

SECOND JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF BERNALILLO

Javier Benavidez, James Santiago Maestas,
Roberto Roibal, the SouthWest Organizing
Project, the New Mexico Health Equity Working
Group, and the Pajarito Village Association,

Appellants/Petitioners,

v.

No. D-202-CV-2015-04466
Consolidated with No. D-202-CV-2015-05363

the Bernalillo County Board of County
Commissioners, and Art De La Cruz,
Wayne Johnson, Debbie O'Malley, Maggie
Hart Stebbins, and Lonnie Talbert, Bernalillo
County Commissioners,

and

Consensus Planning and Western
Albuquerque Land Holdings, LLC,

Appellees/Respondents.

THE APPELLANTS/PETITIONERS'
STATEMENT OF APPELLATE ISSUES

I. Introduction

This is an appeal or, alternatively, a proceeding by certiorari, filed by Javier Benavidez, James Santiago Maestas, Roberto Roibal, the SouthWest Organizing Project, the New Mexico Health Equity Working Group, and the Pajarito Village Association (the "Appellants/Petitioners"). The Appellants/Petitioners request that the Court vacate the following decisions made by the Bernalillo County Board of County Commissioners addressing the proposed Santolina development:

1. The decision approving the zone map amendment for the proposed Santolina development (the "zone map amendment") (June 16, 2015 vote (Record ["R"], 88312; June 18, 2015 written decision [R, 86821]; Board Ordinance # 2015-20, R, 88654-88656);

2. The decision denying the Appellants/Petitioners' appeal to the Board of County Commissioners from a determination of the Bernalillo County Planning Commission ("the Planning Commission") recommending approval of the zone map amendment (May 28, 2015 vote, R, 88119; June 1, 2015. (The vote is not recorded in the transcript, and the written decision is not in the Record. The Appellants/Petitioners will file a motion to supplement the Record to include it and the minutes of the meeting that include the vote.);
3. The Board of County Commissioners' decision approving the development agreement between Bernalillo County and Western Albuquerque Land Holdings, LLC. (the "Development Agreement") (June 24, 2015 vote, R, 88525; August 10, 2015 final Development Agreement, R, 88660-88725).
4. The decision approving the Santolina Level A Master Plan (the "Santolina Master Plan") (June 16, 2015 vote, R, 88309; June 19, 2015 written decision, R, 86811; Board Resolution #2015-42, R, 88635-88653); and
5. The decision denying the Appellants/Petitioners' appeal to the Board of County Commissioners from a recommendation of the Planning Commission that the Santolina Master Plan be approved (May 11, 2015 vote, R, 87879; May 15, 2015 written decision, R, 58864-58872).

Except for the negotiations on the Development Agreement, all of these decisions were made in one set of Board of County Commissioners' proceedings. This Statement of Appellate Issues therefore presents one Summary of Proceedings in Section II. After that Statement of Proceedings, this Statement of Appellate Issues is divided into the following sections:

- Section III sets forth the statement of facts relevant to the issues presented;
- Section IV sets forth the standard of review pertaining to the Appellants/Petitioners' claims;
- Section V explains that the Appellants/Petitioners were denied due process in the Board of County Commissioners' proceedings;

- Section VI addresses the Board of County Commissioners' decisions approving the zone map amendment and denying the Appellants/Petitioners' appeal concerning the zone map amendment;
- Section VII addresses the Board of County Commissioners' decision approving the Development Agreement;
- Section VIII addresses the Board of County Commissioners' decisions approving the Santolina Master Plan and denying the Appellants/Petitioners' appeal of the Planning Commission determination concerning the Santolina Master Plan; and
- Section IX sets forth the Appellants/Petitioners' conclusion.

Finally, the Court's September 1, 2015 Order consolidating the two cases in this matter provides that the page limit for this statement of appellate issues is 50 pages.

II. Statement of issues presented for review

The following six issues are presented for review by this proceeding:

- A. Whether the Board of County Commissioners erred by denying the Appellants/Petitioners due process during the Board's proceedings;
- B. Whether the Board erred by approving the zone map amendment;
- C. Whether the Board of County Commissioners erred by denying the Appellants/Petitioners' appeal addressing the zone map amendment;
- D. Whether the Board of County Commissioners erred by approving the Development Agreement;
- E. Whether the Board erred by approving the Santolina Master Plan;
- F. Whether the Board of County Commissioners erred by denying the Appellants/Petitioners' appeal concerning the Master Plan.

III. Summary of proceedings

A. Nature of the case

This is an appeal filed pursuant to NMSA 1978 sections 3-21-9 and 39-3-1.1 and Rule 1-074 of the Rules of

Civil Procedure. Alternatively, this litigation is filed as a petition for a writ of certiorari pursuant to Article VI, sections 2 and 13 of the New Mexico Constitution and Rule 1-075 of the Rules of Civil Procedure.

The Appellants/Petitioners seek reversal of the Board of County Commissioners' five decisions listed above. The Appellees/Respondents are the Board of County Commissioners and the individual members of the Board (collectively the "Board of County Commissioners" or the "Board"), and Western Albuquerque Land Holdings, LLC. and Consensus Planning ("the Santolina developers").

B. Course of the proceedings.

1. The zone map amendment

The proceedings below addressing the zone map amendment and the Santolina Master Plan were initiated by the Santolina developers' filing of an application for Board of County Commissioners' approval of the zone map amendment. R, 44608-44626. The application was considered first by the Bernalillo County Planning Commission (the "Planning Commission"), which determined that it should be approved, and issued a written decision. R, 05570.

The Appellants/Petitioners filed an appeal and an amended appeal (numbered COA2015-0006/CZ-20130009) of the Planning Commission decision. R, 40165-40177. The Board of County Commissioners considered the Appellants/Petitioners' appeal at a hearing on May 28, 2015. R, 87889. During the hearing, the Appellants/Petitioners presented the appeal; the Santolina developers and the Bernalillo County Planning Department staff (the "Planning staff") presented arguments against the appeal. R, 87047-88108. Following these presentations, the Board of County Commissioners voted 3-2 to deny the appeal, with County Commissioners De La Cruz, Johnson, and Talbert voting for denial and Commissioners Hart Stebbins and O'Malley voting against denial. R, 88119. (This information is not in the transcript, and the written decision is not in the Record. The vote is in the minutes of the hearing, and the Appellants/ Petitioners will make a motion to supplement the Record to include those minutes.) The Board subsequently voted to approve the zone map amendment (R, 88312) and entered a written decision to that effect. R, 86821.

2. The Development Agreement

Throughout the Board of County Commissioners' proceedings, the County staff and the Santolina developers negotiated the Development Agreement. The Appellants/ Petitioners and other parties were not involved in those negotiations (R, 87727, 88376), and were only able to comment on a draft of the Development Agreement dated May 22, 2015. R, 86829-86848. The Appellants/Petitioners commented on that draft in writing on June 8, 2015. R, 86522-86529. The Board of County Commissioners subsequently debated a draft of the Development Agreement dated June 22, 2015 (R, 88371-88525) and approved it with modifications. R, 88525. The members of the Board who voted for approval were Commissioners De La Cruz, Johnson, and Talbert; Commissioners Hart Stebbins and O'Malley voted against approval. *Id.*

3. The Santolina Master Plan

The proceedings addressing the Santolina Master Plan began with the filing of an application for approval of the Master Plan by the Santolina developers. R, 41343-41345. The Planning Commission determined that the application should be approved. R, 05576. The Appellants/Petitioners filed an appeal and an amended appeal numbered COA2015-0007/SPR20130004) (neither of which is in the Record) of the Planning Commission's decision.

The Board of County Commissioners considered that appeal and amended appeal at a hearing on May 11, 2015, at which the Appellants/Petitioners presented the appeal, and the Santolina developer and the Planning staff argued against the appeal. R, 87719-87879. Immediately following those presentations, the Board County Commissioners voted 3-2 to deny the appeal. R, 87879. Commissioners De La Cruz, Johnson, and Talbert voted to deny the appeal, and Commissioners Hart Stebbins and O'Malley voted against denial. *Id.*

C. Disposition by the agency

The Board of County Commissioners denied the appeals filed by the Appellants/Petitioners concerning the zone map amendment and the Santolina Master Plan. The Board of County Commissioners approved the zone map amendment, the Development Agreement, and the Santolina Master Plan.

III. Facts relevant to the issues presented for review

A. Facts pertaining to the Board of County Commissioners denial of due process

1. The Appellants/Petitioners presented their interests in this matter to the Board of County Commissioners.
 - a. The Appellants/Petitioners' interests were set forth generally in their amended appeal of the Planning Commission determination that the zone map amendment should be granted (R, 40143-40163) and their amended appeal of the Planning Commission's recommendation that the Santolina Master Plan be approved. (This document is not in the Record, and the Appellants/Petitioners will file a motion to supplement the Record to include it.) These interests included concerns about the unavailability of physical and legal water for the proposed Santolina development, the impacts that the proposed development would have on transportation in the area, the proposed development's impacts on schools in the Albuquerque Public School district, the effects that the proposed development would cause by building on sandy soils, and the inability of the Santolina developers to develop the area at no net expense to local government. R, 40144-40162.
 - b. The interests of the Appellants/Petitioners also were expressed by Roberto Roibal (misspelled "Roybal") when he testified to the Board of County Commissioners for the Appellants/Petitioners. Mr. Roibal stated that he resides in the South Valley, in Pajarito, and has been associated with the SouthWest Organizing Project for 35 years and with the Pajarito Village Association for 25 years. He expressed the concerns of the Appellants/Petitioners as including: where the water will come from for the proposed development, and the need to

protect the water of people in the South Valley (R, 88054-88055), what the proposed development would mean in the way of tax increases for residents of the metropolitan Albuquerque area (R, 88055-88056), the increased traffic that would result from the proposed development. (R, 88057), and the effect that construction at the proposed development on sandy soils would have on the environment (R, 88057-88058).

