

**STATE OF NEW MEXICO
ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD**

IN THE MATTER OF THE PETITION FOR
A HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. 1677-M2

Andy Carrasco, Dempsey Power and
Pat Toledo,

Petitioners,

v.

No. AQCB 2013-6

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

Respondents.

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MOTION TO DISMISS FOR LACK OF STANDING

Smith's Food & Drug Centers, Inc. ("Smith's") moves the Albuquerque-Bernalillo County Air Quality Control Board ("Board") to dismiss the Petition filed by Andy Carrasco, Dempsey Power and Pat Toledo (collectively, "Petitioners"). As grounds for this Motion, Smith's states that each of the Petitioners lacks standing to challenge the issuance of Permit No. 1677-M2 to Smith's under NMSA 1978, § 74-2-7(H) and 20.11.81.2 NMAC. Specifically, petitioner Power lacks standing because he did not participate in the permitting action that led to the issuance of Permit No. 1677-M2. Petitioners Carrasco and Toledo lack standing because they were not, and could not have been, adversely affected by the permitting action. Accordingly, the Petition should be dismissed with prejudice.

BACKGROUND

Smith's owns and operates several Gasoline Dispensing Facilities ("GDFs") in the Albuquerque/Bernalillo County area, including one located at 200 Tramway SE ("Smith's Tramway GDF"). In 2003, the Air Quality Division of the City of Albuquerque's Environmental Health Department ("AQD") issued authority-to-construct Permit No. 1677 for the Smith's Tramway GDF. Permit No. 1677 contained an initial throughput limit of 3,400,000 gallons per year.

On September 27, 2011, Smith's applied for modifications to the authority-to-construct permits for several of its GDFs in Albuquerque and Bernalillo County, including those for the Smith's Tramway GDF and the Smith's GDF located at 1313 Carlisle NE ("Smith's Carlisle GDF"). [AR 1, p.7] Regarding the Smith's Tramway GDF, Smith's sought to modify Permit No. 1677 to increase the throughput limit from 3,400,000 to 3,900,000 gallons per year. [AR 1, pp.1-2]. After determining Smith's application to be complete and after the publishing public notice required by 20.11.41.14(A)(3) NMAC, AQD issued to Smith's Permit No. 1677-M1 with a throughput limit of 3,900,000 gallons per year. [AR 2, pp.11-16]. No one, including the Petitioners, challenged the issuance of Permit No. 1677-M1 to Smith's for the Smith's Tramway GDF.

Meanwhile, Petitioner Carrasco did challenge AQD's issuance to Smith's of Permit No. 2037-M1 for the Smith's Carlisle GDF. Mr. Carrasco claimed an interest in the commercial real property located immediately to the west of the Smith's Carlisle GDF ("Carrasco Plaza"). He argued, among other things, that he was adversely affected by the issuance of Permit No. 2037-M1 because his property allegedly lost

value as a result of the fueling activity at the Smith's Carlisle GDF. See Petition No. 2012-2, attached hereto as Exhibit A, at 2-3. Mr. Carrasco and others filed petitions for a hearing on the merits to challenge Permit No. 2037-M1, which Petitioner Toledo supported through testimony and other involvement.¹ Mr. Carrasco claimed to have standing to file his petition in Carlisle GDF case because: (1) his property value was adversely affected by the issuance of Permit No. 2037-M1, as described above, and (2) he participated in the permitting action by testifying at a public information hearing ("PIH") concerning Permit No. 2037-M1. Petition No. 2012-2 at 2-3; see Section 74-2-7(H) and 20.11.81.2 NMAC (allowing persons who participated in, and who are adversely affected by, a permitting action to file a petition for a hearing on the merits). The petitions resulted in a three-day hearing before the Board. See *generally* the administrative case docket for AQCB Nos. 2012-1 and -2.

The Board reversed Permit No. 2037-M1 for reasons that are not directly relevant to this motion.² Significantly, however, the Board expressly concluded that "AQD gave *legally sufficient* public notice regarding the proposed issuance of Permit No. 2037-M1." See Final Order and Statement of Reasons, attached hereto as Exhibit C, at 3 (emphasis added). AQD's process for providing public notice in that case was pursuant to 20.11.41.14(A)(3) NMAC and was essentially identical to the process it followed for issuing public notice for Permit No. 1677-M2. That process included, among other things, publication in the Albuquerque Journal of a notice of the proposed permitting

¹ Petitioner Toledo now claims an ownership interest in Carrasco Plaza as managing member of Wholly Toledo, LLC. See Assignment of Real Estate Contract and Deed attached hereto as Exhibit B.

