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

Ct App. No.: 34, 285

Margaret M. Freed, Mary Ann Roberts and Pat Toledo,
Appellants-Petitioners,

v.

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

Air Quality Control Board
No. AQCB 2014-2

APPEAL FROM THE ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD
Felicia L. Orth, Hearing Officer

BRIEF-IN-CHIEF

Oral Argument
Requested

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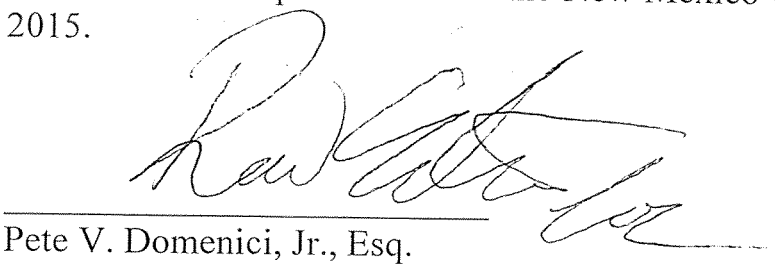
A written transcript was taken at the October 8, 2014 summary judgment hearing for transfer to the Court of Appeals by Court Reporter, Mary Abernathy Seal. The transcript was filed in the New Mexico Court of Appeals on February 4, 2015.



Pete V. Domenici, Jr., Esq.

Pursuant to Rule 12-214 (B) (1) NMRA, Appellants hereby request oral argument. Oral argument would be helpful to resolve issues with respect to the Board's scope of authority, and use of motion practice and discovery under the Air Act that foreclose meaningful public participation and threaten dismissal of all timely filed petitions of persons with standing to appeal and participate in the air permitting process.

TABLE OF AUTHORITIES

NEW MEXICO CASES:

OTHER CASE LAW:

NEW MEXICO STATUTES:

NEW MEXICO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS:

NEW MEXICO AMINISTRATIVE CODE

CITY OF ALBUQUERQUE ORDINANCES

OTHER AUTHORITIES:

I. SUMMARY OF FACTS AND PROCEEDINGS

A. Introduction and nature of the case.

This is an administrative appeal from the Albuquerque-Bernalillo County Air Quality Control Board's ("Board") grant of Respondents' motions for summary judgment on Appellants' Petition for Hearing on the basis of jurisdiction, statutory construction, and standing. [AR bates pgs. 1149-50]. The dismissed Petition for hearing was timely filed on June 2, 2014 pursuant to Section 74-2-7 NMSA and 20.11.81 NMAC, regarding an air quality permit, issued on April 30, 2014 to Smith's Food & Drug Centers, Inc. ("Smith's"), for a fuel station intended to be built at 6941 Montgomery Blvd. NE, Albuquerque, New Mexico. [AR 78, pgs. 320-324; AR bates 562]. The appeal hearing was previously set by the City of Albuquerque Environmental Health Department (EHD) on November 5 and 6, 2014.

The permit at issue in this appeal authorizes annual throughput of 7 million gallons of fuel. [AR 78, p. 321]. Smith's is required to obtain an air quality permit for each of its fuel stations. The air quality permits are issued by EHD pursuant to 20.11.41 NMAC, (Authority to Construct). The air quality permits include a specific limit on the amount of annual throughput of fuel allowed at the station. In order to increase the annual throughput, Smith's is required to obtain a modification to the air quality permit. Smith's has submitted a number of permit

modification requests that greatly increase the amount of throughput allowed at its gas stations. [Docketing Statement, p.2].

After EHD deemed Smith's application administratively complete, Appellants and others requested a public information hearing ("PIH") which was held on April 3, 2014. (AR 52, p. 143). Approximately 26 people attended the meeting in opposition to the issuance of the permit, with approximately 14 people providing public comments opposing the issuance of the permit. [AR bates p. 564]. Approximately 12 Smith's employees appeared at the PIH in support of the permit issuance. *Id.* In addition, a separate petition with over 100 signatures objecting to the issuance of the permit was submitted to the administrative record. *Id.* Public attendees in opposition to the permit expressed quality of life concerns and impacts at the PIH meeting, but EHD rendered the participation meaningless on grounds that only 40 CFR Part 63, subpart CCCCCC ("Hex C") performance standard was relevant to condition the permit. [AR 53, p. 149; AR 55, pp. 159-62; PIH 4/3/14 audio at 22:35 to 39:09; AR 52, p. 143.].

Appellants, with the exception of Pat Toledo ("Toledo"), own property in close proximity to the intended fuel station. [AR bates p.563]. Toledo provides regular assistance and care for his 94-year-old father that resides close to the site, is regularly in the area of the proposed station, and is concerned regarding the impact of the fuel station on his father's property and quality-of-life. *Id.* Further, a middle

school is located 300 to 500 feet from the site. [Tr. 11: 4-7]. Children represent a vulnerable population with respect to increased risk of respiratory infection as a result of air pollution. [Tr. 11:9-12:5 (*citing* presentation of Board member Dona Upson, M.D.)].

On April 30, 2014, EHD issued Permit No. 3135 to Smith's which incorporated Hex C performance standards [AR 78, pgs. 320-24].

B. Further proceedings and disposition below.

On June 2, 2014, the Appellants submitted their Petition for hearing to the Board, pursuant to Section 74-2-7(H) NMSA and Section 20.11.81 NMAC. The Petition alleged that the permit "refused to take into consideration the concerns raised by the public comments at the PIH. The Air Program stated: 'An air quality permit cannot address zoning, non-air-quality building issues, road and traffic control and public safety.' (Exhibit 1, attached hereto)." [AR bates p. 565]. The Petition stated "[e]ach of the Petitioners are adversely affected by the permitting action because the Air Program refused and failed to take into consideration quality-of-life concerns raised by the participants at the PIH. In addition, each of the Petitioners 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 resulting from the construction of the Smith's fuel dispensing station at the proposed location." *Id.*, p. 563. The Petition also noted that the previous

decision in the Smith's Carlisle permitting action, reversed on other grounds by this Court, [1] held that the *New Mexico Air Quality Act* (*hereinafter* sometimes referred to as "Air Act" or "Act") and regulations require permitting decisions to take into account quality-of-life issues. *Id.*, p. 565. The Petition raised the question of whether, contrary to the statements in the Permit, EHD did in fact convey public welfare concerns to other City Departments.

