BEFORE THE BERNALILLO COUNTY, NEW MEXICO

BOARD OF COUNTY COMMISSIONERS

SOUTHWEST ORGANIZING PROJECT, NEW MEXICO HEALTH EQUITY WORKING GROUP, PAJARITO VILLAGE ASSOCIATION, SOUTH VALLEY COALITION OF NEIGHBORHOOD ASSOCIATIONS, JAVIER BENAVIDEZ, SANTIAGO JAMES MAESTAS, ROBERTO ROIBAL, KRISTINE SUOZZI, MARCIA BEAUREGARD FERNANDEZ, ROD MAHONEY, and DANIEL RICHARD "RIP" NDERSON,

Appellants,

APPEAL NO. COA2017-0001
ORIGINAL CASE NO. SPR2016-0001

v.

BERNALILLO COUNTY PLANNING COMMISSION,

Appellee

RESPONSE IN OPPOSITION TO SANTOLINA DEVELOPERS' MOTION TO REMOVE AND/OR REVISE CONDITIONS #8, #9, AND #11 TO APPROVAL OF THE SANTOLINA LEVEL A COMMUNITY MASTER PLAN

Introduction

The Appellants[1] hereby respond in opposition to the motion to remove and/or revise conditions #8, #9, and #11 to approval of the Santolina Level A Community Master Plan filed by Western Albuquerque Land Holdings, LLC (referred to as "the Santolina Developers" or "the Developers") on March 2, 2017. Although the Santolina Developers have titled their motion as a "Memorandum", it clearly constitutes a motion. The Santolina Developers have requested that

[1] The SouthWest Organizing Project, the New Mexico Health Equity Working Group, the Pajarito Village Association, The South Valley Coalition of Neighborhood Associations, Javier Benavidez, Santiago James Maestas, Roberto Roibal, Kristine Suozzi, Rod Mahoney, Marcia Beauregard Fernandez and Daniel Richard "Rip" Anderson.

the Board of County Commissioners remove and/or revise conditions #8, #9 and #11 to approval of the Santolina Level A Master Plan issued on June 19, 2015. Calling the motion a "Memorandum" does not change the true nature of the Santolina Developers' request.

Factual Background

The Board of County Commissioners voted 3-2 to approve the Santolina Level A Master Plan at the June 16, 2015 special zoning meeting. At this hearing proposed findings and conditions to approval of the Level A Master Plan were discussed and negotiated between County staff, the Commissioners and the Santolina Developers.[2] The Board of County Commissioners issued its written decision of its June 16, 2015 vote on June 19, 2015 ("Board Approval of Level A Master Plan"). These conditions were approved by the Board to ensure that the future Santolina Level B master plan would comply with the Albuquerque/Bernalillo County Comprehensive Plan, the Planned Communities Criteria and other applicable state and county laws.

Condition #8 requires the Santolina Developers to provide a "fully executed development agreement" with the Albuquerque/Bernalillo County Water Utility Authority ("Water Authority") prior to approval of any Level B or Level C document. Board Approval of Level A Master Plan (June 19, 2015). Condition #9 requires the Santolina Developers to provide, prior to approval of any Level B or Level C planning document, "a written explanation of the projected Master Plan water use and phasing and subsequent level plans within the context of the 2024 Water Conservation Plan Goal and Program Update (July 2013) or subsequent updates" based on

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[2] *Board of County Commissioners Hearing Transcript*, TR-8, TR-12 (June 16, 2015). The Developers did not object to Finding #19 or to Conditions #8, #9 and #11 when considered and approved by the Commissioners with a 3-2 vote. *Id.* at TR-33, TR-129-132. The Developers also did not file an appeal of the Board's Level A Master Plan Approval with Findings and Conditions.

the fully executed development agreement with the Water Authority. *Id.* Condition #11 requires the submittal of a fully executed development agreement with the Water Authority before any Level B approval. *Id.* Condition #11 also requires that, "Water and wastewater issues for the Santolina Master Planned Community shall be resolved between the Albuquerque/Bernalillo County Water Utility Authority (ABCWUA) and the applicant prior to any Level B approval." *Id.*

Conditions #8, #9 and #11 were in response to testimony given to the Board of County Commissioners by Executive Director of the Water Authority, Mark Sanchez[3], and to the Water Authority letter to the Planning Commission ("Sanchez Letter"), which stated the following, in pertinent part:

> Water Authority ordinances require that a land use master plan be approved prior to the Water Authority providing service to a master planned community outside its service area. The development agreement will specify the requirements and conditions of service. It is through this agreement that the planned community criteria will be addressed…If the Santolina Level A Master Plan is approved by the Bernalillo County Commission, only then will Water Authority staff proceed in negotiating a draft development agreement with the developer.

