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February 9, 2010

**SENT VIA EMAIL AND U.S. MAIL**

City of Glendale Planning Commission
City of Glendale
633 E. Broadway, Room 103
Glendale, CA 91206

Re: Solar Rights Act and Zoning Code Amendment Case No. PZON 2009-001

Dear Members of the Planning Commission:

On February 17, 2010, the City of Glendale's Planning Commission is scheduled to vote on proposed changes to its zoning code that, if adopted, would correct the City's current non-compliance with the state Solar Rights Act. The Solar Rights Act requires the City to approve applications for solar energy systems, including supporting structures, unless it makes a specific finding of an adverse impact on health or safety. To comply with that law, we encourage the City to adopt Option 1 outlined in the Planning Commission Staff Report, amending its zoning code to exempt solar energy systems.[1]

The Legislature has stated its intent that local governments not create unreasonable barriers to the installation of solar energy systems. California Government Code section 65850.5, California's Solar Rights Act, explicitly provides that local governments must remove obstacles to, and minimize the cost of, permitting for solar energy systems. To that end, it requires local governments to approve applications for such systems in a nondiscretionary manner, and limits review to health and safety concerns.

The City of Glendale currently is not in compliance with the Solar Rights Act. Recently, the City denied an application for a solar energy system on the basis that the structure supporting

[1] The Attorney General submits these comments pursuant to his independent power and duty to protect the natural resources of the State from pollution, impairment, or destruction in furtherance of the public interest. *See* Cal. Const. art. V, § 13; Cal. Gov. Code §§ 12511, 12600-12; *D'Amico v. Bd. of Med. Exam'ers* (1974) 11 Cal.3d 1, 14-15. These comments are made on behalf of the Attorney General and not on behalf of any other California agency or office.

the solar panels violated height and setback limitations. The City did not find any health or safety problems, but instead summarily asserted that "the statute does not expressly prohibit the application of the City's zoning ordinances to solar energy systems." (Letter from Chief Assistant City Attorney Michael Garcia, Nov. 14, 2008 ("City Letter").) The City further contended that structures supporting solar panels are exempt from the solar access law, and are subject to zoning restrictions such as height and setback requirements. (*Ibid*.) In denying the application, the City stated that the "structure itself is not necessary to collect, store or distribute solar energy," and thus does not constitute a solar energy system. (*Ibid*.)

The resident whose permit was denied obtained legal counsel. As a result of the increased attention the issue has received, the City is now considering amending its zoning code to address solar energy. City Planning Commission Staff have put forward two options. Option 1 would exempt all solar energy equipment from zoning standards, and would provide that such equipment be reviewed only for health and safety. This option comports with Government Code section 65850.5. Option 2 would exempt solar energy equipment from certain, unspecified zoning regulations but would allow other, also unspecified, zoning restrictions to continue to apply. The Staff Report concludes that Option 2 is the preferred amendment because "the apparent permissiveness of the State standards may result in unintended consequences," and it "may be argued that the State overlooked the potential for undesirable consequences" in enacting section 65850.5.

As discussed in more detail below, we have reviewed the Staff Report and conclude that, of the two proposed options, Option 1 is the only viable amendment. Option 2 would ignore state law, explicitly allowing the City to consider factors other than health or safety in reviewing applications for the installation of solar energy systems.

1. <u>The City's Denial of Applications for the Installation of Solar Energy Systems is Improper and Violates California Government Code Section 65850.5.</u>

In its letter denying the permit application to install a solar energy system, the City makes four contentions: first, that the language of Government Code section 65850.5 does not prohibit it from applying zoning restrictions to solar energy systems; second, that height and setback requirements constitute health and safety standards and thus are permitted under the statute; third, that the statute is intended merely to prohibit review on aesthetic grounds; and finally, that the definition of "solar energy system" does not encompass structures supporting solar panels. Each of these arguments lacks merit.

a. <u>A local government must approve solar installation applications, unless it makes a written finding of a specific, adverse impact on public health or safety.</u>

The City argues that Government Code section 65850.5 "does not expressly prohibit the application of the City's zoning ordinance to solar energy systems," but merely expresses legislative intent that local agencies not adopt ordinances that create unreasonable barriers to the installation of solar energy systems. (City Letter at p. 1.)

However, Government Code section 65850.5, subdivision (b) states in part, "A city or county *shall* administratively approve applications to install solar energy systems through the issuance of a building permit or similar nondiscretionary permit. Review of the application to install a solar energy system *shall* be limited to the building official's review of whether it meets all health and safety requirements of local, state, and federal law. The requirements of local law *shall* be limited to those standards and regulations necessary to ensure that the solar energy system will not have a specific, adverse impact upon the public health or safety." (Emphasis added.)

This language does not simply demonstrate legislative intent, but imposes specific requirements on local governments to approve applications for the installation of solar energy systems in a nondiscretionary manner, taking into account only whether the proposed system could have specific, adverse impacts on public health or safety.

b. Under section 65850.5, the City must demonstrate the specific height and setback proposals in an application violate health and safety regulations.

To address the health and safety component of the statute, the City claims that height and setback zoning requirements in fact constitute health and safety standards -- "the height and setback standards applicable to the residential zones are part of a comprehensive scheme to protect, among other things, public health and safety." (City Letter at pp. 1-2.)

While it is possible that, under certain circumstances, height and setback requirements could be related to health or safety, Government Code section 65850.5, subdivision (c) prohibits a city or county from denying an application for a solar energy system permit "unless it makes written findings based upon substantial evidence in the record that the proposed installation would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact." In denying the referenced application for the installation of a solar energy system, the City did not make such written findings based upon substantial evidence in the record. Instead, the City merely relied on the possibility that certain zoning requirements could relate to health and safety, stating that height and setback standards "have as one of their primary purposes the protection of the health and safety of the community." (City Letter at p. 2.) This blanket statement fails to meet the standards established in Government Code section 65860.5.

c. Section 65850.5 is not limited to aesthetics.