- c. Similar concerns were expressed by Javier Benavidez, who is the Executive Director of the SouthWest Organizing Project. He testified to his concerns about where the proposed development would obtain necessary water, and the proposed development's impact on already overcrowded schools which his children attend. He also testified about possible effects of the dust that would be generated by the construction at the proposed development on people who have asthma, like his son. R, 87830-87834.
- d. Appellant/Petitioner James Santiago Maestas testified that he irrigates in the South Valley of Albuquerque, off the Pajarito Acequia, and that he is the President of the South Valley Regional Association of Acequias. He explained his concerns that farmers like him are the first to feel the effects of water shortages (R, 87990-87991), and he presented an expert witness, Norman Gaume, who testified that there is not enough water for the proposed development. R, 87994-88021.
- e. Appellant/Petitioner the New Mexico Health Equity Working Group signed on to a letter dated February 28, 2015 that raised concerns about the impacts of the proposed Santolina development on water resources used by farmers, acequeros, ranchers, landowners and others. The letter also expressed concerns

about the inevitable increase in property taxes that would be required for schools, infrastructure construction, road repairs, flood control, and services for water and sewers, among others. R, 11661.

2. The Board of County Commissioners' proceedings to determine whether to approve the zone map amendment and whether to deny the Appellants/Petitioners' appeal pertaining to the zone map amendment were zoning proceedings.
 - a. Western Albuquerque Land Holdings, LLC (WAHL) urged the Planning Commission to adopt findings indicating that the zone map amendment is consistent with section 19.5 of the Bernalillo County Comprehensive Zoning Code, specifically the requirements for the Planned Communities Zone and the Reserve Area goals. R, 87051.
 - b. WAHL also urged the County Planning Commission to adopt a finding that the zone map amendment is consistent with the requirements of Bernalillo County Resolution 116-86. *Id.*, R, 87052.
 - c. John Salazar, the attorney for WAHL, listed the "governing documents" concerning the zone map amendment and the Santolina Master Plan as including the Albuquerque/Bernalillo comprehensive plan, the planned communities criteria, and Resolution 116-86 pertaining to zone change requests. R, 87427-87428.
 - d. James Strozier, who represented Consensus Planning, testified to the Board of County Commissioners about the manner in which he alleged that the proposed Santolina development would comply with the Planned Communities Criteria and with the requirements of Resolution 116-86. R, 87448, 87453-87454.
 - e. Mr. Strozier also sent a letter with attachments to the Board of County

Commissioners (R, 40179-40216) in which he addressed the Appellants/Petitioners' appeal relating to the zone map amendment, and in which he explained in more detail his assertions that the proposed Santolina development would comply with the planned communities criteria and the requirements of Resolution 116-86. One of the attachments includes a matrix purporting to reference the pages at which compliance with each of the requirements of the Planned Communities Criteria are met. R, 40211-40212. The same attachment includes an argument alleging that the proposed zone map amendment complies with the requirements of Resolution 116-86. R, 40212-40215.

3. The Board of County Commissioners denied the Appellants/Petitioners due process.
 - a. The Board began its hearings to consider the zone map amendment and the Santolina Master Plan on March 25, 2015. R, 87273-87422.
 - c. On March 23, 2015, two days before the public hearings were held and evidence was presented by any of the parties to the proceedings, the Albuquerque Journal published an op-ed authored by County Commissioner Art De La Cruz supporting the proposed Santolina development. R, 80080.
 - c. The Appellants/Petitioners raised the issue of Commissioner De la Cruz's bias before the Board. R, 88970-88980.
 - d. The Board approved the zone map amendment by a 3-2 vote, and Commissioner De La Cruz cast one of the three votes in favor of the zone map amendment. R, 88312.
 - e. The Board approved the Santolina Master Plan by a 3-2 vote, and Commissioner De La Cruz cast one of the three votes in favor of the zone map amendment. R, 88309.

4. The Board of County Commissioners' proceedings addressing the zone map amendment and the Santolina Master Plan were quasi-judicial.
 - a. The Board of County Commissioners conducted public hearings on the zone map amendment and the Santolina Master Plan. R, 87423.
 - b. The Board reviewed facts and evidence pertaining to the zone map amendment during the public hearing. R, 88047-88096.
 - c. The Board proceedings for the zone map amendment were recorded by a court reporter. R, 88123, 88360.
 - d. All of the individuals who intended to speak at the zone map amendment proceedings were sworn as witnesses. R, 87734, 87735.
 - e. The Board considered the rights of individual parties affected by the zone map amendment during the public hearing. R, 86821, 40144-40162, 88054-88064, 88064-88071, 88054-88055, 88055-88056, 88057.
 - f. The Board purported to evaluate the zone map amendment pursuant to existing requirements under section 19.5 of the Bernalillo County Zoning Code (R, 87051), Bernalillo County Resolution 116-86 (R, 87052, 87453-87454), the Albuquerque Bernalillo Comprehensive Plan (87427-87428), and the Planned Communities Criteria. *Id.* and 87448.
 - g. James Strozier, agent for Consensus Planning, sent a letter with attachments to the Board (R, 40179-40216), in which he characterized the Appellants/ Petitioners' appeal relating to the zone map amendment as a "quasi-judicial proceeding". R, 40179.
 - h. In the same letter, Mr. Strozier asserted that the proposed Santolina

development would comply with the Planned Communities Criteria and the requirements of Resolution 116-86. R, 40211-40215.

- i. During one of the Board of County Commissioners' hearings, John Salazar, counsel for WAHL, stated that the proceeding concerning the Santolina Master Plan was effectively a zone change. R, 87967.
- j. During its proceedings relating to the zone map amendment, the Board of County Commissioners treated the proceedings as adversarial hearings in which the Board heard presentations from the County Planning Staff, the proponents of the proposed Santolina development, the opponents of the zone map amendment, and members of the public. *See* R, 87275-87276.
- k. The Board's written decision asserts that the zone map amendment is consistent with the Planned Communities Criteria and the Reserve Area policies of the Albuquerque/Bernalillo County Comprehensive Plan (R, 86822), is consistent with Resolution 116-86, and is consistent with the health, safety, and general welfare of the residents of Bernalillo County. *Id.*, 86822-86823.
- l. Members of the Board of County Commissioners stated to their constituents that they (the Commissioners) could not speak with their constituents about the pending proceedings concerning the zone map amendment and the Master Plan because they were quasi-judicial proceedings. Testimony of Lorraine Archibald (R, 87593) and Javier Benavidez (R, 87830-87831), and statements of Commissioners Hart Stebbins (R, 87425) and O'Malley (R, 87289).
- m. The Board considered facts and accepted evidence at the proceedings

concerning the Master Plan. R, 87275-87276, 87828-87830, 87830-87844, 87844-87856.

- n. The Board proceedings concerning the Master Plan were recorded by a court reporter. R, 87888, 88360.
- o. All of the witnesses who intended to speak at the Board proceedings concerning the Master Plan were sworn in as witnesses. R, 87734-87735.
- p. The Board addressed the rights of individual parties at the proceedings concerning the Master Plan. R, 87426, 87337-87438, 87449-87453, 87830-87834, 87837-87843, 87990-87991, 87994-88020.
- q. The Board purported to evaluate the Master Plan pursuant to existing legal standards, specifically the requirements of the Albuquerque/ Bernalillo County Comprehensive Plan and the Planned Communities Criteria. R, 87426-87429, 87838-87844.
- r. The Board endeavored to justify its approval of the Master Plan using reasons based on the facts and evidence presented to it, and the legal requirements already in place. R, 86812- 86814.

B. Facts pertaining to the Board of County Commissioners' approval of the zone map amendment

- 5. The Board's written decision approving the zone map amendment neither indicates any basis for the decision in the Record nor provides any analysis to support the decision. R, 86822-86823.
- 6. The request for the zone map amendment does not comply with the requirements of Resolution 116-86.
 - a. The written decision approving the zone map amendment does not demonstrate

that the amendment is consistent with the health, welfare, and safety of the county. R, 86822-86823.

- b. The letter from the Albuquerque/Bernalillo County Water Utility Authority that is relied on by the Santolina developers does not state that the Water Utility Authority will provide water for the proposed Santolina development. R, 30981-30982.
- c. The Albuquerque/Bernalillo County Water Utility Authority letter indicates only that the Water Utility Authority is capable of providing water if the proposed Santolina development meets all of the Water Utility Authority's conditions. *Id.*
- d. The Albuquerque/Bernalillo County Water Utility Authority's 2007 Water Resources Management Strategy indicates that developments outside the Water Utility Authority's service area should provide either water rights or the funding with which to purchase water rights as a condition of service. R, 38087.
- e. The lack of available water for the proposed Santolina development was testified to in a presentation to the Board of County Commissioners by Norman Gaume. R, 87993-88016.
- f. Mr. Gaume stated unequivocally that there is not adequate water for the proposed Santolina development. R, 88010, 88016.
- g. The Santolina developers have made no showing that the original zoning for the area involved was an error.
- h. The Santolina developers also have not shown that the neighborhood where Santolina would be located has changed in such a way that the new zoning is preferable.
- i. The zone map amendment would authorize construction in sandy soils that could

cause adverse health impacts. Testimony of Javier Benavidez (R, 87833-87834), Bernalillo County Place Matters Team Health Impact Assessment on Santolina (R, 05347-05365, R, 05355).

- j. The Board of County Commissioners' denial of the Appellants/Petitioners' appeal pertaining to the zone map amendment does not provide reasons for the decision. (This decision is not in the Record. The Appellants/Petitioners will submit a motion to supplement the Record to include it.)

C. Facts pertaining to the Board of County Commissioners' approval of the Development Agreement

- 7. A draft Santolina Development Agreement was provided to the County in January 2014. R, 09975. Subsequently, negotiations addressing the Development Agreement were conducted between Bernalillo County staff and the Santolina developers. R, 87958.
- 8. A May 22, 2015 draft Development Agreement was made available for public comment. R, 86829-86848.
- 9. The Board of County Commissioners allowed public comment only on the May 22, 2015 draft Development Agreement at a Special Zoning Meeting held on June 16, 2015. R, 88124-88309. *See also* remarks of Bernalillo County Attorney Randy Autio to the effect that no one has ever seen the Development Agreement. R, 87884.
- 10. The Board considered a June 22, 2015 draft Development Agreement without providing an opportunity for any public comment, written or oral, at the Special Zoning Meeting held on June 24, 2015. R, 88365.
- 11. The Board voted to approve the June 22, 2015 Development Agreement, after making amendments, at the Special Zoning Meeting held on June 24, 2015. R, 88525.
- 12. The development agreement passed on a 3-2 vote. Commissioners Art De La Cruz,

Wayne Johnson and Lonnie Talbert voted in favor of approval. Commissioners Maggie Hart Stebbins and Debbie O'Malley voted against approval. R, 88525.

