

**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. 1677-M2

Andy Carrasco and Pat Toledo,

Petitioners,

v.

No. AQCB 2013-6

The City of Albuquerque and Smith's Food
& Drug Centers, Inc.,

Respondents.

**SMITH'S FOOD & DRUG CENTERS, INC.'S OBJECTIONS
TO PETITIONERS' PROPOSED WITNESSES AND EXHIBITS**

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The proposed evidence identified in Petitioners' Exhibit and Witness List vastly exceeds the scope of evidence allowed under the Court of Appeals' November 26, 2014 Memorandum Opinion and the Hearing Officer's May 19, 2015 Order Scheduling Remand Hearing ("Scheduling Order"). The Hearing Officer should therefore disallow the vast majority of Petitioners' proposed witnesses and exhibits from being presented at the July 8, 2015 hearing ("Remand Hearing").

The Scheduling Order identified the extremely narrow scope of the Remand Hearing by quoting directly from the Memorandum Opinion: "[T]he scope of the Board's inquiry at the hearing *is limited to* 'whether Petitioners Toledo and Carrasco's request for a public hearing, together with the emailed questions received by the EHD from the local neighborhood associations, constituted 'significant public interest' to necessitate a public hearing.'" Scheduling Order at 1 (quoting Mem. Op. at 12, ¶ 17) (emphasis added). The Memorandum Opinion leaves absolutely no doubt as to the limited scope

of the Board's inquiry on remand, which the Court described as a "narrow procedural issue[.]" Mem. Op. at 11, ¶ 16. Moreover, the Court identified precisely what evidence the Board is to consider when engaging in this inquiry: (1) "Petitioners Toledo and Carrasco's request for a public hearing[.]" and (2) "the emailed questions received by the EHD from the local neighborhood associations[.]" *Id.* at 12, ¶ 17. These are the only two items of evidence the EHD Director had before her in April 2013 when determining whether significant public interest existed to justify holding a public hearing. The Board's review of that decision cannot include other evidence or information that the EHD Director did not have before her at that time.

Yet Petitioners' Exhibit and Witness List identifies dozens of witnesses and over 100 pages of exhibits concerning evidence and information that was *not* before the EHD Director, such as: (1) events that occurred *after* the EHD Director made her decision, (2) opinions about the level of alleged public interest that were not timely communicated to the EHD Director, and (3) opinions about the impact of EHD's allegedly insufficient public notice, even though the Court of Appeals unequivocally rejected this argument. See Mem. Op. at 8, ¶ 12 ("[T]here is no viable dispute regarding public notice."). Allowing Petitioners to introduce such irrelevant evidence can only lead to confusion of the issues, unreasonable delay and likely prejudice to Smith's and to the City. The Hearing Officer should therefore exercise her authority to exclude such irrelevant evidence and to exclude even arguably relevant evidence that "is unduly repetitious, otherwise unreliable *or of little probative value.*" 20.11.81.16(D)(1) NMAC (emphasis added); see also 20.11.81.12(A) NMAC (enabling the Board and the Hearing Officer to

look to the New Mexico Rules of Evidence for guidance in the absence of a controlling Board regulation).

Smith's explains its specific objections to Petitioners' proposed witnesses and exhibits as follows:

Petitioners' Proposed Witnesses

Pat Toledo and Andy Carrasco, III. Petitioners seek to introduce testimony from Petitioners Toledo and Carrasco regarding, among other things: (1) their personal knowledge regarding their own interest, as well as the interest of individuals identified as "ABQ Citizens" and "other petitioners" in obtaining a public hearing, (2) the facts and circumstances surrounding various documents they submitted to EHD *after* the deadline for requesting a public hearing elapsed, and (3) their "personal knowledge" of the email communications between EHD and "interested parties/neighborhood associations."

None of this testimony is relevant to the question of "whether Petitioners Toledo and Carrasco's request for a public hearing, together with the emailed questions received by the EHD from the local neighborhood associations, constituted 'significant public interest' to necessitate a public hearing." Mem. Op. at 12, ¶ 17. Moreover, Toledo's and Carrasco's alleged "personal knowledge" of the communications of others with EHD is inadmissible hearsay. See Rule 11-801(C) NMRA (defining hearsay as an out of court statement offered in evidence to prove the truth of the matter asserted in the statement). Finally, Petitioners failed to include Toledo's and Carrasco's proposed testimony in narrative form as required under the Scheduling Order. See Scheduling Order at 2 ("Witness and exhibit lists shall include the names and narrative testimony of all proposed witnesses[.]"). This failure deprives Respondents of reasonable notice

regarding the specific content of the proposed testimony. If Toledo and Carrasco are allowed to testify at all, their testimony should be limited to foundational issues concerning their April 24, 2013 written request for a public hearing [AR 10, p. 38], which is one of the two items the Court has instructed the Board to consider on remand. Mem. Op. at 12, ¶ 17. They should not be allowed to testify regarding evidence or information that was not timely before the EHD Director when she made her decision or regarding the communications or opinions of others.