² The New Mexico Court of Appeals recently issued a Notice of Proposed Summary Disposition proposing to summarily reverse the Board's decision.

action as well as direct notice to neighborhood associations located near the Smith's Carlisle GDF.

On February 28, 2013, Smith's applied for a second modification of Permit No. 1677 to increase the throughput limit from 3,900,000 to 5,000,000 gallons per year at the Smith's Tramway GDF. [AR 3, pp.17-18]. On March 4, 2013, AQD conducted an evaluation and determined that the application was complete. [AR 5, p.25] As mentioned above, AQD then published notice of the proposed Permit No. 1677-M2 and emailed the published notice to neighborhood associations within the vicinity of the Smith's Tramway GDF. [AR 4.1, p. 24.1; AR 5, pp.25-31; AR 7, p. 34; AR 7.1, p. 34.1; AR 8.1. p. 36.1] On April 24, 2013, Petitioners Carrasco and Toledo, but not Petitioner Power, submitted to AQD a written request for a PIH. See Exhibit 3 to the Petition. The request did not assert that AQD failed to give adequate notice of the proposed permitting action. *Id.*

On May 14, 2013, the Director of the Environmental Health Department ("EHD") declined the request for PIH due to lack of significant public interest. See Exhibit 4 to the Petition; see also 20.11.41.14(B) NMAC (providing that "[t]he Department shall hold a public hearing if the director determines that there is significant public interest"). The EHD Director noted that no one other than Petitioners Carrasco and Toledo requested a PIH.³ *Id.*

Approximately one month later, between June 13 and June 19, 2013, Petitioners Carrasco and Toledo approached a number of Albuquerque residents with a document entitled "Petition to appeal Smith's permit for increase [sic] throughput" (the "Signature

³ The EHD Director noted that Petitioners Carrasco and Toledo claimed to be members of the unrelated Summit Park Neighborhood Association, which is located near Lomas and Carlisle (approximately seven miles from the Smith's Tramway GDF).

Sheet”), which Petitioner Toledo authored. See Exhibit 2 to the Petition; see also Petitioners’ Responses to Smith’s Discovery Requests, attached hereto as Exhibit D, at 9-10 (Answer to Interrogatory No. 18). The Signature Sheet falsely states, among other things, that “[i]f this throughput is granted, the Four Hills Neighborhood will be subject to approximately 30 tons of cancer causing VOC’s.” See Exhibit 2 to the Petition. In addition to that false statement, Petitioners Carrasco and Toledo obtained signatures by explaining their view of the “issues regarding lack of notice” in this case, and “talked about the effects of increased throughput at [the Smith’s Carlisle GDF].” Exhibit C at 9-10 (Answer to Interrogatory No. 18). Petitioners have refused to disclose any evidence that the increased throughput granted in Permit No. 1677-M2 will lead to emission of “cancer-causing” volatile organic compounds and will have other harmful effects, citing their Notice Limiting Issues on Appeal filed on July 30, 2013 (“Notice Limiting Issues”) and their claim that they “will not be presenting evidence or argument on the impacts of the increased throughput” at the hearing. See Exhibit D at 1, 3-5, 10, 12, 14-15 (Answers to Interrogatory Nos. 1, 4, 5, 7-9, 19; Responses to Request for Admission Nos. 3, 9, 10).

Smith’s is not aware of any such evidence of harmful effects of increased throughput and believes that none exists. Nevertheless, Petitioners Carrasco and Toledo apparently convinced ten other Albuquerque residents to sign the Signature Sheet based on: (1) the false, incomplete and misleading information contained in the Signature Sheet, (2) their legally incorrect view regarding public notice in this case, as explained in further detail below, and (3) their factually and legally incorrect views about the effect of increased throughput at the Smith’s Carlisle GDF. Exhibit D at 9-10

(Answers to Interrogatory Nos. 17-18). Eight of the ten signatures, including that of Petitioner Power, appear to be from residents of a neighborhood located approximately 1/4 mile to the east of the Smith's Tramway GDF.⁴ The remaining signatures are from residents whose stated addresses are located several miles away from the Smith's Tramway GDF.

