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Planning

APPEAL TO COUNTY COMMISSION

Application Date: _____
Appeal Number: _____
Hearing Date: _____

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SITE ADDRESS	Case # SPR2017-0003
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DIRECTIONS/LOCATION Bounded by I-40 to North, 118 St. and escarpment to East, Parajito Mesa on South and escarpment near Rio Puerco Valley on West

LEGAL DESCRIPTION projected sections 1,2,3,4,5,8,9,10,11,12,13,14,15,16&17. T9N, R1E, & sections 6,7,8,16,17&18, T9N, R2E, & sections 32,33,34,35&36, T10N, R1E, & sections 30&31, T9N, R2E, NMPM, Atrisco, Bern. Co.
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ZONE MAP PAGE #	CURRENT ZONE(S) A1 rural	PROPERTY SIZE IN ACREAGE 13,700; 4,243 for Level B.1
UPC #	PROPOSED ZONE(S) Level B.1	SUBDIVISION NAME Santolina

EXISTING USE A1 Rural

PROPOSED USE Santolina Planned Community
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SCOPE OF APPEAL, INCLUDING CASE NUMBER Appeal of Bernalillo County Planning Commission June 7, 2017 Decision, see attached Appeal; SPR2017-0003

DETAILED INFORMATION (JUSTIFICATION MUST BE PROVIDED PER ZONING CODE REQUIREMENTS, ADDITIONAL INFORMATION MAY BE ATTACHED) Please see attached Appeal

I hereby acknowledge that I have read this entire application and affirm that all of the provided information is correct. I agree to comply with the requirements of Bernalillo County and the State of New Mexico as outlined in all applicable laws, ordinances and regulations.

Jamie Park
Printed Name

Jamie Park
Signature

6/24/17
Date

6/2017

BEFORE THE BERNALILLO COUNTY, NEW MEXICO

BOARD OF COUNTY COMMISSIONERS

SOUTHWEST ORGANIZING PROJECT,
NEW MEXICO HEALTH EQUITY WORKING
GROUP, PAJARITO VILLAGE ASSOCIATION,
CENTER FOR SOCIAL SUSTAINABLE SYSTEMS,
SOUTH VALLEY COALITION OF NEIGHBORHOOD
ASSOCIATIONS, SOUTH VALLEY REGIONAL
ASSOCIATION OF FACEQUIAS, JAVIER BENAVIDEZ,
JAMES "SANTIAGO" MAESTAS, ROBERTO ROIBAL,
KRISTINE SUOZZI, ROD MAHONEY, MARCIA
BEAUREGARD FERNANDEZ, DANIEL RICHARD
"RIP" ANDERSON, DR. VIRGINIA NECOCHEA

v.

FILE NO. SPR2017-0003

BERNALILLO COUNTY PLANNING COMMISSION

FIRST AMENDED APPEAL OF THE
BERNALILLO COUNTY PLANNING COMMISSION
RECOMMENDATION THAT THE
BERNALILLO COUNTY BOARD OF COUNTY COMMISSIONERS
APPROVE THE SANTOLINA DEVELOPERS' PROPOSED AMENDMENTS
TO CONDITIONS #8, #9 AND #11 OF APPROVAL TO THE SANTOLINA
LEVEL A MASTER PLAN

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Introduction

- I. **The Appellants hereby appeal to the Board of County Commissioners to reject the recommendation of the County Planning Commission that the Santolina Developers' proposed amendments to Conditions #8, #9 and #11 of Approval to the Level A Master Plan be accepted.**

This is an appeal of the Bernalillo County Planning Commission ("the Planning Commission") recommendation that the Bernalillo County Board of County Commissioners ("the Board of County Commissioners" or "the Board") accept the Santolina Developers' proposed amendments to Conditions #8, #9 and #11 of Approval to the Level A Master Plan ("the Plan"). This appeal is filed by the SouthWest Organizing Project, the New Mexico Health Equity Working Group, the Pajarito Village Association, the South Valley Coalition of Neighborhood Associations, the South Valley Regional Association of Acequias, the Center for Social Sustainable Systems, Javier Benavidez, James "Santiago" Maestas, Roberto Roibal, Kristine Suozzi, Rod Mahoney, Marcia Beauregard Fernandez, Daniel Richard "Rip" Anderson, and Dr. Virginia Necochea (referred to collectively as "the Appellants").

