

Albuquerque-Bernalillo County Water Utility Authority 2007 Water Resources Management Strategy, Section L.

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's 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.

III. The Water Authority Has Not Indicated That It Will Not Enter Into A Development Agreement With the 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 Board approval of the Santolina Level B.1 Master Plan. 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 the

Executive Director of the Water Authority, Mr. Mark Sanchez. In his letter to the 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 Board approval of the Santolina Level A Master Plan. Mr. Sanchez never stated that the Water Authority would have to wait until Board approval of the Santolina Level B.1 Master Plan 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 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) (emphasis added). 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. If there are ever a valid zone map amendment and Level A Master Plan in place, the Water Authority development agreement would not have to wait for Board approval of a Level B.1 Master Plan.

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, Kris 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's 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 Board approval of the Level B.1 Master Plan. *Id.*

Second, like Allen Porter, Kris Cadena is not the Executive Director of the Water Authority. Kris Cadena is identified in the letter in question as the "Principal Engineer" for the Water Authority. Kris Cadena 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.

IV. 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, either within corporate limits of the County or 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. Moreover, the New Mexico Office of the State Engineer is the only entity in New Mexico that can approve the use of water for a specific purpose. NMSA 1978, Section 74-9-2; *See also* NMSA 1978, Section 47-6-11.2

V. There Is No Merit To The Santolina Developers' Assertion That The 2012 Addendum To The Planned Communities Criteria Removed All Requirements Pertaining To Water For Planned Communities.

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.⁹

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

⁹ Legal counsel for WAHL, John Salazar, stated, "And it's not clear. It appears to be an amendment to the Planned Communities Criteria, but I can't tell you I know for a fact". Board of County Commissioners Hearing Transcript, TR-143: 22-24 (May 11, 2015).

VI. There Is No Merit To The Santolina Developers' Assertion That The Board 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 the Board therefore should assume that no such authority exists. *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 Board of County Commissioners is not bound by the rules and procedures of the Albuquerque City Council, a separate political entity. *Id.*

In fact, the Developers concede that the Board has the authority “to establish rules and regulations to govern the transaction of their business,” contradicting their assertion that the Board must follow procedures used by the Albuquerque City Council for Mesa Del Sol. Santolina Developers’ Motion for Rehearing in the Second Judicial District Court case D-202-CV-2015-04466, page 3 (June 12, 2017).

VII. Substantial Harm Will Result If the Board Accepts the Santolina Developers' Proposed Amendments to Conditions #8, #9 and #11.

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 Board accepts the Planning Commission’s recommendation to approve the Developers’ proposed amendments to Conditions #8, #9 and #11 to defer the Water Authority development agreement requirement to Level C, 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 Board accepts the Planning Commission's recommendation to approve the Developers' proposed amendments to Conditions #8, #9 and #11 to defer the Water Authority development agreement requirement to Level C. The public currently has the right to provide comment and testimony on Level A and Level B master plans and associated documents, including the critical 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, it will not be reviewed by the Board and the public will no longer have the opportunity to provide comment and testimony on this critical document.

The Water Authority development agreement would be reviewed by the County Development Review Authority ("CDRA") using summary review procedures that do not permit public review or comment. Moreover, County Staff concede that the CDRA has no authority to review and approve the Santolina Water Authority development agreement, along with other Level B.1 documents and Level C documents and associated plans and plats. Juanita Garcia with the County Planning and Development Services Department advised the Board the following:

We recognize that amendments to the subdivision ordinance will be required to allow the County's development review authority, the CDRA, to have review authority over the Level C plans and some of the projects within the Level B1 plan. Right now as established in the Zoning Code it indicates that any sort of development or approval for Level C plans requires it to be approved and reviewed by the CDRA. However, the CDRA is not structured in such away to allow for that sort of review process so we – we recognize that and we understand that there are going to be some amendments needed to allow for that to happen.

VIII. Substantial Harm Will Result If The Board Accepts The Planning Commission's Recommendation To Approve The Santolina Developers' Proposed Amendments To Conditions #8, #9 And #11 And Does Not Remove Condition #19 Of The Board's Conditions Of Approval To The Santolina Level A Master Plan.

