

6310 4th Street NW (the "4th Street GDF"). AR 2, pp. 142-43. EHD evaluated Smith's application and ruled it complete on December 3, 2013. AR 10, p. 157. EHD published notice of the proposed permitting action on December 6, 2013, and held public information hearings on March 25 and April 23, 2014. AR 14, pp. 164-66; AR 18, p. 174; AR 53, p. 289; AR 91, p. 423. After considering all of the documents and comments it received at the public information hearing and during the public comment period, EHD issued Permit No. 3136 to Smith's. AR 113, p. 596-97; AR 110, pp. 587-88; AR 111, pp. 589-93.

Petitioners filed their Amended Petition For Hearing ("Petition") on August 4, 2014. Section I of the Petition provides the name and address for each petitioner. Petitioners Gradi, McGonagil, Paul-Seaborn, Ledden, Kelly and Chavez provide addresses that appear to be located within one-half mile of the 4th Street GDF. Petition at 1-2. Petitioner Toledo identifies his address as 3404 Calle Del Ranchero NE, which appears to be approximately five miles from the 4th Street GDF. Petition at 2; see Google Map attached as Exhibit A.

Section II of the Petition purports to explain how each of the Petitioners was adversely affected by the permitting action. Petition at 2-4. With regard to Toledo's claim of standing, the Petition states:

Petitioner Pat Toledo is involved in the matter of the Smith's fuel station at Carlisle and Constitution which is on appeal. He is also involved in a court case regarding the site at Tramway and Central, where standing is an issue. As Smith's presented 2400 signatures on a petition submitted in the 4th street application with no indication of the addresses of those signatories, Smith's has indicated it views that the broad public has standing. Pat Toledo has standing in this matter.

Petition at 3. With regard to all of the Petitioners, the Petition further alleges that:

Each of the Petitioners is adversely affected by the permitting action because [EHD] refused and failed to take into consideration quality-of-life concerns raised by the participants at the PIH. In addition, each of the Petitioners are likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and resulting pollution, and other negative impacts on their persons, property and quality of life resulting from the construction of the [4th Street GDF].

Id. None of these allegations specifies how Toledo would be directly affected by the operation of the yet-to-be-built 4th Street GDF in accordance with Permit No. 3136, much less the issuance of the air permit itself, which is the issue before the Board. Nothing Petitioners have alleged confers standing for Toledo.

Smith's served Toledo with discovery requests to discover what evidence exists to support Toledo's standing to assert his claims. See Toledo's Responses to Smith's Discovery, attached as Exhibit B (Int. Nos. 1, 3; RFA Nos. 4, 15). Toledo made virtually no effort to respond to Smith's discovery requests, which is a violation of his obligations under Rule 1-026 NMRA and the Hearing Officer's Prehearing Order. Toledo's only suggestion of having any connection to the 4th Street GDF is his claim that he may be interested in buying the real property upon which the proposed GDF would be located. Exhibit B at 42 (Int. No. 15). As explained below, none of Toledo's claims are sufficient to establish his standing under New Mexico law. Accordingly, the Board should dismiss Toledo as a petitioner in this matter.

ARGUMENT

Whether a party has standing to bring a claim is a question of law that New Mexico courts review de novo. *Protection & Advocacy System v. City of Albuquerque*, 2008-NMCA-149, ¶ 17, 145 N.M. 156, 195 P.3d 1. "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true

all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Id.* (quoted authority omitted). However, if “the plaintiff’s standing does not adequately appear from all materials of record, the complaint must be dismissed.” *Id.* (quoted authority omitted).

The Air Quality Control Act, NMSA 1978, §§ 74-2-1 through -17 (“Air Act”) governs air quality permitting in New Mexico. The Air Act creates a procedural avenue for certain persons to obtain review of EHD’s air quality permitting decisions. Specifically, the Air Act provides that “[a] person who participated in a permitting action before [EHD] and who is adversely affected by such permitting action may file a petition for hearing before the [Air Board].” Section 74-2-7(H). Accordingly, the Air Act governs who has standing to challenge the issuance of an air quality permit. *See San Juan Agric. Water Users Ass’n. v. KNME-TV*, 2011-NMSC-011, ¶ 8, 150 N.M. 64, 257 P.3d 884 (“Where the Legislature has granted specific persons a cause of action by statute, the statute governs who has standing to sue.”).

Complainants who wish to challenge a permit decision must meet two criteria in order to have standing under the Air Act: (1) they must have participated in the permitting action, and (2) they must be adversely affected by the permitting action. Section 74-2-7(H). Similarly, the Air Board’s regulations require a petition for hearing to set forth both “in what manner the petitioner participated in the permitting action . . . and how the petitioner is adversely affected by the permitting action[.]” 20.11.81.14(B)(2)(c) NMAC. As explained below, Toledo cannot meet the second factor of being adversely affected.

1. Toledo Did Not Suffer A Direct Injury, Which Is A Required Element Of Standing in New Mexico.

New Mexico's standing doctrine "generally requires litigants to allege three elements: (1) they are directly injured as a result of the action they seek to challenge; (2) there is a causal relationship between the injury and the challenged conduct; and (3) the injury is likely to be redressed by a favorable decision." *ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, ¶ 1, 144 N.M. 471, 188 P.3d 1222 ("ACLU II"). New Mexico courts "have long been guided by the traditional federal standing analysis[,] which incorporates these three elements. *Id.* ¶ 10. Standing is jurisdictional in New Mexico when a plaintiff seeks relief under a statutory cause of action. *Id.* ¶¶ 9 n.1, 10; *San Juan Agric. Water Users Ass'n.*, 2011-NMSC-011, ¶ 8.

With regard to the first element of standing, New Mexico requires that a complainant allege a direct injury. *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). "[O]nce the party seeking review alleges *he himself is among the injured*, the extent of the injury can be very slight." *Id.* ¶ 12 (emphasis added). New Mexico cases establish that the alleged threat of injury must be "real and traceable to the individual plaintiffs . . . not a general, undifferentiated threat of a hypothetical harm to some unidentifiable person." *ACLU II*, 2008-NMSC-045, ¶ 18; *see also Ramirez v. City of Santa Fe*, 1993-NMCA-049, ¶ 9, 115 N.M. 417, 852 P.2d 690 ("[P]leadings must be something more than an ingenious exercise in the conceivable") (quoted authority omitted).

The New Mexico Supreme Court reaffirmed the importance of the direct injury prong of New Mexico's standing test in *ACLU II*. The plaintiffs in that case asked the

Court to change New Mexico's standing test to focus on the magnitude of the potential harm rather than on the direct nature of the harm to the particular plaintiff. 2008-NMSC-045, ¶ 17. The Court rejected the request, noting that "[r]equiring that the party bringing suit show that he is injured or threatened with injury *in a direct and concrete way* serves well-established goals of sound judicial policy." *Id.* ¶ 19 (emphasis added). The Court quoted the following passage from Justice Kennedy's concurrence in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992):

While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to a professed, stake in the outcome, and that the legal questions presented ... will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.

ACLU II, 2008-NMSC-045, ¶ 19 (quoting *Lujan*, 504 U.S. at 581). The Court went on to explain that the injury in fact requirement "is deeply ingrained in New Mexico jurisprudence" and expressed concern that the plaintiffs' proposed alternative would "eviscerat[e] the standing requirement." *Id.* ¶ 20.

