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December 4, 2020

Alameda County Board of Supervisors  
C/O Andrew Young, Sr. Planner  
Alameda County Planning Department, Community Development Agency

Dear Board of Supervisors,

We represent Save North Livermore Valley ("SNLV"), an association of hundreds of residents, property owners, environmentalists, and proponents of good government. In conformance with Section 17.54.670 of the Alameda County Code of Ordinances, we are writing to appeal the East County Board of Zoning Adjustments ("BZA") Nov. 24, 2020 approval of a conditional use permit ("CUP") and EIR certification for the Aramis Industrial Solar Power Plant Project (PLN2018-00117) ("Project"). For the numerous reasons below, and by way of this appeal, we are urging you to deny the CUP and EIR certification for the Project.

It is with great disappointment that we find ourselves at this juncture. We participated in a November 2018 hearing when the Board of Supervisors Transportation & Land Use Committee ("Committee") discussed the progress of the County Planning staff's ("staff") long-overdue work on policies intended to help identify the scale, scope and best locations for solar installations on undeveloped East County land. Since then, we have urged the County to complete the policies and a related General Plan amendment needed to implement the policies through the East County Area Plan ("ECAP").

Our multiple letters and meeting comments have fallen on the deaf ears of Committee members Haggerty and Miley and the other Board members who we also contacted. Staff similarly has ignored our commonsense recommendation, which simply put, was to request that staff complete the work that it had promised the Board of Supervisors and the public that it would complete.

Since May 2020 staff has processed the Aramis application in an highly irregular manner that appears intended to get the Project through the review process as quickly as possible, and with limited public input. Examples include, but are not limited to the following: refusing a public request for additional time to review the 500-page Aramis draft EIR; scheduling the Aramis BZA review during Thanksgiving week when only two of three commissioners were available; and, most recently, failing to issue the Project's final CUP and EIR certification resolutions until 3:30 p.m. the day before the 10-day appeal deadline expired. In addition, staff internal emails produced in response to a public records act request, show that as staff was drafting the EIR, staff did not believe that the project was consistent with Measure D, ECAP policies, Agricultural Zoning or the General Plan's protection of scenic corridors. Staff

has claimed that some emails were taken out of context, but that's impossible when the emails state the context in which they were originally written.

Now staff proposes to schedule an appeal hearing on some date after December 15, but before the end of 2020. Again, this schedule would reduce public participation and deprive the public of a meaningful opportunity to provide substantive feedback.

Just to be clear, all members of SNLV support solar and other forms of renewable energy. SNLV does not, however, support solar when it has the direct effect of damaging the natural environment, including native flora and fauna and aesthetics, and when it contravenes the voter determination that East County Ag land and open space should be protected.

This letter incorporates by reference and includes all the previous verbal and written comments made on the Project since May 4, 2020, urging that the project not be reviewed until the County completes solar policies and a General Plan amendment or be rejected or continued until more proof is provided that it complies with County and State law. These comments came from SNLV, Chris and Margaret O'Brien, Robert Selna and many other property owners, environmentalists and proponents of good government. The reasons the SNLV is appealing the BZA's Project approval are too numerous to list here. They include, but not limited to, the list below. They fall into several broad categories of ways in which the Project either violates county and/or state law or fails to meet standards established by county and/or state law.

**Measure D.** As proposed, the Project violates numerous provisions of Measure D, including many of the 300(+) policies enumerated in Measure D intended to preserve agricultural land and open space in East Alameda County. Below are just a few examples of the many ways in which the Project violates Measure D.

