IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PETITION FOR A HEARING ON THE MERITS REGARDING AIR QUALITY PERMIT NO. 3135

Margaret Freed, Mary Ann Roberts and Pat Toledo,

Appellants-Petitioners,

v.

The City of Albuquerque and Smith's Food & Drug Centers, Inc.,

Appellees-Respondents.

Ct. App. No. 34,285

Air Quality Control Board No. 2014-2

Appeal from the Albuquerque/Bernalillo County Air Quality Control Board
Felicia L. Orth, Hearing Officer

APPELLEE SMITH'S FOOD & DRUG CENTERS, INC.'S ANSWER BRIEF

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STATEMENT OF COMPLIANCE

Undersigned counsel states that this Consolidated Reply Brief complies with Rule 12-213(F) NMRA in that the body of the brief is prepared in Arial typeface and contains 8,458 words. This word count was obtained using Microsoft Office Word 2007 software.

I. INTRODUCTION

This appeal presents the Court with the opportunity to reaffirm the well-established law in New Mexico that administrative agencies can only act within the scope of the authority delegated to them by statute. The Court also has the opportunity to confirm a corollary to that legal axiom; an agency acting in its adjudicatory capacity may properly grant summary judgment against the party bearing the burden of proof when that party's evidence lacks a nexus to an applicable regulation. Concluding otherwise would force the agency to consider evidence that is outside the scope of its authority, thus inviting the agency to commit error, in addition to causing the agency and the parties needlessly to endure potentially lengthy and expensive evidentiary hearings that, as a matter of law, can have no bearing on the outcome of the case. No New Mexico law or public policy supports such a result.

In this case, the Albuquerque/Bernalillo County Air Quality Control Board ("Air Board") dismissed Appellants' petition challenging a gas station air permit that the City of Albuquerque Environmental Health Department ("EHD" or "City") issued to Smith's Food & Drug Centers, Inc. ("Smith's"). The Air Board granted summary judgment to Smith's and to the City because Appellants' proposed evidence lacked a nexus to an applicable

regulation. Appellants did not dispute that the air permit complied with federal, state and local standards, but instead sought to introduce evidence concerning traffic, odors, potential health impacts and "quality of life" impacts. The Air Board correctly declined to expand the scope of its authority to consider Appellants' evidence. The Court should therefore affirm the Air Board's decision.

II. SUMMARY OF FACTS AND PROCEEDINGS

On November 5, 2013, Smith's filed with EHD an application for an authority-to-construct permit for a proposed gas station to be located at 6941 Montgomery Boulevard NE. **[4 RP 822 ¶ 1]** Smith's requested authorization to pump up to 7,000,000 gallons of gasoline per year (also known as "throughput"), which equates to 45.5 tons per year of Volatile Organic Compounds ("VOCs"). **[Id.]** EHD evaluated Smith's application, ruled it complete and assigned No. 3135 to the proposed permit. **[4 RP 823 ¶ 3]**

EHD published notice of the proposed permitting action and held a public information hearing. **[4 RP 823 ¶¶ 4-6]** EHD air quality staff spoke at the public information hearing about how gas station emissions are regulated pursuant to EPA and local regulations. **[4 RP 823 ¶ 8; 2 RP 159-62]** EHD staff explained that gas station emissions are controlled through

performance standards, which require, among other things: (1) management practices to minimize gasoline spills and to clean them expeditiously, (2) submerged filling of gasoline storage tanks to reduce splashing and release of vapors, and (3) use of Stage I vapor recovery and vapor balance systems. **[Id.; 2 RP 123 (summarizing National Emission Standards for Hazardous Air Pollutants for Source Category: Gasoline Dispensing Facilities, 40 CFR Part 63, Subpart CCCCCC ("Hex C")]** EHD staff explained that gas stations are not regulated by imposing limits on the quantity of pollutants that they may emit. **[4 RP 824 ¶ 8]**

Members of the public gave comments, asked questions and submitted documents at the public information hearing. **[4 RP 824 ¶ 9]** None of the verbal or written public comments identified any aspect of the permitting process that failed to comply with the applicable statutes and regulations for gas station air permitting. **[4 RP 824 ¶ 10]** After considering all of the documents and comments it received at the public information hearing and during the public comment period, EHD determined that the permit application met all of the requirements of the federal Clean Air Act, the New Mexico Air Quality Control Act, and the applicable air quality ordinances and regulations. **[4 RP 825 ¶ 12; 2 RP 327]** EHD then issued Permit No. 3135 to Smith's. **[4 RP 825 ¶ 13; 2 RP**

320-24] EHD sent participant notification letters, which provided a detailed explanation of EHD's decision, to members of the public who had signed up to be notified. **[2 RP 325-27]**

Dissatisfied with this outcome, Appellants filed their Petition for Hearing with the Air Board on June 2, 2014. **[3 RP 562]** The Petition does not identify any aspect of the permitting process that failed to comply with applicable statutes and regulations. **[3 RP 562-68]** Instead, Appellants alleged that: (1) EHD "failed to take into consideration quality-of-life concerns raised by the participants at the [public information hearing,]" and (2) "each of the [Appellants is] likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and other negative impacts on their property and quality of life[.]" **[3 RP 563]** For their remedy Appellants only requested that the Air Board hold an evidentiary hearing; they did not ask the Air Board to reverse the issuance of Permit No. 3135 or to impose conditions on the permit. **[3 RP 567-68]**

The Air Board appointed a hearing officer. **[3 RP 588]** The hearing officer issued a Prehearing Order that, among other things, allowed the parties to serve written discovery and set forth the requirements for parties to file notices of intent to present technical testimony ("NOIs"). **[3 RP 590-92]** Smith's served written discovery to Appellants; no other party served

discovery. **[3 RP 593-94; 4 RP 835-56]** Smith's goal in serving the discovery was to understand: (1) whether Appellants were alleging a violation of any applicable rule or standard, and (2) what evidence Appellants intended to offer in support of their various allegations of negative impacts. **[1 TR 10/8/14 at 45:21 – 46:13]** This information would enable Smith's to determine whether dispositive motion practice would be appropriate and what evidence would be necessary to rebut Appellants' claims in the event the Air Board went forward with a hearing on those claims. **[1 TR 10/8/14 at 100:3 – 101:15]**