In the present case, Toledo fails to allege any facts establishing that operation of the 4th Street GDF in accordance with Permit No. 3136 would directly and concretely injure him. Smith's contends no such facts exist. The closest connection Toledo alleges that he has to the 4th Street GDF is his newfound alleged interest in purchasing the real property where Smith's plans to construct the 4th Street GDF. Being interested in purchasing the property is obviously not the same as owning it. Toledo cannot circumvent New Mexico's well-established law on standing by merely alleging an

interest in purchasing the property. Concluding otherwise would allow any person to evade standing requirements, as Toledo attempts to do here, simply by claiming to be interested in purchasing property. This is not the law.

Toledo's remaining allegations are not even remotely relevant to the requirement that he show how he is adversely affected. For example, his involvement in other cases before the Board and before the New Mexico courts concerning other Smith's fuel centers has no bearing on whether he is adversely affected in this case. Significantly, the Board concluded that Toledo was not adversely affected in the Smith's Tramway Appeal, Docket No. 2013-6, that Toledo references in the Petition and in his discovery responses. Petition at 3; Exhibit B at 2 (Int. No. 1). Toledo claimed to have standing in that case based in part on his allegation that he has friends near the Tramway GDF whom he visits regularly.¹ The Board rejected that claim as a legitimate basis to support Toledo's standing and dismissed his petition. Toledo has even less connection to the 4th Street GDF and he should be dismissed in the present case, as well.

Similarly, the fact that Smith's submitted signatures in support of the 4th Street GDF at the public information hearing has nothing to do with whether Toledo is adversely affected. Smith's submitted the signatures to rebut the suggestion by Toledo and others that "[n]o one from the public spoke in favor of the permit." Petition at 4. Smith's has never alleged that the persons who signed the petition supporting the 4th Street GDF have standing to invoke the Board's hearing procedure. To the contrary, Smith's has consistently maintained that Section 74-2-7(H) and 20.11.81.2 NMAC

¹ Toledo makes a similar claim of standing in the Smith's Montgomery Appeal, which is currently pending before the Board in Docket No. 2014-2. Toledo claims that he regularly visits his father, who lives 4/5 of one mile from the proposed Smith's Montgomery GDF. Smith's has filed a motion to dismiss Toledo for lack of standing in that case, as well, based on Toledo's failure to show that he is adversely affected.

govern who has standing to appeal EHD's issuance of an air permit and that both require a petitioner to be adversely affected in order to have standing.

The Board should ignore Toledo's efforts to direct the Board's attention away from his complete failure to allege any facts showing that he has been adversely affected. Again, New Mexico courts are looking for "something more than an ingenious exercise in the conceivable." *Ramirez*, 1993-NMCA-049, ¶ 9 (quoted authority omitted). Rather, in order to have standing in New Mexico, a claimant "must show injury or a real risk of future injury." *N.M. Cattle Growers Ass'n v. New Mexico Water Quality Control Com'n*, 2013-NMCA-046, ¶ 13, 299 P.3d 436.

To the extent Toledo claims to be acting on behalf of the citizens of Albuquerque, he cannot meet the following three-part test for standing to assert claims on behalf of third parties set forth by the New Mexico Supreme Court in *New Mexico Right To Choose/NARAL v. Johnson*: "The 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." 1999-NMSC-005, ¶ 13, 126 N.M. 788, 975 P.2d 841 (internal quotation marks and citation omitted). Toledo fails to meet the first part of the test because he cannot identify his own injury in fact. Nor can he claim to have a close relation to the third party in this case, which is presumably the entire population of the City of Albuquerque. Finally, there 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. 3136. See *id.* ¶ 14 (holding that advocacy

group had standing to represent its members in part because “privacy concerns and time constraints impose a significant hindrance on the ability of [the members] to protect their own interest[.]”).

Smith’s does not challenge Toledo’s right to participate in public information hearings relating to any proposed GDF air permit, nor does Smith’s challenge his right to give public comment at regular Board meetings or even during a hearing on the merits. Those are the appropriate avenues for Toledo to express his views about GDF air quality permitting. But Toledo cannot be allowed to occupy the status of a petitioner, with the accompanying right to invoke and fully participate in the hearing process, simply because he has taken a special interest in Smith’s fuel centers. *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.”). Concluding otherwise would render New Mexico’s law of standing meaningless and would open the Board’s hearing procedure to anyone who opposes the issuance of any air permit. No sound reason supports such a result.

CONCLUSION

Toledo cannot meet both of the elements of standing set forth in Section 74-2-7(H) and 20.11.81.2. The Board should therefore dismiss Toledo from this action with prejudice. Counsel for EHD concurs in this motion. Concurrence of Petitioner Toledo was not sought due to the dispositive nature of this motion.

SUTIN, THAYER & BROWNE
A Professional Corporation

By 
Frank C. Salazar
Timothy J. Atler

P. O. Box 1945
Albuquerque, New Mexico 87103-1945
Telephone: (505) 883-2500
*Attorneys for Smith's Food & Drug
Centers, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss Petitioner Pat Toledo for Lack of Standing was served on the following parties, counsel and other individuals by the method indicated:

The original of the Motion 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.

Americo Chavez – by First Class Mail
721 Camino Español, NW
Albuquerque, New Mexico 87107

Arthur Gradi – by First Class Mail and Email
6338 4th Street, NW
Los Ranchos, New Mexico 87107
artagradi@gmail.com

Susan Kelly – by First Class Mail and Email
713 Camino Español, NW
Albuquerque, New Mexico 87107
susankellyabq@gmail.com

Bernice Ledden – by First Class Mail
427 Mullen Road, NW
Los Rancho, New Mexico 87107

Ruth A. McGonagil – by First Class Mail and Email
505 Camino Español, NW
Albuquerque, New Mexico 87107
rmcgonagil@gmail.com

Jerri Paul-Seaborn – by First Class Mail and Email
610 Camino Español, NW
Albuquerque, New Mexico 87107
jpseaborn@gmail.com

Pat Toledo – by First Class Mail and Email
pinkopatrick@gmail.com
3404 Calle Del Ranchero, NE
Albuquerque, New Mexico 87106

Carol M. Parker – by Email
Assistant City Attorney
P.O. Box 2248
Albuquerque, New Mexico 87103
cparker@cabq.gov
*Attorney for City of Albuquerque,
Environmental Health Department*

Felicia Orth, Esq. – by Hand Delivery and Email
c/o Margaret Nieto
Control Strategies Supervisor
Air Quality Division, Environmental Health Dept.
One Civic Plaza
3rd Floor, Room 3023
Albuquerque, NM 87103
orthf@yahoo.com
Board Attorney

on the 3rd day of October, 2014.