Petitioners filed their Petition in this case asking the Board to set aside Permit No. 1677-M2 based on their unsupported allegation that AQD: (1) failed to provide "adequate" notice of the proposed permitting action, and (2) declined to hold a public information hearing ("PIH"). Petition at 3. Petitioners' criticism of AQD's public notice is that AQD "did not take adequate measures to provide notice to individuals living in the vicinity of the [Smith's #427 GDF][.]" Petition at 4. Petitioners explain that, "[b]ecause [AQD] knew that there has been significant public interest in other similar permit modifications requested by Smith's at other Albuquerque locations, particularly in high volume, high impact retail gas stations, [AQD] should have take additional measures to ensure that notice was provided to potentially interested persons." *Id.* Petitioners made these allegations despite the Board having already ruled that the similar notice AQD provided in Case No. 2012-2 was legally sufficient. Exhibit C at 3. As explained in further detail below, the Petition must be dismissed because none of the Petitioners meet the criteria for appealing a permitting action under Section 74-2-7(H) and 20.11.81.14(B)(2)(c) NMAC and because the Petitioners' argument regarding public notice fails as a matter of law.

⁴ Signatory Emily DeWeld appears to have signed the Signature Sheet twice.

ARGUMENT

Section 74-2-7(H) and the Board's regulations at 20.11.81.14(B)(2)(c) NMAC require a petition for a hearing on the merits to set forth the facts that confer the petitioner(s) with standing to challenge the permitting action at issue. Specifically, the petition must state both "in what manner the petitioner *participated* in the permitting action that was pending before [AQD] *and* how the petitioner is *adversely affected* by the permitting action[.]" 20.11.81.14(B)(2)(c) NMAC (emphasis added); *see also* Section 74-2-7(H) ("A person who participated in a permitting action before the . . . local agency and who is adversely affected by such permitting action may file a petition for hearing before the . . . local board"). None of the petitioners can meet both factors of having participated in, and being adversely affected by, the permitting action in this case. The Petition should therefore be dismissed as a matter of law.

1. Petitioner Power Lacks Standing Because He Did Not Participate in the Permitting Action

Smith's assumes for purposes of this motion that Petitioners Carrasco and Toledo participated in the permitting action by requesting a PIH on April 24, 2013. Exhibit 3 to Petition. However, Petitioners have acknowledged that Petitioner Power did not participate in the proposed permitting action that led to the issuance of Permit No. 1677-M2. Petition at 2. In order to overcome this barrier to Petitioner Power's standing, Petitioners claim that he would have participated in the permitting action if AQD had provided him with "adequate" notice. *Id.* When asked in discovery to explain the specific factual and legal bases for the allegation that AQD failed to provide adequate notice of the permitting action, Petitioners vaguely stated that AQD "failed to provide public notice of the permitting action in a manner 'necessary to assure adequate notice

to the affected public.” Exhibit D at 2 (Answer to Interrogatory No. 2). Petitioners cited 20.11.42.13(B)(2) NMAC, which is located in Part 42 of the Board’s regulations and which applies to Title V major sources, in support of that statement. Petitioners also claim that 20.11.42.13(B)(2) NMAC may require AQD to provide direct notice to “individual residences or businesses located in the vicinity of the subject GDF.” Exhibit D at 13 (Response to Request for Admission No. 6).

Petitioners’ reliance on Part 42 of the Board’s regulations is misplaced. Part 42 does not apply to GDFs, which are minor stationary sources, unless the subject GDF reaches the high emissions thresholds for major sources set forth in 20.11.42.7(S) NMAC. See Excerpt of Hearing Officer’s Recommended Findings of Fact and Conclusions of Law in Case No. AQCB 2012-2, attached hereto as Exhibit E, at 60 (Conclusion Nos. 44-46). Petitioners have not alleged, and cannot reasonably allege, that the Smith’s Tramway GDF is a major source.

However, even if Part 42 were to apply in this case, which Smith’s disputes, 20.11.42.13(B)(2) NMAC cannot reasonably be read to require direct, individual notice to “residences or businesses located in the vicinity of the subject GDF.” The actual text of 20.11.42.13(B)(2) NMAC provides that “[p]ublic notice and notice of public hearing shall be given by publication in a newspaper of general circulation, to persons on a mailing list developed by [AQD] (including those who request in writing to be on the list), and *by other means if necessary to assure adequate notice to the affected public.*” (Emphasis added). The language regarding “other means if necessary” provides no guidance or standard, much less mandatory language, regarding how AQD could be expected to carry out individual notice in the way Petitioners suggest. For example, by

what standard would AQD determine the geographic area (vicinity) to include for its individualized notices? What form should the individual notices take (e.g. post card, flyer, standard mail)? What would be the cost of postage and who would bear it?