Appellants served discovery responses that were evasive and nonresponsive. **[4 RP 857-59; 1 TR 10/8/14 at 83:5-11]** Smith's requested supplemental discovery responses to correct these deficiencies. **[4 RP 857-59]** Petitioners filed their NOI and, on the same date, served supplemental discovery responses that mostly reference the NOI. **[3 RP 647-92; 4 RP 860-76]** Once again, neither Appellants' NOI nor any of their discovery responses identified a violation of the applicable air permitting statutes and regulations. **[3 RP 647-92; 4 RP 835-56 (*e.g.* Int. Nos. 15-17 and RFA Nos. 11, 12, 15, 17, 18); 4 RP 860-76 (*e.g.* Int. Nos. 15-16 and RFA Nos. 11, 12, 15, 18]** Instead, Appellants identified a technical expert,

Dr. Dana Rowangould, whose proposed testimony can be summarized as follows:

- Gasoline vapors from mobile sources (*e.g.* vehicles) and from stationary sources (*e.g.* gas stations) are associated with health risks. **[3 RP 651-53]**

- Higher levels of throughput at a particular gas station will lead to increased emissions and increased potential health risks associated with those emissions. **[3 RP 653 n.2]**

- Further study is needed "to ensure that the potential air quality and health impacts associated with the proposed Smith's fueling station are better understood." **[3 RP 654]**

- "If the facility is found to result in air quality and/or health impacts that exceed levels that are acceptable (based on regulatory levels, health risks, and/or community sentiment), mitigations and/or alternatives should be explored." **[Id.]**

Smith's filed a motion for summary judgment asserting that: (1) Permit No. 3135 unquestionably complies with applicable law, (2) the Air Board cannot address Appellants' concerns that lack a nexus to applicable regulations, and (3) even if the Air Board could consider Appellants' concerns, Appellants cannot carry their burden of proof because their proposed evidence is inconclusive and merely calls for further study. **[4 RP 822-34]** The City also filed a motion for summary judgment advancing similar arguments. **[3 RP 701-30]**

The Air Board held a hearing on Appellees' motions for summary judgment and granted the motions by a vote of 6 to 1. **[4 RP 1149-50]** The Air Board explained that it "found no genuine issue of material facts of the case; no support for a contention that a standard, rule or statute would be violated by the permit, or construction under the permit; no authority for the Board to address the Petitioners' stated concerns; and no nexus between the Petitioners' stated concerns and the air quality permitting rules." **[4 RP 1150]**

Appellants filed a motion to reconsider in which they argued for the first time that the Air Board could consider Appellants' proposed evidence pursuant to NMSA 1978, § 74-2-7(D) and 20.11.41.18(B)(4) NMAC (10/1/02), which allow the Air Board to impose permit conditions not relating to emission limits or rates. **[4 RP 1151-53]** Before the Air Board could hear the motion, Appellants filed their notice of appeal and docketing statement in this Court. **[SRP 1174a]** Smith's and the City jointly opposed the motion to reconsider based on, among other things: (1) the Air Board's apparent lack of jurisdiction to hear the motion following Appellants' filing of their appeal, (2) Appellants' improper attempt to raise a new argument in a motion to reconsider when they could have raised it earlier, and (3) Appellants' failure to specify what conditions should be imposed or how

their proposed evidence would support imposing such conditions. **[4 RP 1165-72]** The Air Board held a hearing to determine whether to entertain the motion to reconsider and concluded that it lacked jurisdiction to hear it. **[SRP 1174a]** Appellants did not appeal from the Air Board's order declining to hear the merits of their motion to reconsider.

III. ARGUMENT

A. Standard Of Review.

The Air Quality Control Act provides that a decision of the Air Board will be set aside "only if found to be: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law." NMSA 1978, § 74-2-9(C). "A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 61 P.3d 806. "An agency abuses its discretion when its decision is not in accord with legal procedure or supported by its findings, or when the evidence does not support its findings. An agency also abuses its discretion when its decision is contrary to logic and reason." *Oil Transport Co. v. NM State Corp. Comm'n*, 1990-NMSC-072, ¶ 25, 798 P.2d 169 (internal citation omitted).

Interpretation of the Air Quality Control Act, the Air Board's regulations and applicable federal air quality regulations presents an issue of law, which the Court reviews *de novo*. *Pub. Serv. Co. of NM v. NM Pub. Util. Comm'n*, 1999-NMSC-040, ¶ 14, 992 P.2d 860. This Court's review of a grant of summary judgment is also *de novo*. *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 150 P.3d 971. Finally, a reviewing court generally will "give persuasive weight to long-standing administrative constructions of statutes by the agency charged with administering them." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 970 P.2d 599.

B. Summary Judgment Was Proper Because Appellants Failed To Produce Any Evidence Demonstrating A Genuine Dispute Of Material Fact.

1. *The Air Board's Use Of A Summary Judgment Procedure Modeled After Rule 1-056 NMRA Was Appropriate.*

Appellants complain that the Air Board erred in utilizing a summary judgment procedure to dispose of this case. **[BIC 25, 30-34]** However, this case is precisely the type that should be decided by summary judgment. *See Schmidt v. St. Joseph's Hosp.*, 1987-NMCA-046, ¶ 4, 736 P.2d 135 (observing that summary judgment "serve[s] a worthwhile purpose in disposing of groundless claims, or claims which cannot be proved, without putting the parties and the courts through the trouble and expense of full

blown trials on these claims.") (quoted authority omitted); *see also Puerto Rico Aqueduct and Sewer Auth. v. EPA*, 35 F. 3d 600, 606 (1st Cir. 1994) ("Due process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way."). The Air Board's use of a summary judgment procedure modeled after Rule 1-056 is supported by the Air Board's regulations as well as the sound policy observed in *Schmidt* and in *Puerto Rico Aqueduct.*

First, the Air Board's adjudicatory procedures allow it to use the New Mexico Rules of Civil Procedure in the absence of a specific provision in 20.11.81 NMAC. *See* 20.11.81.12(A) NMAC. Although the Air Board's adjudicatory procedures include a provision for expedited "summary procedures" based on pure legal argument, *see* 20.11.81.20(A) NMAC, those procedures are not akin to summary judgment because they test "the merits of the petition" and do not appear to contemplate the use of discovery or consideration of matters outside the pleadings. Smith's did not invoke an expedited summary procedure because it needed sufficient time to conduct discovery and then, if necessary, file a dispositive motion. The hearing on Appellees' summary judgment motions was not expedited in any sense; it took place more than four months after Appellants filed their

petition and well beyond the 60-day hearing timeline contemplated under the Air Act. *See* NMSA 1978, § 74-2-7(I).