Sanchez Letter, ¶¶ 2, 4 (July 29, 2014).

Commissioner O'Malley stated that these conditions were "intended to support the water authority's efforts to reduce overall water use and support good water resources management" and were not intended to "impede the water utility's authority to negotiate in structure[d] development agreements or to induce more stringent requirements as might be proposed by the water authority." Board of County Commissioners Hearing Transcript, TR-132: 24-25, TR-133: 1-6 (June 16, 2015).

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[3] "If there was a Level A Master Plan with all the conditions set forth, we could certainly discuss servicing in the future." Board of County Commissioners Hearing Transcript, TR-79:20-22 (March 25, 2015).

After seven months' notice of these conditions, the Santolina Developers submitted their application for the Level B Master Plan (which later became known as "Level B.1 Master Plan") without the following required documents: 1) a fully executed development agreement with the Albuquerque/Bernalillo County Water Utility Authority, 2) a consequential noise impacts analysis, and 3) a consequential air impacts analysis. *See generally*, Appellants' Appeal of the Bernalillo County Planning Commission Recommendation that the Bernalillo County Board of County Commissioners Approve the Level B.1 Master Plan (January 25, 2017). The Developer also failed to submit required information in its Level B.1 Master Plan application pertaining to water, land use, the "no net expense" requirement, air emissions, government and public services. *Id.*

The County Planning Commission held six hearings on the incomplete Level B.1 Master Plan and voted to recommend approval of the incomplete Level B.1 Master Plan on January 4, 2017, addressing the application's loose ends in its findings and conditions of approval. Planning Commission Hearing Transcript, TR-12: 9-17 (January 4, 2017).[4] The written decision of this vote was issued on January 10, 2017 ("Planning Commission Decision"). The Appellants timely filed an Appeal of the Planning Commission Decision on January 25, 2017 and timely filed a Motion for Deferral of Hearing Set for March 14, 2017 on February 13, 2017.[5]

The Developers untimely filed their appeal of the Planning Commission Decision on March 2, 2017. *See* Appellants' Response in Opposition To and Motion to Dismiss Santolina

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[4] Commissioner Hertel: "...loose ends are part of the findings and conditions?" Ms. VerEecke's response: "Mr. Chair, Commissioner Hertel, that's correct. That's the view of staff".

[5] Appellants made a request to County staff on February 16, 2017 that their Motion for Deferral of Hearing Set for March 14, 2017 be heard at the Board of County Commissioners' hearing set for February 21, 2017. County staff denied that request.

Developers' Appeal to Planning Commission Decision Finding #19 and Conditions #5 and #6 (March 8, 2017). The Developers also filed a Response in Opposition to Appellants Appeal and an Objection to Appellants' Request for Deferral of Hearing Set for March 14, 2017 (March 2, 2017). The Developers assert that they have "complied with all County ordinances, policies, and procedures pertaining to its application" (Developers' Objection to Appellants' Request for Deferral of Hearing Set for March 14, 2017, page 2) yet simultaneously argue to the Board of County Commissioners "impossibility of compliance" (Developers' Motion to Remove and/or Repeal Conditions #8, #9, and #11 to Approval of the Santolina Level A Community Master Plan, pages 2-3) ("Motion").

Argument

I. The Developers' Assertion That the Santolina Master Plans are Legislative Matters is Unpersuasive and is Currently Being Litigated in District Court.

The Developers have argued unpersuasively that both the Santolina Level A Master Plan and Level B.1 Master Plan are legislative matters and therefore the Board of County Commissioners may amend approval conditions of the Santolina Level A Master Plan without adhering to the rules of procedure for quasi-judicial hearings and regular zoning meetings. The Developers' argument is without merit for the following reasons.

