

BEFORE THE COUNTY PLANNING COMMISSION

BERNALILLO COUNTY, NEW MEXICO

PERMIT NO: ASPR2017-0003

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

Introduction

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 (referred to collectively as "the Community Representatives") hereby oppose the application filed by Consensus Planning and Western Albuquerque Land Holdings ("WALH" or "the Santolina Developers") to remove and/or revise conditions #8, #9, and #11 to the Bernalillo County Board of County Commissioners' decision approving the Santolina Level A Master Plan ("Santolina Level A Master Plan Decision"). The Community Representatives' opposition is based on the following six reasons.

First, conditions #8, #9, and #11 are necessary to ensure that the Santolina Developers comply with the Bernalillo County Planned Communities Criteria (the

“Planned Communities Criteria”) requirements for demonstrating that the Developers will have water for the proposed development.

Second, despite the Santolina Developers’ assertions to the contrary, it is not clear that the Albuquerque/Bernalillo County Water Utility Authority (“Water Authority”) will not enter into a development agreement with the Santolina Developers until after the Santolina Developers’ Level B.1 Community Master Plan (the “Level B.1 Master Plan”) has been approved. There is therefore no merit to the Developers’ argument that a development agreement with the Water Authority cannot be considered until after a Level B.1 Master Plan is approved by the Board of County Commissioners.

Third, there is no merit to the Santolina Developers’ assertion that the Water Authority is obligated to provide the proposed Santolina development with water pursuant to the June 27, 2006 “County-Water Authority Franchise and Right-of-Way Agreement”.

Fourth, there is no merit to the Santolina Developers’ assertion that the 2012 Addendum to the Planned Communities Criteria either repealed or amended the Planned Communities Criteria to no longer require submittal of information pertaining to water.

Fifth, there is no merit to the Santolina Developers’ assertion that the Board of County Commissioners must follow the same procedure for the proposed

Santolina development as the City of Albuquerque followed for the Mesa del Sol development.

Sixth, the elimination of conditions #8, #9, and #11 would mean that both members of the public and the Board of County Commissioners would not be able to participate in Bernalillo County's determination of whether there is adequate water for Santolina because that determination would be made by the Bernalillo County Development Review Authority.

Factual Background

The Board of County Commissioners issued its written decision approving the Santolina Level A Community Master Plan (the "Santolina Level A Master Plan"), with findings and conditions of approval, on June 19, 2015 ("Board of County Commissioners Approval of Level A Master Plan"). These conditions were approved by the Board to ensure that the future Santolina Level B.1 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 of County Commissioners 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 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.*

The Board of County Commissioners adopted Conditions #8, #9 and #11 in response to testimony given to the Board by Mark Sanchez, the Executive Director of the Water Utility Authority, and in response to the letter dated July 29, 2014 that he provided to the Bernalillo County Planning Commission (“Planning Commission”). At the Board’s March 25, 2015 hearing, Mr. Sanchez stated 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).

Similarly, in his letter of July 29, 2014, Mr. Sanchez 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); emphasis added.

Seven months after receiving 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”). That application did not include a fully executed development agreement with the Water Authority or any explanation as to the reasons why no such development agreement was included.

The 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. Planning Commission Hearing Transcript, TR-12: 9-17 (January 4, 2017) (“the Planning Commission’s Decision”). Agent for the Santolina Developer, Mr. Strozier, advised the Planning Commission of the Developers’ agreement with the proposed findings and conditions to the Planning Commission’s decision. Mr. Strozier stated, in pertinent part, the following:

We – once again, we are in agreement with that – with this moving forward. We have reviewed – I think that’s – those changes are good, and so we are – we are certainly in agreement with the revised language to, I believe, it was conditions 5 and 6 that is being – that is being presented for your consideration....

Planning Commission Hearing Transcript, TR-63: 15-24 (January 4, 2017).

The written decision of the Planning Commission's January 4, 2017 vote was issued on January 10, 2017 ("Planning Commission Decision"). The Community Representatives ("Appellants") filed an Appeal of the Planning Commission Decision on January 25, 2017 and filed a Motion for Deferral of Hearing Set for March 14, 2017 on February 13, 2017. Both the Appeal and the Motion were filed in a timely manner.