- Measure D specifically deleted language in the prior version of the East County Area Plan ("ECAP") that had allowed "other industrial uses appropriate for remote areas and determined to be compatible with agriculture." Even if County staff concludes that industrial solar is compatible with agriculture it is prohibited by Measure D.
- Measure D specifically controls development activity in the North Livermore Intensive Agriculture Area, and decreed that uses permitted by the Measure "may not be increased." (ECAP, p. iii.)
- Measure D is very clear that, future changes require a "vote of the people of Alameda County." ECAP, p. vii. In fact, Measure D expressly limits the Board of Supervisors authority to authorize new or expanded land uses outside of its Urban Growth Boundary without a prior vote of the electorate as follows: [T]he Board of Supervisors may impose further *restriction* on development and use of land. The Board may also make technical or non-substantive modifications to the terms of this ordinance, to the extent the terms are incorporated into the East County Area Plan, the Castro Valley Plan, the General Plan for the Central Metropolitan-Eden-and Washington Planning Units, or the Open Space Element of the General Plan for purposes of reorganization, clarification or formal consistency within a Plan. Any modifications must be consistent with the purposes and substantive content of (Measure D).
- The Project violates numerous Measure D policies, including Policy 13, which is focused specifically on infrastructure development in East County as follows: Policy 13 only allows for (1)

new, expanded or replacement infrastructure necessary to adequately serve East County; and (2) for improvements of public facilities which do not increase capacity.

**The East County Area Plan ("ECAP")**. The Project violates numerous ECAP provisions, including many of the Measure D policies that were implemented by way of the ECAP.

Related, the Project is in conflict with ECAP land use designations, Large Parcel Agriculture (LPA) and Water Management (WM). The Project's conflicts with the LPA and WM include, but by no means are limited to, the summary below.

#### **LPA**

- The Project is not consistent with the LPA. In sum, the project is not consistent with the purpose of the LPA, which is to "to permit and encourage cultivated agriculture." But, even cultivated agriculture is to be done "without unduly impairing the open, natural qualities of the area." ECAP, p. 78.
- Increasing uses in land use designations created by Measure D requires a general plan amendment, which must be approved by a vote of the public.

#### **WM**

- The WM allows for "quarries, reclaimed quarry lakes, watershed lands, arroyos, and similar compatible uses." Unlike the LPA, the WM does not allow windfarms or any other form of infrastructure. This "like windfarms" argument is how staff wrongly justifies Project conformity with the LPA.
- Staff has stated publicly, and in internal communications, that the Project would violate the WM. One example is the NOP for the project (a public document), in which staff wrote the following: "Broadly speaking the County considers the WM suited to established quarries and their highly-regulated reclamation plans and specialized permits, and not meant for large scale solar facilities."
- Increasing uses in land use designations created by Measure D requires a general plan amendment, which must be approved by a vote of the public.

**Agricultural District Zoning and "Precedent."** The Project is inconsistent with the Agriculture (A) zoning in which it is proposes to locate and should not have been reviewed as a conditional use. Staff claims that it may rely on a precedent of approving an 11-acre project in 2008 and a 30-acre phase of a 60-acre project in 2012, because the Planning Commission approved a recommended CUP for the 2008 project and the Board of Supervisors approved the 2012 project on appeal. Those projects were never built. Unfortunately, staff's interpretation is not supported by evidence and is akin to a zoning amendment, but state law requires a different and specific method for zoning amendments. In the case of the lands covered by Measure D, such a zoning amendment would require a vote of the people and an EIR. Other reasons staff is mistaken include, but are not limited to the following:

- The record illustrates that when the Board of Zoning Adjustments and the Planning Commission approved the 2008 and 2012 projects, the board and commission were not told, nor did they understand, that approving the projects would mean that industrial solar installations would be allowed in the entire LPA and WM.

- The Alameda County Board of Supervisors and staff are on public record on Feb. 28, 2012 explicitly stating that the 2008 and 2012 solar project approvals would not serve as “precedent” for future solar approvals. With respect to Aramis, staff now says the exact opposite. See the Feb. 28, 2012 video by way of this link:  
[http://archivemedia.granicus.com:443/OnDemand/alamedacounty/alamedacounty\\_5fd39392-4b65-43f3-99cc-5541c62e0747.mp4](http://archivemedia.granicus.com:443/OnDemand/alamedacounty/alamedacounty_5fd39392-4b65-43f3-99cc-5541c62e0747.mp4).

Please note the Feb. 28, 2012 verbal exchange between Supervisor Nate Miley and Community Development Director, Chris Bazar directly below.