A. The New Mexico Subdivision Act and its implementing Bernalillo County Ordinances mandate that major subdivision plats and associated documents be reviewed and approved under procedures for major subdivisions and not under summary review procedures for minor subdivisions.

Level C documents for a planned community such as Santolina, which result in types-one, -two, -three (six lots or greater) or -four subdivisions, must be considered by either the Board of County Commissioners or the Planning Commission. NMSA 1978, Section 47-6-9.D; Sections 74-7, 74-10, 74-33 of the Bernalillo County Code of Ordinances. If the Board delegates the authority to review and approve Types 1, 2, 3 (six lots or greater) and 4 subdivision preliminary plats and final plats, as well as associated Level C documents, to the Planning Commission, the delegation must comply with the public hearing requirements contained in NMSA 1978, Section 47-6-14 and with the water permit requirements contained in NMSA 1978, Section 47-6-11.2. *Id.* Only certain Type 3 and all Type 5 subdivision plats and associated Level C documents may be reviewed by the County Development Review Authority under summary review procedures. NMSA 1978, Section 47-6-11.M.

Neither the Santolina Developers nor the Board has explained how the proposed Santolina development would result in either certain type-three or all type-five subdivisions as opposed to types one, two, three (six lots or greater) and four subdivisions.¹⁰ The proposed Santolina development encompasses nearly 14,000 acres and the Level B.1 Master Plan would

¹⁰ A type-one subdivision means "any subdivision containing five hundred or more parcels, any one of which is less than ten acres in size." NMSA 1978, Section 47-6-2.P. A type-two subdivision means "any subdivision containing not fewer than twenty-five but not more than four hundred ninety-nine parcels, any of which is less than ten acres in size. *Id.* at Q. A type-four subdivision means "any subdivision containing twenty-five or more parcels, each of which is ten acres or more in size. *Id.* at S.

govern approximately 4,243 acres. A type-three subdivision means “any subdivision containing not more than twenty-four parcels, any one of which is less than ten acres in size”. NMSA 1978, Section 47-6-2.R. A type-three subdivision that is 5 parcels or less can be reviewed by the CDRA under summary review procedures. A type-five subdivision means “any subdivision containing not more than twenty-four parcels, each of which is ten acres or more in size.” NMSA 1978, Section 47-6-2.T.

The Board and the Developers endeavored to unlawfully circumvent requirements for major subdivisions through the adoption of Condition #19 to the Board’s approval of the Level A Master Plan. 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). Condition #19 is clearly not limited to a Santolina Boundary Plat; it also applies to all subsequent platting actions and associated Level C documents. *Id.*

A summary review procedure does not permit public participation, requires much less information from the developer, and does not require a water permit. NMSA 1978, Section 47-6-27; NMSA 1978, Section 47-6-11.2; 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).

B. Substantial harm will result to the Public, the Planning Commission, and the Board if the Board accepts the Santolina Developers' Proposed Amendments to Conditions #8, #9 and #11 and Condition #19 is not removed

The New Mexico Subdivision Act and its implementing Bernalillo County Ordinances clearly mandate that the public has a right to a public hearing on major subdivision plats and associated Level C documents, and that developers are required to provide “proof of a service commitment from a water provider and an opinion from the state engineer that the [developer] can ...[furnish water sufficient in quantity to fulfill the maximum annual water requirements of the subdivision] or provide a copy of a permit obtained from the state engineer...for the subdivision water use,” NMSA 1978, Section 47-6-11.2.

The Bernalillo County Code of Ordinances also mandates that the Planning Commission, not the CDRA, has review and approval authority for major subdivision actions and documents. Condition #19 would cause substantial harm to the Board, the Planning Commission, and the public if the Board accepts the Planning Commission’s recommendation that the Board approve the Santolina Developers’ proposed amendments to Conditions #8, #9 and #11.