A Hearing Officer whom is also the attorney for the Board was appointed and a hearing on the merits before the Board was scheduled for November 5-6, 2014. [AR bates pgs. 588-89; 693-94]. The Hearing Officer, Ms. Felicia Orth, was also the Hearing Officer that presided in the *Rhino* permitting decision, which was reversed and remanded by the New Mexico Supreme Court. (Tr. 58:8-25).

Smith's propounded discovery on Appellants, and the Appellants filed a notice of intent to present technical testimony identifying their expert and reliance materials. [AR bates pgs. 647-92]. At pre-hearing conference in mid-August, 2014 and under protest of Appellants, the Hearing Officer designated a briefing schedule

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[1] On November 26, 2014 this Court reversed the Board's decision denying the modified Carlisle permit on the basis that the Board made no findings of fact to support its denial. This Court emphasized that it was neither reviewing whether the Board's general mandate to prevent and abate air pollution provided a sufficient basis to deny permit applications, nor whether the Board's mandate allows it to consider quality of life concerns indirectly related to air quality. Memorandum Opinion, p. 9, fn. 1 ("The rule as stated in *Rhino*, is 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. 2005-NMSC-024, ¶ 29."); [AR bates pgs. 1162].

for the City and Smith's to file motions for dismissal/summary judgment. [AR bates pgs. 693-94].

On September 17, 2014, the City filed a motion for summary judgment on Appellants' request for hearing. [AR bates pgs. 701-818]. On September 19, 2014, Smith's filed its motion for summary judgment and separate motion to dismiss Pat Toledo for lack of standing. [2] [AR bates pgs. 822-76; 877-914].

The City and Smith's argued that the prescriptive standard of Hex C as incorporated under 20.11.64 NMAC afforded the Board no authority to address Appellants' quality-of-life concerns. (Tr. 25:15-24, 28:20-25, 41:8). Smith's argued that Appellants could not establish a nexus to applicable regulations to address their concerns pursuant to *Rhino*. [AR bates pgs. 827-29]. The City went further and argued that the holding in *Rhino* should be cabined to the *Solid Waste Act*, only, as a matter of statutory construction as the Act, unlike the *Solid Waste Act*, purportedly did not have an overarching purpose to protect public health, but did so in a "nuanced" way through prescriptive Hex C standard. [AR bates p. 719].

The City and Smith's argued that Petitioners' expert opinion stating increased mobile sources of emissions on and off the site as a function of 7 million gallon throughput elevating risk of health impacts to vulnerable

[2] The record does not reflect the Board engaged alternative resolution (summary procedures) under NMAC 20.11.81.20 and the record does not reflect certification of publication of public notice regarding the summary judgment proceeding in the manner required under 20.11.81.14 (G) and (H) NMAC.

populations such as children, one school and persons with pre-existing conditions located in close proximity to the site was inconclusive. [AR bates pgs. 723-25; 832]. Petitioners' expert recommended the City conduct additional studies to address health and safety impacts and "[i]f impacts are found to exceed acceptable levels on the basis of regulations, increased health risks and community sentiment then mitigation and or other alternatives should be explored." [AR bates p. 648]. The City concluded the Board had no authority to require such studies, which could indicate mitigation or other conditions on the permit to address Petitioner's health and nuisance concerns such as increased traffic and odor created by the proposed station. [AR bates pgs. 726-27].

Smith's separate motion to dismiss Toledo for lack of standing did not, and could not, argue that Toledo was not statutorily "adversely effected" as he had participated in the permitting matter. Neither the Act nor the Board's regulations define the term "adversely affected by the permitting action" or give any guidance on the meaning or application of the term. Smith's argued that Toledo did not have standing because he did not own property within a three mile radius of the site and traveling regularly to care for his 94 year old father that lived close to the site was insufficient standing. [AR bates pgs. 878-79]. Smith's did not provide any legal or regulatory support for its contention that a three mile radius was necessary for standing. Smith's also argued that Toledo could not have standing as a

concerned member of the Albuquerque community who may be adversely affected by the permitting action. [*Id.*, pgs. 884-85]. The Appellants argued that the specific injury alleged for purposes of standing in the appeal to the Board was the failure of the EHD to consider quality- of-life concerns at the PIH meeting. [AR bates pgs. 1013-1030].

Smith's standing arguments were rendered moot by this Court, Nov. 26, 2014 in the related "Tramway" permit appeal memorandum opinion, whereby the Court held that citizens residing in Bernalillo County that participated in a permit action had standing to appeal a permit decision when the adverse effect alleged was the inability of the public "to present comment or evidence on what would otherwise seem to be an attenuated harm." *See* Ct. App. Memo. Opp. No. 33, 269, p. 11.

Regarding summary judgment motions, Appellants responded that the City admitted the Board's procedural rules had no specific provision for summary judgment and that the City sought to pre-empt Appellants' timely filed Petition on the basis of burden of proof that Petitioners must carry at hearing under NMSA (1978) §74-2-7 (K). [AR bates pg. 777-78, 918]; *see also* NMAC 20.11.81.12 (A) (no provision of the rules of civil procedure shall be construed to modify the authority and jurisdiction of the Board). Appellants argued the City's position disallows public participation and technical testimony related to quality-of-life

concerns contemplated under the Act, regulations, and established precedent such as *Rhino*. [AR bates p. 918]; *see also* NMAC 20.11.41.18 (B) (4) (2002) (allowing for reasonable restrictions and limitations as a condition of permit other than those specifically related to emission limits or rates); NMSA 1978 § 74-2-7 D (b) (same). Appellants argued that in granting summary judgment, the Board would be creating the chilling effect that was a major concern of the *Rhino* Court. [AR bates p. 934].