- **Supervisor Nate Miley:** “We have already determined that by approving the [2012 Cool Earth] CUP we will not be legally-obligated in terms of any *precedential* value; this has *no precedential* value whatsoever. Unequivocally.”
- **Community Development Director, Chris Bazar:** “Correct.”

**General Plan.** The Project violates the General Plan in several respects, including, but not limited to, the following:

- **Scenic Rural Recreational Route:** In the 1960s, North Livermore Avenue and Manning Road, precisely where the project would be located, was designated Scenic Rural Recreational Route. That means the route has protections against the very types of visual impacts the Project admits it cannot mitigate. According to the final EIR, the Project would do the following:
  - result in significant and unavoidable adverse impacts on a scenic vista
  - degrade the existing visual character or quality of public views of the site and surroundings
  - contribute to a cumulatively considerable impact on aesthetic resources, and
  - conflict with land use policies adopted to protect sensitive viewsheds and environmental quality

Under CEQA, despite the Project’s many violations of the General Plan, staff concludes that the Project can move forward due to staff’s Statement of Overriding Considerations that justify approving the project despite its environmental (in this case aesthetic) impacts because, the Project “would assist California in meeting” its renewable energy goals. We disagree that contributing 100 megawatts to the state’s noble effort to dramatically increase renewable energy overrides an existing General Plan commitment to preserving a scenic valley. But even if one accepts that as a legitimate trade-off, a CEQA Statement of Overriding Considerations does not allow the project to override the General Plan. Only a General Plan amendment can do that.

**CEQA.** The Project, as proposed, violates CEQA in countless ways, in addition to the land use and zoning conflicts noted above. A few examples related to the Project’s EIR are below.

- **Project Objectives, Description, Setting, Analysis, Mitigations, Alternatives.**
  - **Project objectives.** Improper definition of the project objectives as the project itself, e.g. a 100-MW solar project at this particular site; this is a clever way to reject other alternatives, particularly off-site alternatives, as infeasible.
  - **Project description.** Project description lacks critical details, such as the size of and distance between panels; descriptions and depictions of utility lines, electrical pads, stormwater

detention basins, and grading; does not include any visual renderings of the project; and omits the referenced landscaping plan and agricultural management plan.

- Environmental setting. Inadequate environmental setting/baseline, site is inaccurately described as “degraded” lands, which would apply nearly anywhere that is not entirely pristine habitat.
- Impact analysis. Inadequate impact analysis, across the board, but particularly in the land use, biological resources, visual impact and cumulative impact sections. The 59-acre Sunwalker solar project also is proposed for across the road and apparently is not adequately analyzed as a cumulative impact either, nor are other potential future solar projects that would be reasonably foreseeable if these two projects are approved.
- Mitigation measures. Inadequate mitigation and monitoring, particularly regarding land use, biological and visual impacts noted above.
- Project alternatives. Failure to consider a reasonable range of project alternatives, particularly off-site alternatives. According to the comment letters, there are several viable off-site alternatives in more developed areas of the County that would have far fewer impacts.
- **Biology**. The Biological Resources evaluation within the Final EIR does not provide an adequate evaluation to meet CEQA requirements to evaluate indirect, direct and cumulative impacts on special status species, so none of the EIR’s conclusions regarding impacts on biological resources are backed by substantial evidence. Specifically, the EIR does not propose adequate mitigation for special status species including the California tiger salamander (CTS), California red-legged frog (CRLF), and burrowing owl to fully mitigate for the potential for take of these species and therefore reduce impacts to a less than significant level. However, the largest concerns are associated with the analysis that inaccurately evaluates the potential for CTS to be present and impacted by the project.
- The initial assessment by Helix biologists for the potential for CTS to present is highly flawed and is based on inaccurate information regarding multiple aspects of the species ecology that have led to (1) a flawed assessment of the potential for presence on the site and its value for the species, (2) a flawed analysis of the potential to impact the species and its habitat, and (3) a flawed assessment of the risk of take (injury and mortality) of individual CTS and temporary and permanent loss of habitat. None of the biological surveys conducted for the project provide any data or information that would support making a defensible claim that the potential for CTS to be on the site is low. These surveys are not appropriate or defensible for CTS in terms of location and geographic extent of the surveys on the site, timing of the surveys, and were not conducted during appropriate weather conditions needed to determine the site is not occupied. None of the surveys conducted were done so using the known and standard methods to detect CTS.
- The County has not proposed adequate (or any) mitigation for the loss of upland habitat for these amphibians and the burrowing owl (or any of the special status species known to be present in the immediate area). The EIR acknowledges the potential for the CTS and CRLF to be present, that there is the potential for take of individuals and proposes take avoidance measures during construction, operation and decommissioning to avoid and minimize take. However, the EIR fails to recognize that the same factors that require these avoidance and