13. No written decision documenting the Board's action was ever issued by the Board.
14. The Board and the Santolina Developers entered into a Development Agreement on August 10, 2015. R, 88660-88725.

D. Facts pertaining to the Board of County Commissioners' approval of the Santolina Master Plan.

15. The Board's written decision approving the Master Plan is not based on the record. R, 86949-86956.
16. The Board apparently never voted to adopt the 24 Findings in its June 19, 2015 written decision of its vote approving the Master Plan. R, 86949-86950.
17. The Santolina Master Plan does not identify depth to groundwater, proximity to production wells, or documentation of physical and legal availability of water. R, 88817.
18. The Santolina Master Plan contains only general information about proposed transportation plans. R, 88798-88807.
19. The Santolina Master Plan relies on an outdated 2035 Metropolitan Transportation Plan. R, 88804.
20. A 2040 Metropolitan Transportation Plan was presented to Metropolitan Transportation Board for adoption in April 2015, before the Board of County Commissioners approved the Santolina Master Plan. R, 85332.
21. The Mid-Region Metropolitan Planning Organization advised the Board that based on the 2040 Metropolitan Transportation Plan and its socioeconomic forecast, "the population projection for Santolina was approximately ten percent lower than what those specific zones held in the 2035 MTP [Metropolitan Transportation Plan] Socioeconomic Forecast." R, 80771.

22. The Santolina Master Plan provides only very general estimates of the number of schools that will be needed in 2035 and at full build out of the proposed development, stating: “Specific school sites will be identified and development timed to meet school and community educational needs during development of Santolina.” R, 88822-88824.
23. The Santolina Master Plan relied on the support of the Albuquerque Public Schools (“APS”): “WAHL has established a good working relationship with APS.” R, 88824.
24. APS was a co-applicant with the Santolina developer in the Santolina Master Plan application submitted to the Board of County Commissioners. R, 32562.
25. On March 23, 2015, APS provided to the Board a resolution it passed asking the Board to deny the Santolina Level A Master Plan “until the issues of school financing, transportation, water and infrastructure have been adequately addressed.” R, 40483.
26. The economic analysis relied upon in the Santolina Master Plan does not factor in the hundreds of millions of dollars in public school infrastructure necessitated by the Santolina development. R, 48791, 11462-11487.
27. The APS resolution requesting that the Board of County Commissioners deny the Santolina Master Plan, explained that:
- APS finds that the residential development of 37,930 housing units proposed by the Santolina Master Plan would need taxpayer approval of at least \$681 million in today’s dollars for construction of 15 elementary schools, 4 middle schools, and 2 high schools. APS would need approximately 425 acres to develop the 20 schools needed to serve the Santolina development. All this will have to be funded by APS taxpayers (all of Bernalillo County, City of Albuquerque, parts of Sandoval County). Currently APS taxpayers are funding a capital program in excess of \$1 Billion every 6 years to address a total assessed capital need in excess of \$3 Billion.
- R, 40483.
28. The APS submitted its resolution requesting that the Board of County Commissioners

deny the Santolina Master Plan to the Board on March 23, 2015, before the Board voted to deny the Appellants/Petitioners' appeals and before the Board voted to approve the zone map amendment, the Santolina Master Plan, and the Development Agreement. *Id.*

29. The Board of County Commissioners did not provide any reasons for its decision denying the Appellants/Petitioners' appeal pertaining to the Santolina Master Plan Appeal. R, 86811.

IV. The standard of review

The Appellants/Petitioners have filed this litigation as an appeal pursuant to NMSA 1978 sections 3-21-9 and 39-3-1.1 and Rule 1-074, and in the alternative as a petition for writ of certiorari pursuant to Article VI, sections 2 and 13 of the New Mexico Constitution and Rule 1-075. Both Rule 1-074 and Rule 1-075 provide the same standard of review of administrative agency decisions for the district court to apply. This standard is:

1. whether the agency acted fraudulently, arbitrarily, or capriciously;
2. whether, on the basis of review of the entire record, the decision of the agency is not supported by substantial evidence;
3. whether the action of the agency was outside the scope of authority of the agency; or
4. whether the action of the agency was otherwise not in accordance with law.

1-074(R) NMRA and 1-075(R) NMRA.

IV. The Court should vacate the Board of County Commissioners' approval of the zone map amendment and the Santolina Master Plan because the Board denied the Appellants/Petitioners due process.

- A. The Appellants/Petitioners had a right to due process in the Board of County Commissioners' proceedings.

The Board of County Commissioners' proceedings that are the basis for this litigation were zoning proceedings. One of the issues that the Board considered was whether to grant the Santolina developers' application for a zone map amendment. That issue arose under section 25 of the Bernalillo County Zoning Ordinance and was brought to the Board by means of an appeal from a determination of the County Planning Commission.

A second issue determined by the Board of County Commissioners was whether the Board should approve the Santolina Master Plan. That issue was considered pursuant to section 19.5 of the Bernalillo County Zoning Ordinance, and it also came to the Board in the form of an appeal from a County Planning Commission determination.

Because the Board of County Commissioners' proceedings were zoning proceedings, the Appellants/Petitioners had a right to participate in the proceeding. Section 3-21-6 MSA 1978 provides that:

no zoning regulation, restriction or boundary shall become effective, amended, supplemented, or repealed until after a public hearing at which all parties in interest and citizens shall have an opportunity to be heard.

NMSA 1978 §3-21-6.B.

In addition, the Bernalillo County Zoning Ordinance refers to a hearing being conducted by the Board of County Commissioners when the Board considers an appeal from a determination of the County Planning Commission. Bernalillo County Code of Ordinances, section 25.

Moreover, because the Board of County Commissioners conducted a public hearing on each of these zoning issues, the Board was required to provide due process for the participants in the hearing. In a case involving another zoning matter, the New Mexico Court of Appeals has ruled that a zoning hearing is quasi-judicial, and that:

[A]dministrative adjudicatory proceedings involving substantial rights of an applicant must adhere to fundamental principles of justice and procedural due process.

State ex rel. Battershell v. City of Albuquerque, 1989-NMCA-045, ¶7, 108 N.M. 658.

The Board of County Commissioners' proceedings involved in this matter addressed zoning issues, and as is more fully explained at pages 23-30 *infra*, those proceedings were quasi-judicial in nature. The Board of County Commissioners therefore were required to provide due process for all of the parties involved in the proceedings, including the Appellants/Petitioners.

B. The Board of County Commissioners' proceedings denied the Appellants/Petitioners due process.

1. The Appellants/Petitioners were denied due process in the zone map amendment proceedings by the participation of Commissioner Art De La Cruz.

a. The Court of Appeals has established that county commissioners must be unbiased in zoning matters.

The New Mexico Court of Appeals established due process standards for members of boards of county commissions in Los Chavez Community Association v. Valencia County, 2012-NMCA-044, 277 P.3d 475. In that case, a decision of the Valencia County Board of County Commissioners approving a zone change by a 3-2 vote was challenged on several grounds. One of those grounds was that the party opposing the zone change was denied due process because one of the members of the Board of County Commissioners who voted for the zone change was a first cousin to one of the individuals who sought the zone change. The Court of Appeals upheld that challenge and invalidated the Valencia County Board of County Commissioners' decision on the zone change, and explained in its opinion the need for the members of boards deciding zoning changes to be free of bias.

The Court of Appeals began its analysis by pointing out that those who sit on boards to decide zoning questions act in a quasi-judicial capacity. 2012-NMCA-044, ¶19. The Court noted that decisions on zoning changes involve determining the rights, duties, or obligations of individuals according to current legal standards, and that members of boards that make those decisions must act like the members of judicial bodies and be bound by ethical standards comparable to those that govern courts. *Id.*

The Court of Appeals also pointed out that the due process clauses of the Fourteenth Amendment to the United States Constitution and the New Mexico Constitution prohibit the deprivation of life, liberty, or property without due process, and that procedural due process requires a member of a tribunal be presumed to be biased if he or she is related to a party to the proceeding. 2012-NMCA-044, ¶21. Based on that analysis, the Court of Appeals overruled the Valencia County Board of County Commissioners' approval of the zone change. 2012-NMCA-044, ¶¶23-24.

- b. The participation of County Commissioner Art De La Cruz denied the Appellants/Petitioners due process because of his bias in favor of Santolina.

One of the members of the Board of County Commissioners is Art De La Cruz. Despite the need for him to be unbiased about the zone map amendment for the proposed Santolina development, he demonstrated before the Board of County Commissioners even began its hearings that he was biased in favor of the proposed development. (The Appellants raised this issue below when they endeavored to disqualify Commissioner De La Cruz. R, 88970-88980.) Indeed, it is difficult to imagine how Commissioner Art De La Cruz could have expressed his bias about the proposed Santolina development more directly and more publicly.

The Board of County Commissioners began its hearings to consider the zone map amendment for the proposed Santolina development and the Santolina Master Plan on March 25, 2015. R, 87273-87422. Two days earlier, on March 23rd, Mr. De La Cruz published an op-ed supporting the proposed Santolina development in the *Albuquerque Journal*, the newspaper with the largest circulation both in Bernalillo county and in the state of New Mexico. R, 80080. The entire op-ed is an argument for approval of the proposed development, and its tone and Mr. De La Cruz's position are summarized early in the op-ed. In the first sentence of the op-ed, Mr. De La stated:

It is important for the public to know why I and others support thoughtful, well-planned developments in Bernalillo County, such as the proposed Santolina development.

Id.

Mr. De La Cruz continued to emphasize his bias in favor of the proposed Santolina development in the third paragraph of the op-ed. He stated:

Because growth is inevitable, I consider Santolina to be appropriate progress for our county because we will determine what the development will ultimately become.

Id.

Much of the rest of the op-ed is devoted to expressions of Mr. de la Cruz's disagreement with and disparagement of the arguments of those who have expressed concerns about and opposition to the proposed Santolina development. *Id.*, ¶¶4-10, 12.

There can be no question that Mr. De La Cruz had made up his mind about the proposed Santolina

development before the Board of County Commissioners began its hearings and therefore before Mr. De La Cruz heard any of the evidence presented by any of the parties to the proceeding. Two days before the beginning of those hearings, he stated publicly and in an unambiguous manner that he favors the proposed development and that the arguments against the proposed development lacked merit.