With regard to the notice requirements that are set forth in Part 41, Petitioners admit that the public notice AQD provided in this case complied with 20.11.41.14(A)(3) NMAC, which authorizes AQD to provide notice of the proposed permitting action by publication. See Exhibit D at 13 (Response to Request for Admission No. 4); *cf. Storm Ditch v. D'Antonio*, 2011-NMCA-104, ¶ 22, 150 N.M. 590, 263 P.3d 932 (declining to interpret a statute authorizing notice by publication to also require actual notice because doing so would render the statute meaningless). As mentioned above, the Board has concluded that the notice procedure AQD used for Permit No. 2037-M1 for the Smith's Carlisle GDF, which was identical to the procedure AQD used in this case, was "legally sufficient[.]" Exhibit C at 3. Accordingly, Petitioners' argument that AQD failed to provide adequate public notice is without merit and Petitioner Power lacks standing because he did not participate in the permitting action in this case.

2. Petitioners Carrasco and Toledo Are Not Adversely Affected By The Permitting Action

"[T]o attain standing in a suit arguing the unlawfulness of government action, the complainant must allege that he is injured in fact or is imminently threatened with injury, economically or otherwise." *DeVargas Savings & Loan Ass'n v. Campbell*, 87 N.M. 469, 473, 535 P.2d 1320, 1324 (1975); *see also New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 12, 126 N.M. 788, 975 P.2d 841 ("In order to obtain standing for judicial review in New Mexico, litigants generally must allege that they are directly injured as a result of the action they seek to challenge in court."). Although New

Mexico courts have adopted a liberal approach to standing, the “pleadings must be more than an ingenious exercise in the conceivable.” *Ramirez v. City of Santa Fe*, 115 N.M. 417, 420, 852 P.2d 690, 693 (Ct. App. 1993) (internal quotation marks and quoted authority omitted).

Petitioner Power alleges that he is adversely affected by Permit No. 1677-M2 because he lives near the Smith’s Tramway GDF, but alleged concerns about the increased throughput at the Smith’s Tramway GDF are not before the Board given the Notice Limiting Issues and no such evidence exists. Exhibit D at 1, 4-5, 12 (Answers to Interrogatory Nos. 1, 7-8; Response to Request for Admission No. 3). Even if Petitioner Power’s proximity to the Smith’s Tramway GDF provides some basis for his standing in this case, the same cannot be said for Petitioners Carrasco and Toledo, who admit that they hold no interest in real property within a three mile radius of the Smith’s Tramway GDF. See Petitioners’ Responses to the City’s Discovery Requests, attached hereto as Exhibit F, at 13 (Response to Request for Admission No. 8). They also cannot admit into evidence any injury in fact they have suffered or expect to suffer as a result of the issuance of Permit No. 1677-M2. Exhibit D at 4-5 (Answer to Interrogatory No. 7); see *also* Notice Limiting Issues. Rather, Petitioners Carrasco and Toledo claim that they are adversely affected “because they are members of the Albuquerque community who have an important interest in ensuring that the modifications to Smith’s permit do not adversely affect the quality of life in Albuquerque.” Petition at 3.

Petitioners Carrasco and Toledo cannot claim to have standing simply as members of the Albuquerque community. To conclude otherwise would render meaningless the requirement of Section 74-2-7(H) and 20.11.81.14(B)(2)(c) NMAC that

a petitioner be “adversely affected” by the permitting action. Under that view, essentially any member of the Albuquerque community could challenge a permitting action without having to demonstrate a direct injury in fact. This is not the law. *DeVargas*, 87 N.M. at 473, 535 P.2d at 1324; *New Mexico Right to Choose/NARAL*, 1999-NMSC-005, ¶ 12.

To the extent Petitioners Carrasco and Toledo claim to be acting on behalf of the citizens of Albuquerque, they cannot meet the three-part test for standing to assert claims on behalf of third parties set forth by the New Mexico Supreme Court in *New Mexico Right to Choose/NARAL*. There the Court followed federal standing law and articulated the following test: “The litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party’s ability to protect his or her own interests.” 1999-NMSC-005, ¶ 13 (internal quotation marks and citation omitted). Again, Petitioners Carrasco and Toledo cannot identify an injury in fact. Nor can they claim to have a close relation to the third party in this case, which is presumably the entire population of the City of Albuquerque. Finally, there is no hindrance to the ability of any citizen of Albuquerque who participates in a permitting action to challenge the issuance of an authority-to-construct permit such as Permit No. 1677-M2.