Appellants responded that the Hex C standard did not federally pre-empt reasonable conditions on the permit that could address Appellants' quality-of-life, community, and health concerns. [*Id.*, p. 933]. Appellants relied on the Board's denial of the modified Carlisle permit, reversed by this Court on other grounds, to survive summary judgment. There, the Board held it had the authority to consider quality-of-life impacts that are directly or indirectly related to air quality and that the isolation of the decision process under 20.11.41 NMAC (by extension incorporating Hex C) resulted in a failure to consider other related factors to protect public health under the Act. [AR bates p. 950]. Importantly, the Board in its previous decision in Carlisle cited to NMAC 20.11.41.18 (B) (4) (2002) that allows for reasonable restrictions and limitations as a condition of permit other than those specifically related to emission limits or rates. [*Id.*, p. 931].

Further discovery pursuant to IPRA request in the related but separate "4th street" permitting appeal showed that the Board never disposed of any permitting appeal before public hearing on summary judgment. *See e.g.*, (Tr. 53:19-25). Additionally, responses to Respondents' motions for summary judgment in the 4th street appeal showed the City and Smith's refused to provide monitoring reports and other documents related to performance standard enforcement of Smith's gas stations during discovery, despite opposing counsel deeming this information relevant to regulating the permit in this action. (Tr. 41:11-14).

The Board in this case considered the motions for summary judgment, first, at its regularly scheduled meeting October 8, 2014. Public comment was admitted into the record against the proposed permit. Public comments indicated the City deemed quality-of-life concerns not relevant in related, separate PIHs and that the Respondents slammed the public with motion practice and discovery to avoid public hearings. (Tr. 6:15-7:10; 7:13-9:11); *see also* NMAC 20.11.81.14 (J) (formal discovery is not a right and is discouraged). As a result of Respondents' failure to provide required monitoring or other reporting documents in the separate 4th street appeal, petitioners in that case had no idea if inspections even took place on Smith's fuel stations (Tr. 9:14-10:14). Public comment showed a neighbor in the vicinity of the intended gas station in this action was an asthmatic and stopped walking in the neighborhood years ago as a result of fumes and traffic impacts

caused by two gas stations already located in the area. (Tr. 5:6-22). Public comment quoted a presentation from Board member Dona Upson, M.D. stating children represent a vulnerable population with respect to increased risk of respiratory infection as a result of air pollution. [Tr. 11:9-12:5]. Public comment corroborated that a middle school is located 300 to 500 feet from the proposed intended gas station. [Tr. 11: 4-7]. No public comment favored the proposed permit.

In addition to arguments briefed by Respondents (above), the City made oral argument that because Appellants did not dispute that the PIH was held, proper notice was made regarding the permit application, and that Hex C applied to regulate the intended gas station, summary judgment was allegedly appropriate. (Tr. 14-25). Appellants' response to the motions for summary judgment, however, disputed that 1) they were not "adversely affected" as a result of EHD's failure to consider quality-of-life concerns at the PIH, 2) their technical witness did not identify standards or rules violated b the permit, and 3) "community sentiment" is not a criterion that may factor into the permitting decision under the Act, among other disputed applications of law to facts in the matter. *See e.g.*, [AR bates pgs. 921-22]. The City reiterated its position that the only legally protected interest of violation of the Hex C standard constituted the need for an appeal hearing, and that the public should go before the Legislature or ask for a rule making hearing before

the Board to have its quality-of-life concerns considered under an air permit. (Tr. 30: 4-11).

Smith's made additional oral argument that only in a variance proceeding, could the Board address injury to health and property. (Tr. 38: 24-25). Smith's alleged that no health standard was adopted by the Board to analyze Appellants' stated risks, and that to do so would infringe on the authority of other government agencies. (Tr. 40: 22-25; 45: 1-5). Smith's inaccurately stated no ambient air standard was adopted by the Board despite the fact that *Duke City Lumber* Co. *v. NMED* supports that all 50 states adopted the National Ambient Air Quality Standards. 1984-NMCA-058, ¶¶ 15-18 (*citing* 42 U.S.C. § 7410); (Tr. 40: 8-16). Smith's contended that Appellants could only point to rule making provision to show any nexus to their stated concerns despite reference throughout motion practice to NMAC 20.11.41.18 (B) (4) (2002), NMSA 1978 § 74-2-7, the Board's mandate to abate air pollution under NMSA 1978 § 74-2-5 and the definition of air pollution in terms of injury to human health, interference with public welfare, and reasonable use of property under NMSA § 74-2-2 (B). (Tr.50: 9-11); *see also e.g.*, [AR bates pgs.949-51].

Appellants responded in oral argument that discovery showed not a single appeal petition was disposed of under summary judgment when a timely application for hearing was filed. (Tr. 53:19-22). Further, all case law cited,

including *Rhino*, involved decisions on the basis of evidence taken – not a single case involved a decision on summary judgment below. (Tr. 61:4-12). Appellants noted that the Hearing Officer served in the *Rhino* permit action and made the same arguments limiting the scope of the WQCC's scope of review to hear quality-of- life issues, which were reversed on certiorari by the New Mexico Supreme Court. (Tr. 58:8-25). Appellants argued extensive motion practice and discovery caused unnecessary expense and chilled public participation which was a major concern in the *Rhino* Court. (Tr. 54:1-25). The Board should go no further in these types of administrative appeals other than determining standing or whether a particular witness should testify, otherwise the message was that the City did not care what the public sentiment was regarding environmental permitting. (Tr. 57:16-25).

Regardless of these conclusions, NMSA (1978) § 74-2-7 (I) states that "[i]f a timely petition for hearing is made, the environmental improvement board or the local board shall hold a hearing..." (Tr. 62:1-7) (emphasis added); ABQ Ord. § 9-5-1-7(I) (same). Appellants further noted that Smith's motion to stay the Carlisle decision was denied and as a result, the doctrine of offensive collateral estoppel or issue preclusion should be applied such that the Board should look to that decision to ensure quality-of-life concerns were addressed under the permit and to ensure

the permit was not an isolated decision process from that of other relevant government entities. (Tr. 65:7-13; 66:11-18; 75:7-17).