SUTIN, THAYER & BROWNE
A Professional corporation

By *Fh Selgr*

Exhibit A

Get directions MY places

A 3404 Calle Del Rancho Northeast, Albuquerque

B 6310 4th Street Northwest, Albuquerque, NM

Add Destination - Show options

GET DIRECTION

- Suggested routes
- Carlisle Blvd NE and Montano 5.6 mi, 13 mins**
Rd NW/Montano Rd NE • In current traffic: 16 mins
 - Montano Rd NW/Montano Rd NE 7.1 mi, 13 mins**
• In current traffic: 15 mins
 - Menaul Blvd NE and N.M.-47 5.4 mi, 14 mins**
N/2nd St NW • In current traffic: 15 mins

Driving directions to 6310 4th St NW, Los Ranchos de Albuquerque, NM 87107

- A** 3404 Calle Del Rancho NE Albuquerque, NM 87106
1. Head east on Calle Del Rancho NE toward Carlisle Blvd NE
 2. Turn left onto Carlisle Blvd NE
 3. Turn left onto Montgomery Blvd NE
 4. Continue onto Montano Rd NW/Montano Rd NE
 5. Turn right onto 4th St NW
- B** 6310 4th St NW Los Ranchos de Albuquerque, NM 87107

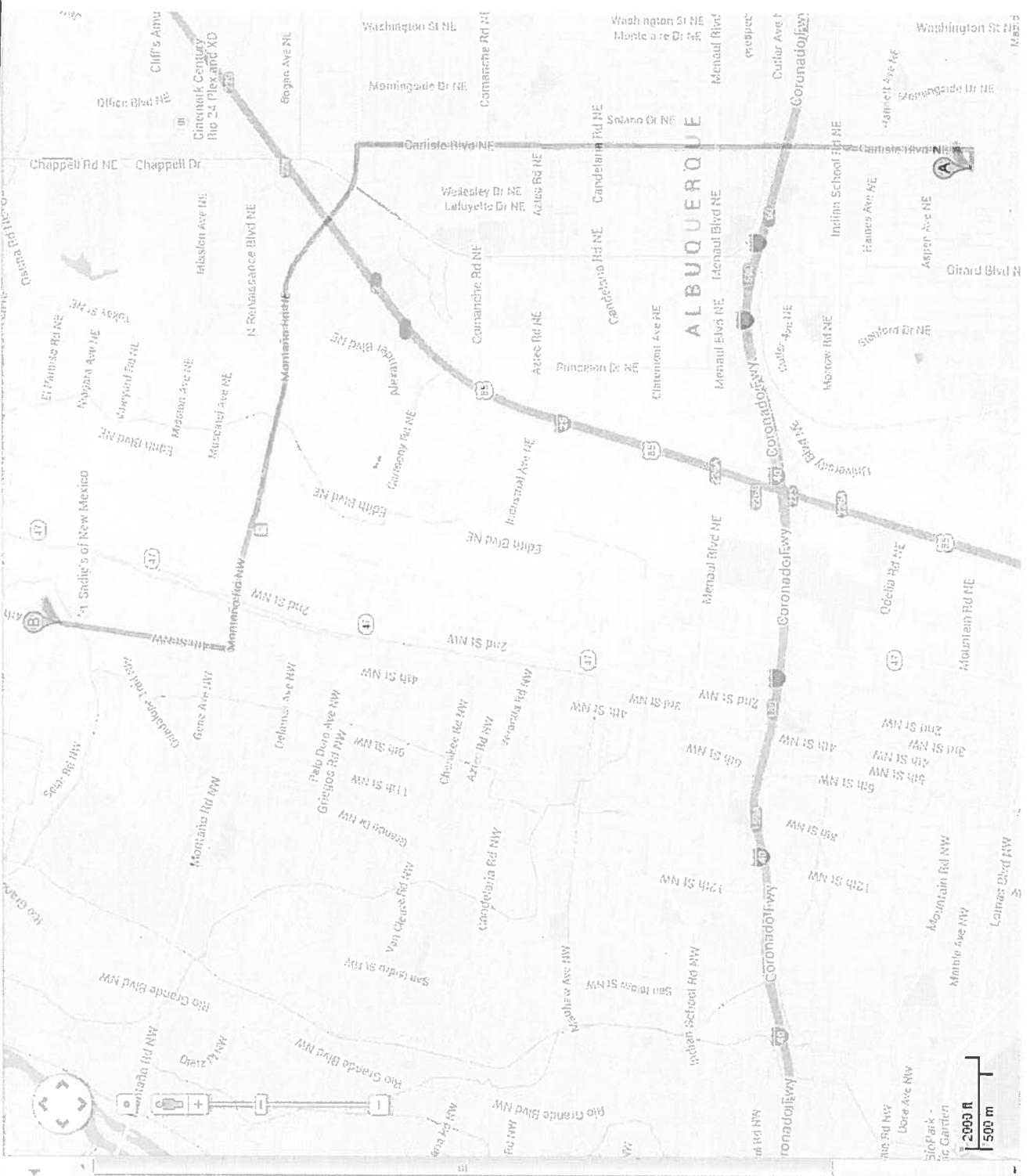


Exhibit B

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. 3136

PAT Toledo's

Arthur Gradi, Ruth A. McGonagil, Jerri
Paul-Seaborn, Bernice Ledden, Susan
Kelly, Americo Chavez, Pat Toledo, as
individuals,

ANSWERS

9/10/14

Petitioners,

v.

AQCB Petition No. 2014-3

City of Albuquerque Environmental Health
Department, Air Quality Program, and
Smith's Food & Drug Centers, Inc.,

Respondents.

SMITH'S FOOD & DRUG CENTERS, INC.'S
INTERROGATORIES, REQUESTS FOR ADMISSIONS AND REQUEST FOR
PRODUCTION OF DOCUMENTS TO PETITIONER PAT TOLEDO

Smith's Food & Drug Centers, Inc. ("Smith's") propounds the following discovery requests to Petitioner Pat Toledo pursuant to Rules 1-033, -034 and -036 NMRA, 20.11.81.14(J) NMAC and the Hearing Officer's Prehearing Order filed on August 8, 2014.

INSTRUCTIONS

When an interrogatory or document request seeks or inquires of knowledge, information or documents in the possession or control of the party served, such request or inquiry extends to the knowledge, information or documents in the possession or under the control of the party served, his/her representatives or agents, including his/her attorneys, unless privileged. If you believe that any of the following interrogatories,



requests for admissions or request for production call for information or documents subject to objection, respond to the extent there is no objection, state that part of each interrogatory or request as to which you raise objection, and set forth the specific legal basis for your objection with respect to such information or documents as you refuse to give.

INTERROGATORIES

Interrogatory No. 1: With regard to the allegation on page 3 of the Amended Petition that "Pat Toledo has standing in this matter[.]" please identify: (1) the specific factual basis for the allegation, including but not limited to a detailed description of how you will be directly adversely affected by the permitting action at issue, and (2) all legal authority (e.g. statute, regulation or case law) upon which you rely in support of the allegation.

ANSWER:

(1) As the response to this question is before the ~~appeals court~~ court in regards to the tramway - Central Smiths Location. Refer to Dempsey Powers, Toledo Carrasco.

(2)

Interrogatory No. 2: With regard to the allegation on page 3 of the Amended Petition that the City of Albuquerque Environmental Health Department's Air Quality Program ("EHD") "refused and failed to take into consideration quality-of-life concerns" raised at the public information hearing, please state: (1) the specific concerns you personally raised at the public information hearing that EHD allegedly failed to consider and, (2) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon those concerns.

ANSWER:

(1)

Compound interrogatory

(2)

Interrogatory No. 3: With regard to the allegation on pages 3 and 4 of the Amended Petition that "each of the Petitioners are likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and other negative impacts on their property and quality of life resulting from the construction of the Smith's fuel dispensing station" at issue," please state in detail, without merely restating the allegations of the Amended Petition, and in your own words: (1) specifically how you will be adversely affected by increased VOC emissions, odors, fumes, and increased traffic, (2) what are the "other negative impacts," if any, to which you refer, (3) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon these alleged adverse affects, and (4) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER:

(1)

Compound interrogatory
by interrogatory #7 you have
already exceeded the 20
interrogatories allowed

(2)

~~was~~ I object to the
improper format and
you are in violation of
the agreement calling for
20 interrogatories

Interrogatory No. 4: Are you personally aware of any instance in which a person suffered a documented physical injury or medical condition that a medical professional determined was the result of emissions from one or more gas stations in Albuquerque or in any other location? If so, please provide all details about any such instances, including but not limited to name of person injured, contact information, type of physical injury or medical condition suffered, date of injury, and location of injury.