Second, the Air Board's regulations provide that the Air Board or a Hearing Officer "may specify procedures *in addition to, or that vary from* the [Air Board's adjudicatory procedures] in order to expedite the efficient resolution of the action or to avoid obvious injustice, if the procedures do not conflict with the [Air Act] or the [Air Board's] regulations, or prejudice the rights of any party." 20.11.81.12(B)(1) NMAC (emphasis added). This provision gives the Air Board sufficient flexibility to use a procedure modeled after Rule 1-056 based on the circumstances and needs of a particular case. Appellants may disagree with the outcome of the summary judgment motions, but they cannot reasonably argue that the summary judgment procedure itself was prejudicial to them; they had ample opportunity to come forward with evidence raising a genuine dispute of material fact and failed to do so.

Finally, Appellants' complaint that the Air Board should have published better notice of the summary judgment hearing is without merit. **[BIC 31-34]** As mentioned above, and as Appellants acknowledge, this case was never set for an expedited hearing on a "summary procedure" pursuant to 20.11.81.20(A) NMAC. **[BIC 5 n.2]** Rather, the case was set

for a full hearing on the merits originally scheduled for September 10-11, 2014. **[3 RP 590 ¶ 1]** The Hearing Clerk published notice of the hearing in the Albuquerque Journal on August 3, 2014. **[3 RP 637]** The published notice stated that "[a]ny person . . . who wishes to be treated as an interested participant must file an entry of appearance. . . by August 8, 2014[.]" **[3 RP 639, 643]** No one filed an entry of appearance by August 8, 2014, nor did anyone who had not previously expressed an interest in the case seek to participate at anytime thereafter.

On August 12, 2014, after receiving Appellants' supplemental discovery responses and NOI, Smith's and the City requested that the merits hearing be moved to a later date to accommodate dispositive motion practice. **[5 RP 1212-13]** The Hearing Officer held a teleconference with the parties' counsel to discuss scheduling. **[3 RP 693]** Based on the agreement of all counsel, the Hearing Officer rescheduled the full hearing on the merits to begin on November 5, 2014, and conditionally scheduled a dispositive motion hearing for October 8, 2014, in the event such motions were timely filed. **[3 RP 693 ¶¶ 1, 4]** The Hearing Clerk then published an amended hearing notice in the Albuquerque Journal on August 31, 2014. **[3 RP 695]** The amended notice provided notice of the motion hearing scheduled for October 8, 2014. **[3 RP 697, 700]**

Appellants cannot reasonably claim that the public was deprived of notice under these circumstances. There is no dispute that the notice requirements for a full hearing on the merits were met. Given that no one entered an appearance for a full hearing on the merits, there was no need to invite entries of appearance for the later-scheduled dispositive motion hearing. Appellants are trying to take advantage of the fact that this case began as a full hearing case (not an expedited summary proceeding) and then proceeded on parallel tracks once Appellees sought to file dispositive motions pursuant to Rule 1-056. Even following Appellants' bizarre suggestion that there may have been some individuals who wanted to participate in the summary judgment hearing, but not in the full hearing on the merits, any such individuals had notice of the summary judgment hearing through the Hearing Clerk's publication of the amended notice.

Moreover, this case is nothing like *Martinez v. Maggiore*, as Appellants suggest. *Martinez* involved a solid waste permit applicant who failed to comply with the public notice requirements of the Solid Waste Act in giving the initial notice of the permit application. 2003-NMCA-043, ¶ 9, 64 P.3d 499. This Court held that the defect in the initial public notice could have prejudiced the public's ability to prepare for and participate in a hearing that was properly noticed three months later. *Id.* ¶¶ 16-17.

In this case, there is no allegation of a defect in the initial notice EHD published concerning Smith's permit application on December 6, 2013. **[2 RP 24]** EHD also published notice of the April 3, 2014 public information hearing on March 12, 2014. **[2 RP 102-04]** Taken together with the other instances of published notice mentioned above, the public has had ample notice and opportunity to get involved in this case. Accordingly, the Air Board's use of summary judgment should not be reversed on the grounds that the Air Board gave insufficient public notice of the summary judgment hearing.

2. *The Air Board Properly Granted Summary Judgment Because Appellants Produced No Evidence Demonstrating That Smith's Failed To Meet The Statutory Prerequisites For Permit Issuance.*

"Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Perea v. Snyder*, 1994-NMCA-064, ¶ 9, 877 P.2d 580; *see also* Rule 1-056(C). "The movant need only make a prima facie showing that he is entitled to summary judgment." *Roth v. Thompson*, 1992-NMSC-011, ¶ 17, 825 P.2d 1241. "Upon the movant making a prima facie showing, the burden shifts to the party opposing the motion to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Id.*

None of the material facts in this case are in dispute because Permit No. 3135 undeniably complies with all applicable statutes and regulations. A full evidentiary hearing was therefore unnecessary and Smith's was entitled to judgment as a matter of law.