The Hearing Officer cross examined undersigned counsel at the conclusion of oral argument and asked whether counsel agreed that 20.11.81.12 (H) (6) NMAC allowed the Board to consider the summary judgment motions. (Tr. 79:13-80:11). In response, counsel stated the regulation may be applicable to motions regarding standing and striking technical witnesses, but was not an appropriate provision to exclude public participation in other contexts. (Tr. 80:12-81:20).

The Board deliberated after argument concluded on the summary judgment motions. When the City was asked by Board member Grace whether the permit at issue was a permit-by-rule under NMAC 20.11.41, the City admitted that it was not. (Tr. 104:14-15). When asked by the Board for the Hearing Officer to provide her opinion as to the merit of the summary judgment motions, the Hearing Officer provided the same limiting opinions as she advanced in *Rhino*. The hearing office advised the Board that it could consider only a narrow set of criteria in a permit appeal. (Tr. 107:5-6). Further, the Hearing Officer advised that Petitioners must be adversely affected under 74-2-7 (H) in order to get the mandatory hearing under 74-2-7 (I) and implied there was no such showing despite Appellants' claims and evidence on the record that quality-of-life concerns were deemed irrelevant at the PIH hearing and with respect to the appeal hearing which was dismissed and

vacated on summary judgment. (Tr. 106:9-15). The Hearing Officer concluded that language regarding the protection of public health and welfare was not present under the Air Act, and thus a nexus to Appellants' quality-of-life concerns as required under *Rhino* for the Board to proceed to hearing could allegedly not be shown. (Tr. 106:18-24).

The Board granted the motions for summary judgment by a vote of 6-1. (Tr. 115:3-7); [AR bates pg. 1149]. As a result, Appellants were not allowed to sufficiently develop the facts essential for determination of whether the permit should have been denied or if it should have been granted with conditions. Appellants' expert witness was not allowed to testify, Appellants were not allowed to cross-examine Smith's and City witnesses, and Appellants were not allowed to fully develop a record. Because of the grant of summary judgment, the Board did not reach the merits of Smith's motion to dismiss Toledo for lack of standing as it was moot.

During the hearing, Toledo individually attempted to motion for recusal of any Board member that disclosed a conflict of interest as a result of any professional or financial interest in proceedings and facilities that are subject to the Air Board's jurisdiction, including Smith's fuel stations located throughout Albuquerque. Toledo also intended to recuse the Board and Hearing Officer on the basis of bias and prejudice as the selective intervention on one related appeal

before the New Mexico Court of Appeals showed the Board and Hearing Officer prejudiced the issues and parties regarding the appeal before the Board. The Hearing Officer did not allow Toledo to make his oral motion before the Board. (Tr. 19:16-20:14).

"The Board 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." [AR bates pg. 1150]. The Board did not prepare findings of fact or conclusions of law.

Notice of this appeal was timely filed on December 22, 2014. This Court thereafter filed its Notice of Proposed Summary Disposition April 30, 2015 on the basis that a final order was not yet entered because Appellants' Motion to Reconsider [AR bates pgs. 1151-64] had not been decided by the Board. The motion was thereafter denied by the Board and noticed to this Court May 8, 2015. This appeal was re-assigned to the general calendar by this Court on August 6, 2015.

II. LEGAL ARGUMENT AND AUTHORITIES

Standard of Review

This Court may set aside, reverse or remand the final decision of the Board if it is found to be "(1) arbitrary, capricious, or an abuse of discretion; (2) not supported by substantial evidence...; or (3) otherwise not act 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, 133 N.M. 97, 27 P.3d 806. A ruling is arbitrary and capricious if it "entirely omits consideration of relevant factors or important aspects of the problem at hand." *Atlixco Coalition v. Maggiore,* 1998-NMCA-134, ¶24, 125 N.M. 786, 965 P.2d 370 (internal citation omitted). To meet this standard the Board "may not disregard those facts or issues that prove difficult or inconvenient or refuse to come to grips with the result to which those facts or issues lead." *Id.* "'Substantial evidence' is evidence that a reasonable mind would regard as adequate to support a conclusion." *Wolfley v. Real Estate Comm'n,* 1983-NMSC-064, 100 N.M. 187, 189, 668 P.2d 303, 305. A ruling that is not in accordance with the law should be reversed "if the agency unreasonably or unlawfully misinterprets or misapplies the law." *Bass Enterprises, et al. v. Mosaic Potash, et al.* 2010-NMCA-065, ¶ 11, 148 N.M. 516, 238 P.3d 885. "On appeal [this Court] may correct an

administrative agency's misapplication of the law." *Rio Grande Ch. Of the Sierra Club,* 2003-NMSC-005, ¶ 13, 133 N.M. 97, 102.

In reviewing an administrative decision for arbitrary and capricious conduct, this Court reviews "the whole record to ascertain whether there has been unreasoned action without proper consideration or disregard of the facts and circumstances." *Las Cruces Prof'l Fire Fighters v. Las Cruces,* 1997-NMCA-044, ¶7, 123 N.M. 329, 331, 940 P.2d 177. "This means that [the Court looks] not only at the evidence that is favorable, but also evidence that is unfavorable to the agency's determination. [The Court] may not exclusively rely upon a selected portion of the evidence, and disregard other convincing evidence, if it would be unreasonable to do so." *Fitzhugh v. New Mexico DOL, Empl. Sec Div.*, 1996-NMSC-044, ¶23, 122 N.M. 173, 180, 922 P.2d 555 (internal citations omitted).

The meaning of a statute is an issue of law that is reviewed de novo on appeal. *State v. Rowell*, 1995-NMSC-079, 121 N.M. 111, 114, 908 P.2d 1379, 1382. Decisions and Orders not based on any evidence in the record and that do not give effect to provisions of the Act that the Board is charged to administer are questions of law reviewed de novo. *Joab v. Espinosa,* 1993-NMCA-113, ¶ 21, 116 N.M. 554, 560, 865 P.2d 1198. "If an agency decision is based upon the interpretation of a particular statute, the court will accord some deference to the agency's interpretation, especially if the legal question implicates agency expertise.