A. The Developers' incorrectly assert that Bernalillo County was a "home rule" county at the time of both Level A Master Plan and Level A Development Agreement approvals.

The Developers' erroneously assert that Bernalillo County was a "home rule" county at the time the Board of County Commissioners approved the Level A Master Plan with conditions (June 19, 2015) and entered into a Level A Development Agreement with the Developers (August 2015). Developers' Motion, page 1 (March 2, 2017). "Home rule" municipalities or counties may enter into development agreements only if it is not expressly denied "by general

law or charter" and the municipality or county grants itself the authority to do so through passage of an ordinance. N.M. Constitution, Article X, §10(D); New Mexico Attorney General Opinion 02-02. The Bernalillo County Home Rule Urban County Charter approved by voters in the November 2016 general election took effect on January 1, 2017. Additionally, no ordinance has been passed authorizing Bernalillo County to enter into development agreements such as the Santolina Level A Development Agreement. Therefore, the Board of County Commissioners still has no authority to enter into development agreements for planned communities such as Santolina.[6]

B. The Developers have failed to provide legal authority for their assertion that proceedings concerning master plans are legislative matters. Decisions of the Supreme Court confirm that the Level A Master Plan proceedings were quasi-judicial proceedings and not legislative proceedings.

The Appellants are not aware of any New Mexico court decisions addressing directly whether a county commission's approval of a master plan, such as that proposed for the Santolina development, constitutes a quasi-judicial decision or is a legislative action. However, the New Mexico Supreme Court's explanation of the difference between zoning actions that are quasi-judicial and those that are legislative in nature indicates that the proceedings concerning the Santolina Level A Master Plan were 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

[6] The issue of whether the Board of County Commissioners had authority to enter into a development agreement with the Santolina Developers is currently being litigated in District Court.

> 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).*

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* 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 Level A proceedings conducted by the Board of County Commissioners indicates that the proceedings were quasi-judicial. The Board reviewed facts and evidence pertaining to the Level A Master Plan, the Board considered the rights of individual parties affected by the Level A Master Plan, the Level A Master Plan was evaluated pursuant to existing requirements and legal standards, and the Board's Level A Master Plan proceedings were conducted in a quasi-judicial manner (each of the Board's hearings were recorded by a court reporter, all of the individuals who intended to speak were sworn in as

witnesses, time was allocated for presentations addressing the Level A Master Plan by County Planning Staff, the applicant, and by those who opposed the Level A Master Plan).

C. The Developers' assertion that Board of County Commissioners' Rules of Procedure for quasi-judicial hearings and regular zoning meetings confirm that master plan proceedings are legislative matters is unpersuasive.

The second faulty assertion relied upon by the Developers for their position that proceedings concerning Santolina Level A and Level B.1 Master Plans are legislative is that the Board of County Commissioners' Rules of Procedure indicate that consideration of the Santolina Master Plans are legislative. Developers' Motion, page 1 (March 2, 2017). The Board's Rules of Procedure do not trump the rulings of the State Supreme Court and Court of Appeals. If there is a conflict between the Board's Rules of Procedure and the rulings of those Courts, the rulings of those Courts govern.

D. The Developers' assertion that Bernalillo County Attorney statements confirming that proceedings addressing the Santolina Master Plans are legislative is unpersuasive.

The third faulty assertion relied upon by Developers for their position that the proceedings addressing the Level A Master Plan were legislative is that the County attorney confirmed "on multiple occasions during the course of the County Commission consideration of the Santolina Level A Community Master Plan" that the proceedings were legislative. *Id.* The County Attorney's opinion is not binding law. Neither the County Attorney nor the Developers cite to any legal authority in support of this position. Furthermore, opinions of the County Attorney do not trump the rulings of the State Supreme Court or Court of Appeals. If there is a conflict between the County Attorney's opinion and the rulings of those Courts, the rulings of those Courts govern.

E. The issue of whether Santolina master plan proceedings are a quasi-judicial or legislative matter is currently before the Second Judicial District Court.