The recommendation of the Planning Commission ("the Planning Commission Decision") was determined by a vote of the Planning Commission on June 7, 2017. For that reason, the Appellants are filing this appeal before 12:00 noon on June 22, 2017.

In addition, the Appellants reserve the right to address the Board of County Commissioners concerning this appeal for themselves and through counsel at any hearing, meeting, or other forum conducted by the Board of County Commissioners addressing the proposed development.

The Appellants also reserve the right to supplement the arguments presented in this appeal with additional support for the arguments presented in this appeal and with additional arguments that are not presented in this appeal.

Finally, the Appellants reserve the right to add additional appellants to an amended appeal to the Board of County Commissioners.

II. **The Appellants' appeal to the Board of County Commissioners is based on the recently issued Second Judicial District Court Order, the requirements of the Planned Communities Criteria, the Planning Commission's rules of procedure and the Bernalillo County Code of Ordinances.**

The Appellants request that the Board of County Commissioners defer consideration of the Planning Commission's recommendation that the Santolina Developers' proposed amendments to Conditions #8, #9 and #11 of Approval to the Level A Master Plan be accepted and this Appeal until a valid zone map amendment, Level A Master Plan and Level A Development Agreement are in place for the proposed Santolina development, if that ever occurs.

If the Board does not defer consideration of this matter, the Appellants request that the Board of County Commissioners reject the Planning Commission's recommendation that the Santolina Developers' proposed amendments to Conditions #8, #9 and #11 of Approval to the Level A Master Plan be accepted. The Appellants' request is based on the following eight reasons.

First, the Honorable Judge Nancy Franchini of the Second Judicial District Court issued a Memorandum Opinion and Order ("Opinion") addressing four of the appeals filed by several of the above-listed Appellants pertaining to the Santolina Level A approvals and reversed the Board's decision approving the zone map amendment for the proposed development.¹ There is no longer a valid Planned Communities Zone ("PC Zone") in place for the proposed development. Because the PC Zone has been voided, the Level A Master Plan and the Level A

¹ The Court dismissed Appellants' appeal of the Board's approval of the Level A Development Agreement "because there is no final written decision to review". Order on Appellee/Respondents' Motion to Dismiss for Lack of Ripeness, Finding 1 (April 28, 2016).

Development Agreement, both dependent upon the PC Zone, have also been voided. The Court's Opinion indicates that proceedings for Santolina Level A must begin anew, therefore the Board should defer consideration of the Planning Commission's recommendation and this Appeal until there is a valid PC Zone, Level A Master Plan, and Level A Development Agreement in place, if that ever occurs.

Second, 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.

Third, 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 Board approves the Santolina Developers' Level B.1 Community Master Plan (the "Level B.1 Master Plan"). 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.

Fourth, 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".

Fifth, 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.

Sixth, there is no merit to the Santolina Developers' assertion that the Board must follow the same procedure for the proposed Santolina development as the City of Albuquerque followed for the Mesa del Sol development.

Seventh, the deferral of conditions #8, #9 and #11 to the Level C phase of development would result in substantial harm. The Developers' assertion that no development can take place until after a Level C plan is approved by the Board is without merit and deferral of the required Water Authority development agreement to Level C would mean that both members of the public and the Board 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.

Finally, the Planning Commission violated its rules of procedure and Section 62-36 of the Bernalillo County Code of Ordinances when the Planning Commission recommended that the Board accept the Santolina Developers' proposed amendments to Conditions #8, #9 and #11. The Planning Commission considered new evidence not properly in the record for the Santolina Developers' application to amend Conditions #8, #9 and #11, in violation of the Planning Commission's rules of procedure. Commissioner Pena also failed to disclose his financial interests or any other type of perceived possible conflict of interest in the proposed Santolina development, in violation of both the Planning Commission's rules of procedure and Section 62-36 of the Bernalillo County Code of Ordinances.