ANSWER: SEE NOI
and Mary ANN ROBERTS
Husband see interrogatories
on Louisiana - Montgomery
Smiths station

Interrogatory No. 5: With regard to the allegation on page 7 of the Amended Petition that the "construction of the Smith's station will result in significantly increased traffic, which will cause an increase in air pollution[.]" without merely restating the allegations of the Amended Petition, please state: (1) how you define "significantly increased traffic[.]" i.e., approximately how many additional vehicles per day you anticipate in the area of the Smith's station, (2) the specific factual basis for the allegation (i.e. explain how you arrived at the number of anticipated additional vehicles), (3) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon a potential increase in traffic, (4) assuming such legal authority exists, which Smith's disputes, what standard do you contend applies to EHD's consideration of possible traffic increases (i.e., what do you contend is the threshold number of anticipated additional vehicles beyond which EHD must deny a gas dispensing facility air permit?), and (5) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER:

(1)

compound interrogatory
see # 3 interrogatory

(2)

Interrogatory No. 6: With regard to the allegation on page 7 of the Amended Petition that seven million gallons of gasoline throughput per year "would be the largest throughput volume in the Albuquerque metropolitan area[.]" please state: (1) the factual basis for the allegation, (2) what efforts you personally made prior to signing and verifying the Amended Petition to investigate the truth of that allegation, (3) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon Smith's request for seven million gallons of gasoline throughput per year, and (4) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER:

(1)

compared
interrogatory
see # 3 interrogatory

(2)

(3)

Interrogatory No. 7: With regard to the allegation on page 7 of the Amended Petition that your property "is immediately north and east of the proposed Smith's location and would be impacted by the VOCs, fumes and increased traffic[.]" please identify: (1) the source(s) of the alleged fumes, (2) all statutory or regulatory standards for VOC emissions, fumes or increased traffic that you contend would be violated by the operation of the Smith's station in accordance with Permit No. 3136, and (3) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER:

(1)

compound

interrogatory

see #3 interrogatory

(2)

(3)

Interrogatory No. 8: With regard to the allegation on page 7 of the Amended Petition that the Smith's station "would have negative and cumulative impacts on the quality of life in the area and on the health, welfare and safety of people who own property, live, go to school and regularly travel in the area[.]" without merely restating the allegations of the Amended Petition, please identify: (1) the specific negative impacts to which you refer, (2) the specific cumulative impacts to which you refer, including an explanation of how you define "cumulative impacts," (3) the specific factual or evidentiary basis for the allegation, (4) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon these alleged negative and cumulative impacts, and (5) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER:

(1)

compared

interrogatory

see # 3 interrogatory

(2)

Interrogatory No. 9: With regard to the allegations on page 7 of the Amended Petition concerning: (A) the alleged demographics of the residents in the vicinity of the proposed Smith's station (e.g. residents with breathing difficulties, low income residents, children), (B) the site plan that you allege is "unreadable," (C) the "safety of fuel tanker deliveries[,]" (D) the alleged "conflicts with the North Fourth Street Rank III Corridor Plan," (E) the alleged "nuisance issues similar to what occurs at other Smith's stations[,]" (F) the alleged "safety and operational issues concerning how drainage will be handled[,]" (G) the alleged "lack of need for an additional gas station in the area[,]" (H) the alleged "fuel station operational considerations[,]" (I) the alleged "cell tower proximity[,]" and (J) the alleged "other concerns" that were raised at the public information hearings, please identify: (1) the specific factual basis for each allegation, (2) all legal authority (e.g. statute, regulation or case law) you contend authorizes EHD to deny a gas station air quality permit based in whole or in part upon any of these issues, and (3) all witnesses and exhibits you will present in support of the allegations at the hearing on the merits.

ANSWER:

(A)(1)

ridiculous,
compound
interrogatory
see #3 interrogatory

(A)(2)

Interrogatory No. 10: Do you contend that the construction and operation of the Smith's station in accordance with Permit No. 3136 will: (A) not meet applicable standards, rules or requirements of the New Mexico Air Quality Control Act or the federal Clean Air Act, (B) cause or contribute to air contaminant levels in excess of a national or state standard or, within the boundaries of the City of Albuquerque and Bernalillo County, applicable local ambient air quality standards, or (C) violate any other provision of the New Mexico Air Quality Control Act or the federal Clean Air Act? If so, please identify: (1) the specific standard, statute or regulation that you contend would be violated by the operation of the Smith's station in accordance with Permit No. 3136, (2) the specific factual basis supporting the contention, and (3) all witnesses and exhibits you will present in support of the contention at the hearing on the merits.

ANSWER:

(1)

Compound interrogatory
see #3 interrogatory

(2)

Interrogatory No. 11: With regard to the allegations on pages 9 and 10 of the Amended Petition regarding public notice and public participation, do you contend that either Smith's or EHD failed to comply with applicable regulations governing public notice and/or public participation prior to issuing Permit No. 3136? If so, please identify: (1) the specific regulation you contend EHD or Smith's violated, (2) the specific factual basis for the contention, and (3) all witnesses and exhibits you will present in support of the contention at the hearing on the merits.

ANSWER:

- (1) *compund*
interrogatory
- (2) *see # 3 interrogatory*
- (3)

Interrogatory No. 12: With regard to the allegations on pages 10 and 11 of the Amended Petition regarding Smith's allegedly being a "chronic violator of the conditions of its other permits[,] please identify: (1) any evidence you have that Smith's is not presently in compliance with its current air quality permits in Albuquerque, (2) all legal authority (e.g. statute, regulation or case law) you contend authorizes EHD to deny a gas station air quality permit based in whole or in part upon an applicant's compliance history with other permits, and (3) all witnesses and exhibits you will present in support of the allegations at the hearing on the merits.

ANSWER:

(1)

ditto

see # 3 in interrogatory

(2)

(3)

Interrogatory No. 13: Do you contend that EHD should have issued Permit No. 3136 with an annual throughput limit that is less than seven million gallons per year? If so, please identify: (1) the maximum throughput limit you contend EHD was authorized to approve for the Smith's station, (2) the specific factual basis for the contention, (3) all legal authority (e.g. statute, regulation or case law) upon which you rely in support of the contention, and (4) all witnesses and exhibits you will present in support of the contention at the hearing on the merits.

ANSWER:

(1)

compound interrogatory
see # 3 interrogatory

(2)

(3)

Interrogatory No. 14: With regard to EHD's participant notification letter dated June 3, 2014, and which is attached to your Amended Petition as Exhibit 1, do you contend that any statement in that letter is factually or legally incorrect? If so, please identify: (1) every statement that you contend is factually or legally incorrect, (2) the specific factual and/or legal basis for your contention that the statement is factually or legally incorrect, and (3) all witnesses and exhibits you will present in support of the contention at the hearing on the merits.

ANSWER:

(1) compound interrogatory
see #3 interrogatory

(2)

(3)

Interrogatory No. 15: If your response to any of the requests for admission set forth below is anything other than an unqualified admission, then for each such response, please state: (1) every reason, factual or legal, why you do not admit the request without qualification, (2) the name, position or job title, and current or last known address of every person you will call to testify as a witness in support of your position on that matter; and (3) a detailed description of every document or other item that you will offer as an exhibit in support of your position on that matter.