In contrast, the Developers filed an appeal of the Planning Commission Decision on March 2, 2017, more than two months after such an appeal was due. *See* Appellants' Response in Opposition To and Motion to Dismiss Santolina 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), as well as a motion to remove and/or revise Conditions #8, #9, and #11 to approval of the Santolina Level A Community Master Plan. *See* Appellants' 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.

Argument

I. THE ELIMINATION OF CONDITIONS #8, #9, and #11 WOULD MEAN THAT THE SANTOLINA DEVELOPERS WOULD VIOLATE THE PLANNED COMMUNITIES CRITERIA REQUIREMENTS ADDRESSING WATER FOR THE PROPOSED SANTOLINA DEVELOPMENT.

- A. *Removal of Conditions #8, #9, and #11 would violate the Planned Communities Criteria requirements for approval of a Level B master plan.*

The Planned Communities Criteria for Level B address the need for the Santolina Developers to provide information about the availability and use of water in two different ways. The first is in subsection D.2 of the requirements for a Level B master plan. It states that an application for approval of such a plan must include:

2. Facilities plan including detailed location, phasing of water systems, sewer systems, drainage systems, and mobility systems.

Planned Communities Criteria, page 39.

The second requirement is in subsection D.4 of the Planned Communities Criteria requirements for Level B master plans. It provides that an application for approval of a Level B master plan shall provide:

4. Statements of water availability and availability of public services including liquid and solid waste management/recycling, cultural and human service facilities, fire and police protection, transit services, and schools.

Id.

The Board of County Commissioners imposed Conditions #8, #9, and #11 in order to mandate that the Santolina Level B.1 Master Plan meet the requirements of these two subsections of the Planned Communities Criteria. The Board sought to mandate that the Santolina Developers' Level B.1 Master Plan would provide the necessary information through a development agreement with the Water Authority. Such a development agreement should address water systems, sewer systems, and drainage systems, as well as water availability. *See* Santolina Level A Master Plan Decision Condition #8.

Without a development agreement with the Water Authority, the incomplete Santolina Level B.1 Master Plan and supporting technical documents merely provide the Planning Commission with conceptual water, sewer and drainage plans. The Developers concede that, "It is understood by all parties that the current planning of the Santolina Master Plan water system is conceptual only and has not yet been adopted by the ABCWUA [Water Authority]". Santolina Level B.1 Master Plan, page 63. The Developers further concede that they have only prepared a "conceptual Water and Sanitary Sewer Master Plan." Water & Sanitary Sewer Master Plan, page 12 (January 25, 2016); Santolina Level B.1 Master Plan, page 68. Additionally, the Revised Drainage (storm water) Master Plan and Terrain Management Plan submitted to the Planning Commission on November 2, 2016 also admits it is merely a conceptual plan. Santolina Level B.1 Master Plan,

page 55, citing to Exhibit 14, “Stormwater Management Plan, 2025” and Exhibit 15, “Stormwater Management Plan, Full Buildout”.

Providing a conceptual facilities plan, which fails to include detailed location and phasing of water, sewer, and drainage systems, does not comply with the Planned Communities Criteria. Additionally, deferring the submission of such required information to the Level C phase of development, as requested by WAHL, does not comply with the Planned Communities Criteria.

The Planning Commission ultimately decided to recommend to the Board of County Commissioners approval of the incomplete Level B.1 Master Plan without ever seeing even a draft Water Authority development agreement¹ and without requiring detailed facilities plans that include detailed location and phasing of water, sewer, and drainage systems, in violation of the Planned Communities Criteria. The Planning Commission found that, in pertinent part:

The Santolina Level B.1 Master Plan with the attached conditions of approval demonstrates *substantial consistency* with the Planned Communities Criteria in the areas of Land Use, Transportation, Environment and Open Space, and Government and Public Service.

Planning Commission Decision, Finding #7, emphasis added.

However, the Planned Communities Criteria do not permit “substantial consistency” with their criteria; they require absolute consistency. The Planned

¹ Appellants have attached the draft development agreement submitted by WAHL to the Water Authority as Exhibit A.

Communities Criteria also do not permit satisfaction of its Level B criteria through the application of future “conditions of approval.” *See* Planning Commission Decision, Conditions #4-6; *See generally*, Planned Communities Criteria, pages 38-40.