Appellants also request that the Bernalillo County Board of County Commissioners ("Board") accept 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 pertaining to the proposed Santolina development are major subdivision

actions and shall be reviewed and approved, along with associated Level C documents, by the Bernalillo County Planning Commission (“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 from the Board’s conditions of approval for the Santolina Level A Master Plan. Condition #19 would allow an unlawful review of proposed Santolina subdivision actions and associated Level C documents, as well as of Level B documents deferred to the Level C phase of development, by the County Development Review Authority (“CDRA”) under summary review procedures.

These proposed amendments would eliminate the unlawful review of major subdivision documents and plats pursuant to summary review procedures and would restore the public participation requirements, the water permit requirements, and the Planning Commission’s review and approval authority of such documents and plats mandated under the New Mexico Subdivision Act.

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 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 Executive Director of the Water Authority, Mr. Mark Sanchez, and in response to the letter dated July 29, 2014 that Mr. Sanchez 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”). The agent for the Santolina Developer, Mr. Strozier, advised the Planning Commission that the Developers agreed 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 6² that is being – that is being presented for your consideration....

² Condition #5 states the following:

To address the first part of a two step, BCC Level B.1 approval process and prior to partial Level B.1 approval, by the BCC, outstanding issues related to water and sewer service should be addressed including resolution of Level A conditions and Level B PCC criteria. Accordingly, the applicant should submit to the Planning staff preliminary drafts of the subject ABCWUA-related documents (i.e. Development Agreement, ABCWUA-acceptable Level B Facilities Plan, and Water Availability or Serviceability Statement) along with any zoning changes or special use requests needed to accommodate ABCWUA-required infrastructure, prior to a Level B Master Plan final hearing before the BCC.

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"). Several of the above-listed 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.

Condition #6 states the following:

The Level B.1 Plan approval shall not be effective until the Level B.1 Development Agreement with Bernalillo County and the Level B.1 Development Agreement with the Albuquerque/Bernalillo County Water Authority are finalized and fully executed. Completion of both the Level B.1 Development Agreements shall occur within one year of the BCC decision date. In the event that both the Level B.1 Development Agreements have not been fully executed by the one-year deadline date, the Bernalillo County Planning and Development Services Director may extend the deadline for up to an additional six months. No further level B or level C applications will be submitted until the development agreement with the ABCWUA is finalized and fully executed. If there is no water development agreement with the ABCWUA after the prescribed time the matter shall return to the BCC for further consideration.

Planning Commission Notification of Decision, Conditions #5 and #6 (January 10, 2017).

The Board of County Commissioners held a hearing on the incomplete Santolina Level B.1 Master Plan on March 14, 2017 and April 4, 2017. The Board voted to defer consideration of the incomplete Level B.1 Master Plan until “receipt of a recommendation to amend the Santolina Level A Plan through the County Planning Commission Process (To Modify Conditions of Approval Related to Water Service).” *See* Notification of Decision, Board of County Commission (April 7, 2017). The Developers then submitted SPR2017-0003 to the Planning Commission on April 24, 2017 to modify conditions of approval related to water service for the proposed Santolina development. Appellants filed a Response in Opposition to Developers’ application to amend conditions of approval related to water service, as well as a Request to Defer the June 7, 2017 Planning Commission hearing and a Request to Amend Condition #19 of the Board’s conditions of approval for the Santolina Level A Master Plan.

The Planning Commission held a hearing on SPR2017-0003 on June 7, 2017 and voted to recommend that the Board accept the Developers’ proposed amendments to Conditions #8, #9 and #11 related to water service.

Argument

I. The Second Judicial District Court Has Voided the Board’s Approval of the Zone Map Amendment for the Proposed Santolina Development, Thereby also Voiding the Board’s Approvals of the Santolina Level A Master Plan and the Santolina Level A Development Agreement.