ANSWER: Please provide answers to this interrogatory below each applicable request for admission.

compounded interrogatory
see #3 interrogatory

REQUESTS FOR ADMISSION

Request for Admission No. 1: Admit that EHD is required to follow the applicable air quality permitting laws when deciding whether to issue an air quality permit.

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1) calls for legal conclusion

(2)

(3)

Request for Admission No. 2: Admit that you have no specific evidence that EHD failed to follow the applicable air quality permitting laws by issuing Permit No. 3136.

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1)

objection
Improper form

(2)

~~also~~ also see
Admission 3

(3)

Request for Admission No. 3: Admit that operation of the Smith's station on 4th Street in accordance with Permit No. 3136 would not violate any applicable air quality statute or regulation.

RESPONSE:

Admit

Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1)

See Carlisle Constitution
brief of proposed summary
disposition NO 32,790

Exhibit
A+B 32

~~Admission 3~~
Air quality Control Board
NOS. 2012-1 and 2012-2
submitted by Dominick Law
& Georgianne Penn-Kies

(2)

(3)

Request for Admission No. 4: Admit that you have no specific evidence that you will be adversely affected by the operation of the Smith's station on 4th Street in accordance with Permit No. 3136.

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1)

calls for legal conclusion

(2)

(3)

Request for Admission No. 5: Admit that you have no specific evidence that the operation of the Smith's station on 4th Street will result in "significantly increased traffic."

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

- (1) the marketing scheme Smiths employs attracts swarms of customers that create much more traffic, congestion
- (2) and odors - hyper marketing is illegal in several countries
- (3) the big pink elephant in the room is this marketing strategy that we are going to create public awareness of so that new law will limit this dangerous marketing strategy.

Request for Admission No. 6: Admit that the public notice provided by EHD for the permitting action in this case complied with the requirements of 20.11.41.14(A)(3) NMAC (2002), which provides as follows: "[W]ithin fifteen (15) days after [EHD] deems an application complete, [EHD shall] publish a public notice in a local newspaper of general circulation. The notice shall include the name and address of the applicant, location of the source, a brief description of the proposed construction or modification, a summary of the estimated emissions and shall identify the manner in which comments or evidence on the application may be submitted to [EHD]."

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1)

calls for legal conclusion

(2)

(3)

Request for Admission No. 7: Admit that Smith's meets all requirements under the Air Quality Control Act and applicable regulations adopted pursuant to that Act for receiving Permit No. 3136.

RESPONSE: Admit ___ Deny X

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1) calls for legal conclusion

(2)

(3)

Request for Admission No. 8: Admit that the Petitioners have no specific evidence of a "cumulative impact" on any person or community resulting from the operation of Smith's fuel centers in Albuquerque.

RESPONSE: Admit ___ Deny X
with our ~~facts~~ technical testimony this will come

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1)

(2)

(3)

Request for Admission No. 9: Admit that the sole purposes of the annual throughput limit in air quality permits for gas stations in Albuquerque and Bernalillo County are to enable EHD to (1) determine annual fees, and (2) forecast an emissions inventory of VOCs in Albuquerque and Bernalillo County.

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1) Calls for a legal conclusion on what constitutes a sole purpose

(2)

(3)

Request for Admission No. 10: Admit that 40 CFR Part 63, Subpart CCCCCC ("Hex C") is the federal regulation governing emission standards for gasoline dispensing facilities.

RESPONSE: Admit ___ Deny ___

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1)

Improper form

(2)

(3)

Request for Admission No. 11: Admit that in promulgating Hex C, the federal Environmental Protection Agency chose to regulate VOC emissions by requiring gasoline dispensing facilities to use Stage I vapor recovery systems and other performance measures rather than by setting ambient air standards for VOCs.

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1)

Improper form

(2)

(3)

Request for Admission No. 12: Admit that there are no ambient air standards for VOC emissions from gasoline dispensing facilities.

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1) calls for legal conclusion

(2)

(3)

Request for Admission No. 13: Admit that Petitioners have no evidence that Smith's will be unable to comply with the requirements of Hex C that are incorporated by reference in Permit No. 3136.

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

improper form

(1)

(2)

(3)

Request for Admission No. 14: Admit that Smith's application for Permit No. 3136 was not an application for a variance pursuant to NMSA 1978, § 74-2-2(B) (1992).

RESPONSE: Admit ___ Deny ✓

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1) *in proper form*

(2)

(3)

Request for Admission No. 15: Admit that you do not own, rent or otherwise have an interest in real property within a three-mile radius of the proposed Smith's GDF.

RESPONSE: Admit ___ Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

- (1) I have an interest in purchasing the old car wash on north 4 st. and have had several conversations with
- (2) the owner. negotiations and pricing are still being bandied about. I will keep you
- (3) informed if I purchase the property.

REQUEST FOR PRODUCTION OF DOCUMENTS

Request for Production No. 1: Produce all written and electronically stored documents, including all exhibits you will present at the Hearing, identified or relied upon in your answers to the interrogatories and requests for admissions set forth above and, for each document produced, identify the corresponding interrogatory(ies) or request(s) for admissions to which that document is responsive.

RESPONSE: *Forthcoming in our NOI*

SUTIN, THAYER & BROWNE
A Professional Corporation

By _____


Frank C. Salazar
Timothy J. Adler

P. O. Box 1945
Albuquerque, New Mexico 87103-1945
Telephone: (505) 883-2500
*Attorneys for Smith's Food & Drug
Centers, Inc.*
3337094.doc

VERIFICATION

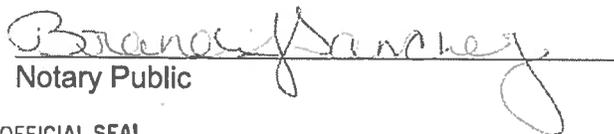
STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

Pat Toledo, being of legal age, having been first duly sworn upon his oath, states that he participated in answering and has read, knows and understands the contents of his answers to Smith's interrogatories, and the statements and information provided therein are true of his own knowledge and belief.



PAT TOLEDO

SUBSCRIBED AND SWORN TO before me on this 9th day of September 2014, by Pat Toledo.



Notary Public

My Commission Expires:

2/13/16
3337094.dac



OFFICIAL SEAL
Brandi J. Sanchez
NOTARY PUBLIC-STATE OF NEW MEXICO
My commission expires: 2/13/16

Exhibit **A**

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

**IN RE: AIR QUALITY PERMIT NO.
2037-M1 ISSUED TO SMITH'S FOOD
& DRUG CENTERS, INC.**

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

SEP 13 2013

Wendy Jones

**GEORGIANNA E. PEÑA-KUES,
ANDY CARRASO, JAMES A.
NELSON, and SUMMIT PARK
NEIGHBORHOOD ASSOCIATION,**

Petitioners-Appellees,

No. 32,790

Air Quality Control Board

Nos. 2012-1 and 2012-2

vs.

**SMITH'S FOOD & DRUG CENTERS,
INC. and CITY OF ALBUQUERQUE,**

Respondents-Appellants.

**MEMORANDUM IN RESPONSE TO
AMENDED NOTICE OF PROPOSED SUMMARY DISPOSITION**

Submitted by:

DOMENICI LAW FIRM, P.C.
Pete V. Domenici, Jr., Esq.
Lorraine Hollingsworth, Esq.
320 Gold Ave. SW, Suite 1000
Albuquerque, New Mexico 87102

Attorneys for Petitioner-Appellee
Andy Carrasco

COMES NOW Petitioner-Appellee Andy Carrasco, by and through undersigned counsel of record, and, pursuant to NMRA 12-210.D(3), hereby submits the following memorandum in response to the Amended Notice of Proposed Summary Disposition.