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 mandate 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 detailed 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. 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.

Removal of these Conditions or deferral of them until after approval of the Santolina Level B.1 Master Plan would violate the Planned Communities Criteria for Level B master plans. Additionally, regardless of any conditions of approval the Board of County Commissioners may impose, the Santolina Developers are still required to provide detailed 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. Moreover, if there is a conflict between conditions of approval for a master plan and the Planned Communities Criteria, the Planned Communities Criteria govern.

Finally, the Santolina 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 Authority development agreement will provide the detailed timing, phasing, location, availability, responsibilities, and maintenance of water, sewer and drainage systems. Santolina Level B.1 Master Plan, pages 63.

(“The key elements of this Development Agreement include: Development commitment that complies with ABCWUA [Water Authority] existing guidelines, policies and current levels of service; [r]esidential, industrial and commercial water conservation provisions, guidelines and standards; [i]nfrastructure improvements, storage, water supply charges; [t]iming, phasing, responsibilities and maintenance of water facilities.”).

The Bernalillo County Interim Director for Infrastructure Planning and Geo-Resources, Mr. McGregor, explained to the Planning Commission the importance and necessity of Planning Commission review of the Water Utility Authority development agreement:

Without a development agreement and without the associated serviceability statement, which outlines the specific water and sanitary sewer improvement needed to serve the entire development and the Level B plan, then the planned community criteria for a detailed plan including detailed location, phasing of water systems, sewer systems, drainage systems, and mobility systems cannot have been satisfied, nor can the requirement for statements of water availability and availability of public services, including liquid waste, have been – have been adequately addressed either.

Planning Commission Hearing, TR-66:17-25; TR-67: lines 1-2 (July 21, 2016).

For these reasons, the Planning Commission should recommend denial of the Santolina Developers' application for removal and/or revision of Conditions #8, #9, and #11.

B. Removal and/or revision of Conditions #8, #9, and #11 would exacerbate the Board of County Commissioners' violation of the Planned Communities Criteria requirements for approval of the Santolina Level A Master Plan.

The Santolina Developers' Level A Master Plan approved by the Board of County Commissioners did not comply with the Planned Communities Criteria requirements for Level A master plans pertaining to water.² Removal of Conditions #8, #9 and #11 therefore would exacerbate the Board's current

² This violation of the Planned Communities Criteria by the Board of County Commissioners is currently being litigated in the Second Judicial District Court case D-202-CV-2015-04466.

violation of the Planned Communities Criteria requirements for Level A master plans by causing further violations of the Planned Communities Criteria requirements for Level B master plans.

1. The Board of County Commissioners erroneously approved the Santolina Level A Master Plan despite its failure to demonstrate that there will be water for the proposed development.

The Planned Communities Criteria make clear that a developer of a proposed planned community must provide documentation of physical and legal water availability for the proposed development at Level A planning. Section 5 of the Planned Communities Criteria provides:

C. Environment and Open Space

6. Identification of depth to groundwater and proximity to production wells; documentation of physical and legal water availability, quantity and quality (existing data).

The Santolina Level A Master Plan failed to comply with this requirement for several reasons. First, the Plan contained none of this information. Second, the Santolina Developers purported to comply with these requirements by asserting that the Water Authority has agreed to provide water for the proposed Santolina development, but that is not correct. The Water Authority letter cited by both the Level A Master Plan and the Level B.1 Master Plan does not indicate that either water rights or water are available. In addition, the Water Authority has no

authority to approve water rights, and the Water Authority's own documents indicate that water is not available.

There is no information in the Santolina Level A Master Plan addressing any of the items required by this subsection. The Level A Master Plan provides nothing about depth to groundwater, proximity to production wells, physical or legal water availability, or quantity or quality of water. There simply is no information about any of those subjects in the Level A Master Plan. Instead, the Level A Master Plan asserts that the Water Authority has committed to providing water for the proposed development. That assertion is not accurate.

The Santolina Level A Master Plan purports to comply with the requirement that water and water rights be available by stating that:

The ABCWUA [Albuquerque Bernalillo County Water Utility Authority] has provided a letter dated July 29, 2014, indicating they have the capability and capacity to serve the Santolina Master Plan as it develops over its 40-50 year buildout.