A. Background of the Santolina Level A Appeals.

Several of the above listed Appellants filed a consolidated action involving five appeals of the Board of County Commissioners’ and the Planning Commission’s actions pertaining to Santolina Level A with the Second Judicial District Court. The following actions were appealed: 1) the Board’s denial of their appeal from the Planning Commission’s recommendation that the Santolina Level A Master Plan be approved, dated May 15, 2015; 2) the Board’s approval of the

Santolina Level A Master Plan, dated June 19, 2015; 3) the Board's denial of their appeal from the Planning Commission's recommendation to approve the requested zone map amendment ("ZMA") for the proposed Santolina development, dated June 1, 2015; 4) the Board's approval of the ZMA from A-1 Rural Agricultural to the Planned Communities ("PC") Zone, dated June 18, 2015, and 5) the Board's approval of the Development Agreement.

B. The Court reversed the approval of the Zone Map Amendment.

The Court recently reversed the Board of County Commissioners' decision approving the Zone Map Amendment. Memorandum Opinion and Order, pp. 2, 8-9, 9-14, 16-18, 20. The Zone Map Amendment was sought by the Santolina Developers, and it changed the zoning of the Santolina property from A-1 Rural Agricultural to Planned Communities. *Id.*, pp. 2, 5-6. The Court reversed the Board's approval of the Zone Map Amendment on the grounds that the Board's Zone Map Amendment proceedings were quasi-judicial and that the Board denied the Appellants/Petitioners procedural due process.³ *Id.*, pp. 9-14, 16-18.

C. The Court's ruling reversing the Zone Map Amendment means that the Board's Zone Map Amendment decision is void.

The basis on which the Court reversed the Zone Map Amendment was that the Board of County Commissioners denied the Appellants/Petitioners procedural due process. The Court stated:

The Op-Ed [by Commissioner De La Cruz] in the Court's opinion raises questions of partiality and prejudice, or the appearance thereof, sufficient to warrant at the very least the Board's consideration of the recusal or disqualification of Commissioner De La Cruz. Accordingly, the Court **REVERSES** the Decision approving the [Zone Map Amendment] and the denial of Appellants' appeal of the CPC's recommendation of the [Zone Map Amendment] to the Board.

Opinion, page 17 (May 31, 2017).

³ The Court addressed the Zone Map Amendment proceedings and the Appellants/Petitioners' appeal from the County Planning Commission decision on the Zone Map Amendment.

Moreover, the Appellants sought to disqualify Commissioner De La Cruz from the entire proceeding, not just from voting on the Zone Map Amendment. *See* Appellants/Petitioners' Request for Recusal and Alternative Motion for Disqualification of Bernalillo County Commissioner de la Cruz.⁴ ("Request and Alternative Motion") Record ("R"), 80971-80979. As the Court noted in its Opinion, the Board heard argument on the Request and Alternative Motion, but never voted on the Request and Alternative Motion.

The Appellants filed their Request and Alternative Motion the day before the Board began its hearings on Santolina (R., 80971-80979), and the Request and Alternative Motion was taken up as a preliminary matter at the beginning of the Board's first hearing on March 25, 2015. R., 87277-87296. After the Board failed to vote on the Request and Alternative Motion, Commissioner De La Cruz participated in all of the Board's proceedings concerning the Zone Map Amendment as well as all of the Board's proceedings addressing the Santolina Level A Master Plan, and the Development Agreement between the Board and the Santolina Developers ("the Development Agreement"). *See* R. 87296-87422 (March 25, 2015 Board hearing transcript); R. 87296-87422 (March 26, 2015 Board hearing transcript); R. 87719-87888 (May 11, 2015 Board hearing transcript); R. 87889-88123 (May 28, 2015 Board hearing transcript); R. 88124-88360 (June 16, 2015 Board hearing transcript); and R. 88361-88526 (June 24, 2015 Board hearing transcript).

The Board denied the Appellants procedural due process at the start of the Board's proceedings, and continued those proceedings on the basis of that denial of procedural due process. For that reason, this case is analogous to the situation in Nesbit v. City of Albuquerque, 1977-NMSC-107, 91 N.M. 455.

⁴ Appellants misspelled Commissioner De La Cruz's name in its Request and Alternative Motion submitted to the Board.

