

DOCKETED

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Via Email & CEC Docket 24-OPT-02

Drew Bohan
Executive Director
California Energy Commission
715 P Street
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Drew.Bohan@energy.ca.gov

**Re: City of San Juan Capistrano Reservation of Rights in
Docket 24-OPT-02**

Dear Mr. Bohan:

The City of San Juan Capistrano (“City”) hereby files this Standing Reservation of Rights related to its participation in the above-captioned proceeding and its standing objection to jurisdiction of the California Energy Commission (“Commission”) to proceed with the application process for the Compass Energy Storage Project.

BACKGROUND

On April 12, 2024, Compass Energy Storage LLC (“Applicant”) submitted an opt-in application for certification of the Compass Energy Storage Project (“Project”).¹ The Project was effectively denied by the City, which previously determined that the Project use was incompatible with the existing interim uses of the property on which the Project would be located and that a conditional use permit process was unavailable based on the Planned Community (“PC”) District zoning designation. The PC District zoning designation allows uses and structures permitted within the city subject to the approval of a Comprehensive Development Plan (“CDP”) consistent with the General Plan, pursuant to San Juan Capistrano Municipal Code (“Municipal Code”) Section 9-3.315(b). There is no approved CDP which governs the property on which the Project would be located; in the absence of an approved CDP, the PC District zoning designation allows identified interim uses pursuant to Municipal Code Section 9-3.315(c) subject to the development standards for the Agri-Business District, pursuant to Municipal Code Section 9-3.315(e)(3).

¹ Files associated with the Application were uploaded to Commission docket 24-OPT-02 from April 5 through April 11, 2024 and the Commission deemed April 12, 2024 as the effective receipt date. TN255653, *Memo from Renee Longman to Docket Unit* (Apr. 12, 2024).

The Planning Director has the authority and responsibility to review uses not listed in the Municipal Code and permit such proposed unlisted use if it falls within the purpose and intent of the base district, is of a comparable nature to the principal, accessory, or conditional uses set forth in the base district, is not listed in the base district, and will not be detrimental to property in the vicinity of such use pursuant to Municipal Code Section 9-3.203.

The City's Municipal Code does not contain regulations or criteria specifically addressing Battery Energy Storage System ("BESS") facilities. On April 29, 2022, the Development Services Director determined that a BESS facility cannot be accommodated by an unlisted use determination under Municipal Code Section 9-3.203 as the required findings could not be met. As such, the preparation and approval by the City Council of a CDP would be required to allow the proposed use. Consequently, in September 2022 a request was submitted for the City Council to initiate a Rezone study to establish a CDP that would govern the property on which the Project would be located.

The Project was also effectively denied by the City Council after it voted against the initiation of the Rezone study to establish a CDP that centered on the BESS use and would have allowed the Project to be sited on the property pursuant to a conditional use permit. The City has documented the history of the determination and denial in prior comments on the Commission's jurisdiction.²

On May 10, 2024, the City submitted initial comments on the Project noting the lack of Commission jurisdiction to review and certify the Project, a reservation of rights, and certain comments regarding local agency reimbursement, and the lack of a community benefits plan, among other things.

RESERVATION OF RIGHTS

The Commission lacks jurisdiction to consider the Project application under AB 205 because, among other things, the City has effectively denied Project. Nonetheless, the City is participating in this proceeding to protect its rights and advocate for its constituents while also being responsive to Commission staff requests for the City's review and comments on the application. Notwithstanding the foregoing, the City's participation at staff meetings, including, but not limited to, a pre-application meeting, review of the application, any comments submitted by the City based on its review of the application, and any and all filings and pleadings submitted by the City to the Commission, are undertaken and made without waiving or intending to waive, but to the contrary intending to preserve and preserving, any and all rights, objections, and remedies, including but not limited to the City's objections to the Commission's jurisdiction over the Project.

Federal and state courts have used the term "waiver" to refer to a number of different concepts, but "waiver" generally means the "voluntary relinquishment of a known right," though

² *City of San Juan Capistrano Objection to CEC Jurisdiction over Compass Energy Storage Project* at XX (May 31, 2024).

it can also mean “the loss of an opportunity or a right as a result of a party’s failure to perform an act it is required to perform, regardless of the party’s intent to abandon or relinquish the right.”³ Here, the City has not, is not, and does not plan on relinquishing or waiving its right to challenge the Commission’s jurisdiction to consider the application. Instead, the City explicitly and directly challenged the Commission’s jurisdiction over the Project and will continue to challenge the Commission’s jurisdiction unless and until the Commission disclaims jurisdiction over it. If the Commission does not disclaim jurisdiction, the City may pursue any and all options available to it, including judicial relief. In sum, the City has not relinquished any right to challenge Commission jurisdiction and explicitly reserves its right to do so, despite its participation in this proceeding.

Nor should the City ever be “estopped” from challenging Commission jurisdiction over the Project because the Commission lacks jurisdiction and any Commission order or ruling issued on the basis of the Commission’s purported jurisdiction is therefore void and “vulnerable to direct or collateral attack at any time.”⁴ Here, there is an “entire absence of power [for the Commission] to hear or determine the case” because AB 205 does not grant the Commission jurisdiction over projects already denied by a local government with land use authority, among other reasons. Thus, any Commission order or ruling considering the merits of the Project application is void and the City can challenge that order or ruling at any time. Nevertheless, the City is submitting this standing reservation of rights out of an abundance of caution.

Sincerely,



Ryan M. F. Baron
of BEST BEST & KRIEGER LLP

RMB:pa

cc: Ben Siegel, City Manager, City of San Juan Capistrano
Paul Garcia, Senior Planner, City of San Juan Capistrano
Jared Babula, Attorney, California Energy Commission

³ *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 315.

⁴ *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660.