The Appellants have appealed the Board of County Commissioners' Decision approving the Level A Master Plan to the District Court for the Second Judicial District. That appeal (case number D-202-CV-2015-04466, consolidated with number D-202-CV-2015-05363) is still pending in the Second Judicial District Court, and the Court has not indicated a date by which the parties may expect a ruling on the Appellants' challenge. The issue of whether Santolina master plans are quasi-judicial or legislative proceedings is currently being litigated in the Second Judicial District. For that reason, if the District Court grants the relief requested by the Appellants and reverses the Board of County Commissioners' Decision approving the Level A Master Plan (which include Conditions #8, #9 and #11), any Board decision removing and/or revising its Level A Master Plan approval would be invalidated and any Board decision approving the Level B.1 Master Plan would be invalidated.

The Board of County Commissioners therefore should defer its consideration of the Developers' Motion and consideration of the Level B.1 Master Plan until the validity of the Level A Master Plan, Level A Zone Map Amendment and the Level A Development Agreement, along with approvals of such instruments, is finally resolved by the District Court. *See* Appellants' Motion for Deferral of Hearing Set for March 14, 2017 (February 13, 2017).

II. The Developers' Assertion That Conditions #8, #9 and #11 of the Level A Master Plan Approval Are Not Necessary is Unpersuasive.

The Developers have mischaracterized both the Level A Master Plan process and the Level B.1 Master Plan process in support of their Motion. Additionally, the Developers have unpersuasively argued that Conditions #8, #9 and #11 are not necessary for the following reasons.

A. The Level A Master Plan Process.

The Developers' mischaracterization of the Level A Master Plan process relies on testimony given by a Mr. Alan Porter, with the Water Authority, at the Planning Commission May 28, 2014 hearing. Developers' Motion, page 3 (March 2, 2017) ("The level of detail needed for the Development Agreement is usually not provided until the planning process advances to level 2 or level B status"). This testimony is contradicted by the Water Authority's formal letter to the Planning Commission, in pertinent part:

> Water Authority ordinances require that a land use master plan be approved prior to the Water Authority providing service to a master planned community outside its service area. The development agreement will specify the requirements and conditions of service. It is through this agreement that the planned community criteria will be addressed...**If the Santolina Level A Master Plan is approved by the Bernalillo County Commission, only then will Water Authority staff proceed in negotiating a draft development agreement with the developer.**

Water Authority letter to the Planning Commissioners (July 29, 2014) ("Sanchez Letter") (emphasis added). This letter indicates that the Water Authority staff did not feel that they had to wait until Board approval of a Level B master plan to proceed with negotiating a draft development agreement with the Santolina developers.

Furthermore, Executive Director of the Water Authority, Mike Sanchez, later testified before the Board of County Commissioners that, "If there was a Level A Master Plan with all the conditions set forth, we could certainly discuss servicing in the future." Board of County Commissioners Hearing Transcript, TR-79:20-22 (March 25, 2015). This statement indicates that the Water Authority staff did not feel that they had to wait until the Board approved a Level B Master Plan to begin drafting a development agreement with the Santolina Developers.

Conditions #8, #9 and #11 for approval of the Level A Master Plan were clearly in response to this Water Authority letter to the Planning Commission, to testimony provided by the

Water Authority executive director, as well as to Planned Communities Criteria for Level B phase of development.

B. The Level B.1 Master Plan Process

The Developers also mischaracterize the Level B.1 Master Plan process by claiming that a draft water development agreement was provided to the Water Authority for review and discussion on June 10, 2016. Developers' Motion, page 3 (March 2, 2017) (citing to Exhibit A, letter from John P. Salazar to Charles Kolberg, attorney for the Water Authority). Developers have failed to provide a copy of this alleged draft development agreement with the Water Authority in Exhibit A of its Motion and have failed to cite to the record in support of this assertion. The record does not reflect that a draft development agreement with the Water Authority was provided to either the Water Authority or the Planning Commission for their review and consideration.

Furthermore, Water Authority Chief Executive Director, John Stomp, testified to the Planning Commission that the Level B.1 Master Plan contained "enough specifics" sufficient for the Water Authority to make a decision on a development agreement for the proposed Santolina Development. Planning Commission Hearing Transcript, TR-108: 5-25 (November 2, 2016). This indicates that the Water Authority does not have to wait until Board approval of the Level B.1 Master Plan to begin drafting a development agreement with the Santolina Developers. The Water Authority staff has represented that it already has the information necessary to begin drafting a development agreement.