Air quality permitting in New Mexico is governed by the Air Quality Control Act, NMSA 1978, §§ 74-2-1 through -17 ("Air Act"), and by the regulations promulgated pursuant to the Air Act. Permit No. 3135 was issued pursuant to 20.11.41 NMAC (10/1/02, prior to 2014 amendments) ("Part 41"). Part 41 incorporates by reference 20.11.64 NMAC (2/16/09) ("Part 64"), which is entitled "Emissions Standards for Hazardous Air Pollutants for Stationary Sources." *See* 20.11.41.2(B)(2)(a) NMAC (10/1/02). Part 64, in turn, incorporates the EPA's National Emission Standards for Hazardous Air Pollutants ("NESHAP"), which includes the regulation governing gas station emissions known as "Hex C." 20.11.64.12 NMAC (12/12/11).

Hex C employs a performance-based approach to controlling gas station emissions by requiring, for example, the use of Stage I vapor recovery equipment and certain management practices, and does not set specific emission limits. The Air Board's regulation governing gasoline handling at retail service stations also requires a vapor recovery system.

20.11.65.15 NMAC (10/13/09). Appellants do not dispute that operation of the Smith's gas station in accordance with Permit No. 3135 would comply with the standards set forth in these regulations; they plainly admit they "are not challenging the technical issues addressed in the permitting process." **[BIC 27]**

Instead, Appellants sought to present evidence regarding a range of topics such as traffic, odors, potential health impacts and "quality of life" impacts, which are far beyond the scope of the applicable regulations. The New Mexico Legislature has given the Air Board virtually no leeway to deviate from the applicable federal standards to consider this type of information in the permitting process. For example, the Air Act provides that "[r]egulations adopted by the [Air Board] may . . . prescribe standards of performance for sources and emission standards for hazardous air pollutants that . . . *shall be no more stringent than but at least as stringent as* required by federal standards of performance[.]" Section 74-2-5(C)(2) (emphasis added). The Air Board's wholesale adoption of Hex C is consistent with this legislative mandate. 20.11.64.12 NMAC (12/12/11). The Air Board has also promulgated variance regulations stating that "the [Air Board] cannot grant a variance from federal requirements in . . . [Part 41] . . . and [Part 64]." 20.11.7.2, .6 NMAC (8/1/04). These authorities

leave the Air Board with no room to evaluate an air permit based on factors beyond those specified in the federal standards or in the standards the Air Board itself has adopted. *See City of Albuquerque v. State Labor & Indus. Comm'n*, 1970-NMSC-037, ¶ 5, 466 P.2d 565 (holding that an administrative agency "is bound by its own rules and regulations."); *see also Pub. Serv. Co. of NM v. NM Envitl. Imp. Bd.*, 1976-NMCA-039, ¶ 19, 549 P.2d 638 ("The Board having set the standard is bound by it, the same as any one [sic] else.").

In contrast, there are instances in which the Air Board in carrying out its functions may consider broad factors such as public health, safety and welfare. For example, Section 5 of the Air Act, which governs rulemaking, provides for an expansive scope of public input; it includes, among several other things, consideration of the potential impact on public health and welfare and of the economic feasibility of the proposed regulation. Section 74-2-5(E) (2007); 20.11.82.32(A) NMAC (10/15/12). *But see* Section 74-2-5(C)(2) (regulations governing standards for hazardous air pollutants must be identical to federal standards). Similarly, Section 8 of the Air Act, which governs variances, enables the Air Board to consider whether the granting of a variance will, among other things, "result in a condition injurious to health or safety[.]" NMSA 1978, § 74-2-8(A)(2)(a) (1992). *But see Duke*

City Lumber Co. v. NM Envtl. Imp. Bd., 1984-NMSC-042, ¶ 17, 681 P.2d 717 (holding that these considerations in a variance proceeding are limited by the definition of "air pollution" set forth in Section 74-2-2(B), which requires a showing of a "reasonable probability" of harm rather than a condition that merely tends to cause harm).

Language allowing for such broad inquiries is glaringly missing from Section 7 of the Air Act, which governs permitting, and from Part 41. Those authorities require EHD to issue, and the Air Board to affirm, a permit that meets applicable standards. *See* NMSA 1978, § 74-2-7(C)(1) (2003) (setting forth grounds for permit denial and emphasizing whether the proposed permitting action will comply with applicable standards and regulations); 20.11.41.16(A) NMAC (10/1/02) (same); *see also* NMSA 1978, § 74-2-7(L) (2003) (framing the Air Board's inquiry in terms of whether a source "will or will not meet applicable local, state and federal air pollution standards and regulations[.]"). The difference between the focus on standards in Section 7, and the broader inquiries allowed under Sections 5 and 8, demonstrates that the legislature knows when to allow an agency to exercise discretion for the protection of public health and welfare and when to require an agency to follow specific standards.

The standards at issue in this case already incorporate considerations for public health and welfare that were made in the rulemaking and legislative processes. Regulators, the regulated community and the public must be able to rely on these standards. *Cf. Smith v. Bd. of County Comm'rs*, 2005-NMSC-012, ¶ 33, 110 P.3d 496 ("Owners have a right to use their property as they see fit, within the law, unless restricted by regulations that are clear, fair, and apply equally to all."). The performance measures set forth in Hex C reflect the EPA's policy decision concerning the appropriate methods for reducing gas station emissions. The New Mexico Legislature and the Air Board have adopted the EPA's regulatory approach and it is the law applicable to this case.

Appellants' proposed evidence, by their own admission, bears no relationship to the applicable permitting regulations. For example, Appellants claimed in their petition that they "are likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and other negative impacts[.]" **[RP 563]** The Air Board cannot address these allegations beyond what is already required under the existing permitting framework. As EHD explained in its participant notification letter, "[a]n air quality permit cannot address zoning, non-air-quality building issues, road

and traffic control and public safety." **[2 RP 325]** The question before the Board was not whether more could be done to reduce or prevent VOC emissions, fumes, odors, traffic, "other negative impacts" or health risks; the question was whether Permit No. 3135 complies with existing standards and regulations. Section 74-2-7(L). There is no dispute that it does.

