



June 8, 2015

Maggie Hart Stebbins, Chair
Art De La Cruz, Vice-Chair
Wayne Johnson, Member
Debbie O'Malley, Member
Lonnie Talbert, Member
Bernalillo County Board of County
Commissioners
One Civic Plaza
Albuquerque, N.M. 87102

By electronic mail to:
Catherine VerEecke, Program Planner
Bernalillo County Planning Department
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Re: Draft Development Agreement for the proposed Santolina development

Dear Chairperson Stebbins and Commissioners De La Cruz, Johnson, O'Malley, and Talbert:

The following are the comments of the SouthWest Organizing Project, the New Mexico Health Equity Working Group, and the Pajarito Village Association (referred to collectively as "the Appellants"¹) on the Draft of the proposed Santolina Level A Development Agreement dated 12:00 p.m. on June 1, 2015 ("the Draft Development Agreement") between the Bernalillo County Board of County Commissioners ("the Board of County Commissioners") and the developer of the proposed Santolina development ("the Santolina Developer").

Introduction

The Draft Development Agreement fails completely to commit the Santolina Developer to achievement of the Developer's goals and objectives for the proposed Santolina development. For that reason, the Draft Development Agreement in fact provides no assurances for Bernalillo County or the Board of County Commissioners that those goals and objectives will be achieved.

The Draft Development Agreement also is flawed because important terms do not specify which party has the authority to make decisions in the event of disputes; those terms also have no provisions for how disputes are to be resolved. Bernalillo County and the Board of County Commissioners therefore will have no choice but to seek relief in district court whenever a dispute between the County and the Developer cannot be resolved.

In addition, the process used to negotiate the Draft Development Agreement completely excluded members of the public from participating in the negotiations. This process was both unwise public policy and a violation of the New Mexico Open Meetings Act, NMSA 1978

¹ The appeals filed by these three organizations have been denied, but the organizations are referred to as "the Appellants" for ease of reference.

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sections 10-15-1, *et seq.*

Finally, there are several important points at which the Draft Development Agreement actually undermines the authority of the Board of County Commissioners to act on behalf of the residents of Bernalillo county. Because the Board of County Commissioners' primary responsibility is to protect the health, safety, and welfare of those residents, the Board of County Commissioners should not relinquish its authority in that manner.

For each of these reasons, the Board of County Commissioners should not approve the Draft Development Agreement.

I. The Draft Development Agreement fails to secure enforceable commitments from the developer.

The development agreement is a contract between Bernalillo County and the Developer of the proposed Santolina development that is supposed to set forth each party's commitments to the other in connection with the proposed development. Despite that, the Draft Development Agreement makes essentially no commitments by the Santolina Developer that the County would be able to enforce. There are several examples of this weakness in the Draft Development Agreement.

A. The Draft Development Agreement fails to include an enforceable provision addressing the jobs-to-housing ratio to be achieved by the Santolina development.

The Draft Development Agreement does not call for the Santolina Developer to make any firm or enforceable commitment concerning the jobs-to-housing ratio that is central to the Agreement. On the contrary, section 4.4 of the Draft Development Agreement states first that the Santolina Level A Master Plan ("the Santolina Master Plan") has been approved:

based upon the Property having a reasonable balance between residential and employment land uses such that the Project maintains the characteristics of a self-sustaining community throughout the period of development.

Draft Development Agreement, pages 3-4.

The Draft Development Agreement provides that the County may withhold future residential building permits if there is an imbalance between residential and employment land uses, but there are no criteria for determining whether such an imbalance exists. Moreover, this

provision only addresses the balance or imbalance between residential and employment land uses; it says nothing about actual numbers of jobs.

The number of jobs that will be created appears to be addressed in the Draft Development Agreement's table (on page 4) showing numbers of jobs for particular numbers of dwelling units, but it is not clear whether those numbers constitute requirements or are merely goals. However, the concluding sentence of section 4.4 of the Draft Development Agreement confirms that the numbers in that table are only goals. That sentence states:

Nevertheless, as stated in the Santolina Level A Master Plan and evidenced by the land use category area percentages, the ultimate goal remains an approximate jobs to housing ratio of 2:1 or 75,000 jobs at full buildout.

Draft Development Agreement, page 4.

As this language indicates, the Santolina Developer's only commitment is to have a goal of an approximate jobs to housing ratio of 2:1. That is not a commitment that could be enforced by Bernalillo County or the Board of County Commissioners.