C. The Developers' request to remove and/or revise Conditions #8, #9 and #11 will violate the Planned Communities Criteria Level B requirements.

As previously stated, the conditions of approval for the Level A Master Plan were adopted by the Board of County Commissioners in an effort to ensure that the future Level B

Master Plan would comply with the Albuquerque/Bernalillo County Comprehensive Plan, the Planned Communities Criteria, and other applicable state and county laws. The Planned Communities Criteria require developers to submit facilities plans for water systems, sewer systems and drainage systems, as well as statements of water availability and availability of public services, including liquid and solid waste services at the Level B phase of development. Planned Communities Criteria, page 39.

Conditions of approval #8, #9 and #11 specifically deal with the Planned Communities Criteria Level B requirements pertaining to water availability and serviceability, and water, sewer and drainage systems. If the Board grants the Developers' requested relief and removes these conditions entirely or revise these conditions to defer compliance until after Level B Master Plan approval, but before a Level C plan is approved, such relief would violate the Planned Communities Criteria for Level B master plans.

Regardless of any conditions of approval the Board of County Commissioners may impose, the Developers are still required to provide facilities plans for water systems, sewer systems and drainage systems, as well as statements of water availability and availability of public services, including liquid and solid waste services at the Level B phase of development pursuant to the Planned Communities Criteria. Planned Communities Criteria, page 39.

Conditions of Approval for the Level A Master Plan do not trump the Planned Communities Criteria. When there is a conflict between conditions of approval for a master plan and the Planned Communities Criteria, the Planned Communities Criteria govern.

Furthermore, the Developers cannot provide the required detailed facilities plans for water, sewer and drainage systems until a fully executed development agreement with the Water Authority is in place. The Developers also cannot provide statements of water availability and

availability of liquid and solid waste services until a fully executed development agreement is in place. One reason for this is because the Water Utility development agreement will provide the detailed timing, phasing, location, availability, responsibilities, and maintenance of water, sewer and drainage systems.

D. The Developers' assertion that no development can take place until after a Level C plan, therefore no harm will result in delaying the Level B requirement for a development agreement with the Water Authority until the Level C phase of development, is unpersuasive.

The Developers' faulty assertion that no harm will result by deferring the requirement of a Water Authority development agreement from a Level B approval to a Level C approval because the Planned Communities Criteria provides "no development can take place until after a Level C plan has been approved" is incorrect and without supporting legal authority. The Planned Communities Criteria do not prohibit the Developers from building until after Level C approvals. *See generally*, Planned Communities Criteria. The Level A Development Agreement also permits the issuance of building permits before all level master plans and development agreements are approved. *See* Sections 6.10 (Existing Special Use Permits/Certain Interim Uses) *and* 11.15 (Amendment) of the Level A Development Agreement (August 10, 2015).

The Developers made this argument, and failed, in the proceedings before the District Court. Developers' Motion to Dismiss for Lack of Ripeness (November 2, 2015) and the Judge's April 28, 2016 Order finding Appellants' appeals of the Santolina Level A Master Plan and Santolina Zone Map Amendment ripe for judicial review.

E. The Developers' assertion that the 2012 Addendum to the Planned Communities Criteria either repealed or amended the Planned Communities Criteria to no longer require submittal of information pertaining to water is without merit.

The Developers unpersuasively argue that the creation of the Water Authority either repeals or amends by implication the Planned Communities Criteria requirements pertaining to water for all levels of development and, therefore, the Developers are no longer required to provide any information pertaining to water in any of their Santolina master plans. Developers' Motion, page 6 (March 2, 2017) and Developers' Response to Appellants Appeal of Planning Commission Decision, pages 5-6 (March 2, 2017). This assertion is without merit for two reasons.