This case brings to the forefront the relationship between the right of concerned members of the public, who oppose a permit application, to raise issues regarding quality of life and other impacts related to the proposed permit as part of the public participation process and the scope of an administrative body ability to rely on such concerns to support the denial of a permit application.

During the Air Quality Board's deliberations, the Hearing Officer specifically stated that it was her belief that the Board was not authorized to consider quality-of-life issues that were raised by the neighbors. (Transcript, Jan. 9, 2013, at 72/lns4-13). The Hearing Officer's statement is directly contrary to the New Mexico Supreme Court's holding in *Colonias Dev. Council v. Rhino Env't'l Services*, 2005-NMSC-024. The Hearing Officer's comments and the Court's proposed summary disposition, have the effect of limiting the Board to a determination as to whether the permit application meets the technical requirements of the regulations, an approach that was specifically rejected by the Supreme Court in the *Colonias*. As stated by the Supreme Court, such a narrow

view of the Board's role "has the potential to chill public participation in the permitting process contrary to legislative intent." 2005-NMSC-024, ¶21.

The case now before the Court is the next step after *Colonias*. As allowed in *Colonias*, the community presented testimony and evidence demonstrating that the Smith's facility and the increased throughput not only might impact their quality-of-life but are in fact impacting it. The Board carefully considered the public comments and found a basis in the Air Quality Act for both hearing and acting on the quality-of-life issues. The Court now proposes to overturn that decision, reasoning that the permit application met all of the technical requirements and the Board improperly denied the permit.

The Petitioners request that the Court either grant summary affirmance, finding that the Board acted within its mandate, or that the matter be put on the general calendar in order to allow full briefing to address the issue of the Board's authority to address quality-of-life issues that are clearly related to the issuance of the permit modification.

A. Public concerns about the impacts from the Smith's gasoline station and the Board's decision.

The Smith's gasoline station that is at the heart of this matter is located on the corner of Carlisle and Constitution in Albuquerque on a small piece of property that formerly contained a small auto repair business. It is a very high volume fueling station located at an already problematic intersection immediately adjacent

to a residential neighborhood. The Carlisle and Constitution intersection is poorly designed for the amount of traffic it is required to handle and the Smith's gasoline station has made the traffic problems significantly worse. The operations at the gasoline station have spilled over onto neighboring properties and into the alley between the station and the adjacent residential property. The people who live in the residential neighborhood have suffered numerous impacts from the facility, including substantial odors and fumes that have limited their ability to use their backyards and, which, in some cases, have permeated into the interior of homes. (See, for example, RP 00001-00005; RP 00012-00015; RP 00778-00797; 00569; 00510-00516; RP 00778-00782; RP 00868-00870).

The gasoline station was opened in late June, 2010 and within a year of construction the station exceeded Smith's original estimate of the annual throughput. (RP 00827). At that point, the gasoline station was in violation of its air quality permit and the City took enforcement action. (RP 00828). Smith's then sought a permit modification to allow it to operate at the higher throughput level, rather than taking steps to ensure that the station was operating within the limits of its existing permit. (RP 00828-00829). After notice of the permit modification was published, the Department received a number of public comments and requests for hearing. (RP 1099-1151). The comments raised numerous concerns about the impacts the increased throughput would have on the neighborhood. A

public hearing was held and thirty-seven people signed the sign-in sheet. (RP 01312-01317). Verbal and written comments were submitted as part of the public hearing. (RP 1318-1351).

On April 17, 2012, the Department granted Smith's request for a modified permit and issued Permit No. 2037-M1 with conditions. (RP 00850). The Department issued the modified permit based on the conclusion that there was no technical basis for denying the permit. (RP 00850). On May 17, 2012, Andy Carrasco, James A. Nelson, the Summit Park Neighborhood, and Georgianna E. Pena-Kues requested a hearing before the Air Board. (RP 00863). The hearing was held on August 21, 22, and 23, 2012. (RP 00867). The hearing was conducted by a hearing officer and the members of the Board were present to hear all of the testimony and evidence. (*Id.*).

The Board deliberated in open session on January 9, 2013. During the deliberations, the Board engaged in extensive discussions concerning the quality of life issues raised by the neighbors during the hearing and the appropriate way to address such issues. (See, e.g., Jan. 9, 2013 Transcript of Hearing (TR) at 13/ln20-19/ln5; 21/ln13-25/ln25; 34/ln2-20; 38/ln15 to 41/ln7; 62/lns 14-22; 64/lns5-14; 78/lns3-13; 89/ln13-90/ln9; 94/ln15 to 97/ln6; 103/lns3-8). During the deliberations, the Hearing Officer made the following statement: "I believe that the Board's authority is limited to considering whether this permit modification was

issued within certain law and regulations, and that the quality-of-life issues of the local neighborhood are beyond the reach of this board, except to the extent, obviously, that they are addressed by a vapor recovery system already in place and the other air quality standards, emissions, limitations, et cetera, that are already in place.” (TR 72/Ins3-13).

After hearing and considering all of the evidence, and considering the applicable statutory and regulatory requirements, including the Board’s clear mandate to “prevent or abate air pollution” set forth in §74-2-5 NMSA.A, the Board reversed the Department’s grant of the permit modification.

B. The Board has the authority to consider and base its decision on quality-of-life issues raised by the public.

The New Mexico Supreme Court, in *Colonias Dev. Council v. Rhino Envt’l Services*, 2005-NMSC-024, ¶24, 138 N.M. 133, held that adverse impacts on a community’s social well-being and quality of life may be raised during public hearings concerning permit applications and that the final decision maker must take such concerns into consideration when deciding whether to approve or deny a permit. 2005-NMSC-024, ¶24, 138 N.M. 133. Quality of life issues may include concerns about public health and welfare and other impacts on the community that are not addressed by specific technical regulations. *Id.* Adverse public testimony, whether in the form of technical testimony or public comment, must be taken into account when reaching a final decision. *Id.* at ¶¶24, 41, 43. The Supreme Court

specifically found that the hearing officer was incorrect in stating that the only determination to be made was whether the permit application met the technical requirements of the regulations. ¶¶7, 8, 24.

The Supreme Court reiterated the importance of public participation in environmental permitting actions and held that the Secretary, acting as the final decisionmaker, “must use discretion in implementing the Solid Waste Act and its regulations to encourage public participation in the permitting process.” *Id.* (citing to *Joab v. Espinosa*, 116 N.M. 554, 558, 865 P.2d 1189, 1202 (Ct.App. 1993)).

The Court specifically rejected the argument that the concerns of individual residents about the negative impacts from a landfill on their community are an insufficient basis for the denial of the permit. *Id.* at ¶25. Citing to the decision in *Joab*, the Court stated that “community concerns can affect the Secretary’s decision to deny a permit or impose conditions on one. *Joab* is consistent with the idea that the Secretary must consider public testimony in deciding whether a landfill permit affects an entire community’s health, welfare or safety.” *Id.* at ¶26.