- B. The Draft Development Agreement's treatment of negative impacts and mitigation measures is deficient.

Section 5.3 of the Draft Development Agreement purports to commit the Santolina Developer to:

Mitigate the negative impacts resulting from development of the Santolina property as such negative impacts may be identified in the Level B and Level C review process.

Draft Development Agreement, page 4.

However, the provision contains no definition of what negative impacts are or who determines whether a specific impact is negative. There also is no definition of what constitutes mitigation. Finally, there is no provision for mitigation of negative impacts that occur after the Level C review process is completed. This language provides no enforceable commitment that could be used by the Board of County Commissioners or by Bernalillo County.

C. The Draft Development Agreement fails to require the Santolina Developer to comply with the “no net expense” policy.

The Draft Development Agreement also does not mandate that the Santolina Developer make an enforceable commitment to comply with the “no net expense” policy of the County Comprehensive Plan and Planned Communities Criteria. The language addressing this issue in section 7.1 of the Draft Development Agreement is vague. It provides:

The “no net expense” test is satisfied if the County’s on-site public expenditures and off-site public expenditures reasonably allocated to the Project have been, or will be, off-set by revenues and/or economic and fiscal benefits (direct, indirect and induced) from the Project.

Draft Development Agreement, page 9.

This provision states that expenses allocated to the Project may be offset in the future, but there is no deadline indicating how soon in the future that offset must occur. There also is no indication of what the remedy will be if such an offset does not occur.

In addition, the determination that the Santolina development meets the “no net expense” requirement is based on a study conducted in 2013 by David Taussig & Associates that was paid for by the Santolina Developer (and that was contradicted by the study conducted by Dr. Kelly O’Donnell), but both studies were predictions only, and there is no provision for future evaluations to determine whether the “no net expense” test is in fact being met. Section 7.2.2 of the Draft Development Agreement does indicate that the Level B analysis for subsequent phases of the Santolina development must also satisfy the “no net expense” policy, but that section does not make clear whether the Level B analysis is to include what has occurred since the Level A analysis was conducted.

There is therefore no firm commitment by the Santolina developer to meet the “no net expense” requirement.

II. The Draft Development Agreement neither defines who determines compliance nor specifies how disputes about compliance are to be resolved.

There are several provisions of the Draft Development Agreement that fail to indicate which party determines whether the Santolina developer has complied with its obligations under the Agreement, and that have no provision defining how decisions about compliance will be made

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if the Santolina Developer and Bernalillo County are not able to agree. Examples of these provisions are:

- Section 4.4 Housing/Employment, which addresses the jobs-to-housing ratio that the Santolina Developer has represented will be achieved;
- Section 5.3 Commitment to Mitigation of Negative Impacts, which purports to commit the Santolina Developer to such mitigation;
- Section 6.1 Categorizing Infrastructure and section 6.2.4 Open Space, Parks, Recreation and Trail Facilities, which assert that infrastructure constructed by the Santolina Developer must meet “industry practices and standards customarily acceptable to and uniformly applied by Bernalillo County”; and
- Section 7.1 The Test and section 7.2 Satisfaction of the Test at Master Plan and Village Plan Levels, which address compliance with the “no net expense” test.

III. The process used by Bernalillo County to negotiate the Draft Development Agreement has been inappropriate.

The Appellants concur with the points made to the Board of County Commissioners concerning the Draft Development Agreement by Hessel E. Yntema, III on behalf of the South Valley Coalition of Neighborhood Associations in his letter dated June 5, 2015. Mr. Yntema explained why the process used by Bernalillo County staff to negotiate the Draft Development Agreement violated applicable New Mexico zoning law and the State Open Meetings Act. Mr. Yntema also addressed the inconsistency between the process used to negotiate the Draft Development Agreement and section 25.A of the Bernalillo County Code of Zoning Ordinances, as well as the requirement that the Draft Development Agreement be reviewed in a public process by the County Planning Commission.

In addition, the Appellants object to the way in which changes were made to the Draft Development Agreement at the last minute. The Appellants were first provided with access to the Draft Development Agreement on May 22, 2015, and a new draft of the Draft Development Agreement was posted on the Bernalillo County website on June 1, 2015. This procedure has not provided members of the public with reasonable opportunities to respond to the Draft Development Agreement.