However, the court may always substitute its interpretation of the law for that of the agency's because it is the function of the courts to interpret the law." *Fitzhugh*, 1996-NMSC-044 at ¶22. "[This Court is] not bound by an agency's interpretation of a statute, since it is a matter of law that is reviewed de novo." *Bass*, 2010-NMCA-065 at ¶11, *quoting N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, ¶11, 141 N.M. 41, 150 P.3d 991.

"Summary judgment is not appropriate when the facts before the court are insufficiently developed or where further factual resolution is esssential for determination of the central legal issues involved." *National Excess Ins. Co. v. Bingham*, 1987-NMCA-109, 106 NM 325, 328, 742 P.2d 537, 540.

ARGUMENT

A. The Board erred in not hearing the appeal where the record shows Appellants' stated quality-of-life concerns were deemed irrelevant at the PIH hearing and summary judgment hearing such that Appellants were "adversely affected" under NMSA 1978 §74-2-7 (H).

Appellants preserved the issue that the Board incorrectly determined Appellants were not adversely affected in dismissing the Petition on the face of the Petition, at the summary judgment hearing below and upon timely appeal to this Court. *See* [AR. bates pg. 563; Notice of Appeal; Docketing Statement, pgs. 7-8; (Tr. 54: 1-25; 55:15-18)].

"Where the Legislature has granted specific persons a cause of action by statute, the statute governs who has standing to sue." *San Juan Agric. Water Users*

Ass'n. v. KNME–TV, 2011–NMSC–011, ¶ 8, 150 N.M. 64, 257 P.3d 884. In order to establish that one is adversely affected, Appellants must show that the injury complained of is within the zone of interests sought to be protected by the statute at issue. *New Mexico Cattle Growers' Assoc. v. NM WQCC, et al.,* 2013-NMCA-046, ¶ 10, 229 P.3d 436. To show standing Appellants must allege three elements: "(1) they are directly injured as a result of the action they seek to challenge; (2) there is a causal relationship between the injury and the challenged conduct; and (3) the injury is likely to be redressed by a favorable decision." *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 1, 144 N.M. 471, 188 P.3d 1222. The extent of the alleged injury can be slight. *ACLU*, 2008-NMSC-045, ¶ 11. Appellants have standing to protect themselves from injury as a result of unlawful government action. *De Vargas Sav. & Loan Ass'n. of Santa Fe v. Campbell*, 1975-NMSC-026, ¶ 13, 87 N.M. 469, 535 P.2d 1320.

NMSA 1978 § 74-2-7(H) states, "[a] person who participated in a permitting action before the department or the local agency and who is adversely affected by such permitting action may file a petition for hearing before the environmental improvement board or the local board."*Id.*; *see also* ABQ Ord. § 9-5-1-7(H) (same). It is undisputed that Appellants participated in the PIH and then timely filed request for an appeal hearing before the Board contending that the EHD in issuing the permit "refused to take into consideration the concerns raised by the public comments at the PIH" [AR bates p. 563]. As such, it was incumbent upon the Board to hold a hearing on the merits pursuant to statute. NMSA 1978 § 74-2-7(I) (Board shall hold hearing on all timely filed petitions);

ABQ Ord. § 9-5-1-7(I) (same); *see also* NMAC 20.11.41.16 (A) (5) (2002) (the Department shall deny a request for a permit if any provision of the Act is violated); ABQ Ord. § 9-5-1-7(C) (same). But the Board dismissed the Petition on summary judgment after limiting instruction given by the Hearing Officer.

Unlike Tramway, in this case Appellants participated in a PIH, but the record shows their stated concerns were deemed not relevant by EHD. As a result, Appellants' ability to present comment or evidence on their stated concerns was illusory and Appellants were "adversely affected" because of the EHD's forced and limiting interpretation of the Air Act. Summary judgment dismissing Appellants' Petition denied Appellants a reasonable opportunity to present comments, evidence, data, views, and to develop the record such that the permit in this action could have been influenced and modified with conditions by the Board or denied outright on Appellants' concerns. NMSA 1978 § 74-2-7 (D) (allowing for imposition of reasonable restrictions and limitations on the permit other than those relating specifically to emission limits or emission rates); NMAC 20.11.41.18 (B) (4) (2002) (same). At all hearings and proceedings in this action, the EHD and Respondents alleged that quality-of -life concerns are beyond the jurisdiction of the Board. Appellants should allegedly either take the matter to other governmental departments and or Appellants should petition for rule making amendment such that the Board has jurisdiction to consider quality-of-life issues despite statutory provisions under the Act that allow for conditions under the

permit other than those relating specifically to emission limits or emission rates. Appellants remain "adversely affected" because the permit was upheld without any conditions or denial that would have provided a remedy to Appellants.

The refusal of the EHD and the Board to give full effect to the Act such that the record could have been developed and the Board could have placed reasonable conditions in response to Appellants' concerns that include, but are not limited to, odors, fumes, increased traffic and other negative impacts on their property and quality of life is arbitrary, capricious and unlawful as discussed further below and as previously determined in *Rhino*. Without the Hearing Officer's, the Board's and Respondent's limiting construction of the Act, the causal relationship between the injuries alleged were likely to be redressed by a favorable decision by the Board. Indeed, the Board in the separate Carlisle matter did so, but for this Court's reversal on other grounds. The Carlisle matter was not stayed and in effect at the time of the Board's grant of summary judgment. The Carlisle matter regarded the same issues and parties. But unlike this case, the parties were provided a full and fair opportunity to be heard and litigate the issues. The Board should have also considered Appellants' quality-of-life concerns on the merits pursuant to the doctrine of offensive collateral estoppel. *Shovelin v. Central New Mexico Elec. Co-op., Inc.*, 1993- NMSC-015, ¶ 12, 115 N.M. 293, 298, 850 P.2d 996, 1001 (administrative decisions proceedings in which the parties had the opportunity to fully and fairly litigate the issue at the

administrative hearing can be preclusive effect in further civil trials and other proceedings).