minimizations measures indicate that the site serves as habitat for these listed and special status species.

- The flawed biological analysis assumes the site is not occupied by the CTS and therefore does not properly address the need to consult with the regulatory agencies to determine the need to obtain Incidental Take Permits under the California Endangered Species Act and Federal Endangered Species Act to address the potential for take in the form of harassment, injury and death of individuals. Mortality of even one individual can be significant. There is no analysis on the potential for the avoidance measures, including the exclusionary fence during construction to itself result in take, or whether that take is significant. There is no requirement for a relocation plan in the event a species is encountered.
- To reduce the impacts of the project to a less than significant level the project impacts must not only be avoided and minimized but must also be fully mitigated. Consequently, compensatory mitigation is required. The EIR lacks an enforceable measure to ensure consultation with the regulatory agencies, is conducted to ensure the County, as the lead agency, is reducing the impacts of the project to a less than significant level.
- The project requires an incidental take permit under CESA, with compensatory mitigation in approx. 3:1 ratio for all permanently disturbed areas, but no take permit is proposed.
- Avian wildlife monitoring is inadequate at only 3 months out of the year for 3 years.
- The EIR fails to examine the so-called "lake effect" of solar panels, which can result in significant bird mortality. The area is a stopover for migrating waterfowl and shorebirds, and has seasonal wetlands and depressions.
- The EIR survey for special status plant species on site relies on a grossly outdated survey protocol from the year 2000; this has been updated twice since.
- The permanent fencing proposed to surround the site will result in wildlife entanglement.
- The bio-retention basins to be constructed as part of the project will be an attractive nuisance for amphibians and likely to cause take of listed CRLF and CTS.
- EIR fails to analyze impact on the habitat of sheep grazing, which is a more intensive land use that can impact habitat more significantly than the current dry land farming and light ranching.
- Use of toxic rodenticide on the project site poses a danger to endangered San Joaquin kit fox.
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#### **Other CEQA Issues**

- The EIR failed to analyze adequacy of water supplies for the project. EIR concludes this is a less than significant impact, but it substantially underestimates the impact of 1.2 million gals that would be required to wash the panels at least 4x per year.
- The EIR fails to analyze the potential for contaminated runoff from the panel washing to adversely affect the underlying groundwater basin.
- The EIR does not include any program to monitor water use or contamination.
- Significant, unavoidable adverse impacts to a County-designated scenic corridor as noted above, yet no visual renderings of the project are included in the EIR.
- The EIR does not include a visual analysis of the view of the project from surrounding and nearby EBPRD lands and trails.

- The EIR's conclusion that the project will result in significant and unavoidable visual and aesthetic impacts is correct, but directly conflicts with its conclusion that a large-scale industrial land use is consistent and compatible with the agricultural general plan and zoning designations.
- Project will increase local wildfire risk; nearest fire station is 10 miles away.
- Problems with VMT analysis, inaccurate greenhouse gas emissions calculations, and failure to analyze increased local heat island effect from solar projects.