Appellants may disagree with the EPA's, the Legislature's and the Air Board's policy choice to regulate gas station emissions through performance measures rather than through imposing emission limits or by requiring health impact studies or "quality of life" inquiries. But, that disagreement is more properly addressed through the legislative and rulemaking processes, not through challenging a permit that undeniably complies with applicable law. *Cf. Safeway Stores, Inc. v. City of Las Cruces*, 1971-NMSC-052, ¶ 5, 484 P.2d 341 (holding that liquor licensing authority lacked discretion to deny license where applicant met all statutory prerequisites; to conclude otherwise "would result in an unmistakably ambiguous application of liquor law requirements, belying any legislative intent as to uniform, statewide regulation of the affected subject matter."). Summary judgment was proper in this case because Appellants produced no evidence that could have any bearing on whether Permit No. 3135

complied with applicable standards.

C. Neither *Colonias* Nor The Air Board's Decision In The Smith's Carlisle Permitting Case Supports Appellants' Effort To Expand The Scope Of The Air Board's Inquiry To Include Evidence Lacking A Nexus To Air Permitting Regulations.

1. *The Colonias Nexus Requirement Is An Essential Check On Agency Power.*

The thrust of Appellants' argument is that, by inviting public participation in permit hearings, the Legislature and the Air Board must have intended for any and all views expressed by the public to be factored into the Air Board's permit review, even if those views lack a connection to existing permitting standards. **[BIC 22-30]** Appellants primarily rely on *Colonias Dev. Council v. Rhino Envtl. Servs.*, 2005-NMSC-024, 117 P.3d 939, a solid waste permitting case. Rather than supporting Petitioners' approach, *Colonias* actually forbids it.

The New Mexico Supreme Court held in *Colonias* that "a legislative body may not vest unbridled or arbitrary power in an administrative agency[,]" but instead "must furnish an administrative agency a reasonably adequate standard to guide it." *Id.* ¶ 29 (internal quotation marks and quoted authority omitted); *see also Montoya v. O'Toole*, 1980-NMSC-045, ¶ 4, 94 N.M. 303, 610 P.2d 190 ("The Legislature may lawfully delegate authority to an administrative agency when that authority is restricted by

specific legislative standards."). In light of this well-settled law on the limits of agency power, the Court held that an agency's authority to address community concerns "requires a nexus to a regulation" and that the agency in that case "must consider whether lay concerns *relate to violations of the Solid Waste Act and its regulations.*" 2005-NMSC-024, ¶¶ 24, 29 (emphasis added).

Unlike the air quality permitting regulations that apply here, the solid waste regulations at issue in *Colonias* expressly required the Environment Department to consider whether the proposed landfill would cause a public nuisance or create a potential hazard to public health, welfare or the environment. *Id.* ¶¶ 30-32. The Court held that the nearby community's concerns about the landfill's impact on their quality of life had a nexus to these broad factors. *Id.*

Although the solid waste regulations provided no standard for evaluating the public's input, the Court concluded that the lack of a standard was acceptable because, "[i]n certain situations, when an agency is charged with protecting public health, safety and welfare, it may be difficult to lay down a definite comprehensive rule." *Id.* ¶ 35. In those circumstances, "a certain amount of discretion is necessary to administer and enforce regulations so as to implement legislative enactments and

meet the needs of individual justice." *Id.* The "certain situations" to which the Court referred constitute the exception and not the rule.

New Mexico courts have long followed the general rule that agency decision-making must be guided by specific standards. As the New Mexico Supreme Court held nearly 80 years ago:

> [W]e find the general rule to be that a statute or ordinance which vests arbitrary discretion . . . in public officials, without prescribing a uniform rule of action, or, in other words, which authorizes the issuing or withholding of licenses, permits, approvals, etc., according as the designated officials arbitrarily choose, without reference to all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any definite rule or specified conditions to which all similarly situated might knowingly conform, is unconstitutional and void.

State ex rel. Sofeico v. Heffernan, 1936-NMSC-069, ¶ 32, 67 P.2d 240. The Court in *Sofeico* recognized an exception to the general rule, which provides that "some situations require the vesting of some discretion in public officials, as, for instance, *where it is difficult or impracticable to lay down a definite, comprehensive rule*, or the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety, and general welfare." *Id.* ¶ 33 (quoted authority omitted) (emphasis added).

In a more recent case, the Court reaffirmed that the impracticability exception described in *Sofeico* does not apply when the permitting

authority "could easily have adopted a specific standard[.]" *Smith v. Bd. of County Comm'rs*, 2005-NMSC-012, ¶ 36, 110 P.3d 496. "Later cases make it clear that the exception noted [in *Sofeico*] is not of universal application, even where decisions under the police power are involved." *Safeway Stores, Inc. v. City of Las Cruces*, 1971-NMSC-052, ¶ 26, 484 P.2d 341 (Stephenson, J. specially concurring). Concluding otherwise would obviously cause the exception to swallow the rule.

As the Court held in *Colonias*, the applicable landfill permitting regulations presented one such circumstance in which it would be "difficult to lay down a definite comprehensive rule." 2005-NMSC-024, ¶ 35. The regulations required the Environment Department to consider broad categories of facts, including whether the landfill would cause a public nuisance or create a potential hazard to public health, welfare or the environment. *See Old Abe Co. v. New Mexico Mining Comm'n*, 1995-NMCA-134, ¶ 27, 908 P.2d 776 ("The standards regulating municipal solid waste disposal are doubtless difficult to devise, but if such controls are to be effective, they, of necessity, must be broad and somewhat flexible.") (quoted authority omitted). *But see In re Camino Real Envitl. Center, Inc.*, 2010-NMCA-057, ¶¶ 15-17, 242 P.3d 343 (holding that *Colonias* does not establish a legal exception to an unambiguous statute prescribing the

duration of landfill permits). The *Colonias* Court was careful to note that the regulations, and not the general purpose of the Solid Waste Act, are what required the Environment Department to consider the community's concerns. 2005-NMSC-024, ¶ 29.