1. Substantial harm will result to the public.

The Santolina Developers have requested that the Planning Commission recommend that the Board approve its proposed amendments to Conditions #8, #9 and #11 of the Board’s Approval of the Level A Master Plan so that the required Water Authority development agreement would be deferred to the Level C phase of development and no longer have to be submitted with its Level B.1 Master Plan. *See* Santolina Developers’ Application (Request) to remove and/or amend Conditions #8, #9 and #11 to the Board’s Approval of the Level A Master Plan (April 24, 2017); *See also* Santolina Developers’ Application SPR2017-0003 submitted to

the Planning Commission.¹¹ The Planning Commission voted to recommend that the Board accept the Santolina Developers' proposed amendments to Conditions #8, #9 and #11 on June 7, 2017. *See* Planning Commission Notification of Decision (June 10, 2017).

Appellants have filed an appeal of the Planning Commission Decision with the Board. *See* Appellants' 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 (June 22, 2017).

In this context, Condition #19 is an unlawful attempt to circumvent the public participation and water permit requirements mandated by the New Mexico Subdivision Act. Under Condition #19, no public hearings would be held on the proposed Santolina plats and associated Level C documents, or on any Level B documents that have been deferred to the Level C phase of development, and the Developers will not be required to comply with the water permit requirements.

The public's right to provide comment and testimony on the critical Water Authority development agreement and associated water permit requirements would be eliminated if the Board accepts the Planning Commission's recommendation that the Board approve the Developers' proposed amendments to Conditions #8, #9 and #11 to defer the Water Authority

¹¹ 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.*

development agreement requirement to Level C. Not only does the public have a right to a public hearing on major subdivision plats and associated Level C documents, NMSA 1978, Section 47-6-11.2, the public also 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 lawfully reviewed by either the Board or the Planning Commission, but is instead unlawfully reviewed by the County Development Review Authority under summary review procedures, the public will no longer have the opportunity to provide comment and testimony on these critical water documents.

2. Substantial harm will result to the Planning Commission.

Condition #19 would also preclude the Planning Commission from exercising its lawfully delegated review and approval authority for major subdivision plats and associated Level C documents. Bernalillo County Code of Ordinances, Section 74-7. As previously discussed, the New Mexico Subdivision Act only permits the Board to delegate its review and approval authority of minor subdivisions to the County Development Review Authority. NMSA 1978, Section 47-6-11.M. The Board may not delegate its review and approval authority of major subdivision plats and associated Level C documents, which is what the proposed Santolina development would result in, to the CDRA. NMSA 1978, Section 47-6-9.D. Only the Planning Commission may review and approve major subdivision plats and associated Level C documents if that authority is delegated to the Planning Commission by the Board. *Id.*

Condition #19 is an unlawful attempt to circumvent the Planning Commission's review and approval authority for major subdivision actions and documents. The proposed Santolina development would encompass nearly 14,000 acres and the Level B.1 Master Plan would govern approximately 4,243 acres. Neither the Santolina Developers nor the Board has explained how such a massive planned community would result in minor subdivision plats.

Moreover, County Staff concede that the CDRA has no authority to review and approve the Santolina Water Authority development agreement, along with other Level B.1 documents, and Level C documents and associated plans and plats. Juanita Garcia with the County Planning and Development Services Department advised the Board the following:

We recognize that amendments to the subdivision ordinance will be required to allow the County's development review authority, the CDRA, to have review authority over the Level C plans and some of the projects within the Level B1 plan. Right now as established in the Zoning Code it indicates that any sort of development or approval for Level C plans requires it to be approved and reviewed by the CDRA. However, the CDRA is not structured in such away to allow for that sort of review process so we – we recognize that and we understand that there are going to be some amendments needed to allow for that to happen.

Board Transcript, TR-24: 25, TR-25: 1-12 (April 4, 2017).