Moreover, the claim by Petitioners Carrasco and Toledo that their goal is to protect the quality of life in Albuquerque should be viewed with a heavy dose of skepticism. First, Petitioners Carrasco and Toledo refuse to disclose the specific factual basis for their allegations concerning the “negative effects of the increased throughput”

on the ground that Petitioners do not intend to present such evidence at the hearing. See Exhibit D at 1, 3-5, 10, 12, 14-15 (Answers to Interrogatory Nos. 1, 4, 5, 7-9, 19; Responses to Request for Admission Nos. 3, 9, 10); see *also* Exhibit F at 5-7, 13-14 (Answers to Interrogatory Nos. 10, 12-13; Responses to Request for Admission Nos. 9-10). Yet their claim of standing is based on that very assertion. While Petitioners may be free to limit the evidence they intend to present at the hearing, they cannot unilaterally exempt themselves from the requirements for standing set forth in Section 74-2-7(H) and 20.11.81.14(B)(2)(c) NMAC. Petitioners should not be allowed to rely on allegations of “negative effects of the increased throughput” to confer standing but then decline to demonstrate any evidence in support of those allegations. Again, Smith’s believes that no such evidence exists.

Second, there is an abundance of evidence suggesting that the Petition is pretextual and constitutes part of an ongoing pattern of conduct by Petitioners Carrasco and Toledo designed to harass and annoy Smith’s. For example, Petitioners Carrasco and Toledo admitted in discovery that they have only ever challenged requests for increased throughput submitted by Smith’s. Exhibit D at 6-7, 12 (Answer to Interrogatory No. 12; Response to Request for Admission No. 2). They have not challenged applications for increased throughput submitted by other GDFs. *Id.* Petitioners Carrasco and Toledo also placed a false call to the Albuquerque Fire Department to report an alleged fuel spill at the Smith’s Carlisle GDF that never occurred. See Albuquerque Fire Department Incident Report, attached hereto as Exhibit G, at 2. More recently, Petitioners Toledo and Carrasco have erected numerous signs along their property located to the west of the Smith’s Carlisle GDF that contain

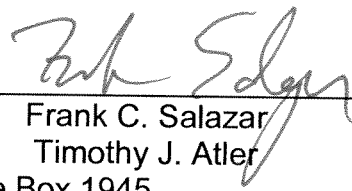
false statements of fact about Smith's and encourage the public to "BOYCOTT SMITH'S[.]" See Photographs of Signs, attached hereto as Exhibits H through Q. The Board should not allow Petitioners Carrasco and Toledo to use its hearing procedure as a pretext to achieve their private goals under the guise that they are acting for the benefit of Albuquerque residents or to harm Smith's simply because they object to the Smith's Carlisle GDF.⁵

CONCLUSION

For the reasons set forth above, each of the Petitioners lacks standing in this case and the Petition should be dismissed with prejudice. Counsel for the City concurs in this motion. Concurrence of counsel for Petitioners was not sought due to the dispositive nature of this motion.

SUTIN, THAYER & BROWNE
A Professional Corporation

By _____


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⁵ Petitioner Carrasco disclosed at the hearing in Case No. AQCB 2012-2 his desire that Smith's purchase his property, testifying that he asked Smith's for \$3.2 million and added that "[i]f they piss me off, I want three times that amount. Guess what. They pissed me off." See Excerpt of Transcript of Proceedings from Case No. AQCB 2012-2, Vol I at 236:22 – 237:12, attached hereto as Exhibit R.

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss for Lack of Standing was served on the following parties, counsel and other individuals by the method indicated:

The original of the Motion to Dismiss for Lack of Standing was filed with the Hearing Clerk in this matter along with nine copies, all of which were delivered to the Hearing Clerk by hand delivery.

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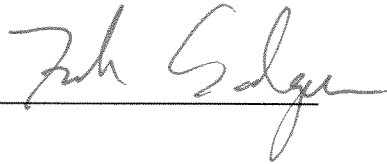
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Hearing Officer

on the 27th day of August, 2013

SUTIN, THAYER & BROWNE
A Professional corporation

By _____

A handwritten signature in cursive script, appearing to read "John S. Sutin", written over a horizontal line.

