

STATE OF NEW MEXICO
ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE PETITION FOR
A HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. 3135,

Margaret Freed, Mary Ann Roberts,
Pat Toledo,

Petitioners.

No. AQCB 2014-

**SMITH'S FOOD & DRUG CENTERS, INC.'S REPLY IN SUPPORT OF
MOTION TO DISMISS PETITIONER PAT TOLEDO FOR LACK OF STANDING**

Petitioner Toledo's general opposition to Smith's fuel centers does not give him standing to appeal every GDF air permit that is ever issued to Smith's. The Air Quality Control Act ("Air Act"), the Board's regulations and the common law undoubtedly require him to be adversely affected in a direct and concrete way in order to have standing. Section 74-2-7(H); 20.11.81.2 NMAC; *ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, ¶ 1, 144 N.M. 471, 188 P.3d 1222 ("ACLU II"). Toledo fails in his response brief to establish that he is directly adversely affected by the permitting action in this case. Toledo instead reasserts his vague claims of hypothetical harm and argues that he has standing merely because he is a citizen of Albuquerque and because he occasionally travels near the proposed station to visit his father. These are the same claims by Toledo that the Board rejected in the Smith's Tramway case. The Board should reject these claims here, as well.

ARGUMENT

1. EHD's Permitting Action Did Not Adversely Affect Toledo.

Toledo claims in his response brief that he is "adversely affected by the refusal of [EHD] to give weight to his threatened quality of life concerns at the April 3, 2014 Public

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Information Hearing[.]” Response Brief at 2. Toledo then quotes from several paragraphs in the Petition, apparently in support of his claim that he is adversely affected. *Id.* at 2-3. Nothing that Toledo said at the public information hearing or that is alleged in the Petition shows how Toledo is *directly* adversely affected. See *De Vargas Sav. & Loan Ass’n v. Campbell*, 1975-NMSC-026, ¶ 11, 87 N.M. 469, 535 P.2d 1320 (“New Mexico has always required allegations of *direct injury to the complainant* to confer standing.”) (emphasis added).

It is not enough that Toledo professes to have a sincere interest in advocating for the health and well being of residents in the vicinity of the Montgomery GDF or throughout the City of Albuquerque. See *United States v. SCRAP*, 412 U.S. 669, 687 (1973) (holding that the direct injury requirement of standing “prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders”); see also *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982) (“[S]tanding is not measured by the intensity of the litigant’s interest or the fervor of his advocacy.”). Toledo “must show that the action injures him in a concrete and personal way” in order to have standing. *ACLU II*, 2008-NMSC-045, ¶ 19 (quoted authority omitted).

Toledo cannot make this showing simply by alleging that EHD failed to take his comments into consideration. EHD did consider Toledo’s comments but did not find that any of them warranted denial of Permit No. 3135 under the applicable air quality permitting statutes and regulations. AR 79, pp. 326-27. EHD’s disagreement with Toledo about the significance of his comments cannot amount to a direct injury conferring Toledo with standing to challenge Permit No. 3135. Concluding otherwise

means that any person who disagrees with EHD's permit decisions has standing merely by alleging that EHD did not consider that person's comments. This is not the law. The issue is whether the person is directly adversely affected by the issuance of the permit. *DeVargas*, 1975-NMSC-026, ¶ 11; *ACLU II*, 2008-NMSC-045, ¶ 18.

This is exactly why the Board should also reject Toledo's request that it recognize his standing "simply as a citizen of Albuquerque[.]" Response Brief at 7. Neither Section 74-2-7(H) nor 20.11.81.14(B)(2)(c) NMAC opens the permit appeal process to all citizens of Albuquerque. To the contrary, these laws require that a petitioner be "adversely affected" by the permitting action. *Id.* Ignoring that requirement would render the provisions imposing it meaningless, which the Board cannot do. See *Int'l Ass'n of Firefighters v. City of Carlsbad*, 2009-NMCA-097, ¶ 11, 147 N.M. 6, 216 P.3d 256 ("We seek to give meaning to all parts of the statute, such that no portion is rendered surplusage or meaningless.").