Santolina Level A Master Plan, page 65 (December 1, 2014).

In fact, however, that is not what was stated in the letter from the Water Authority to which the Level A Master Plan refers. 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 (July 29, 2014). 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' current guidelines, policies and ordinances, as amended from time to time.

...

If the CPC decides to recommend approval of the 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 (July 29, 2014).

Moreover, Mr. Sanchez testified later that the letter "was taken a little out of context" and that the Water Authority had not "committed service" for the proposed Santolina development. Testimony of Mark Sanchez at the Board of County Commissioners' hearing, Hearing Transcript, TR- 69 (March 25, 2015). This was confirmed by the testimony of Allen Porter, an official with the Utility Planning section of the Water Authority. He told the County Planning Commission that:

It's very important to note that the terms of this Development Agreement are going to include for them [the Santolina Developers] to bring their own water to be used in their development.

Testimony of Allen Porter at County Planning Commission hearing, Hearing Transcript, TR-31 (May 28, 2014).

There is therefore no merit to the Santolina Level A Master Plan's assertion that the Water Authority has stated that it will provide water for the proposed development.

Moreover, the Water Authority's ability to make any such guarantees is very limited for two 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, Section 74-9-2; *See also* NMSA 1978, Section 47-6-11.2.

The second is that the Water Authority's own 2007 Water Resources Management Strategy³, which was in effect at the time of the Board's approval of the Level A Master Plan, indicates that new developments such as Santolina that are outside of the current Water Authority service area must either provide their own water rights or provide funding with which to acquire water rights. Section L of that Strategy states as a recommendation that:

The [Water] Authority should continue the current no-net-expense policy. Developments outside of the service area should provide

³ Appellants have attached the 2007 Water Resources Management Strategy, Section L as Exhibit B.

water rights or funding for the purchase of new water rights as a condition of service in accordance with the no-net-expense policy.

The Board of County Commissioners therefore erred by approving the Santolina Level A Master Plan because the Santolina Developers did not demonstrate that they have water or water rights for the proposed development.

2. Removal of Conditions #8, #9, and #11 would exacerbate the Board of County Commissioners' erroneous approval of the Santolina Level A Master Plan by causing further violations of the Planned Communities Criteria requirements for Level B master plans.

Despite the Board of County Commissioners' erroneous approval of the Santolina Level A Master Plan, Conditions #8, #9, and #11 would mandate compliance with the Planned Communities Criteria requirements for Level B master plans by ensuring that there will be water and facilities and services using water for the proposed development. Condition #8 states:

Prior to approval of any Level B or Level C planning document, the applicant will provide a fully executed development agreement with the ABCWUA [Water Utility Authority]. The development agreement should be structured to ensure compliance with ABCWUA's existing guidelines, policies, and ordinances and as may be amended from time to time. The development agreement should, at a minimum, address residential, industrial, institutional and commercial water conservation provisions, guidelines, and design standards. The development agreement should, at a minimum address infrastructure improvements, direct and indirect potable reuse, and water supply charges, as well as provide a Phasing Plan consistent with ABCWUA policies. This condition shall in no way constrain the ABCWUA from imposing such requirements as it may deem necessary.

Santolina Level A Master Plan Decision (June 19, 2015).

Condition #9 provides:

Prior to approval of any Level B or Level C document, the applicant shall, based on the approved ABCWUA development agreement, provide to the County a written explanation of the Projected Master Plan water use and phasing and the subsequent level plans within the context of the 2024 Water Conservation Plan Goal and Program Update (July 2013) or subsequent updates.

Id.

Finally, Condition #11 states:

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. An agreement between the applicant and ABCWUA regarding timing, responsibilities, and maintenance of water and sewer facilities required to service Santolina will be developed and agreed upon prior to any Level B approval.

Id.

The effect of these three Conditions is to mandate compliance with the Planned Communities Criteria requirements for approval of Level B master plans and to ensure that there will be water for the proposed Santolina development if it is approved. Without those three Conditions, there would be nothing to guarantee that there will be water for the proposed development because there is nothing in the record in this matter to support the Board of County Commissioners' erroneous determination that the Santolina Developers demonstrated that they will have the necessary water and water rights.

Removal of Conditions #8, #9, and #11 therefore would exacerbate the error committed by the Board of County Commissioners and allow the proposed Santolina development to proceed without water or water rights.