In Nesbit, the developer of apartments failed to give the statutorily required notice to neighbors of the property in question. 1977-NMSC-107, ¶1. After the City Commission denied the proposal, the developer obtained review in the District Court, which reversed the Commission in 1973. The Commission then approved the developer's proposal. *Id.* When construction began in 1976, the neighbors filed a motion to intervene in the litigation and a motion to set aside the 1973 judgment. The District Court granted both motions, and the developer appealed (*Id.*), arguing that even if the zoning agencies' decisions were invalid, the 1973 District Court decision was correct because all of the parties entitled to notice of that proceeding were served. *Id.*, ¶10.

The Supreme Court disagreed, stating:

The 1976 district court found as a matter of law that the failure to give the notice required by statute *rendered all subsequent acts void*. The 1973 judgment and the subsequent approval by the City Commission were also void. *By failing to follow statutory procedures, due process of law was violated and no subsequent act could correct the defect.*

Id., ¶11, emphasis added.

The Supreme Court's reasoning in Nesbit applies in this matter. There, the neighbors were denied procedural due process at the start of the City's proceedings, and the Supreme Court ruled that "no subsequent act could correct the defect." 1977-NMSC-107, ¶11. Here, the Board denied the Appellants procedural due process at the start of the Board's proceedings concerning the Zone Map Amendment and "no subsequent act by the Board [can] correct that defect." For that reason, all of the Board's proceedings concerning the Zone Map Amendment that occurred after the Board's denial of procedural due process – *i.e.*, all of the Board's proceedings on that issue – are void. Moreover, the Board cannot correct its error merely by taking a new vote on the Zone Map Amendment. If the Santolina Developers propose to seek a new amendment of

the zone map, they must file a new application requesting that relief, and that application must be considered first by the Planning Commission.

D. The ruling reversing the Zone Map Amendment also voids the Board's decision approving the Santolina Level A Master Plan.

1. Amendment of the zone map is a required condition for approval of the Santolina Level A Community Master Plan.

The Bernalillo County Zoning Ordinance (“the Zoning Ordinance”) indicates that an area should be mapped for a planned community before or at the same time that a Level A Master Plan is approved, and this was confirmed by the Court’s Opinion. The appropriate sequence of approvals for establishment of a planned community is set forth in the Zoning Ordinance.

Section 19.5(B)(1) of the Zoning Ordinance indicates that:

Adoption and amendment of rank two Level A plans is by the Board of County Commissioners. It is initially done when the PC [Planned Communities] zone is mapped for a community; application for the PC zone shall be accompanied by a proposed Level A plan for the planned community.

Zoning Ordinance (PC Planned Communities Zone), §19.5(B)(1).

The significance of this language was explained in the Court’s Opinion. The Court stated:

According to the Zoning Code, it appears the PC Zone is “mapped” first before the adoption of a Level A plan, given that the application for the PC Zone needs the Level A with it. This interpretation is supported by Finding of Fact ¶2 in the Decision regarding the Master Plan. [*Id.* 88647 (“The request for approval of the Santolina Level A Master Plan has been submitted in conjunction with a request for a zone change for Planned Communities (PC) Zoning in accordance with Section 19.5 of the Bernalillo County Zoning Code (Planned Communities Zone)).]

Memorandum Opinion and Order, pp. 13-14.

As interpreted by the Court, the Zoning Ordinance therefore indicates that an area should be zoned for a Planned Community before the adoption or at the time of approval of a Level A

Master Plan, and this was the procedure followed by the Board in this matter. The Santolina property was zoned A-1 Rural Agricultural until the Board amended the zone map to change that zoning to Planned Communities. R. 88311-88312. In accordance with the timing dictated by the Zoning Ordinance, the Board made that zoning change immediately after the Board's approval of the Santolina Level A Master Plan. *Id.*, R. 88309. Moreover, the Zoning Ordinance indicates that this sequence was appropriate. The Ordinance states that:

All property is governed according to the zone in which it is located. Any use not designated a permissive or conditional use in a zone is specifically prohibited from that zone, except as otherwise provided herein.

Zoning Ordinance, §6.E.