**Staff and the Board of Supervisors failed to complete Solar Policies/ Least Conflict Mapping, directly contributing to the conflict now before the Board.**

- A Feb. 28, 2012 exchange between Supervisor Wilma Chan and Planning Director Albert Lopez went as follows:
  - Supervisor Chan: "Why is it taking so long to develop the solar policy?"
  - Planning Director Lopez: "We have been working for several months.... We think we are moving at a fairly rapid clip."
- During the same Feb. 28, 2012 hearing Supervisor Keith Carson obtained assurances from staff that it would not process another solar project in East County until staff finished the solar policies. Looking back, it's ironic that Supervisor Carson was particularly concerned about legal challenges.
- Years later, Supervisor Haggerty mistakenly stated that the County had decided to handle East County solar projects on a "case-by-case" basis, meaning without policy direction. The record of hearings and staff memos indicate that, instead, Haggerty and Miley's Transportation and Land Use Committee, directed staff to create policies that include some county case-by-case analysis regarding environmental mitigations. This incorrect notion of a case-by-case analysis – without the help of any policies – has been perpetuated by Haggerty and staff, which would prefer not to complete the policies and a general plan amendment that would require voter approval, given Measure D.
- A county solar policy was discussed at the Board in 2018, but again, never completed. As recently as 2019, County Planner Bruce Jensen sought consultants to complete a mapping study to find areas in East County that would cause the "least conflict" with the natural environment, as other counties have done. The Community Development Department 2020-2021 Budget highlighted completing solar policies.
- Despite repeated pleas during the past several months from community and environmentalists, Haggerty refused to place a temporary moratorium or pause on East County solar projects. In letting projects in the "pipe" go forward, as Haggerty described them, he contradicted the direction the full Board of Supervisors provide in 2012.

**Findings failure.** The Project does not meet any of the four findings necessary to approve a Conditional Use Permit, according to the County Code. As an example, on Finding #1 – that the *project be required by public need* – staff has never provided any evidence that the Project is REQUIRED by public need. And, staff does not even make any genuine effort to argue that the Project meets Finding #1. Instead, the staff report on the Project states that the project, "would assist California in meeting renewable energy generation goals...."

Staff later attempted to beef up its findings language after it was pointed out that “*required by public need*” and “*assist in meeting*” do not mean the same thing. Now staff’s findings attempt to expand the potential positive impact of the project as an solar energy facility that is of the type that “will enable the State of California to make further progress toward” meeting its renewable goals. Staff is playing games with words. The project is not required by public need.

As noted at the outset, this letter incorporates all of the points made previously about the projects failure to comply with county and state law, including the its failure to make findings as described in detail in a SNLV letter to the Board of Zoning Adjustments, dated November 20, 2020 and in staff’s possession.

**The Project CUP Resolution is Inconsistent with the BZA Motion.** A number of mitigations and conditions were added to the Project by way of motions near the conclusion of the November 24, 2020 BZA Project review hearing. Unfortunately, the final CUP resolution produced by staff does not accurately reflect the motions that were made. One example is BZA Chair Frank Imhoff’s motion for a setback that would include a landscape buffer, 80 feet from the "west side." Mr. Imhof was directing a setback from the solar arrays themselves. The map attached to the Project CUP resolution shows a setback of the Project that has little relation to the solar arrays. Instead, the map setback is from the project area boundary - only a small portion of which includes solar arrays.

### **Conclusion**

The conflict over this project, including this appeal, could have been avoided had staff completed policies indicating, among other things, the East County areas where industrial solar installations would have caused the least conflict with the natural environment. Many counties have completed similar work. In Alameda County such an effort was particularly relevant because in 2000 voters approved Measure D, which specifically protected agricultural land and open space in East County and prioritized the North Livermore Valley for cultivated agriculture. One obvious location *NOT* to site solar installations would have been areas – like the proposed Project site – that the General Plan had designated permanently as Scenic Rural Recreational Routes.

In sum, the project would violate the Measure D protections as well as the General Plan and other County and State laws. Staff says that’s OK though, because the Project will assist the State in meeting it renewable energy goals. The two of three BZA members who attended the Nov. 24, 2020 hearing seemed to have agreed.

You, the Board of Supervisors, share responsibility in this failure of planning and governance. Fortunately, you still have the opportunity to correct your mistakes. Denying the Aramis project’s CUP and EIR certification would be a good start.

Respectfully,



Robert Selna  
Save North Livermore Valley