approve a Resolution Regarding Establishment of a Public Benefit Program for Solar Power Plants in Imperial County. (Agenda Item No. 9.) The Program would require payments to the County of up to \$5,000 per acre for every acre of Prime Farmland and up to \$2,000 per acre of Farmland of Statewide Importance used in the development of a solar power plant. In addition, the Program would require payments of \$150 per “project acre”¹ per year for the first 10 years of the project and \$200 per project acre per year for year 11 through the end of the project (plus applicable CPI).² Developers would also be required to guarantee sales tax revenue expected to be owed to the County in the future.

The assessment would be imposed through a Public Benefit Program Agreement, which the County represents it would not require, but would instead “encourage and recommend.” Notwithstanding these assertions however, the County Executive Officer represented to the Board in a letter accompanying the Resolution that the Resolution establishing the Program would adopt “a policy *requiring* solar developers to enter into a Public Benefit Agreement with the County, *prior to the issuance of any required permits.*”³ Given that the Program is silent regarding how, or if, the County will proceed to process permits if a developer does not “voluntarily” agree to participate in the Program, and in light of the Executive Officer’s prior representations, it is evident that these fees are not voluntary, but rather the County intends to exact the proposed fees from developers.

Legal Concerns with the Program

The County officially describes the Program as a mitigation measure “designed to address concerns expressed by the local community and others related to the impacts of [utility-scale solar] projects” However, other statements in the resolution and the discussion during the December 6th meeting suggest that the County has other motivations and that the Program is, in fact, designed to generate general revenue for the County. Specifically, talk of a “host fee”, a fee “for the use of County lands”, and compensation “for offsetting temporary impacts to the community, local economy and agriculture industry”, in addition to uncertainty about how the collected funds will be utilized all support the conclusion that this Program is viewed as an opportunity to raise general revenues, not address project impacts. The fact that the Executive Officer’s transmittal letter discussed the “large share of property taxes” that solar projects “might otherwise be required to pay” but for a state law exemption further suggests that the County hopes to supplement its general fund with a tax on solar facilities. A desire to raise revenues does not provide a legal justification for imposing the fees. For this reason, and others explained in more detail below, we urge the Board to reject the proposed Program when it is considered at the December 20, 2011 meeting.

¹ The term “project acre” is undefined. The County most likely intends to apply the proposed fees to every acre included in the solar power plant footprint. However, Deputy County Executive Officer Andy Horne stated at the December 6th meeting that the Program has been designed to compensate the County for use of County land. The County should clarify whether it intends to apply the Program to all lands within the physical border of the County, all lands within the County’s jurisdiction, or only lands actually owned by the County.

² Nominal discounts and credits would be offered to developers that hire locally, hire veterans, offer permanent (non-construction) jobs, and/or start construction before 2013.

³ Letter from Ralph Cordova, Jr. to the Imperial County Board of Supervisors (Nov. 30, 2011), *available at* http://imperial.granicus.com/MetaViewer.php?view_id=2&clip_id=208&meta_id=22069 (emphasis added).

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The County has No Legal Basis for Requiring Participation in the Program at this Time

The proposed Program would condition the issuance of required permits for solar power plants on the applicant's consent to enter into a Public Benefit Program Agreement. As part of this Agreement, a developer would annually pay a Community Benefit assessment (\$150-200 per acre, minus discounts), which would purportedly serve the developer's interests by "mitigating" community concerns that solar energy projects might displace other hypothetical development projects, which might provide greater economic benefits to the County. The developer would also deliver to the County, where applicable, an Agriculture Benefit payment to "offset[] temporary impacts to the community, local economy and agriculture industry" caused by the use of Prime Farmland and Farmland of Statewide Importance for a solar power plant development. Explicitly and implicitly, both payments appear to be development impact, or mitigation, fees.⁴

Under the Mitigation Fee Act (California Government Code Sections 66000 *et seq.*), local governments may impose fees to defray or mitigate the costs of development. Development impact fees must bear a reasonable relationship to the impacts of development and must comply with the requirements of California Government Code Section 66001. Here, the County has not implemented any of the procedures for imposing a development impact fee on solar power plants (e.g., the County has not performed an analysis of the impacts, their proportionality, the nexus between proposed fees and expected impacts, and the ability of fees to reduce the impacts; it has not dedicated the fees to the purpose for which they are collected). The Agriculture Benefit payment is premised on the foundationless assumption that other uses of the land, including agriculture and other unspecified developments, would be more economically productive. Similarly, the Community Benefit payment puts an arbitrary price on unspecified community concerns. Before it requires these payments, the County must demonstrate a reasonable relationship between the amount of the fees and the likely impacts of a proposed project. (California Government Code Section 66001(a); *see also San Remo Hotel v. City & County of San Francisco* (2002) 27 Cal.4th 643, 671 (observing that "arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster").) Given that impacts to agricultural resources will generally not be significant because of their temporary nature and that the County cannot guarantee that the concerns of every member of the community will be addressed by the Community Benefit payment, it is unlikely that the proposed payments are sufficiently related to the impacts they purport to address.