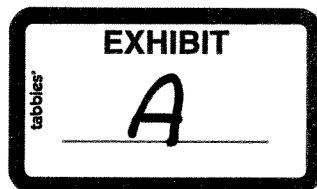
STATE OF NEW MEXICO
ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE PETITION
FOR A HEARING ON THE MERITS
REGARDING AIR QUALITY PERMIT
NO. 2037-M1

PETITION FOR HEARING

The Petitioners in this matter, Andy Carrasco, James A. Nelson, and the Summit Park Neighborhood Association, by and through their attorney Robert McNeill, pursuant to Section 74-2-7 NMSA 1978 and 20.11.81 NMAC, hereby petition the City of Albuquerque Environmental Health Department (EHD) and the Albuquerque-Bernalillo County Air Quality Control Board for a hearing as authorized by law with reference to Air Quality Permit No. 2037-M1 issued on April 17, 2012 to Smith's Food & Drug Centers, Inc. (Smith's) effective that date. The permit modification authorized Smith's to increase the annual throughput of gasoline from 3,369,925 gallons per year to 4,500,000 gallons per year at its fuel dispensing station located at 1313 Carlisle Blvd, NE, in Albuquerque. In accordance with 20.11.81.14 NMAC, Petitioners provide the following information:

-1-



AQCB Petition No. 2012-2

Names, addresses, telephone numbers, and other contact information with reference to the Petitioners in this matter

- A. Andy Carrasco
3420 Constitution Avenue, NE, Unit A
Albuquerque, NM 87106
Tel: 505-688-2789
- B. James A. Nelson
P.O. Box 16028
Albuquerque, NM 87191
Tel: 505-319-1916
- C. Summit Park Neighborhood Association
By: Judy Jennings, its President
P.O. Box 30893
Albuquerque, NM 87190-0893
Tel: 505-268-4168

Petitioners' participation in permitting action and how Petitioners were adversely affected by permitting action

Petitioners testified at the public information hearing conducted February 27, 2012 by the City Environmental Health Department Air Quality Division regarding Permit No. 2037-M1. On April 17, 2012, the City Environmental Health Department issued Air Quality Permit No. 2037-M1 to the applicant effective that date. The decision granted Smith's a permit modification notwithstanding that it was in existing violation of the terms of its original permit by repeatedly exceeding allowed throughput limits.

Petitioners Carrasco and Nelson own real property immediately adjacent to the Smith's facility which is the subject of not only Smith's failure to comply with existing

permit requirements, but also highly inappropriate and impermissible permitting conditions as to this facility. Fumes generated during customer refueling and the unsafe and potentially dangerous wholesale refueling activity on the site just a few feet from Petitioners' business and their property have created a hazardous and environmentally undesirable situation. The business property has been rendered economically obsolete and has suffered a significant diminution in value.

Petitioners' real property was extensively remodeled at the owners' significant expense in order to accommodate medical offices prior to the permitting action in this case. Petitioners have lost a tenant at their property as a direct result of the hazardous and serious air quality degradation that has occurred as a direct result of the Smith's facility which is in an entirely inappropriate location by any reasonable standard. Any minimal, cursory examination of the site makes it obvious that the decision to permit this Smith's facility was a result of a lack of sufficient investigation, extremely poor judgment, and a failure of the political and governmental processes to function effectively.¹

¹ An article published in the May 3-9, 2012 issue of the *Weekly Alibi* newspaper titled "Fuel to the Fire" and written by Elise Kaplan discusses the broader, deleterious impact of the Smith's gas facility on the immediate area and surrounding neighborhood. Further, testimony submitted for the February 27, 2012 hearing record on the part of Georgianna E. Pena-Kues provided EHD with

**ASSIGNMENT OF REAL ESTATE CONTRACT
AND DEED**

WITNESSETH:

Tillman J. Tucker and Ethel W. Tucker, husband and wife (hereinafter referred to as "Assignors"), for and in consideration of the sum of \$10.00 and other good and valuable consideration, have quitclaimed and assigned, and do hereby quitclaim and assign all of their right, title and interest in and to the following-described Real Estate Contract and lands covered and described in said contract, specifically including any and all monies due to the Assignor under the terms of said contract, to Wholly Toledo, LLC, a New Mexico limited liability company (hereinafter referred to as "Assignee"), the address of which is 3404 Calle del Ranchero, N.E. Albuquerque, New Mexico 87106, and which contract and the lands covered thereby being assigned by the Assignors to the Assignee are specifically described as follows, to-wit:

That certain real estate contract dated May 22, 2008 by and between Tillman J. Tucker and Ethel W. Tucker, husband and wife, as Sellers, and Andy Carrasco, III, as Buyer, that real estate contract having been filed on May 23, 2008 in the records of the County Clerk, Bernalillo County, New Mexico as Instrument No. 2008058846, that real estate contract covering the following described real property located in Bernalillo County, New Mexico:

