

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

Dempsey Power, Pat Toledo
and Andy Carrasco,
Petitioners,

vs.

AQCB Petition No. 2013-6

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

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**PETITIONERS TOLEDO'S AND CARRASCO'S CONSOLIDATED OBJECTIONS TO
CITY OF ALBUQUERQUE (EHD) and SMITH'S FOOD & DRUG CENTERS, INC.'S
(SMITH'S) WITNESS AND EXHIBIT LIST**

Petitioners, by and through undersigned counsel of record, hereby submit their
Consolidated Objections to the EHD's and Smith's Witness and Exhibit List.

BACKGROUND

The Court of Appeals remand to the Air Board ("Board") (Nov. 26, 2014) specifically
held regarding the issue of standing,

Petitioners [Pat Toledo and Andrew Carrasco] had standing to request the Board to
review whether the EHD properly refused Petitioners' request to holding a public
hearing. It would be anomalous to conclude that members of the public whose request for
a hearing was denied by the EHD were not "adversely affected" by that decision. The
Petitioners are members of the public that live within the EHD's jurisdiction. They were
not barred from requesting such a hearing and the regulations at that time did not limit
those who could request a public hearing to only members of the public who could
establish that they would experience an adverse impact from the permit modification.
20.11.41.14 NMAC (10/01/02)... Thus, because Petitioners are members of the public
living within the EHD's jurisdiction and requested a hearing, they had standing....
Concluding otherwise would give unfettered discretion to the EHD in the determination
of when significant public interest exist [sic] to hold a public hearing because, as
Respondents conceded at oral argument, it would foreclose the opportunity for review of

the EHD's determination by the Board based on factors unrelated to this specific issue." *Id.*, pgs. 10-11 (emphasis added).

The Court of Appeals question to consider on remand states, "the Board should determine whether Petitioners Toledo and Carrasco's request for a public hearing, together with the e[-]mailed questions received by the EHD from the local neighborhood associations, constituted 'significant public interest' to necessitate a public hearing." *Id.*, p. 12.

In re EHD WITNESS AND EXHIBIT LIST

OBJECTION TO WITNESS TESTIMONY

1. Mary Lou Leonard, Director, EHD, City of Albuquerque

Petitioners object to the following intended testimony of Ms. Leonard, "[s]he will testify that she gave the fact that the Associations had not requested a hearing on their own behalf more weight than Mr. Toledo's and Mr. Carrasco's statement of being 'in alliance' with an association. As a result, she viewed Mr. Toledo's and Mr. Carrasco's request as coming from two individuals rather than from an association." EHD Witness and Exhibit List, p.2. This intended testimony conflicts with the Court of Appeals' remand decision to the extent that the Appellate Court determined Petitioners Toledo and Carrasco, as individuals and members of the public within EHD's jurisdiction that requested a hearing, had standing to request a public hearing. The Appellate Court was clear that the regulations in force at the time of the EHD director's decision to find no alleged "significant public interest" did not limit members of the public within EHD's jurisdiction from requesting such a hearing. Thus, the Hearing Officer should either strike this portion of the testimony or at a minimum must provide limiting instruction to the Board in its capacity as fact finder, as the intended testimony has the potential

to confuse the issue of determining ‘significant public interest’ with standing that has already been decided by the Appellate Court in the affirmative.

In the absence of striking such testimony or providing limiting instruction to the Board, the testimony is substantially likely to prejudice Petitioners with respect to the question before the Board—whether Pat Toledo and Andy Carrasco’s request for a public hearing constituted significant public interest. In other words, without limiting instruction, at a minimum, the intended testimony reduces to the following: because Toledo and Carrasco are individuals with standing to request a hearing, there is no “significant public interest” because Toledo and Carrasco are merely individuals. In addition to confusing the issue of standing not before the Board, the testimony is circular in whole or part in its reasoning. For the same reasons, the Hearing Officer should strike or at a minimum must limit the following intended testimony, “[s]he will testify that she denied Mr. Toledo’s and Mr. Carrasco’s public hearing request because it was a request by two individuals and she determined that a request from two individuals did not demonstrate ‘significant public interest.’” *Id.*, p.3.

The City and Smith’s relies on regulations that allow the Board to look to the Rules of Civil Procedure and Rules of Evidence for the District Courts for guidance, in purported support of denying public participation. *See e.g.*, 20.11.81.12 (A) NMAC; *see also* Rule 1-012 (F) NMRA (“the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter”); Rule 11-105 NMRA (“if the court admits evidence that is admissible against a party or for a purpose – but not against another party or for another purpose – the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.”). The City and Smith’s should not be heard to object to either striking this testimony or providing limiting instruction to the Board and further upon its

assertions pursuant to Objection to Petitioners' witness and exhibit lists that the July 8, 2015 hearing should be conducted fairly and impartially.