First, the 2012 Addendum to the Planned Communities Criteria, on its face, does not say that the creation of the Water Authority repeals or amends the Planned Communities Criteria requirements pertaining to water for all levels of development phasing. The Addendum merely acknowledges that the Water Authority was established since the initial adoption of the Planned Communities Criteria in 1990. Addendum to the Planned Communities Criteria (May 22, 2012). Attorney for the Santolina Developers, John Salazar, even conceded that it was unclear that the 2012 Addendum is an amendment.[7]

Second, New Mexico Courts do not favor repeal or amendment by implication. *State v. Trung Ho*, 2014-NMCA-038, 12 (2014); *Johnston v. Bd. of Educ. of Portales Mun. Sch. Dist. No. 1*, 1958-NMSC-141, 34 (1958); *First Baptist Church of Roswell v. Yates Petroleum Corp.*, 2015-NMSC-004, 22 (2015). Therefore, the Santolina Developers are still required to comply

[7] Mr. Salazar stated, "And it's not clear. It appears to be an amendment to the Planned Communities Criteria, but I can't tell you I know for a fact". Board of County Commissioners Hearing Transcript, TR-143: 22-24 (May 11, 2015).

with the Planned Communities Criteria requirements pertaining to water for all phases of development.

F. The Developers' assertion that the Albuquerque/Bernalillo County Water Utility Authority is obligated to provide water to the proposed Santolina development is without merit.

The Developers rely on a "County-Water Authority Franchise and Right-of-Way Agreement, fully executed as of June 27, 2006" ("Franchise Agreement") in their erroneous assertion that the Water Authority "has an obligation to provide water" to the proposed Santolina Development. The Appellants requested this Franchise Agreement from County Staff on March 7, 2017, in order to properly respond to this assertion within the extremely limited three-day response time permitted by County staff. County staff has failed to provide this Franchise Agreement to Appellants and such agreement is not publically available.

However, the Water Authority enabling statute, Section 72-1-10 NMSA, does not mandate that the Water Authority must provide water to every potential user of water within Bernalillo County, both within corporate limits of the County and within the unincorporated area of the County. The Water Authority has discretion to determine its water availability and capability of service. *Id.* In the event that this Franchise Agreement does in fact conflict with Section 72-1-10 NMSA, state law prevails over the Franchise Agreement.

G. The Developers' assertion that the Albuquerque/Bernalillo County Water Utility Authority has provided statements of water availability and serviceability for the proposed Santolina development is incorrect.

The Developers incorrectly argue that the Water Authority has made representations regarding availability and serviceability of water for the proposed Santolina development through their faulty reliance on the July 29, 2014 Water Authority letter to the Planning Commission ("Sanchez Letter") and on the testimony of the Water Authority's Chief Executive

Officer, John Stomp, given at the November 2, 2016 Planning Commission hearing. In fact, however, the letter in question does not indicate any such commitment by the Water Authority, nor does the letter indicate that either water rights or water are available.

The only positive statement in the letter, which is from Water Authority Executive Director Mark Sanchez, states that, "The Water Authority is capable of serving the master planned community." Sanchez letter, ¶1. However, the letter indicates clearly at several points that the Water Authority's capability to provide service is not guaranteed.

The letter states:

> [S]ervice will be contingent upon the Santolina developer's ability to comply with the Water Authority's current guidelines, policies and ordinances, as amended from time to time.
>
> ...
>
> If the CPC decides to recommend approval of the master plan [Level A Master Plan], the Water Authority recommends that the CPC provide conditional approval which requires that the developer successfully execute a development agreement with the Water Authority for the Santolina Master Plan.
>
> ...
>
> In order for Santolina to be served by the Water Authority, the developer will need to provide significant infrastructure improvements, and the expansion will need to occur at no net expense to the existing ratepayers.

Sanchez letter, ¶¶1-3.

Executive Director Sanchez further testified before the Board of County Commissioners that, "With regard to the letter which was sent to the CPC, I think it was taken a little out of context. It's been represented that we either endorsed it or committed service, neither of which is the case." Board of County Commissioners Hearing Transcript, TR-69: 3-7 (March 25, 2015). There is therefore no merit to the Developers' assertion that the Water Authority has made representations of availability and serviceability for the proposed Santolina development.

Moreover, the Water Authority's ability to make any such guarantees is very limited for three reasons. The first is that the Water Authority has no legal authority to grant the Santolina

development water rights. The only entity in New Mexico that can approve the use of water for a specific purpose (such as a proposed development) is the New Mexico State Engineer. *See* NMSA 1978 §74-9-2. The second is that the Water Authority does not have the water rights to supply the proposed development. The third is that existing consumptive uses of water in the Middle Rio Grande exceed the legally available supply.