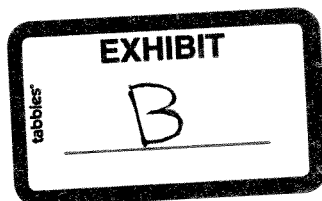
The West Twenty-four feet (W. 24') of Lot numbered Six (6) and all of Lots numbered Seven (7), Eight (8), Nine (9), Ten (10) and Thirteen (13) and Fourteen (14), in Block numbered Twelve (12) of the Business Section of McDuffie Place, Unit No. 3, an Addition to the City of Albuquerque, New Mexico, as the same are shown and designated on the replat of Block 12, filed in the office of the County Clerk of Bernalillo County, New Mexico on April 1, 1950.

SUBJECT TO the reservations in the patent, easements, restrictions, claims, liens and encumbrances of record.

The above described real estate contract is escrowed with Sunwest Trust, Inc., Albuquerque, New Mexico, Account No. 10064716.

The Assignors agree that this is a full and complete assignment of all of the Assignor's right, title and interest in and to the above-described Real Estate Contract and the lands covered and affected thereby, described above, and includes the assignment of the Assignor's rights and obligations under the terms and conditions of said contract, with the provision that the conveyance evidenced herein shall be and is without warranty of any nature whatsoever, express or implied, without recourse, and on an "as is" basis.

The Assignee hereby acknowledges and agrees that it is accepting the Assignors' interest in the subject real estate contract and the real property covered thereby without warranty from Assignors of any nature whatsoever, express or implied, without recourse, on an "as is" basis, and



that it is not relying on any representations of any nature whatsoever that may have been made by the Assignors, their attorney or agents, including but not limited to representations as to the status of the subject real estate contract or the terms thereof, or as to the condition of and title to the real property covered thereby, but that it is relying solely on its own inspection of the premises and any improvements located thereon, its own inspection of the subject real estate contract and the terms and conditions thereof, and any inquiries or inspections it may have deemed to be necessary relating to the subject real estate contract and the real property covered thereby.

The Assignee, and the undersigned Pat D. Toledo and Anna-Lena Toledo, husband and wife, in their individual capacities, jointly and severally, hereby agree to hold harmless and indemnify the Assignors from any and all claims, demands, liabilities, and obligations of any nature whatsoever, and to pay any and all costs associated therewith (including defense costs), which may be brought against the Assignors by Andy Carrasco, III (the Purchaser under the subject real estate contract), or which may be brought by any party or entity claiming under or through Andy Carrasco, III including but not limited to James A. Nelson, which may have existed in the past, may now exist or which may exist in the future, which may arise out of, or be related in any manner to, the subject real estate contract, the real property covered thereby, any and all transactions of any nature whatsoever between the Assignors and Andy Carrasco, III concerning and related to that contract and real property, and/or the currently pending litigation in the Second Judicial District Court, Bernalillo County, New Mexico, known as Tucker v. Carrasco et al., Cause No. D-202-CV-2012-09356.

The Assignors have executed of even date herewith a quitclaim deed covering the above-described tract of land in favor of the Assignee, which the parties agree will be placed in escrow along with the above contract being assigned with the escrow agent hereinafter designated and under its Escrow No. 10064716 at Sunwest Trust, Inc., Albuquerque, New Mexico.

The Assignors and the Assignee hereby agree that the terms and conditions of this document shall be binding on and inure to the benefit of the parties hereto, and their respective heirs, devisees, personal representatives, trustees, successors and assigns.

DATED this 24th day of MAY, 2013.

ASSIGNORS:

Tillman J. Tucker
Tillman J. Tucker
Ethel W. Tucker
by Tillman J. Tucker
her attorney-in-fact
Ethel W. Tucker by Tillman J.
Tucker, her attorney-in-fact

ASSIGNEE: WHOLLY TOLEDO, LLC

By: Pat D. Toledo
Pat D. Toledo, Managing Member

By: Anna-Lena Toledo
Anna-Lena Toledo, Member

By: Andy Carrasco, III
Andy Carrasco, III, Member

STATE OF NEW MEXICO ALBUQUERQUE/BERNALILLO COUNTY AIR
QUALITY CONTROL BOARD

IN THE MATTER OF THE TWO PETITIONS FOR A
HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. 2037-M1 ISSUED TO
SMITH'S FOOD & DRUG CENTERS, INC.