This is not a case like Los Chavez Community Association v. Valencia County, *supra*, in which the Court of Appeals presumed bias on the part of the Valencia County Commissioner who voted for a zone change sought by her cousin. 2012-NMCA-044, ¶21. Here, the issue is not presumption of bias; rather it is the actual bias that Commissioner Art De La Cruz expressed directly and clearly.

Because he had prejudged the requested zone change for the proposed Santolina development, Commissioner de la Cruz should have recused himself or been disqualified from participating in the hearing and from voting on that requested zone change. In the words of the State Court of Appeals in Chavez Community Association v. Valencia County, *supra*:

Due process requires a neutral and detached judge in the first instance.

2012-NMCA-044, ¶23; quotation marks and citations omitted.

Moreover, Commissioner De La Cruz's bias in favor of the proposed Santolina development was not merely an academic matter; it had concrete consequences. The Board of County Commissioners approved the zone map amendment on a 3-2 vote, and Commissioner De La Cruz cast one of the three votes in favor of the zone map amendment. R, 88312. Without Commissioner De La Cruz's vote, the Board of County Commissioners would not have approved the zone map amendment.

For these reasons, the Board of County Commissioners' proceedings denied the Appellants/Petitioners due process, and the proceedings therefore were contrary to law. In accordance with 1-074(R) NMRA and 1-075(R) NMRA, this Court should vacate the decisions reached by the Board as a result of those proceedings.

Moreover, the Court should follow the precedent established by the Court of Appeals in Los Chavez Community Association v. Valencia County, *supra*. This matter is identical to that case except that this matter does

not involve a presumption of bias because Commissioner De La Cruz demonstrated his bias. This Court should vacate the Board of County Commissioners' decision approving the zone map amendment and disqualify Commissioner De La Cruz from participating in any future Board of County Commissioners' proceedings addressing the proposed Santolina development. See Los Chavez Community Association v. Valencia County, *supra*, 2012-NMCA-044, ¶¶21-24.

2. Decisions of the Supreme Court confirm that the zone map amendment proceedings and the Santolina Master Plan proceedings were both quasi-judicial proceedings.

The decisions of the New Mexico Supreme Court and application of the principles enunciated in those decisions, make clear that the proceedings conducted by the Board of County Commissioners were quasi-judicial and that the Board of County Commissioners therefore was required to provide due process in those proceedings.

- a. The Supreme Court has established the criteria that determine whether a proceeding is quasi-judicial.

In Dick v. City of Portales, 1994-NMSC-092, 118 N.M. 541, the Court considered the City of Portales City Council's refusal to approve the transfer of a liquor license. In its opinion, the Supreme Court addressed the factors that make a proceeding quasi-judicial:

A local governing body is acting in a quasi-judicial capacity when it is "required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." *Black's Law Dictionary* 1245 (6th ed. 1990); cf. State ex rel. Battershell v. Albuquerque, 108 N.M. 658, 662, 777 P.2d 386, 390 (Ct. App. 1989) (stating that hearings before a zoning commission are quasi-judicial)

1994-NMSC-092, ¶5.

The Supreme Court reiterated these criteria more recently in Albuquerque Commons Partnership v. City Council of the City of Albuquerque, 2008-NMSC-0025, 144 N.M. 99, *rev'd on other grounds*, Albuquerque Commons Partnership v. City Council of the City of Albuquerque, 2011-NMSC-002, 149 N.M. 308. In the 2008 Albuquerque Commons Partnership v. City Council of the City of Albuquerque case, the Supreme Court considered a challenge to the City of Albuquerque's adoption of the 1995 Uptown Sector Plan. One of the issues raised in the

challenge was whether the City's adoption of that Plan constituted a quasi-judicial action or a legislative action.

Quoting from an earlier State Court of Appeals decision concerning this issue, the Supreme Court stated:

[L]egislative action reflects public policy relating to matters of a permanent or general character, is not usually restricted to identifiable persons or groups, and is usually prospective; quasi-judicial action, on the other hand, generally involves a determination of the rights, duties, or obligations of specific individuals on the basis of the application of currently existing legal standards or policy considerations of past or present facts developed at a hearing conducted for the purpose of resolving the particular interest in question.

2008-NMSC-0025, ¶32; citation omitted.

Application of these criteria to the proceedings conducted by the Board of County Commissioners indicates that the proceedings were quasi-judicial.

- b. The proceedings addressing the zone map amendment were quasi-judicial.
 - i. The Board reviewed facts and evidence pertaining to the zone map amendment.

In its consideration of the zone map amendment, the Board of County Commissioners conducted hearings addressing the zone map amendment and the Appellants/Petitioners' appeal of the County Planning Staff that the zone map amendment be approved. During the hearings, the Board received evidence and heard arguments from the County Planning Staff, the Appellants/Petitioners, opponents of the Appellants/Petitioners' appeal, and members of the public. *See* presentations by County Planning Staff, Roberto Roibal, Douglas Meiklejohn, and James Strozier, R, 88047-88096. Moreover, the proceedings were recorded by a court reporter (*see, e.g.*, R, 88123, 88360), and all of the individuals who intended to speak were sworn as witnesses. R, 87734-87735.

- ii. The Board of County Commissioners considered the rights of individual parties affected by the zone map amendment.

The Board of County Commissioners' proceeding addressing the zone map amendment involved determining the rights of specific individuals, including both WAHL, which applied for the zone map amendment, and the Appellants/Petitioners (except Santiago James Maestas), who protested the zone map amendment.

The land that is the subject of the zone map amendment is owned by WAHL (*see* statement of John Salazar,

attorney for WAHL, R, 87426), and WAHL applied for the zone map amendment. *See* Notification of Decision of Board of County Commission, June 18, 2015, R, 86821. The proceeding therefore determined the right of WAHL to the zone map amendment on the basis of WAHL's interests in and plans for the property that is within the area covered by the zone map amendment.

The Board of County Commissioners' proceeding also involved the rights of the opponents of the zone map amendment. The application for the zone map amendment was opposed by Appellants/Petitioners Javier Benavidez, Roberto Roibal, SouthWest Organizing Project, New Mexico Health Equity Working Group, and Pajarito Village Association. *See, e.g.*, First Amended Appeal of Bernalillo County Planning Commission Decision Approving Amendment of the Zone Map in Connection with the Proposed Santolina Planned Communities Level A Master Plan, R, 40144-40162; testimony of Roberto Roibal (misspelled "Roybal" in the Board's hearings transcripts) against approval of the zone map amendment, R, 88054-88064; statement of Douglas Meiklejohn, counsel for the Appellants/Petitioners, in opposition to the zone map amendment, R, 88064-88071.

As Mr. Roibal explained, he and the other Appellants/Petitioners who opposed the zone map amendment have major concerns about several issues, including: where the proposed Santolina development will obtain the water that will be needed for the development (testimony of Roberto Roibal, R, 88054-88055), what the proposed development would mean in the way of tax increases for residents of the metropolitan Albuquerque area (*Id.*, R, 88055-88056), and the increased traffic that would result from the proposed development. *Id.*, R, 88057.

iii. The zone map amendment was evaluated pursuant to existing requirements.

The Board of County Commissioners' proceedings addressing the zone map amendment were conducted to determine whether the zone map amendment met existing requirements. WAHL itself urged the County Planning Commission to adopt findings indicating that the zone map amendment is consistent with section 19.5 of the Bernalillo County Comprehensive Zoning Code, specifically the requirements for the Planned Communities Zone and the Reserve Area goals. December 3, 2014 submission of WAHL to the County Planning Commission, R,

87051. WAHL also urged the County Planning Commission to adopt a finding that the zone map amendment is consistent with the requirements of Bernalillo County Resolution 116-86. *Id.*, R, 87052.

In addition, both John Salazar, counsel for WAHL, and Jim Strozier, spokesman for Consensus Planning, indicated that existing requirements apply to the proposed zone map amendment. Speaking to the Board of County Commissioners about the Santolina developers' opposition to the Appellants/Petitioners' appeal concerning the zone map amendment, Mr. Salazar stated that there was a need to review the "governing documents" applicable to the Board of County Commissioners' consideration of the Santolina Master Plan and the zone map amendment, and he listed those "governing documents" as including the Albuquerque Bernalillo comprehensive plan, the planned communities criteria, and Resolution 116-86 pertaining to zone change requests. Statement of John Salazar, R, 87427-87428.

Similarly, Mr. Strozier testified to the Board of County Commissioners about the manner in which he alleged that the proposed Santolina development would comply with the Planned Communities Criteria and with the requirements of Resolution 116-86. Testimony of James Strozier, R, 87448, 87453-87454. Mr. Strozier also sent a letter with attachments to the Board of County Commissioners (R, 40179-40216) in which he addressed the Appellants/Petitioners' appeal relating to the zone map amendment, and in which he explained in more detail his assertions that the proposed Santolina development would comply with the Planned Communities Criteria and the requirements of Resolution 116-86. One of the attachments includes a matrix purporting to reference the pages at which compliance with each of the requirements of the Planned Communities Criteria are met. R, 40211-40212. The same attachment includes an argument alleging that the proposed zone map amendment complies with the requirements of Resolution 116-86. R, 40212-40215.

These efforts to justify the zone map amendment pursuant to the existing requirements of the Planned Communities Criteria and Resolution 116-86 confirm that the Board of County Commissioners' proceedings addressing the zone map amendment were quasi-judicial proceedings according to the ruling of the State Supreme Court in the 2008 Albuquerque Commons Partnership v. City Council of the City of Albuquerque, *supra*. In fact,

Mr. Strozier himself confirmed this in his letter referred to above, in which he characterized the Appellants/Petitioners' appeal of the zone map amendment as "a Quasi-Judicial Proceeding". R, 40179.

- iv. The Board's proceedings addressing the zone map amendment were conducted in a quasi-judicial manner.

The Board of County Commissioners treated the zone map amendment proceedings as quasi-judicial according to the criteria established by the Supreme Court.

First, as was pointed out above, each of the Board's hearings was recorded by a court reporter (*see, e.g.*, R, 88123, 88360), and all of the individuals who intended to speak were sworn as witnesses. R, 87734-87735. Second, as is also explained above, the Board of County Commissioners set the proceedings as adversarial hearings in which the Board heard presentations from the County Planning Staff, the proponents of the appeal addressing the Master Plan, opponents of the appeal, and members of the public. *See* outline of procedures for March 25th hearing on the Santolina Master Plan (R, 87275-87276).