Colonias is distinguishable from the present case because the regulations governing air quality permitting for gas stations are nothing like the landfill regulations at issue in *Colonias*. As discussed above, the applicable air quality permitting regulations incorporate specific, mandatory federal standards that are comprehensive; they do not require or even allow the Air Board to exercise discretion when applying them.

Colonias is of no aid to Appellants because their proposed evidence lacks a nexus to the applicable air quality regulations. Appellants did not point the Air Board to a single air permitting regulation that would trigger the Air Board's discretion to consider public health and welfare.[1] Instead, Appellants repeatedly asserted that their proposed evidence relates to the Air Board's rulemaking authority. **[4 RP 985-86]** Specifically, Appellants argued that Dr. Rowangould's testimony "invokes the regulatory criteria under . . . [Section] 74-2-5(E), and [Section] 74-2-5.3(C)[,]" which are

[1] As explained in Section D below, Appellants' new argument that their evidence could support the imposition of permit conditions under Section 74-2-7(D) and 20.11.41.18(B)(4) NMAC (10/1/02) was not preserved and lacks merit in any event.

rulemaking statutes. **[4 RP 985]** Again citing Section 74-2-5(E), Appellants claimed that "[t]he Board must give weight to this testimony under the [Air Act] as it impacts the health, welfare [sic], the public interest, and relates to the subject of air contaminants." **[4 RP 985]**

Smith's agrees that Dr. Rowangould's testimony, and even Appellants' proposed non-technical testimony concerning quality of life factors, would be appropriate for a rulemaking proceeding, with the caveat that the Air Board in promulgating regulations may not exceed the authority delegated to it by the Legislature. *See Pub. Serv. Co. of NM v. NM Envitl. Imp. Bd.*, 1976-NMCA-039, ¶ 7, 549 P.2d 638 ("Administrative bodies are the creatures of statutes. As such they have no common law or inherent powers and can act only as to those matters which are within the scope of the authority delegated to them."). Appellants' proposed testimony is not appropriate in a permit action, though, because it lacks a nexus to an applicable permitting standard as required under *Colonias*. The Air Board's grant of summary judgment should therefore be affirmed.

2. *The Air Board Was Not Required To Follow Its Erroneous Decision In The Smith's Carlisle Case, Which This Court Later Reversed.*

Appellants would have liked for this case to proceed as did the air permit appeal that came before this Court in *Peña Kues et al. v. Smith's*

Food & Drug Centers, Inc. et al., No. 32,790, mem. op. (N.M. Ct. App. Nov. 26, 2014) (non-precedential) ("*Smith's Carlisle*"). **[Opinion reproduced at 4 RP 1154-64]** *Smith's Carlisle* concerned Smith's application for a modification to an existing air permit to increase the amount of permitted throughput at its gas station located at Constitution and Carlisle in Albuquerque. *Id.* at 2, ¶ 1. The Air Board held a three-day evidentiary hearing during which the petitioners provided comment and testimony. *Id.* at 4, ¶ 5. Despite acknowledging that the requested permit modification met all applicable regulatory requirements, the Air Board reversed the issuance of the modified permit based on its general statutory authorization to prevent and abate air pollution. *Id.* at 6-7, ¶ 9.

The Air Board made no effort to explain how denial of the permit modification would accomplish the prevention or abatement of "air pollution," which is a term of art under the Air Act. *See* NMSA 1978, § 74-2-2(B) (defining "air pollution"). This Court reversed, not only because the Air Board failed to find facts in support of its decision, but also because the decision was in irreconcilable conflict with findings the Air Board did make. *Smith's Carlisle*, No. 32,790, mem. op. at 7-11, ¶¶ 10-13. Specifically, the Air Board found that there was no evidence that throughput limits are intended to reduce or control air emissions, that the primary means for

controlling gas station emissions are the performance standards mandated under Hex C, and that Smith's had complied with those standards. *Id.* at 8, ¶ 11, and at 10-11, ¶ 13.

Appellants are correct that this Court did not decide the issue of whether the Air Board could make a permit decision based on its general statutory authorization to prevent and abate air pollution. *Id.* at 9 n.1. **[BIC 4 n.1]** The Court nevertheless observed, as Smith's argues above, that "there must be a nexus between the quality of life concerns and an applicable regulation, regardless of whether the Board considered those concerns to be directly or indirectly related to air quality." *Smith's Carlisle*, No. 32,790, mem. op. at 9 n.1 (citing *Colonias*, 2005-NMSC-024, ¶ 29).

Appellants argued below that the Air Board's decision in *Smith's Carlisle* was binding precedent or was at least persuasive authority. **[RP 966-67, 977-80]** Appellants also argued for the first time at the summary judgment hearing, as they argue to this Court, that the Air Board's decision in *Smith's Carlisle* was entitled to collateral estoppel effect. **[1 Tr. 10/8/14 at 75:23 – 76:19; BIC 21-22]** Smith's and the City responded by pointing out that: (1) the Air Board is not a precedent-setting tribunal like the appellate courts, **[1 Tr. 10/8/14 at 33:19 – 34:12]** (2) the Air Board's decision in *Smith's Carlisle* was not persuasive and it would likely be

overturned on appeal **[RP 1132-33]**, and (3) the Air Board's decision in *Smith's Carlisle* provides no guidance in this case. **[Id.; 1 Tr. 10/8/14 at 51:5-16, 98:10 – 99:10]**

While it is true that administrative decisions can have collateral estoppel effect in some circumstances, "[w]hether the doctrine should be applied is within the trial court's discretion[.]" *Shovelin v. Central New Mexico Elec. Co-op, Inc.*, 1993-NMSC-015, ¶ 14, 850 P.2d 996. Given the myriad problems with the Air Board's decision in *Smith's Carlisle*, it was not an abuse of discretion for the Air Board to decline to follow that decision in this case.