The Santolina property was zoned A-1 Rural Agricultural before the Board changed the zoning to Planned Communities. The uses that the Zoning Ordinance authorizes in A-1 Rural Agricultural areas do not include Planned Communities, which means that the Santolina property could not be used for that purpose without the Zone Map Amendment. Zoning Ordinance, §7, A1 Rural Agricultural Zone (as amended through June 10, 2014).

2. The Board's decisions confirm that approval of the Santolina Level A Master Plan depends on the approval of the zoning change.

The Board of County Commissioners' written decisions changing the zoning for the Santolina property and the approval of the Santolina Level A Master Plan confirm that the zoning decision is a condition that is to be satisfied at or before the time of the approval of the Master Plan. The Board's written decision changing the zoning for the proposed Santolina development from A-1 Agricultural to Planned Communities states:

The decision is based on the following Findings:

1. The request is for a zone map amendment from A-1 Rural Agricultural to Planned Community Zone in connection with the proposed Santolina Planned Communities Level A Master Plan.

....

3. The request for approval of the PC Planned Communities Zone has been submitted in conjunction with the request for approval of the Santolina Level A Master Plan (SPR-20130004).

Zone Map Amendment Decision, p.2, R. 86822.

Similarly, the Board of County Commissioners' written decision approving the Santolina Level A Master Plan ("the Level A Master Plan Decision") stated:

The request for approval of the Santolina Level A Master Plan has been submitted in conjunction with a request for a zone change for Planned Communities (PC) Zoning in accordance with Section 19.5 of the Bernalillo County Zoning Code (Planned Communities Zone) (CZ-20130009).

Level A Master Plan Decision, p. 2, Findings ¶2, R. 88646.

3. The Santolina Level A Master Plan also indicates its dependence on the Zone Map Amendment.

The language of the Santolina Level A Master Plan itself confirms that the Zone Map Amendment is a condition for the approval of the Master Plan. For example, the Plan states:

Concurrently with the Bernalillo County approval of this Master Plan, the Planned Communities Zone (PC Zone) has been applied to the property. The Santolina PC Zone (see Chapter 4), places zoning on the property in alignment with the vision for Santolina expressed in this Level A Master Plan.

Santolina Level A Master Plan, p. 10, R. 86584.

As another example, the Master Plan indicates:

In addition to the Master Plan, WAHL [Western Albuquerque Land Holdings, LLC] also requested adoption of Planned Community Zone (PC Zone) for the entire Master Plan Area. The PC Zone is in conformance with the Level A Master Plan for the planned community.

Id., p. 23, R 86597.

Furthermore, the Santolina Developers have conceded that, “[t]he Master Plan does not function without having the PC zone designation applied to it.” Santolina Developers’ Motion for Rehearing, page 9 (June 12, 2017).

4. The Court’s ruling reversing the Zone Map Amendment voids the approval of the Santolina Level A Master Plan.

The Zoning Ordinance indicates that a zone map amendment changing zoning to Planned Communities Zone should be done before or at the same time as approval of a Level A Master Plan. In this matter, the Court reversed the Board of County Commissioners’ decision amending the zone map to change the zoning for the proposed Santolina development property from A-1 Rural Agricultural to Planned Communities. The result of that decision is that the land where the proposed Santolina development would be located remains zoned A-1 Rural Agricultural, and the Board’s decision changing the zoning of that land to Planned Communities is no longer valid.

For that reason, the Board’s approval of the Santolina Level A Master Plan also is not valid because the land addressed by that Master Plan is no longer zoned Planned Communities.

E. The Court’s ruling reversing the Zone Map Amendment voids the Board’s approval of the Santolina Level A Development Agreement.

1. Amendment of the zone map is a required condition for approval of the Santolina Level A Development Agreement.

The Board of County Commissioners entered into the Santolina Level A Development Agreement (“Development Agreement”) on August 10, 2015, nearly two months after the Board’s approvals of the Zone Map Amendment and the Santolina Level A Master Plan. R 88725. Section 3.3 of the Development Agreement expressly states the Agreement’s dependence on the Zone Map Amendment; it provides:

This Agreement is contingent upon action by the Governing Body approving the Master Plan, the Land Use Plan, the PC Zoning, and this Agreement.”

