

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

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IN THE MATTER OF THE TWO PETITIONS FOR
A HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. 2037-M1 ISSUED TO
SMITH'S FOOD & DRUG CENTERS, INC.

Georgianna E. Peña-Kues, Petitioner, No. AQCB 2012-1

and

Andy Carrasco, James A. Nelson and
Summit Park Neighborhood Association,
Petitioners No. AQCB 2012-2

**SMITH'S FOOD & DRUG CENTERS, INC.'S MOTION TO VACATE AIR QUALITY
CONTROL BOARD'S FINAL ORDER FOR LACK OF MAJORITY VOTE**

Smith's Food & Drug Centers, Inc. ("Smith's") moves the Albuquerque-Bernalillo County Air Quality Control Board ("Board") to vacate its Final Order and Statement of Reasons filed herein on February 14, 2013 ("Final Order"), and as grounds states:

1. Pursuant to the City of Albuquerque and Bernalillo County Joint Air Quality Control Board Ordinances, § 9-5-1-3(B)(6) and § 30-32(b)(6), respectively, "[a]ny action, order or decision of the [B]oard requires a simple majority vote of the members present, except for adoption, amendment or repeal of a Board regulation, in which case the concurrence of four members shall be required."

2. On February 13, 2013, the Board held a meeting during which it considered and voted upon the Final Order. Of the six Board members present at the meeting, three members voted in favor of the Final Order, two members voted against it and one member abstained. See Transcript of February 13, 2013 Board Meeting at 7:4 – 8:13.

3. The vote of three Board members in favor of the Final Order out of the six Board members present did not constitute a “simple majority vote of the members present[.]” § 9-5-1-3(B)(6) and § 30-32(b)(6), but instead was only a plurality of the Board members present.


4. The Final Order is invalid given the lack of an affirmative vote of the majority of the Board members present at the February 13, 2013 meeting. *See Dale J. Bellamah Corp. v. City of Santa Fe*, 88 N.M. 288, 540 P.2d 218 (1975) (affirming trial court’s conclusion that city ordinance was invalid due to lack of affirmative vote of majority of city council members under governing statute).

5. Smith’s has contacted the parties to request their concurrence in this Motion, and the parties have responded as follows:

- a. Adelia Kearny, attorney for the City of Albuquerque Environmental Health Department Air Quality Division concurs.
- b. Petitioner Georgianna E. Peña-Kues did not respond.
- c. Pete V. Domenici, Jr., attorney for Petitioner Andy Carrasco did not respond.
- d. James A Nelson, Petitioner Pro Se did not respond.
- e. Judy Jennings, President, Summit Park Neighborhood Association concurs.

For these reasons, Smith's respectfully requests that the Board vacate its Final Order.

SUTIN, THAYER & BROWNE
A Professional Corporation

By  _____
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I hereby certify that a true and correct copy of the foregoing **Smith's Motion to Vacate Air Quality Control Board's Final Order for Lack of Majority Vote** was served on the following parties, counsel and other individuals by the method indicated:

The original of Smith's Motion to Vacate Air Quality Control Board's Final Order for Lack of Majority Vote 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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Hearing Officer

on the 6th day of March, 2013.

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By 