Norm Gaume, former director of the New Mexico Interstate Stream Commission and expert in the matters of the Albuquerque metropolitan area's water supplies and the water supplies legally available within the Middle Rio Grande as limited by the Rio Grande Compact, raised the issues of water rights and legally available supply of Middle Rio Grande water during the Board of County Commissioners' Level A Master Plan proceedings. *See* Norm Gaume Written Testimony for May 11, 2015 Board of County Commissioners Hearing (May 17, 2015).

Finally, the Water Authority's Chief Executive Officer, John Stomp, testimony relied upon by the Developers establishes that the Water Authority has not yet made a statement of water availability and serviceability for the proposed Santolina development and, in fact, may not do so. Developers' Motion, page 7 (March 2, 2017). Mr. Stomp testified that how water is allocated "will be up to our Board and at the discretion of our Board." *Id.* (citing to Planning Commission November 2, 2016 Hearing Transcript, TR-102: 13-14). Mr. Stomp also testified that the July 29, 2014 Water Authority letter ("Sanchez Letter") was, "[a] statement of capability. It was not a statement of service." Planning Commission Hearing Transcript, TR-101: 10-13 (November 2, 2016).

H. The Developers' assertion that the proposed Santolina Development should not be treated differently than Mesa del Sol is without merit.

Sections 4-38-1 through 4-38-42 NMSA established the creation of boards of county commissioners. Section 4-38-1 NMSA states, in pertinent part, "The powers of a county as a

body politic and corporate shall be exercised by a board of county commissioners." The Board of County Commissioners is authorized to promulgate its own rules, procedures and ordinances that may impose conditions on the proposed Santolina Development that were not imposed by the Albuquerque City Council in that entity's procedures for the Mesa del Sol master planned community. *Id.* The Bernalillo County Board of County Commissioners is not bound by the rules and procedures of the Albuquerque City Council, a separate political entity. *Id.*

The Developers provide no legal authority for their assertion that, "Santolina should not be treated differently than Mesa del Sol". Developers' Motion, page 7 (March 2, 2017).

III. The Developers' Assertion that it is Necessary to Remove or Revise Conditions #8, #9 and #11 of the Level A Master Plan Approval is Unpersuasive.

A. There is no conflict between Conditions #8, #9 and #11 of the Level A Master Plan Approval and the Level A Development Agreement.

The Developers' unpersuasively argue that Conditions #8, #9 and #11 conflict with Section 6.2.5 of the Level A Development Agreement and therefore must be removed or revised. Developers' Motion, page 8 (March 2, 2017). Section 6.2.5 of the Level A Development Agreement provides, in pertinent part, the following:

> If the Authority provides water and sewer service for the Project, the Owner will enter into a separate development agreement with the Authority concerning the terms of providing such water and sewer service to the Project. All matters associated with water and sewer infrastructure for the Project shall be resolved solely between Owner and the Authority. The County will not promote, support or enact any ordinance, legislation or policy that interferes with and/or restricts the Owner's use of the Authority's water and sewer infrastructure and/or agreements between the Owner and Authority, as long as that use does not diminish or otherwise negatively affect current County water or sewer service.

Santolina Level A Development Agreement, page 7 (August 10, 2015).

Conditions #8, #9 and #11 affirm and implement the requirement of a Water Authority development agreement if the Water Authority provides water and sewer service for the Project

(*See* Conditions #8 and #9). These conditions also affirm and implement the requirement that all matters associated with water and sewer infrastructure for the Project be resolved solely between the Owner and the Authority (See Condition #11). These conditions clearly do not conflict with Section 6.2.5 of the Level A Development Agreement. Therefore, it is not necessary to remove or revise Conditions #8, #9 and #11.

Conclusion

For the above stated reasons, the Board of County Commissioners should deny the Developers' Motion to Remove and/or Revise Conditions #8, #9 and #11 to the Approval for the Level A Master Plan.

Dated: March 8, 2017.

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Certificate of Service

I certify that on March 8, 2017 copies of this "Response in Opposition To WAHL's Motion to Remove and/or Revise Conditions of Approval for Level A Master Plan" were sent by electronic mail to:

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