After determining that testimony concerning the impact of the permitted facility on a community’s quality of life must be allowed and considered, the Court stated that “[the] authority to address such concerns requires a nexus to a regulation,” and that “the general purposes of the Environmental Improvement Act and the Solid Waste Act, considered alone, [do not] provide authority for requiring

the Secretary to deny a landfill permit based on public opposition.” *Id.* at ¶29. The Court found that the expression of the general purpose of the Solid Waste Act, which included protection of “public health, safety and welfare,” do not create a standard for protecting “public health, safety and welfare.” *Id.* Even though the Court did not find the required nexus in the purpose of the Solid Waste Act, it did find such a nexus in the regulatory requirement that “the solid waste facility application demonstrates that neither a hazard to public health, welfare or the environment nor undue risk to property will result.” *Id.* at ¶31. Based on this requirement, the Court found that the Secretary’s review is not limited to technical regulations, “but clearly extend to the impact on public health or welfare resulting from the environmental effects of a proposed permit.” *Id.*

In conclusion, the Court ordered that Colonias Development Council be allowed to present testimony regarding the impact of the proliferation of industrial sites on the local community. The Court also instructed the Secretary “to reconsider the public testimony opposing the landfill and explain the rationale for rejecting it, if the Secretary decides to do so. We are not suggesting that the Secretary must reach a different result, but we do require, as the Act itself requires, that the community be given a voice, and the concerns of the community be considered in the final decision making.” *Id.* at ¶43.

new facilities or modified existing facilities will not emit air pollution, which will cause violations of air pollution control regulations upon operation following construction. This procedure will protect the source owner's investment as well as uphold public concern and desire for input prior to commencement of construction of air pollution sources in Bernalillo County." 20.11.41.6 NMAC. The Air Quality Act and the Board's regulations express an intent to consider air quality and air pollution in the context of impacts to public welfare and the reasonable use of property.

Section 74-2-5 and 74-2-2.B, coupled with the purpose of Part 41, are analogous to the requirements that an applicant for a solid waste permit demonstrate that the facility will pose "neither a hazard to public health, welfare, or the environment nor undue risk to property" and that solid waste facilities be operated "in a manner that does not cause a public nuisance or create a potential hazard to public health, welfare or the environment." 2005-NMSC-024, ¶31. The Supreme Court found that these provisions of the Solid Waste Act and regulations "do not limit the Secretary's review to technical regulations, but clearly extend to the impact of public health or welfare resulting from the environmental effects of a proposed permit." *Id.* Similarly, the mandate to prevent or abate air pollution, coupled with the definition of air pollution, require the Board to consider the impact of a proposed permit or permit modification on public welfare, visibility

and the reasonable use of property, which is precisely what the Board did in reaching their decision to deny Smith's application to increase the throughput at the Carlisle gasoline station.

The testimony presented at the hearing before the Board demonstrated that the increased throughput would have both direct and indirect impacts on air quality. The increased throughput has a direct impact on air quality because it results in an increased release of volatile organic compounds (VOCs). (RP 00832). Petitioner Gerogianna E. Pena-Kues presented evidence that the VOCs include known human carcinogens. The increased throughput of gasoline directly results in increased emissions of VOCs, increased emissions of carcinogenic compounds and degradation of air quality, all of which interfere with the public welfare. The Department investigated the gasoline station, prior to Smith's submitting the permit modification, and found that Smith's was in violation of its existing permit, which meant that it was violating the permitted emission rate. (See RP 00015-00018, 00787-00789 for discussion of Smith's permit violations). Instead of requiring Smith's to bring the gasoline station throughput and emissions into compliance with its existing permit, the Department approved a permit modification that allowed Smith's to increase its throughput and its emissions, without considering the impact of those increases on the air quality and air pollution in the vicinity of the station. Because this is a gas station, increased

throughput necessarily means increased traffic, which also results in increased air pollution.

The neighbors complained to the City about the odors and fumes being generated by the gas station. (Hearing Transcript (TR) 1124/lns3-9). At the hearing, adjacent property owners testified that they could smell fumes from the gasoline station in their backyards, inside their homes and throughout the neighborhood, which had a direct impact on the reasonable use of their property. (RP 00790-00792). Community members testified that their outdoor activities had been limited or impacted by the odors and fumes from the Smith's gasoline station. (*Id.*). There was also testimony about the impact of the increased semi-truck and vehicle traffic, which is a direct result of the increased throughput, on adjacent properties and on the neighborhood generally.

It is evident from the transcript of the Board's deliberations that the Board did consider the impact of the increased throughput on air quality, air pollution, as defined in the Air Quality Act and the quality of life in the area, and determined that the increased throughput allowed by the requested modification would contribute to increased air pollution. (RP 01002). On that basis, the Board denied the permit modification.

The proposed disposition does not adequately address the first part of the *Colonias* decision-that is, whether and to what extent may the Board hear, consider

and act on quality of life issues raised by the public. As directed by the Supreme Court, the community was given a voice and the concerns of the community were properly considered in the decision making process. The Board's decision is consistent with the *Colonias* decision and the Petitioner requests that the Court grant summary affirmance.

The proposed disposition is inconsistent with the requirement that deference is owed to the Board both as to its interpretation of the statute that governs it and as the fact finders in this matter. Generally, the Court gives some deference to an agency's interpretation of a statute that governs it but the Court is not bound by the agency's interpretation because it is a matter of law that is reviewed de novo. *Id.* Under basic principles of statutory construction, the plain language of the statute governs and is given full effect. *Id.*; *New Mexico Board of Veterinary Medicine v. Riegger*, 2007-NMSC-044, ¶11, 142 N.M. 248. The Board's interpretation of the mandate set forth in §74-2-5 is not unreasonable and should be given deference, especially in light of the *Colonias* decision.

A fact finder in an administrative hearing serves the same role as any other fact finder and should be given the same deference on factual questions. *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶22, 125 N.M. 786 (a "hearing officer is not an interested party who submits proposed findings to a trial court but rather an impartial official who presides at a formal, adjudicatory hearing, where he or she is

in a position to assess the credibility of witnesses and rule on evidentiary motions”). In this case, the Board heard all of the testimony and evidence and acted as the ultimate fact finders and should be given deference on factual questions.

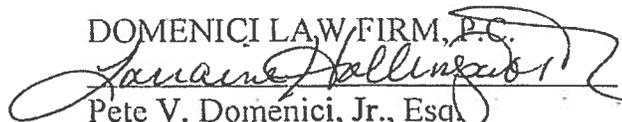
The proposed summary reversal will have the effect of chilling public participation in environmental permitting matters because it makes public participation meaningless, despite the fact that the Air Quality Control Act and the Board’s regulations provide for public participation in permit proceedings. In the *Colonias* decision, the Supreme Court reversed the Court of Appeals based a similarly narrow view on the role of the decision-maker because it “has the potential to chill public participation in the permitting process contrary to legislative intent.” 2005-NMSC-024, ¶21. Instead of carefully considering how the *Colonias* decision regarding public participation and quality of life issues should apply in this matter, the proposed summary reversal only focuses on the nexus aspect and the technical requirements for an authority to construct permit application. What is left is a pro forma requirement for a public participation process that has no meaning and no relation to the actual permit decision. Public participation is rendered meaningless, despite statutory and regulatory provisions for public input and numerous appellate decisions emphasizing the importance of public participation in environmental permitting. In the future, members of the

public will be reluctant to participate because of the very real perception that their concerns will not be considered and it is simply not worth the effort to become involved. Because of such concerns, the Supreme Court in *Colonias* found a way to connect the publication participation with the actual permit decision. The Air Quality Board's decision is consistent with the *Colonias* decision and should be upheld on summary affirmance.