II. THE WATER AUTHORITY HAS NOT INDICATED THAT IT WILL NOT ENTER INTO A DEVELOPMENT AGREEMENT WITH THE SANTOLINA DEVELOPERS UNTIL AFTER BOARD APPROVAL OF THE SANTOLINA LEVEL B.1 MASTER PLAN.

The Santolina Developers have asserted that the Water Authority has represented that it will not be able to enter into a development agreement with them until after approval of the Santolina Level B.1 Master Plan by the Board of County Commissioners. The record in this matter indicates that this is not accurate. The only definitive statement by Water Authority personnel that addresses the Authority's ability to enter into a development agreement with the Santolina Developers was provided by Mark Sanchez, the Executive Director of the Water Authority. In his letter to the County Planning Commission dated July 29, 2014, Mr. Sanchez stated:

If the Santolina *Level A Master Plan* is approved by the Bernalillo County Commission, only then will Water [Utility] Authority staff proceed in negotiating a draft development agreement with the developer. Of course, final approval of any development agreement requires formal action by the Water [Utility] Authority governing board.

Sanchez letter, page 2, ¶4 (July 29, 2014), emphasis added.

Mr. Sanchez therefore made clear that the Water Authority may enter into a development agreement with the Santolina Developers after the approval of the Santolina Level A Master Plan. Mr. Sanchez never stated that the Water Authority would have to wait until the Santolina Level B.1 Master Plan had been approved by the Board of County Commissioners before the Authority could enter into a development agreement with the Santolina Developers. *Id.*

The Santolina Developers have attempted, unpersuasively, to counter this evidence by citing to communications by lower level members of the Water Authority staff. First, the Developers assert that Alan [*sic*] Porter indicated in his testimony to the County Planning Commission on May 28, 2014 that the Water Authority could not enter into a development agreement with the Santolina Developers until the Santolina Level B.1 Master Plan is approved, but that assertion is unpersuasive for two reasons.

First, as was noted above, Mr. Porter was with the Utility Planning section of the Water Authority, he was not the Executive Director of the Water Authority. For that reason, to the extent that Mr. Porter's position is inconsistent with the position stated by the Water Authority Executive Director Mark Sanchez, Mr. Porter's statement cannot stand as indicating the official position of the Authority.

Second, Mr. Porter did not actually state that the Water Authority could not enter into a development agreement with the Santolina Developers until after the Santolina Level B.1 Master Plan was approved. Instead, he stated that:

As such, Water [Utility] Authority policy prohibits the execution of a Development Agreement until the proposed development is in an approved land-use planning area. The level of detail needed for the Development Agreement is usually not provided until the planning process advances to a level 2 or level B status.

Testimony of Allen Porter at County Planning Commission hearing, Hearing Transcript, TR- 31 (May 28, 2014).

This testimony is notable because Mr. Porter indicated that a development agreement cannot be entered into by the Water Authority until the proposed development is in an approved land-use planning area. In this case, however, the proposed Santolina development is in an approved land-use planning area because of two decisions made by the Board of County Commissioners. The first was the decision to grant a zone map amendment changing the zoning for the proposed Santolina development from Agricultural to Planned Communities. The second decision was to approve the Santolina Level A Master Plan. The land where the proposed Santolina development would be located, including the Level B.1 Master Plan area, therefore is in an approved land-use planning area.

The Santolina Developers also have alleged that the letter from Kris Cadena of the Water Authority to Joe Chavez, the Chairman of the Planning Commission,

indicates that the Water Authority cannot enter into a development agreement with the Developers until after the Board of County Commissioners approves the Santolina Level B.1 Master Plan, but that allegation is unpersuasive for two reasons.

First, Ms. Cadena's letter does not state that approval by the Board of County Commissioners must precede a development agreement between the Water Authority and the Santolina Developers. The letter states:

With your assistance, the Water [Utility] Authority requests that the CPC [County Planning Commission] make the determination on the proposed Level B plan so as to provide some level of certainty on the approved land uses for the Level B plan. Our understanding is that there is a condition that the Water [Utility] Authority Board must approve a development agreement prior to the Level B approval by the CPC [County Planning Commission]. We are requesting that this condition be revised to state prior to BCC [Board of County Commissioners] approval for the Level B Plan *so as to be a concurrent process*.