Similarly, Toledo fails to rebut Smith's argument that he cannot meet the elements for establishing third-party standing set forth in *New Mexico Right To Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 13, 126 N.M. 788, 975 P.2d 841. See Motion at 9. Third-party standing is an approach recognized by the courts that allows an individual or organization standing to assert claims on behalf of others under certain circumstances. The Court in *Johnson* held that the litigant seeking standing must meet the following three factors: "[t]he litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests." *Id.*

Toledo makes no attempt in his response brief to explain how he meets the elements of third-party standing in *Johnson*. Instead, Toledo misquotes Smith's Motion in an effort to suggest that Smith concedes that any citizen of Albuquerque has standing to challenge any air permit. Smith obviously does not take that position and the law does not support it in any event. Toledo tries to suggest otherwise by misquoting the following statement from Smith's Motion: "[T]here is no hindrance to the ability of any citizen of Albuquerque who participates in a permitting action to challenge the issuance of a minor stationary source permit such as Permit No. 3135." Response Brief at 8 (quoting Smith's Motion at 9).

Toledo omits key language from the quotation in an effort to mislead the Board about Smith's argument. The actual quote from Smith's Motion is as follows: "[T]here is no hindrance to the ability of any citizen of Albuquerque who participates in a permitting action and who is adversely affected by it to challenge the issuance of a minor stationary source permit such as Permit No. 3135." Motion at 9 (emphasis added). Toledo also takes the quote out of context. Smith was addressing the third *Johnson* factor (hindrance to third parties) after having addressed the first two factors, i.e., Toledo's lack of direct injury and his lack of a close relationship to the entire population of Albuquerque. Thus, reading the entire quote in context demonstrates that Smith does not take the position that every citizen of Albuquerque has standing to challenge the issuance of an air permit.

More importantly, as set forth above and in Smith's Motion, New Mexico law does not support such a position. New Mexico law requires a direct and concrete injury in order for a claimant to have standing. *DeVargas*, 1975-NMSC-026, ¶ 11; *ACLU II*,

2008-NMSC-045, ¶ 18. Toledo plainly does not have a direct and concrete injury. The Board should therefore dismiss him from this action.

2. The Board Should Not Allow Toledo To Present Additional Evidence In Support Of His Standing At The October 8, 2014 Hearing On Dispositive Motions.


Toledo claims that he will “provide testimony and other evidence in support of [his] standing at the dispositive motion hearing scheduled for September 8, 2014 [sic].” Response Brief at 8. There is no reason for allowing Toledo to do so. Toledo had a sufficient opportunity in responding to Smith’s discovery and to Smith’s motion to dismiss to marshal and present all of the evidence purportedly demonstrating how he has been adversely affected in this case. Toledo’s responses make clear that he has not been adversely affected and he fails to specify what other evidence he intends to present to the Board.

Allowing Toledo to present new evidence in support of his standing at this late stage would be extremely prejudicial to Smith’s. Pursuant to the Hearing Officer’s June 18, 2104 Prehearing Order, Smith’s timely served Toledo with discovery seeking any evidence purportedly supporting Toledo’s standing in this case. See Smith’s July 1, 2014 Certificate of Service; Exhibit C to Smith’s Motion to Dismiss (Int. Nos. 1, 2, 3, 5; RFA Nos. 1, 2, 3, 5). Petitioners’ original deadline under the Prehearing Order for responding to the discovery was July 25, 2014. Prehearing Order at 7, ¶ 7. As a matter of professional courtesy, Smith’s counsel granted petitioners an extension until August 1, 2014 to serve their discovery responses. Smith’s received Petitioners’ discovery responses on August 1, but determined that they were evasive and that Petitioners’ objections were meritless. See Exhibit B to Smith’s Motion for Summary Judgment.

Counsel for Smith's sent Petitioners' counsel a letter asking Petitioners' to supplement their discovery responses to correct these deficiencies. *Id.* On August 8, 2014, Petitioners served supplemental discovery responses that added little substantive information and mostly referred to Petitioners' NOI. See Exhibit C to Smith's Motion to Dismiss.

Toledo should not be allowed to provide vague and evasive answers to discovery and then present to the Board new evidence that Smith's has not had a fair opportunity to evaluate. But even if the Board allows Toledo to present new evidence at the hearing, it is clear from the Petition, from Petitioners' discovery responses and NOI, and from Toledo's response brief that he cannot offer any additional facts that would confer him with standing. The Board should therefore dismiss Toledo from this action.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply in Support of Motion To Dismiss was served on the following parties, counsel and other individuals by the method indicated:

The original of the Reply was filed with the Hearing Clerk in this matter along with nine copies, all of which were delivered to the Hearing Clerk by hand delivery.

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on the 8th day of October, 2014.

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By 