3. Substantial harm will result to the Board of County Commissioners.

If the Board accepts the Planning Commission's recommendation that the Board approve the Developers' proposed amendments to Conditions #8, #9 and #11 to defer the Water Authority development agreement requirement to Level C, the Board will not be able to review this critical document of the proposed Santolina development. This is because the Planned Communities Criteria state that the Board only has review and approval authority for Level A and Level B planned community master plans and associated documents. Planned Communities Criteria, pages 35, 38. The Planned Communities Criteria therefore acknowledge that the Board has delegated its review and approval authority of major subdivision plats and associated Level

C documents to the Planning Commission and of minor subdivision plats and associated Level C documents to the County Development Review Authority. *Id.* at page 41.

Moreover, 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; Testimony of Bernalillo County Interim Director for Infrastructure Planning and Geo-Resources, Mr. Dan McGregor, Planning Commission Hearing, TR-66:17-25; TR-67: 1-2 (July 21, 2016).

For the above stated reasons, the Appellants request that the Board accept the following two proposed amendments to the Board's Approval of the Santolina Level A Master Plan:

- 1) the addition of the following "Finding": 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 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; and
- 2) the removal of Condition #19.

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.

IX. The Planning Commission Violated Its Rules Of Procedure And Section 62-36 Of The Bernalillo County Code of Ordinances When Making Its Recommendation That The Board Accept The Santolina Developers' Proposed Amendments To Conditions #8, #9 And #11.

- A. The Planning Commission violated its rules of procedure by considering new evidence not properly in the record when making its recommendation that the Board accept the Santolina Developers' proposed amendments to Conditions #8, #9 and #11.*

The Planning Commission's Hearing Procedure B.3 mandates the following:

Any and all correspondence and documents covering matters before the Commission must be submitted by 12:00 noon, eight calendar days prior to the public hearing on that matter. The Commission may vote to waive this requirement if it determines that the material is necessary to make an informed decision on the matter.

Guidelines for the Conduct of Business by the County Planning Commission and Board of Adjustment, Section B, Hearing Procedures (May 2012) ("Planning Commission Hearing Procedures").

Additionally, Hearing Procedure B.7 provides "the normal order for an application" before the Planning Commission as follows:

- a) Planning Staff Presentation
- b) Applicant's Presentation
- c) Presentations By Other Concerned Parties Pro And Then Con
- d) Rebuttal
- e) Cross-Examination
- f) Staff Response
- g) Chairman's Summary of Issues (In Complex Cases Only)
- h) Comments by CPC Members
- i) Motions, Including Findings, And Conditions That May Be Required

Id.

During the “Presentations By Other Concerned Parties” portion of the hearing on the Santolina Developers’ application to amend Conditions #8, #9 and #11, legal counsel for the Appellants advised the Planning Commission that there was no evidence in the record supporting the Developers’ assertion that the Water Authority could not enter into a development agreement with the Developers until after the Board approved the Level B.1 Master Plan. Agent for the Developers, Mr. Jim Strozier, during the “Rebuttal” portion of the hearing, submitted to the Planning Commission an alleged March 15, 2017 email exchange between the executive director of the Water Authority, Mr. Mark Sanchez, and a Mr. Garret, of Garret Development, in which Mr. Sanchez allegedly stated that the Water Authority could not enter into an agreement with the Santolina Developers until after the Board approved the Level B.1 Master Plan.

Legal counsel for the Appellants immediately objected to the admission and consideration of this alleged email on the grounds that it was not properly part of the record in this matter as it had not been included in the Developers’ application to the Planning Commission and had not been provided to the Planning Commission eight days prior to the hearing pursuant to Hearing Procedure B.3. Chairman Chavez responded, “It is now [part of the record].” Mr. Strozier conceded that the alleged March 15, 2017 email had not been included with its April 24, 2017 application being considered by the Planning Commission on June 7, 2017.

The Planning Commission did not proceed to waive the eight-day requirement and determine that the alleged email was “necessary to make an informed decision on the matter.” The Planning Commission proceeded to vote to recommend that the Board accept the Developers’ proposed amendments to Conditions #8, #9 and #11, based on its unlawful

consideration of this alleged email not properly part of the record pursuant to Hearing Procedure B.3.