Appellants always had standing under the Air Act to have their Petition heard on the merits.

B. The Board erred in determining no genuine issue of material facts, no standard, rule, or statute would be violated by the permit and that it had no authority to hear Appellants' stated concerns because no nexus to these concerns and the air quality permit rules purportedly existed where NMSA 1978 § 74-2-7 (D) and NMAC 20.11.41.18 (B) (4) (2002), specifically, as well as other provisions of the air permitting program allow for imposition of reasonable restrictions and limitations on the permit other than those relating specifically to emission limits or emission rates.

Appellants preserved the issue that the Board incorrectly determined Appellants could not show any nexus to their quality-of-life concerns and the Air Act, applicable regulations and standards in dismissing the Petition on the face of the Petition, at the summary judgment hearing below, appeal to this Court, and on their docketing statement. *See* [AR. bates pgs. 563-565; 1151-1164, 1334; Notice of Appeal; Docketing Statement, pgs. 15-16; (Tr. 61:25-63:1-7; 69:18-21)].

As argued by Appellants throughout the proceedings below, *Colonias Dev. Council v. Rhino Envt'l Services,* 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939 is directly on point regarding the central errors of law committed in this case. for example, the same Hearing Officer as in *Rhino* limited the scope of the Act by advising the Board before it granted summary judgment that none of the public comment, briefing, argument made, the statute and associated ordinance and

regulations were of legal consequence or could support the grounds for which the permit is granted, denied, or granted with conditions. (Tr: 105:24-106:4). In doing so, NMSA 1978 § 74-2-7 (D) and NMAC 20.11.41.18 (B) (4) (2002) that allow imposition of reasonable restrictions and limitations on the permit other than those relating specifically to emission limits and rates were rendered mere surplusage. NMSA 1978 § 74-2-7 (D) and NMAC 20.11.41.18 (B) (4) (2002) provide specific nexus as required by *Rhino* to Appellants' stated concerns such that the Board could have heard the Petition on the merits and granted a remedy in whole or part.

But unlike this case, the *Rhino* matter, as in all cases cited for authority below, went to full evidentiary hearing. Had the Board not been incorrectly advised and informed, it would have fulfilled its mandatory duty to hold the hearing pursuant to NMSA 1978 § 74-2-7 (I) (the board shall hold a hearing on all timely filed petitions); *but see* (Tr. 106:11-15 "[T]he person requesting a hearing must be adversely affected.... Of course that is what Ms. Parker and Mr. Atler were trying to ascertain."). Had the Board held the hearing, developed the record, allowed testimony and cross examination of witnesses, Appellants would have been in position to influence or condition the permit as was the case in the separate Carlisle permit appeal. Instead, the Hearing Officer adopted the City's position that unlike the *Solid Waste Act* reviewed in *Rhino*, the Air Act allegedly

had no purpose to protect the public health, welfare and safety in the community. (Tr. 106:23-24 "That language simply does not occur in the air quality permitting...").

"The environmental improvement board or the local board shall prevent or abate air pollution." NMSA 1978 § 74-2-5 (A); ABQ Ord. § 9-5-1-4 (A) (same). "Air pollution" includes emissions of air contaminants except those found in nature that "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." NMSA 1978 § 74-2-2 (B) (2001); ABQ Ord. § 9-5-1-2 (same). The term "air pollution" is used substantially throughout the entire Act and directs the Board to protect human health, animal and plant life and to protect against the unreasonable interference with public welfare and use of property. When the Board adopted its regulations, it was explicitly required and remains under a continuing duty to consider facts and circumstances regarding the public interest and environmental, health and social impacts on the community and property. NMSA 1978 § 74-2-5 (E).

The Air Act's purpose like the *Solid Waste Act* is to protect the public health, welfare and safety in the community and the Air Act remains capable of addressing Appellants' stated concerns.

NMSA 1978 § 74-2-7 (H) and (I) together with NMAC 20.11.41.14 (B) (2002) were adopted by the Board to ensure the ability of the public to participate and influence the outcome of environmental permitting. In violation of the Board's regulations, however, the Hearing Officer allowed Respondents' use of the Rules of Civil Procedure to modify the authority and jurisdiction of the Board under summary judgment motion practice. NMAC 20.11.81.12 (A); *see also* NMAC 20 11.41.16 (A) (5) (2002) (the Department shall deny a request for a permit if any provision of the Act is violated). Respondents admit there is no summary judgment provision under the Board's regulations. The record establishes that no other permitting appeal before the Board was dismissed on summary judgment.

This Court should neither defer to the Board's interpretation of its lack of authority to hear Appellants' stated concerns nor its decision to foreclose meaningful public participation in the permitting process because it failed to consider important issues rather than use its expertise to discern polices embedded in the Act. *Atlixco Coalition v. County of Bernalillo*, 1999-NMCA-088, ¶ 26, 127 N.M. 549, 984 P.2d 796. The proposition that neither public testimony from lay witnesses regarding general concerns about negative impacts nor expert testimony regarding social and health impacts allegedly caused by the intended fuel station can affect the air permit was rejected in both *Rhino*, 2005-NMSC-024, ¶¶ 10, 25-

27, 117 P.3d 939, 943 and *Joab v. Espinosa,* 1993-NMCA-113, 116 N.M. 554, 865 P.2d 1198. Thus, it has already been decided by our Supreme Court that this Court should give no deference to the Board on grounds of any claimed long-standing administrative construction of the Act. *Cf. High Ridge Hinkle Joint Venture*, 1998–NMSC–050, ¶ 9, 126 N.M. 413, 970 P.2d at 602.