Third, the Board of County Commissioners asserted that its approval of the zone map amendment was justified on the basis of the facts that had been presented and the legal requirements applicable to those facts. For example, the Board's written decision asserts that the zone map amendment is consistent with the Planned Communities Criteria and the Reserve Area policies of the Albuquerque/Bernalillo County Comprehensive Plan. Decision approving the zone map amendment, finding 6, R, 86822. The Board of County Commissioners' decision also asserts that the zone map amendment is consistent with Resolution 116-86, and that it is consistent with the health, safety, and general welfare of the residents of Bernalillo county. *Id.*, R, 86822-86823. The Board of County Commissioners therefore purported to draw conclusions and make its decision concerning the zone map amendment based on information presented during the Board's hearings and the Board's evaluation of that information pursuant to existing legal requirements.

Fourth, individual Bernalillo County Commissioners told their constituents that they (the Commissioners) could not speak with the constituents about the pending proceedings because they were quasi-judicial proceedings.

See testimony of Lorraine Archibald, R, 87593, testimony of Javier Benavidez (R, 87830-87831), and statements of Commissioners Hart Stebbins (R, 87425) and O'Malley. R, 87289. At least some of the Board members therefore understood that the Board's proceedings concerning the zone map amendment were quasi-judicial.

- c. The Board of County Commissioners' Santolina Master Plan proceedings were quasi-judicial.

The Board of County Commissioners' proceedings addressing the Santolina Master Plan were initiated by the filing of an appeal and an amended appeal from a determination of the County Planning Commission recommending approval of the Master Plan. (The Appellants/ Petitioners have not found these documents in the Record.) The appeal and amended appeal were then considered by the Board of County Commissioners in a proceeding that was quasi-judicial according to the criteria established by the Supreme Court and the Court of Appeals.

- i. The Board of County Commissioners purported to consider facts and accepted evidence.

First, as was the case in *Dick v. City of Portales, supra*, and the 2008 *Albuquerque Commons Partnership, supra* case, the Board of County Commissioners' proceedings involved determination of facts and presentation of evidence concerning the Santolina Master Plan. The Board of County Commissioners conducted hearings on the appeal during which it heard from the County Planning Department Staff (the Planning Staff), the proponents of the appeal, opponents of the appeal, and members of the public. See outline of procedures for March 25th hearing on the Santolina Master Plan (R, 87275-87276); statements by Planning Staff (Record, 87828-87830); the appellants' presentation (R, 87830-87844); and opponents' arguments (R, 87844-87856). Moreover, the proceedings were recorded by a court reporter (*see, e.g.*, R, 87888, 88360), and the individuals who intended to speak were sworn as witnesses. R, 87734-87735.

- ii. The Board of County Commissioners addressed the rights of individual parties.

In addition, the proceedings addressing the Santolina Master Plan met another criterion established by the

Supreme Court because those proceedings involved determination of the rights of individual parties. These parties included Western Albuquerque Land Holdings, LLC (WAHL) and Consensus Planning (the Santolina developers). As was indicated at the Board of County Commissioners' hearing by John Salazar, the attorney for WAHL, and James Strozier, Consensus Planning's representative, WAHL owns the land that is covered by the Santolina Master Plan, and WAHL and Consensus Planning sought approval of the Master Plan in order to further WAHL's plans for development of the area. R, 87426, 87437-87438, 87449-87453.

On the other hand, approval of the Master Plan was opposed by the Appellants/Petitioners. Javier Benavidez, who is the Executive Director of the SouthWest Organizing Project, was one of the individuals who spoke against the proposed Santolina development and the Master Plan for the proposed development. He expressed concerns about where the proposed development would obtain necessary water, the proposed development's impact on already overcrowded schools which his children attend, and possible effects of the dust that would be generated by the construction at the proposed development on people who have asthma, like his son. R, 87830-87834.

These and other aspects of the Santolina Master Plan were also addressed by the Appellants/Petitioners' counsel, Douglas Meiklejohn. He raised these concerns in terms of the failure of the Master Plan to comply with the requirements of the Planned Communities Criteria. R, 87837-87843. Particular concerns about the water that would be required for the proposed Santolina development were raised by Appellant/Petitioner James Santiago Maestas, who is the President for the South Valley Regional Association of Acequias. He testified that he is a farmer and an irrigator, and expressed concern about water shortages because farmers are the first to experience the problems caused by those shortages. R, 87990-87991. In addition, he presented as an expert witness Norman Gaume, who testified at length about the lack of excess water in the middle Rio Grande basin and the unavailability of water for the proposed Santolina development. R, 87994-88020.

- iii. The Board of County Commissioners purported to evaluate the Santolina Master Plan pursuant to existing legal standards.

The Board of County Commissioners purported to evaluate facts and rights at issue in the proceedings

addressing the Santolina Master Plan pursuant to existing legal standards, which is another criterion enunciated by the Supreme Court in Dick v. City of Portales, *supra*, and Albuquerque Commons Partnership, *supra*. The Board's evaluation of the Santolina Master Plan involved whether the Master Plan complied with existing requirements of the Albuquerque Bernalillo County Comprehensive Plan and the Planned Communities Criteria. These were listed as the documents governing the Board of County Commissioners' consideration of the Master Plan by John Salazar, attorney for the Santolina developers. R, 87426-87429. The Planned Communities Criteria also were the focus of the Appellants/Petitioners' appeal and amended appeal of the County Planning Commission's recommendation that the Master Plan be approved (which is not in the Record) and those Criteria were referenced in the argument presented to the Board of County Commissioners by Douglas Meiklejohn, counsel for the Appellants/Petitioners, to the effect that the Master Plan should not be approved. R, 87838-87844.

iv. The Board of County Commissioners' Santolina Master Plan proceedings were conducted in a quasi-judicial manner.

Finally, the manner in which the Board of County Commissioners conducted the proceedings addressing the Santolina Master Plan also indicates that they were quasi-judicial proceedings. As was pointed out above, each of the Board's hearings was recorded by a court reporter (*see, e.g.*, R, 87888, 88360), and all of the individuals who intended to speak were sworn as witnesses. R, 87734-87735.

Second, the Board of County Commissioners conducted its proceedings as hearings, allocating time for presentations addressing the Santolina Master Plan by County Planning Staff, the proponents of the appeal addressing the Master Plan, opponents of the appeal, and members of the public. *See* outline of procedures for March 25th hearing on the Santolina Master Plan (R, 87275-87276).

Third, the Board of County Commissioners purported to justify its approval of the Santolina Master Plan using reasons based on the facts and evidence presented to it and the legal requirements already in place. (The Appellants/Petitioners do not agree that the asserted reasons are valid.) For example, the Board's written decision asserts that the Master Plan is consistent with the applicable Albuquerque/Bernalillo County Comprehensive Plan

policies and complies with the Planned Communities Criteria. Decision approving the Master Plan, Findings 5, 6, R, 86812. That decision also asserts that the Master Plan's provision for an open space buffer and an internal open space network are consistent with the Planned Communities Criteria and the Comprehensive Plan (*Id.*, Finding 13, R, 86813), and that the Santolina developers have demonstrated the physical and legal availability of water for the proposed Santolina development (*Id.*, Finding 18, R, 86814). The Board of County Commissioners therefore has asserted that it has drawn conclusions and made decisions on the basis of the information presented to it during the proceeding. Although this assertion is incorrect (*see page 29, infra*), it does indicate the manner in which the Board purported to conduct its proceedings.

Finally, speakers at the Board of County Commissioners' hearings testified that members of the community had approached their representatives on the Board about the Santolina matter before the proceedings began, but that they were told that those representatives could not discuss the matter because the proceedings were quasi-judicial. *See, e.g.*, testimony of Lorraine Archibald, R, 87593, testimony of Javier Benavidez (R, 87830-87831) and statements of Commissioners Hart Stebbins and O'Malley.

The Board of County Commissioners' proceedings were quasi-judicial. For that reason, the Appellants/Petitioners were denied due process as to all of the issues considered in those proceedings because of the participation of Commissioner De La Cruz who was biased in favor of the proposed Santolina development. All of the decisions made by the Board of County Commissioners in those proceedings therefore were contrary to law, and they should be vacated by this Court.

IV. The Board of County Commissioners erred by approving the zone map amendment.

The Court should vacate the Board of County Commissioners' approval of the zone map amendment because the Board's proceedings denied the Appellants/Petitioners due process. There also are other reasons that the approval should be vacated. Each of these reasons was raised to the Board by the Appellants/Petitioners in their amended appeal of the Planning Commission's decision to approve the zone map amendment. R, 40143-40163.

- A. The Board of County Commissioners has not cited anything in the administrative record or provided any analysis to support its decision approving the zone map amendment.

Despite its efforts to justify its decision approving the zone map amendment based on information that had been presented to it, the Board of County Commissioners in fact cited nothing in the Record to support its decision. The Board also has provided no analysis indicating that its decision was in fact based on that information. This violated the requirement that agencies must make their decisions based on the record before them.

The need for an agency to make its decisions based on the record before the agency has been made clear by the New Mexico Court of Appeals. See Fasken v. Oil Conservation Commission, 87 N.M. 292, 294, 532 P.2d 588, 590 (Ct. App. 1975) and City of Roswell v. New Mexico Water Quality Control Commission, 84 N.M. 561, 564-565, 505 P.2d 1237, 1240-1241 (Ct. App. 1972), *cert denied sub nom. New Mexico Water Quality Control Commission v. Roswell*, 84 N.M. 560, 505 P.2d 1236 (N.M. 1973). In this matter, however, nothing in the Board of County Commissioners' written Decision Approving the Zone Map Amendment (R, 86821-86828) explains how that Decision is justified by the record of the Board's administrative proceeding. There also is no analysis to support the conclusions that are asserted in that Decision.

The Board's written Decision includes only three Findings that address the requirements that must be met for proposed zoning changes. They are Findings two, seven, and eight. R, 86822-86823. Finding #2 asserts that the request for approval of the amendment to the zone map has been submitted in accordance with section 19.5 of the Bernalillo County Zoning Code and that development of the Santolina property will take place in accordance with that section. R, 86822. There is nothing in Finding #2, however, to indicate what, if anything, in the administrative record supports either of these assertions. There also is no analysis of section 19.5 or any explanation of why the zone change will take place in accordance with that section. In other words, Finding #2 consists of an unsupported conclusion only. There is nothing in that Finding to demonstrate that its conclusion is supported either by analysis or by material in the record.