The Appellants therefore join the South Valley Coalition of Neighborhood Associations in its demands that the Board of County Commissioners determine that the process used to negotiate the Draft Development violated the Open Meetings Act and that the Board invalidate the Draft Development Agreement.

IV. The Draft Development Agreement would undermine the authority of Bernalillo County to protect county residents.

There are several provisions of the Draft Development Agreement that would limit or remove the ability of the Board of County Commissioners to regulate activity in Bernalillo county for the benefit of the health, safety, and welfare of county residents.

A. The Draft Development Agreement limits the ability of the Board of County Commissioners to take proactive action.

The first such provision is section 3.1, which states:

Future County Commission Actions. Nothing in this Agreement shall be construed to prohibit a future County Commission from regulating for the health, safety and welfare of County residents; provided that such regulation is rationally related to the alleviation of legitimate threats to public health, safety and welfare.

Draft Development Agreement, page 2.

On the one hand, this provision means that the Development Agreement cannot be construed to prohibit Bernalillo County from addressing threats to the health, safety, and welfare of county residents. On the other hand, however, it means that the Development Agreement can be construed to prevent Bernalillo County from taking affirmative steps to protect or enhance the health, safety and welfare of county residents if no threat to health, safety and welfare is present. In other words, the Development Agreement could be used to prevent Bernalillo County from acting proactively to address potential problems before actual threats arise.

B. The Draft Development Agreement limits the applicability of Bernalillo County ordinances and regulations.

The second provision that undermines Bernalillo County's authority is section 8.4. It states:

The establishment of rights under this Agreement shall not preclude the application of County ordinances, rules, regulations and procedures of general applicability ("**County Regulations**"), except to the extent that such County Regulations conflict with the provisions of this Agreement. The Owner [the Santolina Developer] does not waive its rights to oppose adoption of any such proposed

ordinances or regulations that do not already exist.

Draft Development Agreement, pages 9-10, emphasis in original.

This provision means that if there is a conflict between a Bernalillo County ordinance or regulation and the Draft Development Agreement, the Draft Development Agreement governs. In other words, the Draft Development Agreement provides that the Board of County Commissioners agrees that the Santolina development is exempt from any ordinances or regulations that the Board has adopted that conflict with the Draft Development Agreement.

Not only would this provision be inappropriate public policy, it also violates NMSA 1978 section 3-21-6(B) of New Mexico's zoning laws, which requires that zoning ordinances only be enacted, amended, or repealed by means of proceedings that include opportunities for public participation. In addition, this provision would violate section 25.A of the Bernalillo County Zoning Code, which mandates that proposed zoning changes be considered by the County Planning Commission.

C. The Draft Development Agreement requires the Board of County Commissioners to abdicate two important responsibilities.

The last two provisions of the Draft Development Agreement that would undermine the authority of the Board of County Commissioners are section 6.2.3 and section 6.2.5. Section 6.2.3 states that if the Albuquerque Metropolitan Arroyo Flood Control Authority ("AMAFCA") provides storm water infrastructure for the proposed Santolina development, all matters associated with AMAFCA storm water infrastructure shall be resolved solely between AMAFCA and the Santolina Developer. Section 6.2.5 is similar. It states that if the Albuquerque/Bernalillo County Water Utility Authority ("the Water Authority") provides water and sewer service to the proposed Santolina development, all matters involving water and sewer service to the development shall be resolved solely between the Water Authority and the Santolina developer.

Each of these provisions means that the Board of County Commissioners is abdicating its regulatory authority in favor of that authority being exercised by another entity. In one situation the other entity is AMAFCA; in the other it is the Water Authority. This abdication of authority is particularly inappropriate because neither of these entities is controlled by the Board of County Commissioners or by any other entity of Bernalillo County government.


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Conclusion

The Draft Development Agreement is deficient in many respects, and the process used to negotiate it excluded the members of the public and violated State law and the Bernalillo County zoning code. The Board of County Commissioners therefore should refuse to consider or approve the Draft Development Agreement. The Board of County Commissioners also should direct the Bernalillo County staff to negotiate a new draft of the Development Agreement that provides adequate protection for Bernalillo County and the Board of County Commissioners by including enforceable provisions. In addition, the Board of County Commissioners should direct the County staff to use a process for the renegotiation of the Development Agreement that provides for public participation and that complies with the Open Meetings Act.

Thank you for your consideration of these issues.

Yours truly,


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