It is well settled in New Mexico that legislative policy favors the public's ability to participate meaningfully in the environmental permitting process. *Martinez v. Maggiore*, 2003-NMCA-043, 133 N.M. 472, 64 P.3d 499 (construing the *Solid Waste Act*); *Southwest Research v. State*, 2003-NMCA-012, 133 N.M. 179, 62 P.3d 270 (construing the *Hazardous Waste Act*). Unlike *Southwest Research* where this Court held that another public hearing was not necessary on the NMED's clarification of permit condition previously determined at hearing, there can be no argument from Respondents that issuing the air permit that allows 7 million gallons of fuel annually and that commenced the construction of the intended fuel station is a minor, administrative matter not necessarily subject to a public hearing. *Southwest Research*, 2003-NMCA-012, ¶ 19, 133 N.M. 179, 184.

At all times below, however, Respondents characterized the Hex C performance standard as preempting the Board's authority to place reasonable conditions on the air permit. But only Idaho and South Dakota are precluded from issuing conditions on air permits under Hex C where significant benefits can be

achieved. 73 Fed. Reg. 1916, 1924, ¶ 6 (Jan. 10, 2008) (40 C.F.R. Part 63 Subpart CCCCCC). Further, when asked directly by the Board if the permit at issue was a permit-by-rule under 20.11.41.1 NMAC et seq. the City admitted it was not. (Tr. 104:14-15).

The Board's grant of summary judgment disregarded facts and issues that are difficult and inconvenient and thus reduced the permitting process to a mere ministerial act, which is not in accordance with the law. *Cf. El Dorado at Santa Fe, Inc. v Bd. of County Commrs.*, 1976-NMSC-029, 89 N.M. 313, 318, 551 P.2d 1360, 1365 (Subdivision statute required Board to endorse plat that complied with statutory provisions); *see also* ABQ Ord. § 9-5-1-4(B) (Board shall adopt a plan that abates air pollution recognizing the differences, need, requirements, and conditions with the County or any part thereof). Like *Rhino*, the Hearing Officer and Respondents believed that only technical considerations were relevant to the Board's scope of review. *Id.*, 2005-NMSC-024, ¶ 10, 117 P.3d 939,943. Like *Rhino*, the limited public comment taken at the summary judgment hearing was thus deemed not relevant to condition or deny the permit and public participation below always remained a sham. *Id.*

Like *Rhino*, Appellants in this case are not challenging the technical issues addressed in the permitting process. *Id.*, 2005-NMSC-024, ¶ 12, 117 P.3d 939, 943. Similar to *Rhino* that challenged the proliferation of landfills in their

community, Appellants and the public here challenged the proliferation of fuel stations in their neighborhood. *Id.*, 2005-NMSC-024, ¶¶ 28, 30, 117 P.3d 939, 946-47; *see also e.g.* (Tr. 5:6-22). The City, however, argued these circumstances together with the fact that notice of the permit and the PIH hearing being held was undisputed required summary judgment The grant of summary judgment on this basis constitutes abuse of discretion and is clearly inconsistent with the New Mexico Supreme Court's ruling in *Rhino* that social impact studies are an appropriate, relevant remedy as advanced by Appellant's expert. *Id.*, 2005-NMSC-024, ¶ 36, 43, 117 P.3d 939, 949-50. The fact that no evidentiary hearing was held on Appellant's concerns also requires this Court, like the Supreme Court in *Rhino*, to remand this appeal to the Board for a hearing on the merits. *Id.*

Like *Rhino*, the proliferation of fuel stations in Appellants' neighborhood raises highly relevant issues of health and other property impacts likely caused by the intended fuel station. The final decision does not include meaningful findings or conclusions such that it can be determined whether substantial evidence supports the issuance of the permit without conditions or alternatively, requires the denial of the air permit. Appellants are prejudiced in their duty to cite to the record to determine whether substantial evidence supports the permit be upheld because the Board threw the case out on summary judgment and at all times below the Board was advised by EHD and the Hearing Officer/attorney for the Board

that it had no authority to consider quality-of-life concerns. Appellants do not waive their position that the final decision was not supported by substantial evidence.

Like *Rhino*, Appellants were denied a reasonable opportunity to be heard. Like *Rhino*, the cumulative effects of three fuel stations in the community, as a result of the permit, should have been considered, as it bears on Appellants' stated quality-of-life, use of property, the environment, and health concerns. Consistent with the holding in *Rhino*, the Board "cannot ignore concerns that relate to environmental protection simply because they are not mentioned in a technical regulation." *Id.*, 2005-NMSC-024, ¶ 34, 43, 117 P.3d 939, 948 (internal citation omitted).

The Board has a duty to liberally interpret the Act both under its own regulations and horn book principles of administrative law to meet the needs of individual justice and realize the purpose of the *Air Quality Control Act*—to prevent and abate air pollution, which by definition means to protect human health, animal and plant life and to protect against the unreasonable interference with public welfare and use of property. NMAC 20.11.81.12 (A); NMSA 1978 § 74-2-2 (B); NMSA 1978 § 74-2-5 (A); *Old Abe Co. v. New Mexico Min. Comm'n.* 1995-NMCA-134, ¶¶ 6, 27, 28, 121 N.M. 83, 87, 92-93, 908 P.2d 776 (construing the *New Mexico Mining Act* and discussing the relatively new Air Act); *id. citing* 3

Kenneth C. Davis & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 17:1, at 98 (3rd ed. 1994) ("Inadequate discretion is probably a larger problem than excessive discretion."). Smith's argument that the Board's consideration and redress of Appellants' stated concerns amounts to standardless decision making was rejected by the Supreme Court in *Rhino*, 2005-NMSC-024, ¶ 35, 117 P.3d 939, 948 and this Court in *Old Abe Co.*, NMCA-134, ¶¶ 27, 28, 121 N.M. at 92-93.

The Board's decision should be reversed by this Court and remanded for an evidentiary hearing.

C. The Board erred in utilizing summary judgment procedure where further discovery revealed no other previous permit actions before the Board were dismissed on summary judgment, notice was not provided to Petitioners in accordance with the Board's alternative adjudicatory procedures, and the City admits there is no specific provision allowing for summary judgment under the Board's adjudicatory procedures.

