

January 12, 2010

VIA EMAIL AND U.S. MAIL

Timothy McNulty, Esq.
Office of the County Counsel
County Government Center
1055 Monterey Street, Room D320
San Luis Obispo, CA 93408

Re: **Excelaron, LLC—EIR Scoping and Other Matters**
(File No. DRC2009-00002)

Dear Mr. McNulty:

Thank you for taking the time to meet with me and my client on December 16 regarding the Excelaron project. I am writing this letter to follow-up on several items we touched on during our discussion in advance of the Planning Commission scoping meeting scheduled for Thursday. On a broad level, I must note that I am concerned that some of the county processes seem to be based on the position of whoever is currently making the decision, reducing the county process to a system not of laws, but of personal determinations, which is not the American system of due process. As a result, this raises procedural due process and equal protection concerns regarding the County's processing of my client's proposed project.

I. General Objections to the Planning Commission Scoping Meeting

First, we object to the Planning Commission holding the scoping meeting as unorthodox, not consistent with standard County CEQA procedures (whether found in the County CEQA Guidelines or based on historic practice), and as likely to lead to premature opinions by the Commission before they have been provided with the EIR and all the evidence. Consequently, this arguably violates Excelaron's equal protection and due process rights. The proposed approach of involving the Planning Commission in the Environmental Impact Report (EIR) scoping process apparently is being used here because it has been used by the City of San Luis Obispo, and/or on one County project in the past: the proposed photovoltaic solar farms in the Carrizo Plains, which involved much larger projects, a unique set of potential cumulative impacts, and a concurrent California Energy Commission process. However, none of those reasons apply here, and therefore do not justify repeating that one-time approach in this instance.

Nothing in the County CEQA Guidelines authorizes the Planning Commission to hold the scoping meeting. In fact, the County CEQA Guidelines do not speak to scoping at all, nor do other portions of the County Code, and it is our understanding from speaking with County staff and with other project applicants that this has not been the County's practice in the past. Surely the rules don't change in San Luis Obispo County just for the Excelaron project, with no revisions to the controlling county code sections to ensure that it will be standard practice in the future.

In my 24 years practicing land use law throughout California I have never seen a Planning Commission hold a scoping meeting. Rather, these meetings are typically held by planning department staff. Having the Planning Commission hold the scoping meeting places the cart before the horse, in that one of the County's primary decision-making bodies ends up listening to public complaints on the project before an EIR has been prepared to objectively assess and address any of the environmental impacts or areas of public concern. Thus, the proposed process potentially biases the later decision-making process and can prejudice the project. Notably, in the audio record from the March 26, 2009 Planning Commission meeting, where the idea of such a scoping meeting was first raised, you cautioned the Commission that they would need to be "awfully careful" in such a forum "not to take a position . . . before all the evidence is ready."

Furthermore, as you know, scoping meetings do not envision a dialogue, thus issues raised by the public, even if inaccurate, cannot be responded to by my client. In contrast, at the ultimate public hearings on this matter, any such misinformation can and will be responded to by my client, and there are procedural due process protections in the law to allow my client to do so. (U.S. Const. amend. V; Cal. Const. Article I, §7.) Thus, from this standpoint as well, having the Planning Commission hold this scoping meeting has procedural due process inequities to my client's detriment.

In addition to the due process concerns raised by the County's proposed course of action, there are also significant equal protection concerns. The Equal Protection Clauses of the California and U.S. Constitutions seek to ensure that "all persons similarly situated [are] treated alike." (*See Squaw Valley Dev. Co. v. Goldberg* (2004) 375 F.3d 936.) Equal protection issues exist when similarly situated individuals or entities are treated differently and "there is no rational basis for the difference in treatment." (*Id.* at 564.) Here, the County is requiring Excelaron to engage in a procedural process not imposed on similar projects and is applying far more scrutiny than it normally applies to other similarly situated applicants. Furthermore, the County has not provided any reason for the disparate treatment. As such, the extra requirement is irrational and likely would not withstand judicial review. Targeting an individual landowner or applicant also gives rise to procedural due process claims. (*See e.g., Harris v. County of Riverside*, 904 F.2d 497, 502 (9th Cir. 1990).)

Although my client understands that it cannot stop the Planning Commission from holding the scoping meeting, we felt it was important to voice these concerns for the record and your consideration in advance of the meeting.