Finding #7 is similar. It includes three allegations. The first is that the request for the zone map

amendment is consistent with the Albuquerque/Bernalillo County Comprehensive Plan policies for master planned communities. The second is that the request has demonstrated that the existing zoning on the property in question is no longer appropriate. And the third is that the request has demonstrated that the proposed Santolina development is more advantageous to the community because it furthers and implements the plans and goals of the Planned Communities Criteria and the County Comprehensive Plan. Board of County Commissioners' Decision Approving the Zone Map Amendment, third page. R, 86822-86823. However, nothing in Finding #7 provides any information to indicate where in the record any of these demonstrations is presented. Finding #7 also does not provide any analysis of its conclusions. There is no information, for example, about what policies in the Comprehensive Plan and the Planned Communities Criteria have been reviewed for consistency with the request for the zone map amendment or how that request demonstrated that consistency. Like Finding #2, Finding #7 presents an unsupported conclusion only.

The same is true of Finding #8, which is the third Finding that addresses criteria in Resolution 116-86 for zone map amendments. R, 86823. Finding #8 simply repeats one of the requirements of Resolution 116-86 – that a zone map amendment must be consistent with the health, safety, and general welfare of the County residents. There is nothing to indicate what that criterion means or how it is applied to the zone map amendment for the proposed Santolina development; there also is no information to indicate what, if anything, in the record supports the conclusion that this zone map amendment complies with that criterion.

None of these three Findings provides any analytical support or record support for the proposition that the zone map amendment complies with applicable requirements. Moreover, none of the other Findings cited to support the Board of County Commissioners' Decision Approving the Zone Map Amendment provides either type of support:

- Finding #1 describes the request for the zone map amendment;
- Finding #3 explains that the request for the zone map amendment was submitted in conjunction with the request for approval of the Santolina Master Plan;

- Finding #4 provides the anticipated time period for the proposed Santolina development, and asserts (without basis) that the proposed development is responsive to growth that is expected to occur;
- Finding #5 is a description of the Santolina Master Plan and the proposed zoning for the area covered by the Plan; and
- Finding #6 presents allegations about the Santolina Master Plan.

R, 86822.

The language of the Board of County Commissioners' Decision Approving the Zone Map Amendment and the Findings that are cited in support of that Decision make clear that the Decision is not based on information from the record of the Board's administrative proceedings. Because the Board of County Commissioners did not comply with the established principle that its rulings must be based on the record, the Board's Decision Approving the Zone Map Amendment was contrary to law, and it should be vacated by this Court.

B. The request for the Santolina zone map amendment does not comply with the requirements of Bernalillo County Resolution 116-86.

The second reason why the Board of County Commissioners' Decision Approving the Zone Map Amendment should be vacated is that the request for the zone map amendment does not comply with the requirements for zone map amendments established by the Bernalillo County Resolution 116-86 ("Resolution 116-86) (R, 39964-40121). The requirements set by Resolution 116-86 for a proposed zone map amendment include the following:

- A proposed amendment must be consistent with the health, safety, and general welfare of the County (Resolution 116-86, §1.A)
- A proposed land use change must not be in significant conflict with the Comprehensive Plan or other County Master Plans (*Id.*, §1.C);
- The applicant for the zoning change must demonstrate that the existing zoning is inappropriate because:
 - o An error was made when the original zone map was created; or

- Changes in the neighborhood conditions have made the existing zoning no longer appropriate; or
 - A different zoning is more advantageous to the community as articulated in the Comprehensive Plan or other County Master Plan, even if neither of the two preceding subsections applies (*Id.*, §1.E);
- A proposed land use change will not be approved where some of the uses permitted by the change would be harmful to adjacent property, the neighborhood, or the community. *Id.*, §1.F.

The zone map amendment proposed for the Santolina development does not meet any of these requirements.

1. The zone map amendment is not consistent with the health, safety, and welfare of Bernalillo county.

The Board of County Commissioners' Decision Approving the Zone Map Amendment asserts that the request for the zoning change is consistent with the health, welfare, and safety of the county. R, 86823. However, the only Finding that addresses this issue is Finding #8, which simply alleges without support or reference to the administrative record that the request for the zoning change meets this requirement. *Id.* In fact, the information in the record indicates that the application for the zone change is inconsistent with the county's welfare, safety, and health in at least the following three ways.

- a. There is not water available to serve the proposed Santolina development.

First, contrary to the assertions by the Santolina developers in the December 1, 2014 Revised Santolina Master Plan (R, 31277), the Albuquerque Bernalillo County Water Utility Authority ("the Water Authority") has not agreed to provide water for the proposed development. The letter (R, 30981-30982) cited by the Santolina developers to support its assertion that the Water Authority has agreed to provide water for the proposed development in fact does not indicate that either water rights or water are available. Instead, all that the letter indicates is that the Water Authority is capable of serving Santolina if Santolina complies with the Water Authority's current guidelines, policies and ordinances. *Id.* There is nothing in the letter to indicate that Santolina has complied

with these requirements.

Second, the Water Authority's own 2007 Water Resources Management Strategy (R, 38064-38088) indicates that developments outside the Authority's service area should provide either water rights or the funding with which to purchase water rights as a condition of service. R, 38087. In addition, the lack of available water was testified to in a presentation to the Board of County Commissioners by Norman Gaume. R, 87993-88016. Mr. Gaume's testimony is particularly compelling not only because of his extensive expertise (R, 87991-87993) but also because he was subject to cross-examination by the members of the Board of County Commissioners, and he stated unequivocally that there is not adequate water for the proposed Santolina development. R, 88010, 88016.

b. Construction of a planned community on the sandy soils in the area would cause adverse health effects.

The information in the record establishes that the soils in the area covered by the zone map amendment consist of erodible sand dunes. In addition, other material in the record indicates that construction of a planned community at the proposed Santolina development site would result in blowing sand that can contribute to asthma and other respiratory illnesses. For that reason, the zone map amendment that would allow such construction is inconsistent with the health, safety, and welfare of the county.

c. The proposed Santolina development would likely cause net expenses to Bernalillo County and the City of Albuquerque.

There were several analyses presented to the Board of County Commissioners about whether the proposed Santolina development would cause net expense to local governments, but the most realistic analysis indicates that it is not likely that the development could be conducted without net expense to those governments. That analysis was completed by Ph.D. economist Kelly O'Donnell (R, 39918-39922), and several of the most important points in her analysis were the following:

- New Mexico's working population is shrinking in large part because the economy here cannot sustain enough good jobs to keep working people here.
- According to the Bureau of Business and Economic Research and the Mid-Region Council of Governments,

only about 7,700 new jobs will be created in the area covered by the proposed Santolina development by the year 2035 (as opposed to the 25,000 new jobs predicted by the Santolina Developer).

- According to an analysis of 2013 census data for western Bernalillo county, about two-thirds of the people who moved there did so from other locations within the county, and the majority of the remaining one third of those people moved to the west side of Bernalillo county from counties surrounding Bernalillo county. This means that the Santolina Developer's prediction of tax revenue that would be created by the proposed Santolina development are unrealistically high.
- Finally, the Santolina Developer's estimates of Bernalillo County's costs do not include any expenditures for new infrastructure, infrastructure maintenance, or open space acquisition, even though the Santolina Level A Master Plan appears to assume that the County would acquire, develop, and maintain open space for the development. Even more importantly, the Master Plan does not consider the costs that will be incurred for transportation and water.

2. The zone map amendment is in significant conflict with adopted elements of the Comprehensive Plan.

The zone map amendment was requested for the purpose of allowing the Santolina Developer to proceed with the proposed Santolina development. But the Santolina Developer has failed to comply with the Planned Communities Criteria that must be met for approval of the Santolina Master Plan. The clearest example of this is the failure to meet the Planned Communities Criteria requirement for demonstrating availability of water. The Planned Communities Criteria mandate that a level A master plan identify depth to groundwater, provide information about proximity to production wells, and demonstrate legal and physical availability of water, including information about water quantity and quality. Planned Communities Criteria, §5.C.6. None of this information is provided in the Santolina Master Plan or in other documents that support the application for the zone map amendment.

3. The Santolina developers have not demonstrated that the existing zoning is inappropriate.

Resolution 116-86 provides that there must be a showing that the existing zoning is inappropriate either

because there was an error in the original zoning or changed neighborhood conditions have made the new zoning more appropriate, or because a different category is more advantageous to the community even if neither of the first two conditions applies. Here, there has been no showing or even allegation by the Santolina Developer that the original zoning was an error. The Santolina Developer also has not shown that the neighborhood where Santolina would be located has changed in such a way that the new zoning is preferable. Finally, as is explained above, the new zoning would be less, not more, advantageous to the community. The Santolina Developer therefore has not met the burden of showing that the existing zoning should be changed.

4. The zone map amendment is harmful to the neighborhood and the community.

The proposed Santolina development would adversely affect Bernalillo county because of the proposed development's use of water, the impacts that its construction would have on air quality, and the net expense that the development would likely cause the County and the City of Albuquerque. For those and other reasons, the zone map amendment that is designed to facilitate the Santolina development would be harmful to the Bernalillo county community.

For all of these reasons, the Board of County Commissioners' Decision Approving the Zone Map Amendment was contrary to law because it violated Bernalillo County Resolution 116-86, and the Decision should be vacated.

V. The Court should vacate the Board of County Commissioners' denial of the Appellants/Petitioners' appeal concerning the zone map amendment.

All of the reasons given above for vacating the Board of County Commissioners' decision approving the zone map amendment also indicate that the Board erred when it denied the Appellants/Petitioners' appeal to the Board from the Planning Commission's approval of the zone map amendment. There also is one other reason why the Board's denial of the Appellants/Petitioners' appeal should be denied. This issue could not be raised before the Board because it only arose when the Board made its decision.

In its decision denying the Appellants/Petitioners' appeal the Board of County Commissioners provided no

information about the basis or reasons for the Decision. The language in the Decision simply states that “the Board of County Commissioners denied the appeal” (This document is not in the Record. The Appellants/Petitioners intend to file a motion to supplement the Record to include it.) This failure by the Board of County Commissioners to state reasons for its Decision violates the principle enunciated by New Mexico courts that administrative agencies must explain the reasons for their decisions.