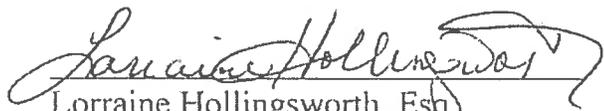
C. Conclusion

The Petitioner respectfully requests that the Court grant summary affirmance rather than summary reversal. If summary affirmance is not granted, the Petitioner requests that the matter be placed on the general calendar to allow full briefing on the very important question of the scope of authority for an administrative agency to rely on quality of life concerns in reaching a final decision on an environmental permit application and other issues identified above.

Respectfully submitted,

DOMENICI LAW FIRM, P.C.

Pete V. Domenici, Jr., Esq.
Lorraine Hollingsworth, Esq.
320 Gold Ave. SW, Suite 1000
Albuquerque, New Mexico 87102

I hereby certify that a true and correct copy of the foregoing was mailed to counsel and parties of record on this 13th day of September, 2013.


Lorraine Hollingsworth, Esq.

Exhibit

B

Sept 3.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

IN RE: AIR QUALITY PERMIT NO.
2037-M1 ISSUED TO SMITH'S FOOD
& DRUG CENTERS, INC.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

DESK COPY

AUG 12 2013

Wendy Edms

GEORGIANNA E. PEÑA-KUES,
ANDY CARRASCO, JAMES A.
NELSON, and SUMMIT PARK
NEIGHBORHOOD ASSOCIATION,

Petitioners-Appellees,

vs.

No. 32,790

Air Quality Control Board

Nos. 2012-1 and 2012-2

SMITH'S FOOD & DRUG CENTERS,
INC. and CITY OF ALBUQUERQUE,

Respondents-Appellants.

AMENDED NOTICE
PROPOSED SUMMARY DISPOSITION

You are hereby notified that the:

Record Proper

was filed in the above-entitled cause on **May 10, 2013**.

This case has been assigned to the SUMMARY CALENDAR pursuant to Rule 12-210(D) NMRA.

Summary reversal is proposed.

Note: This is a *proposal* of how the Court views the case. It is not a final decision. You now have twenty (20) days to file a memorandum telling the Court any reasons why this proposed disposition should or should not be made.

See Rule 12-210(D) NMRA.

Issues: We address the issues raised in both docketing statements together. Appellants, the City of Albuquerque and Smith's Food & Drug Centers, contend the decision of the Air Quality Control Board in this matter should be reversed because it was arbitrary, capricious, and an abuse of discretion; not supported by substantial evidence in the record; and otherwise not in accordance with law. *See* NMSA 1978, § 74-2-9(C) (1992). We propose to agree, for several reasons.

It is undisputed that the increase in throughput authorized by the permit modification would not violate any local, state, or national air-quality standard. Despite this fact, the Board rejected the hearing officer's recommendation and reversed the City's approval of the permit modification, relying on the following reasoning: (1) A statutory mandate requires the Board to prevent or abate air pollution, *see* NMSA 1978, § 74-2-5(A); (2) the permit modification allowing increases in throughput would contribute indirectly to increased air pollution, in violation of that mandate; (3) the modification would also increase risks to public health, another factor that may be considered by the Board; and (4) the Board's

mandate allowed it to consider quality-of-life concerns that are directly or indirectly related to air quality, such as increases in traffic and noise levels. [RP 988-991] Thus, the central pillar of the Board's decision is the general authorization to prevent or abate air pollution. However, we propose to hold this exceedingly broad statement of authority is devoid of any meaningful standards for the agency to apply, and would impermissibly grant the Board unlimited discretion to deny any permit application or application for permit modification.

The Legislature may not vest unbridled or arbitrary power in an administrative agency. *See In re Colonias Dev. Council v. Rhino Env't'l Servs. Inc.*, 2005-NMSC-024, ¶ 29, 138 N.M. 133, 117 P.3d 939. For this reason, general expressions concerning the authority granted to an agency, such as the power to protect the public health, safety, and welfare, do not create an acceptable standard which the agency may apply in deciding whether to grant or deny an application for a permit. *See id.* The broad authorization relied on by the Board in this case, to "prevent or abate air pollution," similarly purports to confer on the Board essentially limitless discretion to deny permit applications. Every entity that applies for a permit or a modification will necessarily add emissions to the air; otherwise the entity would not qualify as a minor or major source and would not need a permit. *See* NMSA 1978, §§ 74-2-7 (2003) and 74-2-2(T) (1992) (amended 2001) (respectively, defining a "source" as

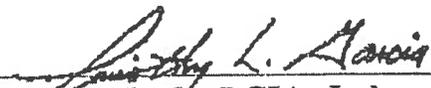
something that “emits or may emit an air contaminant[,]” and requiring a person who intends to construct or modify a “source” to obtain a permit from the local board prior to such construction or modification). Thus, the authority apparently claimed by the Board to prevent any increase in emissions by, for example, minimizing vehicle traffic, would allow the Board to deny any and all applications for permits or modifications, on the basis that an increase in emissions will result. The only guiding standard that would be applicable would be the Board’s own view of what is appropriate. We propose to reject this view of the Board’s authority, and to hold, in line with *Colonias*, that the statutory language relied on by the Board is simply general authorization language that invokes the police power of the government and does not provide any specific authority for the Board’s actions.

A second reason for our proposed reversal is the fact that the Board appears to have considered matters that were beyond the scope of its authority. In making its decision the Board did not limit its consideration to the actual emissions that would issue from the source if the requested modification was granted. Instead, the Board considered “quality of life” factors such as increased traffic in the neighborhood, reasoning that these concerns would contribute indirectly to increased air pollution in the neighborhood. [RP 988, 990] However, the Board’s mandate does not seem to include the authority to control traffic in a given area by means of granting or

denying permit applications or modifications. We can find nothing in the statute that allows the Board to deny a permit modification by relying on indirect effects the modification might have on air quality. Instead, the statutory grounds for denying an application require the Board to determine whether the modification itself, rather than indirect effects flowing from the modification, will: (1) fail to meet applicable standards, rules, or requirements of the state Air Quality Control Act or the federal Clean Air Act; (2) cause or contribute to air-contaminant levels exceeding federal, state, or local standards; or (3) violate any other provision of the Air Quality Control Act or the Clean Air Act. § 74-2-7(C)(1)(a)-(c). The focus of the statute, therefore, is on the source's direct effects on air quality vis a vis standards promulgated by the federal, state, or local government. We propose to reverse the Board's reliance on alleged indirect effects on air quality in this case.

The third basis for this proposed reversal is the fact that the Board's decision appears to violate the Board's regulations. An administrative agency must follow its own regulations. See *City of Albuquerque v. State Labor & Indus. Comm'n*, 1970-NMSC-037, ¶ 5, 81 N.M. 288, 466 P.2d 565; *Hillman v. Health & Social Servs. Dep't*, 1979-NMCA-007, ¶ 8, 92 N.M. 480, 590 P.2d 179. The Board's own regulations authorize it to deny a permit or modification for specific reasons such as exceeding an applicable air-quality standard, emitting a hazardous air pollutant in

follows: “emission . . . of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility[,], or the reasonable use of property[.]” In other words, the emissions must reach a certain level of harmfulness before they will be considered air pollution. There appears to be no evidence in the record indicating that the indirect effects of the permit modification would include emission amounts rising to the level of air pollution. Unless that floor is reached, it appears the Board has no statutory authority to deny the modification even under its own expansive view of its power. We propose to hold that the Board has misapprehended its role in the permitting process; rather than possessing the authority to prevent any increase at all in emissions, at most it is empowered to limit such emissions below when they occur within a certain harmful level. In the apparent absence of any evidence indicating that level was reached in this case, we propose to reverse the Board’s decision for this reason as well.


TIMOTHY L. GARCIA, Judge