Ed Barsis and Annette Underhill. Mr. Barsis and Ms. Underhill wrote emails to EHD Environmental Health Scientist Regan Eyerman on behalf of the Four Hills Village Neighborhood Association and the Executive Hills Homeowners' Association, respectively, in March 2013. [AR 6, pp. 32-33; AR 9, p. 37] These emails constitute the second and final item the Court has instructed the Board to consider on remand. Mem. Op. at 12, ¶ 17. Petitioners provide absolutely no detail regarding what they expect Mr. Barsis and Ms. Underhill to say regarding these emails. Petitioners should not be allowed to offer the testimony of Mr. Barsis or Ms. Underhill regarding any evidence or information that was not timely before the EHD Director when she made her decision because such testimony is irrelevant to the narrow procedural issue before the Board.

ABQ Citizens. Petitioners identify Clay Terry, Larry Nicholson, Emily Deweld, Don Stanoff, Fred Atencio, Jeffrey Valencia, Marie Ferenzy, Bennie English, Joey Meyer and former Petitioner Dempsey Power as "ABQ Citizens" whom Petitioners expect to testify regarding "the facts and circumstances that led to [their] June, 2013 signing of the 'Petition to appeal Smith's permit for increase [sic] throughput[.]'" None of these individuals submitted a timely request for a public information hearing and none of

them can provide relevant, non-hearsay information concerning the two items of evidence that were timely presented to the EHD Director. Additionally, Petitioners failed to identify these witnesses' proposed testimony in narrative form and, even if they had, the proposed testimony is duplicative and of no probative value.

Brian Sanderoff (President, Research & Polling, Inc.). Petitioners expect to call their previously identified technical witness, Mr. Sanderoff, to testify "on the basis of his personal and expert knowledge that the notice provided in this case was insufficient as a practical matter to provide 'all interested persons' notice such that 'significant public interest' had the best opportunity to materialize in the first place." As noted above, the Court of Appeals rejected this argument and affirmed the Board's dismissal of former Petitioner Power based on the undisputed legal sufficiency of EHD's public notice. Mem. Op. at 7-8, ¶¶ 10-12. Petitioners' attempt to characterize EHD's public notice as insufficient "as a practical matter[,]" rather than as a legal one, cannot resuscitate this dead issue. Stated differently, the Court did not invite the Board to revisit the issue of public notice on remand but instead stated in no uncertain terms that "there is no viable dispute regarding public notice." *Id.* at 8, ¶ 12. Accordingly, Mr. Sanderoff's proposed testimony concerning the alleged inadequacy of EHD's public notice is irrelevant and should be excluded.

Carlisle Petitioners. Petitioners identify Georgianna E. Peña Kues, James A. Nelson and Judy Jennings, who were each petitioners in the Smith's Carlisle air permitting case, AQCB Nos. 2012-1 and -2, as proposed witnesses. Petitioners state that these individuals "may provide public comment at the hearing that supports significant public interest in the granting increased through put [sic] air permits to

Smith's, of which the respondents were made aware before the filing of the Tramway petition[.]” It is unclear from this description what exactly Petitioners expect these individuals to say. None of these individuals submitted a timely request for a public information hearing in this case and none of them can provide relevant, non-hearsay information concerning the two items of evidence that were timely presented to the EHD Director. Additionally, Petitioners failed to identify these witnesses' proposed testimony in narrative form and, even if they had, the proposed testimony is duplicative and of no probative value. These witnesses should be excluded from testifying.

Public Comment Witnesses. Petitioners identify Juan Reynosa (Field Organizer, Southwest Organizing Project), Margaret Freed, Mary Ann Roberts, Dr. Dana Rowangould, Arthur Gradi, Ruth A. McGonagil, Jerri Paul Seaborn, Bernice Ledden, Americo Chavez, Susan Kelly, Andy Burgess (President, Summit Park Neighborhood Association) and Delano Garcia as witnesses who are “[r]eserved for public comment.” To the extent Petitioners are offering the proposed testimony of these witnesses to prove that significant public interest existed in April 2013 to justify holding a public hearing, the proposed testimony of these witnesses should be excluded. None of these individuals submitted a timely request for a public information hearing in this case and none of them can provide relevant, non-hearsay information concerning the two items of evidence that were timely presented to the EHD Director. Additionally, Petitioners failed to identify these witnesses' proposed testimony in narrative form and, even if they had, the proposed testimony is duplicative and of no probative value.

If the Board or Hearing Officer are nevertheless inclined to allow these individuals, or anyone else, to offer testimony in the form of public comment, Smith's

requests that the Hearing Officer instruct individuals making public comment to: (1) limit their comments to a reasonable period of time (i.e. no more than two or three minutes), and (2) focus their comments on the narrow issue before the Board, i.e., whether the two items of evidence that were timely submitted to the EHD Director constituted significant public interest. These reasonable limitations will help to avoid confusion of the issues, unnecessary delay and prejudice at the Remand Hearing.