This principle has been enunciated both by the New Mexico Supreme Court and by the New Mexico Court of Appeals. *See, e.g., Fasken v. Oil Conservation Commission*, 87 N.M. 292, 294, 532 P.2d 588, 590 (N.M. 1975), *Continental Oil Company v. Oil Conservation Commission*, 70 N.M. 310, 321, 373 P.2d 809, 816 (N.M. 1962), *Akel v. Human Services Department*, 106 N.M. 741, 743, 749 P.2d 1120, 1122 (Ct. App. 1987), *cert denied sub nom. New Mexico Human Services Department v. Akel*, 107 N.M. 74, 752 P.2d 789 (N.M. 1988), *City of Roswell v. New Mexico Water Quality Control Commission*, 84 N.M. 561, 565, 505 P.2d 1237, 1241 (Ct. App. 1972), *cert denied sub nom. New Mexico Water Quality Control Commission v. Roswell*, 84 N.M. 560, 505 P.2d 1236 (N.M. 1973).

Because the Board of County Commissioners failed to comply with this well established requirement, the Board’s decision denying the Appellants/Petitioners’ appeal pertaining to the zone map amendment was contrary to law, and this Court should vacate it.

- VI. The Board of County Commissioners’ approval of the Development Agreement should be vacated.
- A. The Board’s failure to provide a written decision and reasons for its decision approving the Development Agreement violates State law.

The Court should vacate the Board of County Commissioners’ approval of the Development Agreement because the Board has not issued a decision explaining its reasons for approval of the Agreement. (The Appellants/Petitioners were not able to raise this issue below because it only arose when the Board made its decision.) The Board has not issued a written decision of its vote and the reasons for its vote; the Board has only posted an August 10, 2015 Development Agreement to its website.

The New Mexico courts have held on several occasions that administrative agencies must explain the reasons for their decisions so that reviewing courts may be able to conduct meaningful review, and that they must base their decisions on information in the record before them. *See* page 30, *supra*. In this matter, the Board of County Commissioners has failed to provide a written decision of its vote approving the Development Agreement and its reasons for doing so, based on evidence in the record before them.

B. The Bernalillo County ordinance that authorizes the Development Agreement violates State law.

The failure of the Bernalillo County ordinance that authorizes the Development Agreement to comply with state law was raised before the Board of County Commissioners at the Special Zoning Meeting held on May 28, 2015 (R, 87904-87906) and through written comments submitted to the Board for the Special Zoning Meeting held on June 16, 2015. R, 86501-86502.

The use of a development agreement is authorized by section 19.5 of the Bernalillo County Zoning Code. It provides that:

Uses not established by a Level B Plan. Until a Level B plan has been adopted by the County to govern a site, uses and regulations specified in the Level A Development Agreement, which must accompany initial county zoning, shall govern the interim permissive and conditions uses.

Bernalillo County Code of Ordinances, §19.5.

However, there is nothing in New Mexico law that authorizes zoning by means of a development agreement, and NMSA 1978 section 3-21-6.A states that zoning shall be provided by ordinance. There is therefore no authority for the zoning by development agreement that section 19.5 purports to allow.

C. The preparation of the Development Agreement violated State law and Bernalillo County ordinance.

The preparation of the Development Agreement did not involve the public (R, 87884-87885), which is required by New Mexico law, or the Planning Commission, which is required by the applicable Bernalillo County ordinance. (This issue was raised by the Appellants/Petitioners in their June 8, 2015 written comments on the Development Agreement [R, 86522-86529, 86526], and at the June 16, 2015 Board of County Commissioners'

hearing on the Development Agreement. R, 88365.)

The Development Agreement was prepared in negotiations between the Bernalillo County staff and the Santolina developers (R, 87958), and that did not involve the Planning Commission. In addition, members of the public, including the parties involved in the Board of County Commissioners' proceedings, were not permitted to see drafts of the Development Agreement or to participate in the negotiations concerning the Agreement. *See* R, 88365.

The failure to involve the Planning Commission violated section 25.A of the Bernalillo County Code of Ordinances. It mandates that any proposed zoning amendment, supplement, or change be submitted to the Planning Commission for its recommendation and report. In this case, the Development Agreement constitutes zoning, which was required to be reviewed by the Planning Commission. Moreover, New Mexico law requires that members of the public have an opportunity to be heard concerning any proposed zoning. NMSA 1978 §3-21-6.B. The exclusion of members of the public from the process by which the Development Agreement was negotiated violated this requirement.

D. The Development Agreement's provisions violate State law and the Bernalillo County Zoning Code.

The Appellants/Petitioners pointed out in their written comments on the May 22, 2015 draft of the Development Agreement, and orally at the June 16, 2015 Board of County Commissioners' hearing on the Development Agreement (R, 88358), that the Development Agreement violates both New Mexico law and Bernalillo County Ordinances.

There are at least two provisions of the Development Agreement that violate New Mexico law and the Bernalillo County Zoning Code. The first provision at issue is section 8.4. It states that the establishment of the Development Agreement does not preclude the application of Bernalillo County regulations to the proposed Santolina development except to the extent that such regulations conflict with the Development Agreement. R, 88669. In the event of such a conflict, the provisions of the Development Agreement would control. *Id.* In other words, zoning ordinances that otherwise would apply to the proposed Santolina development do not apply if they

conflict with the Development Agreement. This means that Bernalillo County is effectively enacting zoning by the provisions of the Development Agreement, which violates both NMSA 1978 section 3-21-6.B and section 25.A of the Bernalillo County Zoning Code.

The second provision of the Development Agreement that violates NMSA 1978 section 3-21-6.B and section 25.A of the Bernalillo County Zoning Code is section 8.5. It indicates that the Development Agreement shall not preclude the application of changes in Bernalillo County Regulations to the proposed Santolina development if those changes are mandated by changes in State or Federal law. R, 88669. The clear implication of this section, however, is that changes in County Regulations that are not mandated by changes in State or Federal law cannot apply to the proposed Santolina development. This too constitutes zoning by means of the Development Agreement, which violates the provisions cited above.

For all of these reasons, the Board of County Commissioners' approval of the Development Agreement was contrary to law. This Court therefore should vacate that approval.

VII. The Board of County Commissioners' approval of the Santolina Master Plan should be vacated.

The Board of County Commissioners' approval of the Santolina Master Plan should be vacated for three reasons. First, the Board's approval was not based on information in the Record of the Board's proceeding. (This argument could not be raised by the Appellants/Petitioners below because the issue only arose when the Board made its approval decision.) Second, the Board's approval should be vacated because the Santolina Master Plan does not comply with the Planned Communities Criteria. (The Appellants/Petitioners raised this argument before the Board in their Amended Appeal of the Planning Commission's recommendation that the Board approve the Master Plan. This document is not in the Record, and the Appellants/Petitioners will file a motion to supplement the Record to include it.)

A. The Board's decision is not based on the Record.

The New Mexico Court of Appeals has made clear that agencies must base their decisions on information in

the record before them. See Fasken v. Oil Conservation Commission, 87 N.M. 292, 294, 532 P.2d 588, 590 (Ct. App. 1975) and City of Roswell v. New Mexico Water Quality Control Commission, 84 N.M. 561, 564-565, 505 P.2d 1237, 1240-1241 (Ct. App. 1972), *cert denied sub nom.* New Mexico Water Quality Control Commission v. Roswell, 84 N.M. 560, 505 P.2d 1236 (N.M. 1973).

In this matter, however, only one of the 24 Findings asserted to support the Board of County Commissioners' approval of the Santolina Master Plan (Finding 19) explains how its conclusions are justified by the record of the Board's proceeding. Moreover, none of the other Findings explains how the approval of the Santolina Master Plan is justified.

The following is a breakdown of the 24 Findings that are asserted to support the Board's Approval of the Santolina Master Plan. R, 86949-86956.

- Findings 1 and 2 describe the request for approval of the Santolina Master Plan, including a description of the sections of land involved, and assert that the request for approval of the Master Plan has been submitted in conjunction with a request for a zone map amendment. R, 86950.
- Finding 3 indicates the time period within which the Santolina development is projected to occur, and asserts that the Master Plan is responsive to the growth that is anticipated in the Albuquerque Metropolitan Area. *Id.* There is nothing in that Finding, however, to indicate that this assertion is supported by anything in the record of the Board's administrative proceeding or by any analysis of information before the Board.
- Finding 4 describes the goals that the Master Plan sets forth. *Id.*
- Findings 5 and 6 assert that the Master Plan is consistent with the Albuquerque/Bernalillo County Comprehensive Plan policies for the Reserve Area and that the Master Plan complies with the Planned Communities Criteria, but provide no citation to the record or analysis to support either of those assertions. *Id.*
- Findings 7 and 8 describe the Development Agreement that is being prepared for execution between the Santolina Developer and the Board of County Commissioners. R, 86950-86951.

- Finding 9 asserts that the proposed Santolina development is suited for approval as a planned community as a result of seven factors, but the Finding provides no citations to anything in the record or analysis of information before the Board to support the Finding's conclusions with respect to any of those seven factors. R, 86951.
- Findings 10 and 11 present assertions about the Santolina Transportation Plan but those Findings contain neither any analysis nor any citations to the record to support their assertions. *Id.*
- Finding 12 asserts that the Santolina Fiscal Impact Analysis and an Economic Impact Analysis demonstrate substantial benefits to Bernalillo County. *Id.* However, the Finding never addresses the fiscal impact analysis that demonstrated the flaws in these studies. Moreover, the Finding undermines its own assertion by noting that "there are no concrete assurances that market demand currently exists for the development."
- Findings 13, 14, and 15 present assertions about the open spaces and parks allegedly provided for by the Santolina Master Plan, but those Findings present neither citations to the record nor analysis to support those assertions. *Id.*
- Finding 16 asserts that an archaeological study has been conducted, but acknowledges that more detailed studies will be required later. *Id.*
- Findings 17 asserts without explanation or support that Bernalillo County has taken into account water supply availability and cumulative impacts. R, 86952.
- Finding 18 asserts that the Albuquerque/Bernalillo County Water Utility Authority has stated in a letter dated July 29, 2014 that it will provide water for the proposed Santolina development. *Id.* However, the Finding fails to address the language in that letter which indicates that the Water Authority has made no such commitment. Finding 18 also alleges that the Santolina Developer has complied with the Planned Communities Criteria requirement to demonstrate physical and legal availability of water, but neglects to address the failure of the Developer to provide the information required by those Criteria.
- Finding 19 is the only Finding that provides a basis in the record for its conclusions. *Id.* This Finding

presents assertions about the estimated amount of water that will be used by the proposed Santolina development, and cites the Water Master Plan as support for that assertion. However, the Finding also asserts without any basis in the record or analysis that the water for the proposed development will be provided by the Albuquerque/ Bernalillo County Water Utility Authority.