3. *Recognizing The Statutory Limits Of The Air Board's Authority And Affirming The Colonias Nexus Requirement Does Not Render Public Input Meaningless.*

Appellants seem to read *Colonias* as providing the public with a "quality of life" veto whenever any environmental permitting statute provides for public input. They argue that to deny the public this veto will have a chilling effect on public participation because the public's input would be rendered meaningless. **[BIC 2, 8, 12]**

Reading *Colonias* so broadly would obviate existing regulatory frameworks and invites the type of abuse of power against which the *Colonias* Court cautioned. 2005-NMSC-024, ¶ 29. The polestar for

avoiding such abuse is the Court's holding that public input must have a nexus to an applicable regulation in order to inform permitting decisions. *Id.* *Colonias* therefore stands for the proposition that the role of public input is to ensure that government agencies follow, rather than circumvent, applicable regulations when making permitting decisions.

Applying the *Colonias* nexus requirement does not render public input meaningless; it simply means that the scope of relevant public input in a given case will vary depending on the regulatory framework at issue. The regulations in the present case are much more specific and much less flexible than the ones at issue in *Colonias*. The scope of the public input upon which the Air Board could legally base its decision is accordingly more limited than that upon which the Environment Department could rely in *Colonias*. For example, the Air Board could consider public testimony concerning whether Permit No. 3135 contained all of the necessary requirements of Hex C, but it could not properly consider testimony concerning traffic, odors and any other issues lacking a nexus to the applicable regulations.

Public participation also serves broader purposes in that it promotes transparency and helps to ensure the proper functioning of government. Although the Legislature did not articulate in the Air Act a specific purpose

for public participation, the Legislature has stated in other statutes that "all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees[,]" and that "to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees." NMSA 1978, § 14-2-5 (1993); *see also* NMSA 1978, § 10-15-1(A) (2013) ("[A] representative government is dependent upon an informed electorate[.]").

Public participation reminds permit writers and permit applicants that they must follow the law or risk being exposed in a public forum, and facing possible legal consequences, for their failure to do so. Participation also enables the public to learn about the applicable law and endeavor to change it. For example, if Appellants disagree with the performance-based approach governing regulation of gas station emissions, they may seek to change the laws mandating that approach through the legislative or rulemaking processes. *See e.g.* 20.11.82.18(A) NMAC ("Any person may file a petition with the [Air Board] to adopt, amend or repeal any regulation within the jurisdiction of the [Air Board]."). The public's ability to give feedback to the government in this way is not only meaningful but is integral to the proper functioning of a representative democracy.

In sum, the purpose of public participation is to help ensure that the government follows the law. Public participation does not exist so that a vocal minority may veto a lawful permitting activity. Concluding otherwise invites the type of lawless decision-making that occurred in *Smith's Carlisle* and would impermissibly grant the Air Board unfettered power. The Air Board correctly declined to expand the scope of relevant public input in this case and its grant of summary judgment should be affirmed.

D. Appellants' Late Effort To Modify Their Requested Relief To Include Unspecified Permit Conditions Is Untimely And Lacks Merit In Any Event.

1. *Appellants Did Not Preserve Their Argument Regarding Permit Conditions.*

Following the Air Board's grant of summary judgment, Appellants made a last-ditch effort to establish a nexus by filing a motion to reconsider referencing, for the first time, Section 74-2-7(D) and 20.11.41.18(B)(4) NMAC (10/1/02) as legal authority supporting their effort to bring in "wide ranging evidence[.]" **[4 RP 1151-52 ¶¶ 5-7]** Section 74-2-7(D) and 20.11.41.18(B)(4) NMAC (10/1/02) allow EHD to specify permit conditions imposing, among other things, reasonable restrictions and limitations not relating to emission limits or emission rates. These authorities and Appellants' newfound desire to seek permit conditions figure prominently in

Appellants' brief-in-chief. **[BIC 6, 8, 11, 14, 20-23, 26, 34]** But, Appellants failed to preserve this argument below.

"To preserve a question for review it must appear that a ruling or decision by the [lower tribunal] was fairly invoked[.]" Rule 12-216 NMRA. Appellants never invoked a ruling on their new argument because the Air Board never heard or decided the merits of Appellants' motion to reconsider. *Cf. State v. Jones*, 2002-NMCA-019, ¶ 8, 40 P.3d 1030 (holding that issue raised for the first time in a motion to reconsider was preserved for appeal because trial court ruled on the motion). Rather, the Air Board determined that it lacked jurisdiction to hear the motion because Appellants had already initiated their appeal in this Court. **[SRP 1174a]** The Air Board entered an order denying Appellants' request for hearing on their motion to reconsider. **[Id.]** Appellants did not appeal from that order. Accordingly, Appellants failed to preserve this issue for appeal.

2. *Summary Judgment Was Proper Because Appellants Never Produced Evidence Justifying The Imposition Of Permit Conditions.*

Even if the Court determines that Appellants preserved their argument concerning permit conditions, the argument nevertheless fails for at least two reasons. First, Appellants provided no analysis to the Air Board, and they provide none to this Court, regarding why their proposed

evidence had a nexus to Section 74-2-7(D) and 20.11.41.18(B)(4) NMAC (10/1/02). The Court should reject this undeveloped argument. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 110 P.3d 1076 (court need not consider inadequately developed arguments).

Appellants seem to presume that EHD has unfettered authority to impose conditions on a permit and therefore Appellants should be allowed to present "wide ranging evidence" to the Air Board. **[4 RP 1152 ¶ 6]** Even if that were true, which Smith's disputes as explained below, Appellants give no hint as to what conditions they seek or how their evidence would support imposing such conditions. They should not be allowed to elaborate on these details for the first time in their reply brief to this Court. *See Padilla v. Wall Colmonoy Corp.*, 2006-NMCA-137, ¶ 18, 145 P.3d 110 (declining to address a party's expanded argument raised for the first time in a reply brief).

Second, and perhaps more important, any effort by Appellants to stretch Section 74-2-7(D) and 20.11.41.18(B)(4) NMAC (10/1/02) to accommodate their evidence would be an exercise in futility. Appellants rely on the language in 20.11.41.18(B)(4) NMAC (10/1/02) concerning "reasonable restrictions and limitations *other than those relating specifically to emission limits or emission rates*[.]" (Emphasis added). This provision

does not grant EHD unlimited power to impose permit conditions in order to supersede or circumvent the established standards for gas station air permits, as appellants suggest.