Petitioners object to the following intended testimony of Ms. Leonard on grounds that it is not relevant to the question before the Board, "when a public hearing is denied, it does not preclude public participation. Because... Mr. Toledo and Mr. Carrasco could continue to participate in the public process, she decided to deny their request for a public hearing." *Id.*

2. Isreal Tavarez, Environmental Health Manager, Permitting Division, Air Quality program, EHD, City of Albuquerque

For the same reasons and considerations outlined above, Petitioners object to the following intended testimony of Mr. Tavarez, "[h]e will testify that he recommended to the EHD Director to deny this public hearing request because it was a request by two individuals who were not authorized to represent anyone else. He recommended that a request by two individuals did not demonstrate 'significant public interest'. *Id.*, p.5. Further, use and mention of the word "alliance" in the record and in intended testimony in light of the Court of Appeals decision on Petitioners' affirmed standing is potentially confusing and prejudicial and must be subject to limiting instruction by the Hearing Officer.

Petitioners object to the following intended testimony of Mr. Tavarez on grounds that it is not relevant to the question before the Board, "[h]e will testify that ... regardless of whether a public hearing is held, individuals may still participate in the air quality permitting process by commenting to the Program during the public comment period on the air quality permit application, by requesting information regarding the application or by discussing the permit application with the assigned Permitting staff.... [A]ny individual who participated in the air quality permitting process for that application who is adversely affected can appeal EHD's

decision to the Air Board. He will testify that denying a public hearing does not prevent these kinds of public participation.” *Id.*

OBJECTION TO EXHIBITS

Petitioners object to the extent that any exhibits offered by EHD that may be entered in whole or part at the July 8 hearing may be used for purposes of arguing against individual standing or that tends to confuse the issue of individual standing with “significant public interest” of Petitioners, as standing has already been decided against Smith’s and the City by the Court of Appeals. The Hearing Officer is respectfully requested to provide limiting instruction regarding intended exhibits to this extent.

In re SMITH’S WITNESS AND EXHIBIT LIST

OBJECTION TO EXHIBITS

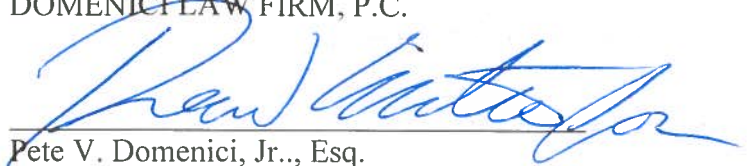
Smith’s states it does not intend to call its own witnesses but instead intends to cross-examine any of the Petitioners’ or the City’s witnesses who are allowed to testify and may call rebuttal witnesses if necessary at the remand hearing. Smith’s proposed witness list, p.3. This is unobjectionable to Petitioners.

Smith’s, however, provided Petitioners’ responses to Smith’s and the City’s discovery requests as “conditional exhibits” depending on the Hearing Officer’s July 2 ruling on objections. *Id.* Petitioners object to the extent that the provided responses to Smith’s discovery regarding interrogatories (“rogs.”) nos. 15, 16, and 20 and requests for admission (“rfas”) 13, 14 are outside the record. Thus, rogs. 15, 16 and 20 and rfas 13, 14 should be excluded on that basis. *See* AR 91-103 (indicating the offered discovery is not in the record). Similarly, Petitioners object to the extent that the provided responses to the City’s discovery regarding interrogatories (“rogs.”) nos. 15- 20 and requests for admission (“rfas”) 1-7 and 17-20 are

outside the record. Thus, rogs. nos. 15- 20 and rfas 1-7 and 17-20 should be excluded on that basis. *See* AR 106-113 (indicating the offered discovery is not in the record).

Petitioners object to the extent that any exhibits or conditional exhibits offered by Smiths that may be entered in whole or part at the July 8 hearing may be used for purposes of arguing against individual standing or that tends to confuse the issue of individual standing with “significant public interest” of Petitioners, as standing has already been decided against Smith’s and the City by the Court of Appeals. The Hearing Officer is respectfully requested to provide limiting instruction regarding intended exhibits to this extent.

Respectfully Submitted,
DOMENICI LAW FIRM, P.C.

A handwritten signature in blue ink, appearing to read "Pete V. Domenici, Jr.", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was e-mailed to counsel for the City of Albuquerque and Smith's Food & Drug Centers, Inc. on the 1st day of July, 2015.

I further certify that a true and correct copy of the same was hand delivered to the Hearing Officer and that the original and requisite 9 hard copies of the same were hand delivered to the hearing clerk on July 1, 2015.


Pete V. Domenici, Jr., Esq.