The Planning Commission's and the Developers' violation of Hearing Procedure B.3 was not harmless error and significantly prejudiced Appellants and the public. Neither the Appellants nor the general public were provided with a copy of this alleged email that the Developers' claim expressly states the official position of the Water Authority regarding when the Water Authority can enter into a development agreement with the Santolina Developers. Hence, the Appellants and the public were unable to verify the authenticity of the alleged email or effectively rebut the Developers' assertion and the alleged email in support thereof.

Moreover, legal counsel for the Appellants was not permitted to cross-examine the Developers' agent regarding this alleged email in violation of Hearing Procedure 7(e). Had legal counsel for Appellants been permitted to do so, Mr. Strozier would have been cross-examined regarding why the alleged March 15, 2017 email had not been included as an exhibit to the Developers' application submitted to the Planning Commission on April 24, 2017 and why the alleged email had not been provided eight days prior to the June 7, 2017 hearing on the Developers' application.

B. The Planning Commission violated its rules of procedure and Section 62-36 of the Bernalillo County Code of Ordinances by not requiring Commissioner Johnny Pena to disclose his conflict of interest regarding the proposed Santolina Development and the matter under consideration by the Planning Commission.

Rule 6 of the Planning Commission mandates the following:

A member of the CPC who has a conflict of interest of a financial nature, that could influence the outcome of a particular case, shall reveal the existence of such conflict before the case is heard, and physically withdraw from the consideration for the case. A member of the CPC with any type of perceived possible conflict of interest, should so state at the outset. His withdrawal from that particular deliberation shall be at the will of the CPC.

Id., Subsection C. Additionally, Rule 9 of the Planning Commission states that, “These rules may be suspended for the consideration of a given item by a majority vote of the membership of the CPC present.” *Id.*

Commissioner Johnny Pena was appointed to the Planning Commission on January 24, 2017 by the Board of County Commissioners, by a motion sponsored by Vice Chair of the Board, Steven Quezada. *See* the Board’s Action Report for the January 24, 2017 Board Administrative Meeting, Section 6.B. Commissioner Pena is married to Klarissa Pena, the Special Projects/Governmental and Community Relations Director at Youth Development Inc. (“YDI”), who is a co-applicant with WAHL. *See* SPR2017-0003. Mrs. Pena also serves on the Albuquerque City Council, representing District 3, and is the Chair of the Water Authority.¹² In May 2015, City Councilor Mrs. Pena recused herself from Albuquerque City Council deliberations on a draft bill pertaining to the Santolina Level A Master Plan. The reason for her recusal was that her employer, YDI, Inc., “own[s] small portions of land that Santolina would be built on.”¹³

Being married to an employee of a co-applicant for the proposed Santolina Development presents, at the minimum, a “perceived possible conflict of interest” and, at the most, a “conflict of interest of a financial nature”. *Id.* at Rule 6. At the minimum, Commissioner Pena was required to state that he is married to an employee of a co-applicant for SPR2017-0003 so that the Planning Commission could then determine whether he should withdraw from deliberations pertaining to SPR2017-0003. At the most, Commissioner Pena was required to reveal that he has a financial interest in the proposed Santolina Development before the Planning Commission

¹² <http://klarissapena.com/get-to-know-klarissa/about-klarissa/>. Last accessed on June 19, 2017.

¹³ *See* attached Exhibit A. Additionally, according to Commissioner Pena, Mrs. Pena “is always right.” *See* attached Exhibit B.

even heard the Developers' application to amend Conditions #8, #9 and #11 and should have withdrawn from consideration of the matter, just like his wife did, because his family household receives income from a co-applicant of the proposed Santolina Development. Moreover, the Planning Commission did not suspend Rule 6 for the consideration of SPR2017-0003.

Conclusion


For the above stated reasons, the Appellants request that the Board of County Commissioners defer its consideration of the Planning Commission's recommendation to approve the Santolina Developers' proposed amendments to Conditions #8, #9 and #11 of Approval to the Level A Master Plan and this Appeal until a valid PC Zone, Level A Master Plan and Level A Development Agreement are in place, if that ever occurs.