Appellants preserved the issue that the Board incorrectly utilized summary judgment proceedings in dismissing the Petition at the summary judgment hearing below, appeal to this Court, and on their docketing statement. *See* [AR Bates pg. 918; Notice of Appeal; Docketing Statement, pgs. 9, fn. 2, 23-25; (Tr. 53:19-22; 56:13-25; 57:16-25; 61:7-12; 69:18-21)]. Appellants incorporate the proceeding facts, argument, and authorities above in full herein and supplement the following facts, arguments, and authorities regarding this particular issue where appropriate.

Respondents, the Hearing Officer, and the Board never disputed that the summary judgment motions and hearing were ever procedurally administered through the Board's alternate resolution summary procedures under 20.11.81.20 NMAC et seq. The record shows that the public notice of the summary judgment hearing was only e-mailed and mailed to parties and interested persons on September 26, 2014. [AR 915-917]. The notice was never published in a newspaper of general circulation in Bernalillo County. *Id.* The notice did not provide information on procedure for interested third parties to present technical evidence and testimony at the hearing. *Id.* The record was never supplemented to reflect proof of publication. *Id.*

Where a party makes a written request to the Board to decide the merits of a petition solely on legal arguments presented in written briefs and oral arguments, the Hearing Officer may grant the request and schedule it for an expedited hearing if she thinks it has a likelihood of success provided that:

> public notice is given in accordance with Subsection G of 20.11.81.14 NMAC, and include in the public notice instructions for persons other than parties who wish to participate in the oral argument to submit a statement of intent equivalent to the statement provided in Paragraph (2) of Subsection H of 20.11.81.14 NMAC.

20.11.81.20 (A) (2) (a) NMAC.

20.11.81.14(G) (1) (a) NMAC provides, in relevant part, that the summary judgment hearing notice shall be published in "at least one newspaper of general circulation that is distributed at least weekly in Bernalillo county." Further, "the

hearing clerk shall file with the record proper an affidavit certifying how and when notice was given and shall attach to the affidavit a copy of the notice of hearing and affidavits of publication." NMAC 20.11.81.14 (G) (2). 20.11.81.14 (H) NMAC required that the public notice of summary judgment hearing provide detailed, necessary information regarding filing requirements of any third parties that wished to present technical evidence and testimony at the summary judgment hearing.

Martinez v. Maggiore, 2003-NMCA-043, 133 N.M. 472, 64 P.3d 499 is dispositive that the summary judgment motion hearing below was a legal nullity. In *Martinez*, this Court found that failure to substantially comply with statutory notice procedures required remand for de novo review of petitioner's application for modification to a solid waste permit. *Id.*, 2003-NMCA-043, ¶ 13, 133 N.M at 476. "In demanding a new public hearing after proper notice, the court recognized the importance of 'vindicating the general public's right to participate in the permitting process' and the important interest in insuring that modifications to a landfill permit 'do not adversely affect the quality of life' of the surrounding community. *Id.* ¶¶ 18-19." *Rhino*, 2005-NMSC-024, ¶ 22, 117 P.3d at 945 (*quoting Martinez*). Like *Martinez*, the deficient public notice on summary judgment hearing regarding the Petition deprived the general public's fundamental due process right to participate in the environmental permitting process to insure that the permit did not adversely affect the quality of life of the surrounding community.

The first rule of statutory construction is the plain language of a statute is the primary indicator of legislative intent. *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998–NMSC–050, ¶¶ 5-6, 126 N.M. 413, 970 P.2d 599, 600-601.

A basic principle of statutory interpretation is that courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). Where language of the statute is "clear and unambiguous, this Court must give effect to that language and refrain from further statutory interpretation." *Quynh Truong v. Allstate Ins. Co.*, 2010–NMSC–009, ¶ 37, 147 N.M. 583, 227 P.3d 73.

Respondents cannot be heard to argue that the Air Act adjudicatory regulations are also "nuanced" such that the Hearing Officer had the discretion to ignore the Board's alternate resolution summary procedures. The Hearing Officer's reliance upon 20.11.81.12 (H) (6) NMAC for the proposition that it excuses mandatory public notice requirements regarding summary judgment is misplaced. Section (H) (6) provides in relevant part, "[a]ll motions may be decided by the hearing officer, in the hearing officer's sole discretion, without hearing.... However, the hearing officer shall refer all motions that would effectively dispose of the petition to the board for a decision." (emphasis added). Giving effect to all provisions of the Board's adjudicatory provision, as this Court must, the Hearing Officer's referral of the summary judgment motions to

the Board for decision required publication in a Bernalillo County newspaper together with detailed information to the public on how to present technical evidence and testimony pursuant to the Board's alternate resolution summary procedures. The harmonization of 20.11.81.12 (H) (6) NMAC with 20.11.81.14 and 20.11.81.20 NMAC does not produce an "absurd result." To rule otherwise would result in a determination that 20.11.81.20 NMAC is mere surplusage.

III. CONCLUSION

No authority cited by the Board's attorney, Smith's, and the City establishes that administrative permit hearings should be decided by requiring discovery, specifically discouraged by the Board's regulations, and followed by summary judgment motion practice. This practice inevitably eliminates public involvement. If the order is upheld, all permit applicants will attempt to force interested, adversely affected parties to endure formal discovery and dispositive motion practice.

Summary judgment is inappropriate and should be reversed. NMAC 20.11.41.81 (B) (4) and NMSA (1978) § 74-2-7 (D) allow reasonable permit conditions, which indicates the Board's broad authority to allow and consider public input during the air permit process. Failure to do so constitutes grounds for reversal.

WHEREFORE, based on the foregoing arguments, facts, circumstances and authorities, Appellants respectfully request that this Court:

1. reverse the Board's order granting summary judgment;
2. remand for public hearing such that Appellants are afforded a reasonable and meaningful opportunity to develop the record , and for
3. any further relief this Court deems justice requires.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to opposing counsel of record and that requisite copies of the same were filed by hand-delivery to the Clerk of the Court of Appeals on the 21st day of September, 2015.

Pete V. Domenici, Jr., Esq.