II. Requested Protocol for the Scoping Meeting

Because the County does not have an established practice or history of holding scoping meetings in front of the Planning Commission, there is no protocol for how such meetings are to be conducted, a major concern for my client. Accordingly, we wish to make note of several points we believe should be mentioned and/or carefully observed during the meeting, in order to avoid any further due process and equal protection concerns than those set forth more generally above.

As an initial matter, it is crucial that both the public and the Planning Commission are fully apprised of the fact that this is not a formal hearing at which the Planning Commission is at liberty to take any sort of action. In addition, both the public and the Commission should be informed (or reminded, as the case may be) of the purpose of EIR scoping meetings.

Scoping is intended to help the lead agency identify "the range of actions, alternatives, mitigation measures, and significant effects to be analyzed in depth in an EIR and eliminating from detailed study issues found not to be important." (14 Cal. Code Regs. § 15083.) It can be "an effective way to bring together and resolve the concerns of affected federal, state, and local agencies, the proponent of the action, and other interested persons including those who might not be in accord with the action on environmental grounds." (*Id.*) Excelaron is hopeful that this scoping meeting will serve as an opportunity for the public to become familiar with many of the specifics of the proposed project, some of which have been revised since the last time the project was under consideration. In addition, Excelaron believes public input will be invaluable in terms of scoping potential alternatives and mitigation measures to be taken under consideration.

Nevertheless, it should be clarified that this is not the appropriate forum for the public to submit "testimony" on the project, including statements regarding whether they are for or against the proposed project. Avoiding such statements is especially important since the Planning Commission will be present. In addition, it cannot be overemphasized that the EIR is a forward-looking document that attempts to assess and analyze the likely environmental impacts of a hypothetical project, and we are only at the beginning stages of assembling that document. Consequently, at this stage it would be improper to discuss "the environmental impacts of the project" or otherwise refer to impacts in absolute, certain terms. The proper focus should be on *potential or reasonably foreseeable* impacts and potentially feasible alternatives and mitigation measures that might reduce certain hypothetical impacts. Moreover, it is sometimes helpful to remind members of the public that CEQA is not concerned with impacts or facets of a project that do not relate in some manner to the physical environment. Consequently, "NIMBY"-type comments, or those that involve economic or political reasons for approving or disapproving of the project, are not appropriate at this meeting, which should be entirely environmentally-oriented.

We trust that you will agree with each of these points in principle and advise the Planning Commission and staff accordingly. We believe that having some representative of the County

raise these issues at the outset of the meeting will serve to avoid a great amount of confusion and keep the scoping meeting on track and productive.

III. Real-Time Billing For EIR Fees

As a final matter, at our meeting in December, we discussed the propriety of the County's administrative fee, which is a flat 25% of the cost of the EIR (including contingencies). In addition, the County requires applicants to post an additional "contingency fee," which is 15% of the EIR cost, in order to cover any unanticipated out-of-contract expenses. This is in addition to the actual contract cost of the EIR. Consequently, my client is expected to front a sum equivalent to 140% of the cost of the EIR contract. According to the County's Estimated Costs form, this money will be deposited in an interest-bearing Environmental Impact Report Trust Fund, and all unused monies will be returned to the applicant.

As you know, Planning Departments are not permitted to operate for-profit under the law, and any fees and charges imposed must have a rational nexus to the actual cost of providing the attendant services. In order for the County's policies of charging a 15% contingency fee and a flat 25% administrative fee to withstand legal scrutiny, the County must provide an accounting of its actual costs in administering the EIR, as well as any expenditures over and above the EIR contract amount. To this end, once the EIR Trust Fund is fully-funded, we would appreciate monthly statements from the County reflective of "real-time billing." Such statements will benefit both the County and the applicant by removing the need to discuss the Trust Fund accounting retroactively at the end of the project. If a monthly accounting of this nature is completely infeasible, we are willing to discuss alternative timeframes, but given our understanding that the County already provides real-time billing for other administrative tasks, we do not view this as an onerous request.

Should you have any questions regarding the foregoing, please do not hesitate to contact me or my associate Sophie Rowlands.

Sincerely yours,

DOWNEY BRAND LLP



Patrick G. Mitchell

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