The City further argues that section 65850.5 was enacted primarily to prohibit design review processes for aesthetic purposes. (City Letter at p. 1.) However, the language of the statute does not reflect this understanding.

Subdivision (a), expressing legislative intent, states that local agencies should not adopt ordinances that create unreasonable barriers to the installation of solar energy systems "including, *but not limited to,* design review for aesthetic purposes." (Emphasis added.) As this

language makes clear, the legislature anticipated eliminating multiple types of barriers, including but not limited to design review and aesthetics. Moreover, subdivisions (c) and (d) express statutory commands and do not reference design review or aesthetics at all; rather, both provisions state that applications for solar energy systems must be approved unless the local agency makes specific findings of health or safety concerns.

d. Contrary to the City's assertion, solar energy systems include both the solar panels and the supporting structures.

Finally, the City claims that the definition of "solar energy system," contained in California Civil Code section 801.5 and referenced in Government Code section 65850.5, does not apply to structures supporting solar panels. (City Letter at p. 2.) Civil Code section 801.5 subdivision (a) defines a solar energy system as either: (1) "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;" or (2) "*Any structural design feature of a building*, whose primary purpose is to provide for the collection, storage, and distribution of solar energy for electricity generation, space heating or cooling, or for water heating." (Emphasis added.)

The City contends that, while solar panels constitute a solar energy system, "the structure itself is not necessary to collect, store or distribute solar energy" and thus should not be considered part of the energy system. Yet, subdivision (a)(2) clearly includes in its definition of a solar energy system "any structural design feature of a building" that is needed for the collection, storage, and distribution of solar energy. Indeed, the language of subdivisions (a)(1) and (2), taken together, divides the definition of solar energy systems into two basic components – devices that collect solar energy, such as solar panels, and structures that enable those devices to function. The statute appears to acknowledge that solar panels must be mounted on a building or other support structure in some way. The City's interpretation of Civil Code section 801.5, which is so cramped as to essentially eliminate the purpose of subdivision (a)(2), is unreasonable.

2. The City Should Amend Its Municipal Code to Exempt Applications for Solar Energy Equipment from All Zoning Regulations.

The City is considering amending the municipal code "to facilitate the installation of solar energy equipment consistent with the State Code." (Planning Commission Staff Report, Oct. 21, 2009 ("Staff Report").) Planning Commission Staff have provided two options for the Commission to consider. Option 1 would exempt applications for solar energy equipment from all zoning regulations. (Staff Report at p. 5.) Option 2 would create a list of zoning regulations from which solar energy equipment installations would be exempt, including, for example, "interior setbacks height, lot coverage, and amount of landscaping," while still requiring solar installations to meet other zoning regulations such as street front setback and parking standards. (*Ibid*.) Under Option 2, "The list of zoning code exemptions may be modified as deemed appropriate by the Commission." (*Ibid*.)

Staff analyzed the advantages and disadvantages of each option. According to the report, the advantages of Option 1 include facilitation of site planning for the selection of optimal locations for the installation of solar energy systems, and cost. (*Ibid*.) The disadvantage is that "installations may be designed or located in ways that would be detrimental to what may be protected through zoning standards." (*Ibid*.) For example, an installation may be located within a required setback, may exceed allowable height limits, may block access to parking, or may create an incompatible visual in the streetscape. (*Ibid*.)

Unspoken in the staff review of Option 1 is the fact that Government Code section 65850.5 already requires that the installation of solar energy systems be exempt from all zoning regulations, other than those specifically related to health or safety. Unless the City makes specific, written findings of adverse effects on public health or safety, considerations of blocked access to parking or incompatible visuals are irrelevant in the permitting of solar energy systems.

In discussing Option 2, Staff contend that, because "[t]he apparent permissiveness of the State standards may result in unintended consequences," and because "[a]n argument may be made that the State overlooked the potential for undesirable consequences" a more restrictive amendment to the zoning code may be required. (Staff Report at p. 5.) Option 2 would exempt installation of solar equipment from only certain, unspecified zoning regulations. (*Ibid*.)

Option 2 runs counter to the intent and the language of Government Code section 65850.5. Nothing in the statute permits local governments to apply non-health or safety related zoning regulations to the permitting of solar energy systems.

Staff list several perceived advantages to Option 2. Primarily, Staff note that this Option would provide flexibility – "zoning standards may be selected and adjusted according to the Planning Commission's desire to reflect the appropriate amount of flexibility for solar energy equipment installations." (Staff Report at p. 6.) The Planning Commission would have the ability to select which "desirable zoning standards" would remain applicable to solar energy systems. (*Ibid*.) Such flexibility is precisely what section 65850.5 seeks to restrain. Subdivision (a) specifically states, "The 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."

The only listed disadvantage to Option 2 is that it may result in "unsightly" installations that are excessively high or architecturally incompatible. (Staff Report at p. 6.) This statement indicates that Option 2 would preserve the City's ability to block or delay solar energy systems based on aesthetic concerns, which is in direct conflict with Government Code section 65850.5.

Due to the foregoing concerns, we strongly urge the City of Glendale to correct its current non-compliance with the Solar Rights Act, and to adopt Option 1 amending the zoning code to exempt solar energy systems without a specific finding of adverse impacts to health or safety.

Thank you for your consideration of these comments. I would welcome an opportunity to discuss these issues further, and to respond to any questions you may have.

Sincerely,

/s/

DEBORAH R. SLON
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

cc: Michael J. Garcia
Chief Assistant City Attorney, City of Glendale