If the Board does not defer its consideration of this matter, Appellants request that the Board take the following actions:

- 1) Reject the Planning Commission's recommendation to approve the Santolina Developers' proposed amendments to Conditions #8, #9 and #11 of approval to the Level A Master Plan;
- 2) Add the following "Finding" to the Findings & Conditions of approval to the Level A Master Plan: 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 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; and
- 3) Remove Condition #19 from the conditions of approval to the Level A Master Plan.

Dated: June 24, 2017.

NEW MEXICO
ENVIRONMENTAL LAW CENTER

A handwritten signature in dark ink, appearing to read "Jaimie Park", is written over a horizontal line.

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Certificate of Service

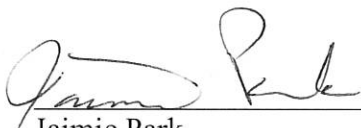
I certify that on June 24, 2017 copies of this First Amended Appeal of the Planning Commission's Recommendation that the Board of County Commissioners Approve the Santolina Developers' Proposed Amendments to Conditions #8, #9, and #11 of Approval to the Santolina Level A Master Plan were sent by electronic mail to:

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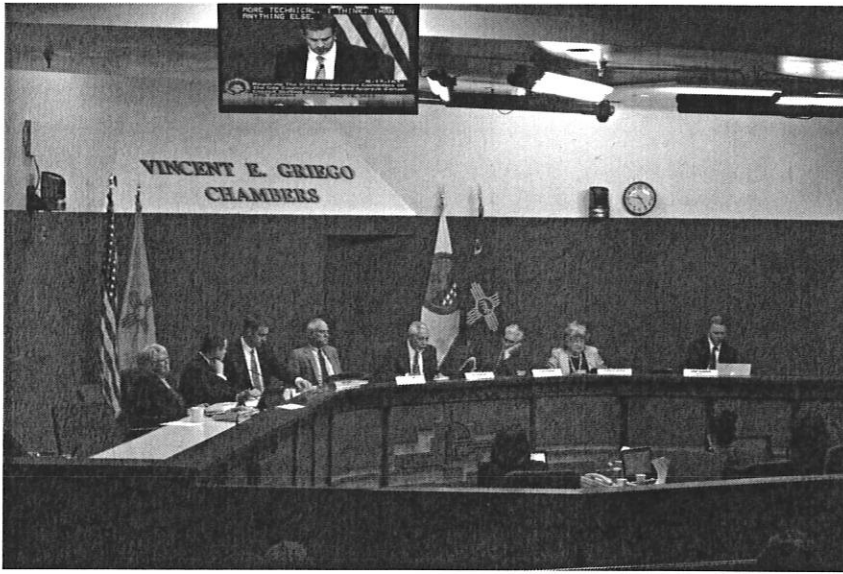
Jaimie Park

ALBUQUERQUE NEWSDESK

June 16, 2015

ABQ City Council rejects city input on Santolina

By Joey Peters



Albuquerque city council chambers during a city council hearing in May 2015. Photo Credit: Andy Lyman

The Albuquerque city council narrowly rejected a measure that would have called on the city to weigh in on a controversial planned development on the city's West Side.

Councilor Isaac Benton carried the bill Monday night, two weeks after the council rejected his introduction of similar legislation that would have also given the city a say on the Santolina master plan.

Benton said the city had a right to influence the master plan based on the city and county adopted Planned Communities Criteria and the Albuquerque/Bernalillo

County Comprehensive Plan. But councilors rejected the bill on a 4-3 vote, with two members abstaining because their employers own some land where Santolina is planned to be built.

During the debate on the legislation, Benton stressed that he wasn't asking for anything drastic.

"We're not asking for signoff approval," he said. "We're not asking for anything other than consultation and input."



City council chambers during a city council hearing in May 2015. Photo Credit: Andy Lyman

EXHIBIT

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A

Santolina is proposed to be built out on 22 square miles west of Albuquerque and house up to 90,000 people in the next 40 to 50 years. The master plan currently sits before the Bernalillo County commission for approval, where it is expected to be voted on Tuesday afternoon.