To the extent the County intends to argue that developers will enter into Public Benefit Program Agreements as part of a fair and voluntary negotiation, which would take the payments outside of the scope of the Mitigation Fee Act, this argument is not well taken. If payment and signing a Public Benefit Program Agreement are *required* before necessary permits will be issued, then the County is *imposing* the fees on developers and the requirements of the Act apply. (*Williams Commc'ns, Inc. v. City of Riverside* (2003) 114 Cal.App.4th 642, 659.) The County cannot use a feigned commitment to refrain from imposing the payment requirements to avoid the legal issues noted above.

⁴ It is worth noting that the fees are not comprehensive mitigation fees. As explained at the December 6th Board meeting, impacts on County services and infrastructure will be addressed and mitigated in the environmental review documents prepared under CEQA. Likewise, any significant impacts of a solar project on agriculture resources, defined to mean the permanent *conversion* of Prime Farmland and Farmland of Statewide Importance, will in most cases be addressed by a requirement to restore the land to agricultural use.

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If the Payments Required by the Program Are not Development Fees, then they Are Taxes that would Violate Propositions 26 and 218 Unless Approved by a Vote of the People

The County's failure to do the work required to establish legal development impact fees, or alternatively "charge[s] imposed as a condition of property development", has other legal ramifications. Specifically, this omission opens the payment requirements to arguments that they are illegal taxes.

Proposition 218, passed by the voters in 1996, amended the California Constitution to prohibit local governments from imposing taxes without a vote of the people. In 2010, Proposition 26 expanded the definition of "tax" in the California Constitution provisions originally added by Proposition 218 to include "any levy, charge or exaction of any kind imposed by a local government," with seven enumerated exceptions. (See Cal. Const. art. XIII C sec. 1(e).) However, none of these exceptions apply to the Agriculture and Community Benefit payments. The Program's proposed assessments quite plainly exceed the costs of any specific benefit or service provided, or regulatory cost incurred, by the County. (See California Constitution Article XIII C, Section 1(e)(1)-(3).) They are not charges imposed for the "use of local government property, or the purchase, rental or lease of local government property", (California Constitution Article XIII C, Section 1(e)(4)) because they apply when developers require County permits, regardless of who owns the land.⁵ As already explained above, they likewise are not "charge[s] imposed as a condition of property development", (*id.* Section 1(e)(6)), for such fees can only be imposed following a demonstration of a reasonable relationship between the amount of the fee and the likely impacts of a proposed project and the County has not made this showing. (California Government Code Section 66001(a).)

Proposition 26 provides that "the local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax . . ." (Cal. Const. art. XIII C sec. 1(e).) For the foregoing reasons, we do not believe the County can meet this burden. The payments required by the Program should consequently be viewed as taxes, which must be approved by a popular vote before the County can collect them.

The Program Is Preempted by State Law

The attempt by the County to impose local taxes to replace a forbidden state tax is additionally preempted by state law. According to Article XI, Section 7 of the California Constitution, "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general [state] laws.*" (*Id.* (emphasis added).) A conflict exists if the local legislation "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067 (2007) (internal quotation omitted).) Relevant to an analysis of the Program payments, an area can be deemed to be "fully occupied by general law" when "the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action." (*Id.* at 1068.)

Enacted by the Legislature pursuant to its constitutional authority to adopt such legislation, California Revenue and Tax Code Section 73 excludes from property tax assessments the new construction of certain types of solar energy systems installed between January 1, 1999 and December 31, 2016. (Cal.

⁵ Even if the County were to limit the Program to instances where the fee would cover only the use, purchase, rental or lease of County property (*see supra* footnote 1), Proposition 26 requires that even these fees must be reasonably related to the value of property rights provided. (California Constitution Article XIII C sec. 1(e) (requiring a fair and reasonable relationship between government-imposed charges and "the payor's burdens on, or benefits received from, the government activity").)

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Const. Article XIII A, Section 2.) It was expressly designed by the Legislature to incentivize the development of new solar energy systems by decreasing the property tax burden attached to such projects. (California Stats. 2008 ch. 538 § 1 (AB 1451).) The Legislature's decisions to repeatedly broaden and extend the law's protections and benefits over the years additionally imply that the state has a paramount interest and concern regarding this program. (*Id.*)

If this were not enough, the Legislature has quite explicitly established in other state statutes that "[t]he implementation of consistent statewide standards to achieve the timely and cost-effective installation of solar energy systems is not a municipal affair, . . . but is instead a matter of statewide concern." (California Government Code Section 65850.5(a).)⁶ The Legislature has furthermore articulated an "intent to encourage the installation of solar energy systems by removing obstacles to, *and minimizing costs of*, permitting for such systems." (*Id.*) The Program, which will significantly increase the costs of permitting solar power plants, conflicts with these principles and is consequently preempted.