Kris Cadena letter (July 13, 2016), emphasis added.

The letter therefore urges that the condition be changed to indicate that a development agreement between the Water Authority and the Santolina Developers be required *prior to* the Board of County Commissioners' approval of the Santolina Level B.1 Master Plan. It does not state that the Water Authority will not enter into a development agreement with the Santolina Developers until after the Level B.1 Master Plan is approved. *Id.*

Second, like Allen Porter, Ms. Cadena is not the Executive Director of the Water Authority. She is identified in the letter in question as the “Principal Engineer” for the Water Authority. She therefore does not have the ability to override the position taken by Executive Director Mark Sanchez in his July 29, 2014 letter to Joe Chavez, Chairman of the Planning Commission.

The Santolina Developers also rely unpersuasively on a January 19, 2017 electronic mail message from John Stomp of the Water Authority to James Topmiller of Bohannon Huston (a contractor for the Santolina Developers). Mr. Stomp did state in his message that “we need approval from the BCC prior to moving forward on the Development Agreement”, however, this statement directly contradicts a previous statement given by Mr. Stomp to the Planning Commission on November 2, 2016.

Mr. 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). Additionally, Mr. Stomp is a lower level official of the Water Authority, and it is not clear whether his assertion reflects the position of the Water Authority leadership or board of directors.

III. THERE IS NO MERIT TO THE SANTOLINA DEVELOPERS' ASSERTION THAT THE WATER AUTHORITY IS OBLIGATED TO PROVIDE WATER TO THE PROPOSED SANTOLINA DEVELOPMENT.

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. However, the Water Authority enabling statute, NMSA 1978, Section 72-1-10, 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. *Id.*

The Water Authority has discretion to determine its water availability and capability of service. *Id.* If there is a conflict between this Franchise Agreement and NMSA 1978, Section 72-1-10, the state law prevails over the Franchise Agreement. *See also* NMSA 1978, Section 47-6-11.2.

IV. THERE IS NO MERIT TO THE SANTOLINA DEVELOPERS' ASSERTION THAT THE 2012 ADDENDUM TO THE PLANNED COMMUNITIES CRITERIA REMOVED ALL REQUIREMENTS PERTAINING TO WATER.

The Developers argue unpersuasively 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' Application to Remove and/or Amend Conditions #8, #9 and #11 to the Board of County Commissioners' Approval of the Level A Master Plan, page 7 (April 24, 2017); *See also* Developers' Motion to Remove and/or Revise Conditions #8, #9 and #11 for the Approval of the Level A Master Plan, 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). Indeed, legal counsel for the Santolina Developers has conceded that the Addendum may not be an amendment.⁴

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*

⁴ John Salazar, the attorney for WAHL, 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).

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

V. THERE IS NO MERIT TO THE SANTOLINA DEVELOPERS' ASSERTION THAT THE BOARD OF COUNTY COMMISSIONERS MUST TREAT THE PROPOSED SANTOLINA DEVELOPMENT IN THE SAME MANNER AS THE CITY OF ALBUQUERQUE TREATED MESA DEL SOL.

The Santolina Developers have alleged, unpersuasively, that the Board of County Commissioners must follow the same procedure that the City of Albuquerque followed with respect to the Mesa del Sol development. However, the Developers cite no authority for this proposition, and therefore there is no authority to support it. *Doe v. Lee*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 765.

NMSA 1978, Sections 4-38-1 through 4-38-42 establish the creation of boards of county commissioners. NMSA 1978, Section 4-38-1 states, in pertinent part, "The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners." *Id.* 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.*

VI. SUBSTANTIAL HARM WILL RESULT IF CONDITIONS #8, #9 AND #11 TO THE BOARD OF COUNTY COMMISSIONERS' APPROVAL OF THE SANTOLINA LEVEL A MASTER PLAN ARE REMOVED AND/OR REVISED.