Petitioners' Proposed Exhibits

All of Petitioners' proposed exhibits are already contained in the record in one form or another. Smith's does not seek to exclude any of these items from the record. However, Petitioners should not be allowed to cause confusion of the issues, delay and prejudice at the Remand Hearing by presenting exhibits to the Board that are irrelevant or are of little probative value to the narrow procedural issue before the Board.

Smith's submits that only five of Petitioners' proposed exhibits are relevant: (1) the March 8, 2013 email from Ms. Eyerman to various neighborhood and homeowners' associations in the vicinity of the Smith's Tramway gas station and the public notice attached thereto [AR 5, pp. 25-27], (2) the March 2013 email exchanges between Mr. Barwis and Ms. Eyerman and between Ms. Underhill and Ms. Eyerman [AR 6, pp. 32-33; AR 9, p. 37], (3) the written request for a public hearing submitted by Toledo and Carrasco on April 24, 2013 [AR 10, p.38], (4) the EHD Director's May 14, 2013 letters to Toledo and Carrasco denying their request for a public hearing [Exhibit 4 to June 24, 2013 Petition for Hearing], and (5) the EHD Director's May 29, 2013 letter to Toledo and Carrasco denying their "appeal" of the denial of their request for a public hearing [Exhibit 5 to June 24, 2013 Petition for Hearing]. None of Petitioners' remaining

proposed exhibits is relevant to the question of “whether Petitioners Toledo and Carrasco’s request for a public hearing, together with the emailed questions received by the EHD from the local neighborhood associations, constituted ‘significant public interest’ to necessitate a public hearing.” Mem. Op. at 12, ¶ 17. Accordingly, the Hearing Officer should disallow the remainder of Petitioners’ proposed exhibits.

Petitioners’ Attempted Reservation of Right to Amend

Petitioners purport to reserve their right to amend or supplement their Exhibit and Witness List at some unknown future date. Petitioners have no such right under the Scheduling Order, which provided clear deadlines for the express purpose of providing the parties and the Board with adequate notice of anticipated witnesses and exhibits in advance of the Remand Hearing. See Scheduling Order at 2 (“In order to provide the Board with the evidence the Parties will be presenting in time for their review prior to the hearing, and to provide the parties with notice of, and an opportunity to object to, each other’s anticipated witnesses and exhibits, the following deadlines are set for witness and exhibit lists . . .”). Any attempt by Petitioners to amend or supplement their Exhibit and Witness List should be stricken as untimely.

Petitioners’ Attempted Reservation of Right to Make Offer of Proof

Petitioners purport to reserve the right to make an offer of proof at the Remand Hearing regarding any exhibits or intended testimony that is excluded from the Remand Hearing. 20.11.81.16(E)(2) NMAC does allow a party to make an offer of proof for excluded evidence and provides that:

Whenever the hearing officer excludes evidence from the record, the party offering the evidence may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded and

what such evidence would have proven. The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded.

However, Petitioners should not be allowed to provide offers of proof at the Remand Hearing, which begins at 5:30 p.m. and cannot possibly accommodate testimony and offers of proof concerning every witness and exhibit Petitioners have proposed. Petitioners were given an opportunity to make a complete record by filing the full narrative testimony of each proposed witness and by submitting all of their proposed exhibits. Petitioners did not take full advantage of that opportunity in their Exhibit and Witness List and have waived the opportunity to do so.

Nevertheless, if the Board or the Hearing Officer is inclined to allow Petitioners to make an offer of proof, Petitioners should be required to submit a written offer of proof *after* the Remand Hearing in order to make their record for appeal. This will prevent unnecessary confusion of the issues, delay and prejudice at the Remand Hearing while allowing Petitioners to make their record for appeal.

CONCLUSION

Petitioners clearly intend to convert the Remand Hearing into a referendum on issues that far exceed the scope of the narrow procedural issue that the Court of Appeals instructed the Board to consider on remand. The Remand Hearing is not about whether the EHD's public notice was sufficient or whether evidence of significant public interest came to light *after* the public comment deadline. Nor is the Remand Hearing about the views of Albuquerque citizens, including the petitioners in other Smith's air permitting cases, concerning Smith's gas stations generally. The Remand Hearing solely concerns the question of "whether Petitioners Toledo and Carrasco's request for

a public hearing, together with the emailed questions received by the EHD from the local neighborhood associations, constituted 'significant public interest' to necessitate a public hearing." Mem. Op. at 12, ¶ 17. Any of the testimony and exhibits that Petitioners seek to introduce that does not directly relate to this specific question is irrelevant and should be excluded in order to prevent confusion of the issues, unnecessary delay and prejudice to Smith's and to the City.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served on the following parties, counsel and other individuals by the method indicated:

The original pleading 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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By _____