- Finding 20 asserts without any explanation or citation to the record that the Master Plan includes an acceptable plan for drainage and storm water management. *Id.*
- Finding 21 notes the amount of unfunded capital infrastructure facility needs that Bernalillo County has, and points out that the financial impact of Santolina infrastructure development cannot add to this unfunded amount. *Id.*
- Finding 22 indicates that the proposed Santolina development is within the Albuquerque Public Schools district, and notes that the district has not approved any school sites or construction of any schools within the development area. *Id.* In addition, Finding 22 fails to take into account the resolution passed by the Albuquerque Public School Board on March 18, 2015 opposing approval of the Santolina Master Plan.
- Finding 23 asserts without analysis or citation that the request for planned community zoning is consistent with Bernalillo County Resolution 116-86, and alleges (also without any basis) that the request provides an overall development strategy that is intended to result in a cohesive, sustainable community with economic benefits to Bernalillo County. *Id.*
- Finding 24 provides the most extreme example of the Findings' unsupported assertions. It alleges that the request for approval of the Master Plan "is consistent with the health, safety, and general welfare of the residents of Bernalillo County", but it neither explains the basis for that allegation nor cites to the record to support that allegation. *Id.*

With the exception of Finding 19, none of these Findings provides any support in the record for the Board's Approval of the Santolina Master Plan or explains the basis for the Board's Approval of that Plan. For that reason,

in accordance with the requirements established by the New Mexico Court of Appeals, the Board's Approval of the Santolina Master Plan should be vacated.

Finally, it is not clear to the Appellants/Petitioners that the Board of County Commissioners ever voted to adopt these Findings. The June 19, 2015 written decision of the Board County Commissioners only states, "At the June 16, 2015 public hearing, the [Board] approved the request for a Planned Communities Level A Master Plan called the Santolina Master Plan...The decision was based on the following Findings..." R, 86949-86950. Commissioner Johnson moved to approve the Level A Master Plan, as amended by the Board during the June 16, 2015 Special Zoning Meeting, which was seconded by Commissioner Talbert. R, 88309. That motion passed on a 3-2 vote, with Commissioners Hart Stebbins and O'Malley voting no. *Id.* Neither the June 16, 2015 Special Zoning Meeting transcript nor the June 19, 2015 written decision issued by the Board reflect that the Board voted to adopt these 24 findings. R, 88309, 86949-86956. If the Board did not adopt these Findings, then they cannot be cited as support for the Board's Approval of the Santolina Master Plan.

B. The Board's approval of the Santolina Master Plan should be vacated because the Master Plan does not comply with the Planned Communities Criteria.

The second reason that the Board's Decision approving the Master Plan should be vacated is because the Santolina Master Plan violates several requirements of the Bernalillo County Planned Communities Criteria, which govern master plans for developments such as the proposed Santolina development. R, 11736-11865. The Appellants/Petitioners raised this argument before the Board of County Commissioners in their appeal of the Planning Commission's recommendation that Master Plan be approved (which is not in the Record) and orally at a Board of County Commissioners' hearing. R, 87838-87843.

1. The Santolina Master Plan does not provide required information concerning availability of water.

The Planned Communities Criteria make clear that a developer of a proposed planned community must demonstrate the availability of water for the proposed development, including identification of depth to groundwater, proximity to production wells, and documentation of physical and legal availability of water. R,

11790. The Santolina Master Plan provides none of this information. See R, 88817. For that reason, the Board's Decision approving the Master Plan should be vacated. R, 87839-87842.

2. The Santolina Master Plan does not provide required information concerning transportation.

The Planned Communities Criteria require the submission of extensive information concerning transportation, including a comprehensive transportation system, phased analysis of travel demand and supply, and studies supporting the plan. R, 11790. Contrary to these requirements, the Santolina Master Plan contains only general information about proposed transportation plans. See R, 88798-88807 and *compare with* R, 11790.

Additionally, the Santolina Master Plan relies on outdated information. The Master Plan relies upon the 2035 Metropolitan Transportation Plan ("MTP"), which includes a socioeconomic forecast. R, 88804. See also R, 85332. The Master Plan should rely upon the 2040 MTP and its socioeconomic forecast. *Id.* The Mid-Region Metropolitan Planning Organization ("MRMPO") provided comments on the Level A Master Plan to the Board of County Commissioners, in which it advised that the "2040 MTP includes a socioeconomic forecast that is significantly lower than the 2035 MTP. The reduction in expected growth is primarily due to the slowdown in growth and the economy that occurred over the past several years in the Albuquerque metropolitan area." *Id.* MRMPO advised the Board that "the population projection for Santolina was approximately 10 percent lower than what those specific zones held in the 2035 MTP Socioeconomic Forecast." R, 80771.

Because the Santolina Master Plan fails to provide the required information regarding transportation plans, the Board of County Commissioners' decision approving the Master Plan is not in accordance with law.

3. The Santolina Master Plan does not comply with the requirements of the Planned Communities Criteria concerning schools.

The Planned Communities Criteria mandate that a developer provide a "concept plan for provision of schools" R, 11790. Despite that, the Santolina Master Plan provides only very general estimates of the number of schools that will be needed in 2035 and at full build out of the proposed development. R, 88822-88824. The Master Plan also relies upon the support of the Albuquerque Public Schools (APS). Though APS began as a co-

applicant with the Santolina developers in the Master Plan Application (R, 32562), APS no longer supports the Master Plan. R, 40482-40483.

APS notified the Board of County Commissioners on March 23, 2015 of its resolution opposing the Santolina Master Plan “until the issues of school financing, transportation, water and infrastructure have been adequately addressed.” R, 40483. The Appellants/Petitioners also raised these issues during the proceedings held on their appeal of the Planning Commission’s decision recommending that the Board approve the Level A Master Plan. R, 87833, 87842.

Because the Master Plan fails to provide the required information regarding schools, the Board’s decision approving the Master Plan is not in accordance with the Planned Communities Criteria.

4. The proposed Santolina development cannot be developed at no net expense to local government.

The Planned Communities Criteria require that planned communities, such as the proposed Santolina development, be developed at no net expense to local government. R, 11741. However, the Santolina Master Plan’s assertion that the Santolina development can be developed without such net expense is based on unrealistic assumptions (*See* R, 88822 and 11462-11487), and the most credible analysis of the proposed Santolina development indicates that it cannot meet this requirement. *See* R, 48788-48792, 39028-39035, and 40483. The Appellants/Petitioners raised this issue during the Board of County Commissioners’ proceedings regarding their appeal of the Planning Commission’s recommendation that the Board approve the Master Plan. R, 87836, 87838.

For example, the economic analysis relied upon in the Master Plan does not factor in the hundreds of millions of dollars in public school infrastructure necessitated by the Santolina development. R, 48791, 11462-11487. The APS, in its resolution requesting that the Board of County Commissioners deny the Master Plan, stated:

APS finds that the residential development of 37,930 housing units proposed by the Santolina Master Plan would need taxpayer approval of at least \$681 million in today’s dollars for construction of 15 elementary schools, 4 middle schools, and 2 high schools. APS would need approximately 425 acres to develop the 20 schools needed to serve the Santolina development. All this will have to be funded by APS taxpayers (all of Bernalillo County, City of Albuquerque, parts

of Sandoval County). Currently APS taxpayers are funding a capital program in excess of \$1 Billion every 6 years to address a total assessed capital need in excess of \$3 Billion.

R, 40483.

The APS resolution requesting the Board of County Commissioners to deny the Master Plan was provided to the Board on March 23, 2015, before the Board voted to deny the Appellants/Petitioners' appeal of the Planning Commission's recommendation that the Board approve the Master Plan and before the Board voted to approve the Master Plan. R, 40482.

Because the proposed Santolina development cannot be developed with no net expense to local government, as is required under the Planned Communities Criteria, the decision of the Board of County Commissioners approving the Master Plan violates the Planned Communities Criteria. The Board decision to approve the Master Plan based on the finding that "the development will be at no net cost to Bernalillo County" (R, 86950), also is not supported by substantial evidence in the record. *See* R, 48788-48792; 39028-39035; and 40483.

All of these reasons demonstrate that the Board of County Commissioners' decision approving the Santolina Master Plan was contrary to law. This Court therefore should vacate that decision.

VII. The Board's decision denying the Appellants/Petitioners' appeal pertaining to the Santolina Master Plan should be vacated.

All of the reasons cited above for vacating the Board of County Commissioners' decision approving the Santolina Master Plan also indicate that the Court should vacate the Board's decision denying the Appellants/Petitioners' appeal of the Planning Commission's recommendation that the Master Plan be approved. In addition, the Board of County Commissioners' decision denying the Appellants/Petitioners' appeal should be vacated because the Board did not provide any reasons for its decision. (The Appellants/Petitioners were not able to raise this issue before the Board because it arose when the Board made its decision.)

The language in the Board's decision denying the Appellants/Petitioners' appeal pertaining to approval of the Santolina Master Plan states only that "the Board of County Commissioners denied the appeal" R, 86811. As is explained on page 30 above, however, the New Mexico courts have made clear that administrative agencies must

explain the reasons for their decisions. Because the Board provided no reasons at all for this decision, the decision was contrary to law, and it should be vacated.

VIII. Claims for relief

For the reasons outlined above, the Appellants/Petitioners request that the Court:

- A. Vacate the Board of County Commissioners' decision approving the zone map amendment for the proposed Santolina development;
- B. Vacate the Board's decision denying the Appellants/Petitioners' appeal from the Planning Commission's decision approving the zone map amendment;
- C. Vacate the Board's approval of the Development Agreement;
- D. Vacate the Board's decision approving the Santolina Master Plan;
- E. Vacate the Board's decision denying the Appellants/Petitioners' appeal from the Planning Commission's recommendation for approval of the Santolina Master Plan; and
- C. Grant the Appellants/Petitioners such other relief as is appropriate.

Dated: December 21, 2015.

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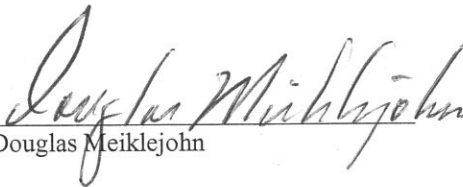
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