Appellants misapprehend the purpose of the provision, which was clarified in the 2014 amendments. The current version is found at 20.11.41.19(B)(4) NMAC (1/1/14) and adds the following explanation: "[E]xamples include monitoring, recordkeeping and reporting; reporting administrative revisions; notifications; posting of permit; and substitution of equipment not resulting in an increase in emissions[.]"

Appellants' evidence bears no connection to these types of conditions; it is plainly related to the quantity of potential emissions at the Smith's gas station based on the station's permitted annual throughput. The Court need look no further than the report of Appellants' sole proposed expert, whose opinions and recommendation for further study are tied directly to the amount of throughput approved in Permit No. 3135. **[3 RP 651-54]** Conversely, Appellants proffered no evidence relating to monitoring, recordkeeping and the like. Appellants' late effort to seek permit conditions therefore did not raise a genuine dispute of material fact that would have precluded the Air Board from granting summary judgment.

E. Summary Judgment Was Proper Because Appellants' Proposed Evidence Fails To Meet The *Duke City Lumber* Standard.

If the Court agrees with Appellants that they could present "wide ranging evidence" to the Air Board based on the Air Board's general authorization to prevent or abate air pollution, which Smith's disputes for all the reasons set forth above, summary judgment was still proper because Appellants could not meet their burden of proving that Permit No. 3135 would lead to air pollution as that term is defined in the Air Act. *See* Section 74-2-2(B) (defining "air pollution" as "the emission . . . of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property[.]").

In *Duke City Lumber Co.*, 1984-NMSC-042, the New Mexico Supreme Court addressed the issue of what evidence is sufficient to prove that proposed emissions would be harmful enough to constitute air pollution under Section 74-2-2(B). Significantly, the *Duke City Lumber* case was decided under Section 8 of the Air Act concerning variances and not under Section 7. As mentioned above, Section 74-2-8(A)(2)(a) allows consideration of whether a variance will result in emissions that will be

"injurious to health or safety," while Section 74-2-7 contains no such provision.

The applicant in *Duke City Lumber Co.* sought a variance from the New Mexico Environmental Improvement Board ("EIB") to allow wood smoke to be emitted from the applicant's wigwam burner, but was denied. 1984-NMSC-042, ¶ 2. The Court noted that evidence presented in opposition to the variance was primarily comprised of unsworn citizen testimony and the testimony of a physician, which was general rather than specific, concerning whether the smoke would be injurious to health. *Id.* ¶ 12. The physician "referred to and read from source material but he did not relate to or apply that material to the facts in this case." *Id.*

The Court reversed the EIB's denial of the variance, holding that the standard for air pollution set forth in Section 74-2-2(B) requires a showing of a "reasonable probability" of harm, not just a condition which "tends to cause harm." *Duke City Lumber Co.*, 1984-NMSC-042, ¶ 17. *But see Duke City Lumber Co. v. NM Envtl. Imp. Bd.*, 1984-NMCA-058, ¶ 21, 690 P.2d 451 (affirming EIB's denial of the variance on remand based on applicant's violation of the National Ambient Air Quality Standards for particulates, which "establishes per se injury to health.").

Appellants do not purport to have evidence establishing a reasonable probability of harm in this case. Their proposed expert, Dr. Rowangould, did not specify what quantity of pollutants emitted from the gas station, and of what duration, would "with reasonable probability injure human health[.]" Section 74-2-2(B). Instead, Dr. Rowangould merely opined that: (1) further study is needed "to ensure that the potential air quality and health impacts associated with the proposed Smith's fueling station are better understood[,]" and (2) "[i]f the facility is found to result in air quality and/or health impacts that exceed levels that are acceptable (based on regulatory levels, health risks, and/or community sentiment), mitigations and/or alternatives should be explored." **[3 RP 654]** Dr. Rowangould's opinion is completely open-ended. Moreover, Dr. Rowangould provided no hint as to what type of study should be done, what standards should apply to the study, or what would be the legal basis for requiring such a study. And, like the physician in *Duke City Lumber*, Dr. Rowangould cites source material without applying that material to the facts of this case. 1984-NMSC-042, ¶ 12.

It was Appellants' burden to establish a reasonable probability of harm under the *Duke City Lumber* standard. See 20.11.81.16(C) NMAC ("[T]he petitioner has the burden of proof, the burden of going forward with

the evidence and the burden of proving by a preponderance of the evidence the facts relied upon by the petitioner to justify the relief sought in the petition."). Appellants could not carry that burden simply by raising questions and calling for additional study. The Air Board's grant of summary judgment should therefore be affirmed.

IV. CONCLUSION

The Court should affirm the Air Board's decision consistent with the *Colonias* nexus requirement and with well-established New Mexico law requiring administrative agencies to act only within the scope of their delegated authority. The Court should also affirm the Air Board's grant of summary judgment because Appellants failed to produce evidence showing a reasonable probability of harm. Concluding otherwise would constitute a major departure from the precedent cited above and would eviscerate the statutorily mandated air permitting framework. The Court need not follow Appellants down that path in order to protect public participation. The public has the right to participate and to ensure the government and permit applicants follow the law; it does not have the right to impose its own standards on the permitting process. For all of these reasons, the Court should affirm the Air Board's decision.

V. PRESERVATION OF ISSUES

Smith's arguments were preserved in the briefing and argument on its motion for summary judgment **[4 RP 822-76; 1 Tr. 10/8/14 at 35:14 – 53:9, 95:13 – 101:15]** and in the joint response to Appellants' motion for reconsideration. **[4 RP 1165-74]**

VI. REQUEST FOR ORAL ARGUMENT

Smith's believes oral argument may assist the Court in navigating the various federal, state and local laws applicable to gas station air permitting and in applying the holdings of *Colonias* to the facts of the present case consistent with language and purpose of the Air Act.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant Smith's Food & Drug Centers, Inc.'s Answer Brief was served on the following parties, counsel and other individuals by email and first class mail:

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By