Backers of the master plan disagreed with Benton's logic behind his bill, arguing that the city had ample time and actually already weighed in on Santolina during the past two years. They also criticized the bill for coming up at the last minute.

"To hear commentary that the city was left in the dark and not involved in this issue is not accurate," Tom Garrity, a spokesman for Western Albuquerque Land Holdings (WALH), the company behind Santolina, told councilors.

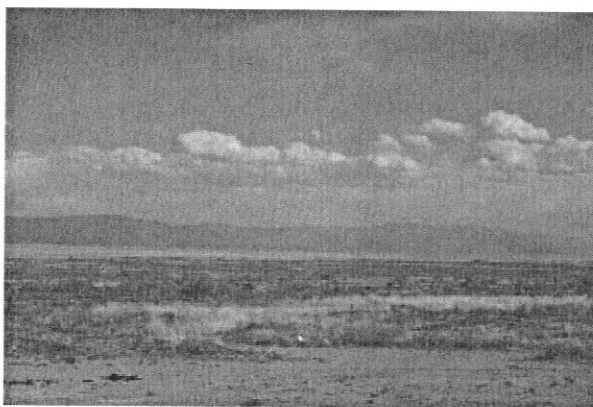
Jim Strozier, president of Consensus Planning and an agent for Santolina, said that the city's Planning Department, Open Space Division and Transit Department had all submitted feedback on the master plan over the past two years.

He also added that the county has heard nearly 50 hours of public debate on Santolina.

"This is not being fast-tracked," he said. "It is happening very thoughtfully and deliberately."

At one point, city Councilor Rey Garduño, a vocal opponent of Santolina, asked Strozier whether he could be impartial about Santolina given his employment by WALH.

"Obviously they are my client," he said, "and with that I have an obligation to work on their behalf."



A portion of the proposed sight of the Santolina Master Plan
Photo: Andy Lyman

But he maintained that his active role in the American Planning Commission —Strozier previously served as chapter president of the urban planning association —meant that he was "ethically obligated" to push forward responsible development plans.

"This is not just a matter of whatever our client wants is going to be the right thing to do," he said.

Others came to the meeting to show support for Benton's bill. Southwest Organizing Project Executive Director Javier Benavidez evoked a Martin Luther King quote that "there is never a wrong time to do the right thing."

"I would argue that it's not too late in this process since this is a 50-year commitment," Benavidez said.

Toward the end of debate, Councilor Ken Sanchez asked City Attorney Jessica Hernandez whether she thought the city had any jurisdiction over Santolina.

"I don't believe the city has any standing to weigh in," she replied.

Sanchez talked about how the state Legislature recently took away extrajudicial land authority from city governments, which he said prevented the city council from deciding an issue like Santolina.

"I believe there is a process in place and that this is an issue of jurisdiction," Sanchez said. "I don't feel this is the right place to be discussing this here at the 11th hour."

Councilor Dan Lewis, who represents the West Side, added that "we need to put infrastructure and jobs on the West Side that we're going to need to grow."

All of this didn't stop Benton, Garduño and Councilor Diane Gibson from making final pleas to support the legislation. Benton talked about how the master plan would lead to "cannibalization of businesses and people" that would leave older neighborhoods closer to the central part of the city "to go into this new development."

Garduño was more harsh in his criticism.

"Santolina is sprawl development," he said. "We should be completely against sprawl development."


Councilors Sanchez, Lewis, Trudy Jones and Don Harris voted against the bill. Benton, Garduño and Gibson cast the three votes in favor of the bill. Councilors Brad Winter and Klarissa Peña recused themselves because their employers, Albuquerque Public Schools and Youth Development Inc, respectively, own small portions of land that Santolina would be built on.


The Bernalillo County commission will hear and maybe give a final vote on the Santolina master at its Tuesday, June 16 zoning meeting.