A. The Developers' assertion that no development can take place until after a Level C plan is approved is without merit.

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 that "no development can take place until after a Level C plan has been approved" is incorrect and without supporting legal authority. Developers' Application to Remove and/or Revise Conditions of Approval to the Level A Master Plan, page 8 (April 24, 2017). Contrary to the Developers' assertion, the Planned Communities Criteria do not prohibit the Developers from building until after Level C approvals. *See generally*, Planned Communities Criteria. Furthermore, 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 it failed, in the proceedings before the Second Judicial District Court. *See* Developers’ Motion to Dismiss for Lack of Ripeness (November 2, 2015), *and see*, 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.

B. The Developers’ assertion that its proposed amendments to Conditions #8, #9 and #11 would only impact the sequence timing of the Water Development Agreement by the Water Authority is without merit.

The Developers assert in their letter giving notice of their application to neighborhood groups that their proposed amendments to Conditions #8, #9 and #11 “would only impact the sequence timing of the Water Development Agreement by the Water Authority”. Developers’ Notice Letter to Sara Newton Juarez, Zoe Economou and the South Valley Alliance (April 24, 2017). This assertion is without merit for three reasons.

First, the Planned Communities Criteria state that the Board of County Commissioners has review and approval authority of only Level A and Level B planned community master plans and associated documents. Planned Communities Criteria, pages 35, 38. The Board does not have review or approval authority when it comes to Level C documents. *Id.* at page 41. If the Planning Commission recommends approving the Developers’ proposed amendments to Conditions #8, #9 and #11 to defer the Water Authority development agreement

requirement to Level C and the Board accepts that recommendation, the Board will not be able to review this critical document pertaining to the proposed Santolina development. Therefore, the Developers' proposed amendments would not merely impact the sequence timing of the Water Authority development agreement, but would significantly impact the Board's review and approval authority of this critical document.

Second, the Board's ability to assess whether the Level B.1 Master Plan and associated documents comply with the Planned Communities Criteria will be substantially undermined. Without a fully executed Water Authority development agreement in place, the Board cannot adequately determine whether the Level B.1 Master Plan and associated documents satisfy the Level B Planned Communities Criteria requirements pertaining to water. One reason for this is because the Water Authority development agreement will provide the detailed timing, phasing, location, availability, responsibilities, and maintenance of water, sewer and drainage systems, as well as the required statements of water availability and serviceability. Level B.1 Master Plan, page 63. The Developers' proposed amendments therefore would not merely impact the sequence timing of the Water Authority development agreement.

Finally, the public's right to provide comment and testimony on this critical document would be eliminated if the Planning Commission recommends

approving the Developers' proposed amendments to Conditions #8, #9 and #11 to defer the Water Authority development agreement requirement to Level C and the Board accepts that recommendation. The public currently has the right to provide comment and testimony on Level A and Level B master plans and associated documents, including the Water Authority development agreement. Bernalillo County Board of County Commissioners Rules of Procedure for Quasi-Judicial Hearings and Regular Zoning Meetings, Rule 19, page 7 (April 22, 2014) (providing procedures for accepting public comment on an agenda item).

However, if the required Water Authority development agreement is deferred to Level C, thereby becoming a Level C document, and is not reviewed by the Board and is instead reviewed by the County Development Review Authority, the public will no longer have the opportunity to provide comment and testimony on this critical document for the reason discussed below.

C. If the Planning Commission defers the required Water Authority development agreement from the Level B phase to the Level C phase of development, this critical document would become a Level C document and would not be lawfully reviewed by the Planning Commission and would not be subject to a public hearing.

Level C documents for a planned community such as Santolina, which result in Types 1, 2,3 (six lots or greater) or 4 subdivisions, must be considered by the Planning Commission and are subject to the public hearing requirements contained in NMSA 1978, Section 47-6-14 of the New Mexico Subdivision Act ("Act") and

Section 74-33 of the Bernalillo County Code of Ordinances. However, the Board and the Developers endeavored to unlawfully circumvent these requirements through the adoption of Condition #19 to the Board's approval of the Level A Master Plan. NMSA 1978, Section 47-6-9.D; Bernalillo County Code of Ordinances, Sec. 74-7, citing to Ord. No. 96-23, art. 1, § 7, 10-1-96 and Ord. No. 2005-7, § 1, 6-28-05 ("With major subdivisions, the Bernalillo County Commission delegates the authority for subdivision review, approval, conditional approval and denial to the county planning commission").