R 88662.

Moreover, this reflects the Development Agreement's relationship to the Zone Map Amendment. The Zone Map Amendment provides the framework for a Planned Community and is the means for implementing the Planned Communities Criteria and ensuring compliance with the Comprehensive Plan. The Development Agreement is the contract between the Board and the Santolina Developers designed to ensure compliance with the Planned Communities Criteria.

2. The Development Agreement is also dependent upon the now invalidated Santolina Level A Master Plan.

As noted above, the Court's ruling voiding the Zone Map Amendment also voids the Board of County Commissioners' approval of the Santolina Level A Master Plan. However, there can be no valid Development Agreement without a valid Level A Master Plan for three reasons. First, the language of Section 3.3 of the Development Agreement quoted above confirms that a valid Level A Master Plan is a condition for the approval of the Development Agreement. *Id.* Second, the Planned Communities Criteria confirm that approval of a Development Agreement is dependent on approval of a valid Level A Master Plan. The Planned Communities Criteria require the following, in pertinent part:

Level A development agreement will be developed *in accordance with* the Community Master Plan to:

- a. *Codify the Master Plan* and Land Use Plan.
- b. Outline a preliminary infrastructure/service agreement to cover phasing of master plan and public services/facilities, and designation of financial, operations, and management responsibility over time.
- c. Commit to mitigation of negative consequences of development when known.
- d. Provide an assignable agreement expressing items mutually accepted by the City and/or County and the planned community developer and committing to their permanency unless re-negotiated.
- e. Provide a document suitable as a legally recorded instrument with the County Clerk.
- f. Identify incentives to be provided by the City to the developer, if any are agreed to.

Planned Communities Criteria, pp. 36-37, emphasis added.

Third, Section 19.5 of the Zoning Ordinance confirms that approval of a Development Agreement is dependent on approval of a valid Level A Master Plan. Section 19.5(A)(2) states:

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 conditional uses. The uses *shall be consistent with the Level A Plan: community plan.*

Zoning Ordinance (Planned Communities Zone), §19.5(A)(2), emphasis added.

For those reasons, the Court's ruling rendering the Santolina Level A Master Plan void also voids the Development Agreement. Therefore, the Board cannot proceed with its consideration of the Planning Commission's recommendation to approve the Santolina Developers' proposed amendments to the Board's approval of the Level A Master Plan or any other matter concerning the proposed Santolina development.

II. 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 for Level B Master Plans. 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 agreement⁵ 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 Communities Criteria also do not permit satisfaction of its Level B criteria through the application of future “conditions of approval” or the deferral of Level B requirements to the Level C phase of development. *See* Planning Commission Decision, Conditions #4-6; *See generally*, Planned Communities Criteria, pages 38-40.

⁵ Appellants provided the Planning Commission with a copy of the draft development agreement submitted by WAHL to the Water Authority as Exhibit A to their Response in Opposition to the Santolina Developers’ Request that the Planning Commission recommend approval of proposed amendments to Conditions #8, #9 and #11 (May 30, 2017). This draft agreement was never considered by the Planning Commission when making its recommendation that the Board approve the Level B.1 Master Plan and was never entered into the record by the Santolina Developers in the proceedings before the Planning Commission concerning approval of the Level B.1 Master Plan.

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, page 63.⁶

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-67:1-2 (July 21, 2016).

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.⁷ Removal of Conditions #8, #9 and #11 therefore would exacerbate the Board's current 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.

⁶ "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."

⁷ This violation of the Planned Communities Criteria by the Board of County Commissioners was not addressed by the Court's recent Opinion.

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 (“Sanchez 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 Strategy⁸, 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 water rights or funding for the purchase of new water rights as a condition of service in accordance with the no-net-expense policy.

⁸ Appellants attached the 2007 Water Resources Management Strategy, Section L as Exhibit B to their Response in Opposition to the Santolina Developers' Request that the Planning Commission recommend approval of proposed amendments to Conditions #8, #9 and #11 (May 30, 2017).