The Requirement that Developers Guarantee the Payment of Taxes Violates Multiple Provisions of the Federal and State Constitutions

The Sales Tax Benefit provision of the Program also suffers from unique constitutional problems. This aspect of the Program would require that developers of solar power plants "guarantee that the County and the Imperial County Local Transportation Authority (LTA) will receive a specified amount of the expected sales tax revenue" to be generated during the construction of the plants. The Program would further oblige developers to "require that all qualifying contractors and subcontractors obtain the appropriate Board of Equalization permit that allows allocation of all eligible use tax payments to [the] County . . ." The Program does not specify how developers will fulfill their guarantee obligations, and the failure to provide a clear definition for "guarantee" could render the levy void for vagueness under Section 1 of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 7 of the California Constitution. In addition, the provision is unconstitutionally vague with regard to how the final amount owed will be calculated and the degree to which developers are responsible for the failure of their contractors and subcontractors to make all eligible payments to the County.

The guarantee provision further violates the equal protection clause of the U.S. Constitution and Section 16, Article IV of the California Constitution. These provisions prohibit "special legislation," meaning legislation designed to "impose[] peculiar disabilities or burdensome conditions in the exercise of a common right on a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." (*Sawyer v. Barbour* (1960) 142 Cal.App.2d 827, 838; *see also Werner v. Southern Cal. etc. Newspapers* (1950) 35 Cal.2d 121, 131 (establishing that the test for identifying the validity of an allegedly unlawful statute is the same as the equal protection clause of the federal Constitution).) Legislative bodies are free to classify people, entities, or things and impose burdens based on those classifications. (*Sawyer*, 142 Cal.App.2d at 838.) But the rationale for the grouping must be reasonable. (*Id.*)

⁶ The term "solar energy system," as used in Government Code Section 6850.5 does not contain the limiting language the County proposes in new section 21.62i of Ordinance 348 providing that a solar energy system must be "an accessory use" and be "used primarily (i.e. more than 50 percent) to reduce onsite utility usage." The County's proposed inclusion of this limiting language not in the state statute conflicts with, and is therefore preempted by, state law. Under state law, a "solar energy system" includes "any solar collector or other solar energy device 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". (California Civil Code Section 801.5 (a)(1), *cross-referenced in* California Government Code Section 65850.5 (emphasis added).)

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Here, the County has not provided any reason, let alone a rational reason, for creating a class of one—solar plant developers—and imposing the odd requirement that they guarantee payment of “a specified amount of the expected sales tax revenue” and impose use tax payment obligations on their contractors. There is no sound reason for targeting solar power plant developers alone to bear this burden.⁷ Accordingly, the surety requirement is unconstitutional under the equal protection clause.

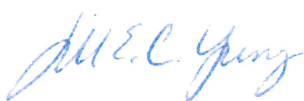
The Program Cannot Be Adopted Until the County Conducts a Review of its Potential Effect on the Environment under CEQA

The Program and the publicly available materials in support of the same fail to acknowledge the potential effects of the adoption of the Program on the environment. Based on information from utility-scale solar developers, we believe that the imposition of the Program will place such a high burden on solar facilities that fewer facilities will be constructed. The State of California is counting on these facilities to ensure compliance with the Renewable Portfolio Standard and plans for decreasing greenhouse gases under the AB 32 Program. Conflicts with these efforts alone are enough to trigger the requirement that the Board prepare an Environmental Impact Report to understand the negative effects of the Program on the environment.

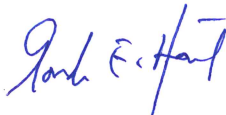
Conclusion

LSA's member companies are committed to being good neighbors in the communities where they develop projects. They stand ready and willing to mitigate the impacts of their plants. However, a one-size-fits-all approach to mitigation that involves the extraction of money, which may or may not mitigate impacts that a particular project might or might not have, is not an appropriate—or a legal—approach to mitigation. We would be happy to discuss with you our ideas for a feasible and legally defensible mitigation policy at any point in the future. In the meantime, we strongly urge the Board to reject the resolution proposing the Public Benefits Program on December 20, 2011.

Sincerely,



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⁷ The fact that construction contractors and subcontractors would be required to enter into agreements with the developers to ensure compliance with this provision when working on solar projects (but not on any other construction contracts) further illustrates the unequal treatment that will result.