Condition #19 states, in pertinent part, that "A summary platting procedure, such as that allowed for a 'minor subdivision' under County ordinances, shall be permitted for the Boundary Plat, and for any subsequent platting actions prior to a Level C plan or a Level C subdivision plat approval." Board of County Commissioners' Approval of the Santolina Level A Master Plan, page 7(June 19, 2015). A summary review procedure does not permit public participation and requires much less information from the developer. NMSA 1978, Section 47-6-27; Bernalillo County Code of Ordinances, Section 74-51, citing to Ord. No. 96-23, art. 6, § 1, 10-1-96 and Ord. No. 2005-7, § 1, 6-28-05; *Compare* Bernalillo County Code of Ordinances, Section 74-82(a)(1) with Sections 74-82(a)(2) and 74-82(a)(3).

Therefore, if the Planning Commission defers the required Water Authority development agreement from the Level B phase to the Level C phase of development, this critical document would become a Level C document and would not be lawfully reviewed by the Planning Commission and would not be subject to a public hearing. This is because of the unlawful adoption of Condition #19 by the Board in its approval of the Level A Master Plan. Condition #19 requires all Level C documents, which would include the Water Authority development agreement if that requirement is deferred to the Level C phase of development, be reviewed by the County Development Review Authority. Level C documents, under Condition #19, would only be subject to summary review procedures. Bernalillo County Code of Ordinances, Sections 74-7 and 74-51.

Condition #19 is also of concern to the Community Representatives because it violates the New Mexico Subdivision Act's water permit requirement. The Act requires the following:

Before approving the final plat for a subdivision containing ten or more parcels, any one of which is two acres or less in size, the board of county commissioners shall require that the subdivider provide proof of a service commitment from a water provider and an opinion from the state engineer that the subdivider can [furnish water sufficient in quantity to fulfill the maximum annual water requirements of the subdivision, including water for indoor and outdoor domestic uses] or provide a copy of a permit obtained from the state engineer...for the subdivision water use.

NMSA 1978, Section 47-6-11.2.; *Id.* at Section 47-6-11, emphasis added.

Condition #19 is clearly an attempt to circumvent this water permit requirement by

treating Level C documents as “minor subdivision” documents subject only to summary review procedures.

Community Representatives opposing the proposed Santolina Development request that the Planning Commission recommend approval of two proposed amendments to the Board’s June 16, 2015 approval of the Santolina Level A Master Plan. The first proposed amendment is to add a “Finding” that all subdivision actions are major subdivision actions and shall be reviewed and approved, along with associated Level C documents, by the Planning Commission pursuant to NMSA 1978, Section 47-6-9.D and Section 74-7 of the Bernalillo County Code of Ordinances, and shall be subject to the public hearing requirements contained in NMSA 1978, Section 47-6-14 and the water permit requirements contained in NMSA 1978, Section 47-6-11.2. The second proposed amendment is to remove Condition #19, which currently allows an unlawful review of proposed Santolina subdivision actions and associated Level C documents by the County Development Review Authority under summary review procedures.

The proposed amendments would eliminate the unlawful review of major subdivision documents and plats pursuant to summary review procedures and would require all Santolina Level C documents to be lawfully reviewed pursuant to

major subdivisions procedures provided in the New Mexico Subdivision Act and the Bernalillo County Code of Ordinances.

Conclusion

For the above stated reasons, the Community Representatives request that the Planning Commission recommend the following three actions:

- 1) the addition of the following “Finding”: All subdivision actions are major subdivision actions and shall be reviewed and approved, along with associated Level C documents, by the Planning Commission pursuant to NMSA 1978, Section 47-6-9.D and Section 74-7 of the Bernalillo County Code of Ordinances, and shall be subject to the public hearing requirements contained in NMSA 1978, Section 47-6-14 and the water permit requirements contained in NMSA 1978, Section 47-6-11.2;
- 2) the removal of Condition #19; and
- 3) denial of the Santolina Developers’ Application to remove and/or amend the Board of County Commissioners’ Conditions #8, #9 and #11 to the Santolina Level A Master Plan.

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Certificate of Service


I certify that on May 30, 2017 copies of this Response in Opposition To Santolina Developers' Application to Remove and/or Revise Conditions #8, #9, and #11 to the Board of County Commissioners' Approval of the Santolina Level A Community Master Plan were sent by electronic mail to:

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