Related Stories:


- [City council rejects introduction of Santolina legislation](http://nmpoliticalreport.com/3956/city-council-rejects-introduction-of-santolina-legislation/) (<http://nmpoliticalreport.com/3956/city-council-rejects-introduction-of-santolina-legislation/>)
- [Santolina moves closer to approval as opponents shout 'Shame!'](http://nmpoliticalreport.com/3886/santolina-moves-closer-to-approval-as-opponents-shout-shame/) (<http://nmpoliticalreport.com/3886/santolina-moves-closer-to-approval-as-opponents-shout-shame/>)
- [Attempt to push back Santolina decision fails](http://nmpoliticalreport.com/3010/attempt-to-push-back-santolina-decision-fails/) (<http://nmpoliticalreport.com/3010/attempt-to-push-back-santolina-decision-fails/>)
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- [Water, 'systems thinking' and Santolina's tangled history](http://nmpoliticalreport.com/2837/water-systems-thinking-and-santolinas-tangled-history/) (<http://nmpoliticalreport.com/2837/water-systems-thinking-and-santolinas-tangled-history/>)
- [ABQ West Side development plans included in capital outlay](http://nmpoliticalreport.com/4087/abq-west-side-development-plans-included-in-capital-outlay/) (<http://nmpoliticalreport.com/4087/abq-west-side-development-plans-included-in-capital-outlay/>)

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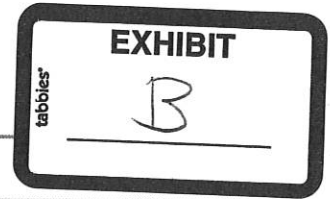
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Couple Raises \$14K for YDI After Wager



Albuquerque Journal · 13 Oct 2012 · 1 · By Elaine D. Briseño Journal Staff Writer

A friendly family bet has turned into a boost of almost \$14,000 for a local nonprofit organization.



Johnny Peña bet his wife Klarissa Peña, special projects director for Youth Development, Inc., that she could not raise \$10,000 for the organization during a fundraiser dinner and silent auction at the couple's home.

It was exactly what Klarissa Peña needed to mobilize the troops.

When it was all over, she had gotten enough donated items for the auction and convinced almost 175 people to attend the dinner and several more to donate online. By the end of the night, the fundraiser had generated \$7,300, and a donor agreed to add whatever was needed to reach the \$10,000 threshold. The biggest-ticket item was a Victrola donated by Joe and Isabel Chavez that brought in \$2,800.

"We had reached our goal by the end of the night," she said. "Then I checked the online donations, and we had received almost \$4,000 more to far exceed our goal."

That meant Peña had to live up to his end of the bargain. He stood on the corner of Central and Coors during rush hour Thursday holding a sign with a picture of Rosie the Riveter that read "It's true ... My wife is always right!"

"I feel so sorry for my husband," Peña said in an interview Thursday. "He's been a good sport."

She didn't leave him on that corner alone, though. She, Youth Development Inc. CEO Chris Baca and other volunteers joined him with their own signs thanking YDI and instructing people on how they could continue to donate.

Peña promised her husband two tickets to a Dallas Cowboys game.

"For being a good sport, he's going to be a winner too," Peña said. "I just bought him two tickets today to the Dec. 23 game against the Saints, but I wasn't invited."

Instead, he will be taking one of the couple's sons.

YDI is a nonprofit group that offers a myriad of services to children and young adults, including substance-abuse counseling, Head Start, shelter for homeless teens and help in finding em-

ployment. They also offer scholarships and GED courses, which will be the beneficiaries of the \$14,000.

Peña said the downturn in the economy led to program cuts in those areas. But, she said the scholarships and GED courses are two important programs they offer.

Jozette Silva, 21, dropped out of high school when she was a sophomore. Her parents divorced, and she had to get a job to help her mom pay bills. The family did not have a car and juggling school with the problem of getting to work overwhelmed her. She said she tried to catch up with her school work, but eventually dropped out.

She lost her job last year, and a family friend suggested she turn to YDI for help finding work. The organization hired her as a receptionist, and employees started encouraging her to get her GED. She will do so after she passes the social studies portion of the test. The group also awarded her a \$500 scholarship so she can go on to college.

"They've helped me a lot," she said. "Without coming here, I would not have worked to get my GED. They pushed me to do that."