Georgianna E. Peña-Kues, Petitioner,

No. AQCB 2012-1 and

Andy Carrasco, James A. Nelson and
Summit Park Neighborhood Association,
Petitioners.

No. AQCB 2012-2

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FINAL ORDER AND STATEMENT OF REASONS

Pursuant to 20.11.81.18.D (2) NMAC, the Albuquerque/Bernalillo County Air Quality Control Board issues this Final Order in this matter, setting aside the Hearing Officer's recommended decision and reversing the action of the Air Quality Division of the City of Albuquerque Environmental Health Department. As reasons for doing so the Board States the following:

1. The hearing on the merits regarding Petition AQCB 2012-1 and Petition AQCB 2012-2 was held On August 21, 22, and 23, 2012 by the Air Board's Hearing Officer, with members of the Board in attendance.
2. Subsequent to post-hearing procedures conducted in accordance with 20.11.81 NMAC, the Hearing Officer on December 7, 2012 filed with the Board her Hearing Officer's Report, Recommended Findings of Fact and Conclusions of Law, and a proposed Final Order.
3. At the regularly scheduled monthly meeting of the Board held on January 9, 2013, the Board deliberated on the merits of this appeal, in accordance with 20.11.81.18 NMAC. Each Board member verified that he or she had either attended the entire three day hearing or had read



b. Conclusion 23 is amended as follows: “The Department and the Air Board have no authority over traffic patterns, construction of streets and highways, traffic violations or fire violations within the City municipal boundaries. See NMSA, §§ 74-2-5.1, 74-2-5, & 74-2-7. The Board has an interest in minimizing air pollution caused by vehicles, to the extent allowed by the Air Act and the federal Clean Air Act. See NMSA, § 74-2-5.D.”

c. Conclusion 27 is amended as follows: “20.11.41.18(B)(4) NMAC, which allows air quality permit conditions to impose “reasonable restrictions and limitations other than those relating specifically to emission limits or emission rates[,]” ~~does not broaden the scope of the Board’s authority to include traffic planning, zoning, or any other matter beyond that which has been delegated to the Board by the NM Act.~~ authorizes permit conditions designed to effectuate the general purpose of the Board’s regulations – to prevent or abate air pollution. See NMSA, § 74-2-5.A.”

e. Conclusion 28 is amended as follows: “AQD gave ~~proper and~~ legally sufficient public notice regarding the proposed issuance of the original Permit No. 2037. NMSA 1978, § 74-2-7(B)(5); 20.11.41.14 NMAC.”

f. Conclusion 31 is amended as follows: “AQD gave ~~proper and~~ legally sufficient public notice regarding the proposed issuance of Permit No. 2037-M1. NMSA 1978, § 74-2-7(B)(5); 20.11.41.14 NMAC.”

g. Conclusion 37 is amended as follows: “Any person seeking to construct a new stationary source or modify an existing stationary source must obtain ~~an~~ valid authority-to-construct permit pursuant to 20.11.41NMAC.”

h. Conclusion 48 is amended as follows: “Notwithstanding a written statement by Division staff apparently to the contrary, Smith’s did not commence a “modification” to the

STATE OF NEW MEXICO
ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE PETITION FOR
A HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. 1677-M2 ISSUED TO
SMITH'S FOOD AND DRUG CENTERS, INC.

Dempsey Power, Pat Toledo, and Andy
Carrasco, Petitioners,

No. AQCB 2013-6

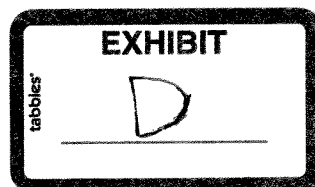
PETITIONERS' RESPONSES TO
SMITH'S FOOD & DRUG CENTERS, INC.'S
DISCOVERY REQUESTS

Andy Carrasco, Dempsey Power and Pat Toledo, by and through undersigned counsel of record, hereby provide their joint Responses to Smith's Food and Drug Centers, Inc.'s Discovery Requests.

INTERROGATORIES

Interrogatory No. 1: State the specific factual basis for the allegation on page 2 of the Petition that Petitioner Power's "quality of life would be adversely affected by the increased throughput of gasoline proposed by the requested permit modification" and identify every person whom Petitioners will call to testify, and every exhibit Petitioners will introduce, in support of that allegation.

ANSWER: Pursuant to the Petitioners' Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation. The Petitioners will not be presenting evidence or argument on the impacts of the increased throughput.



Interrogatory No. 2: State the specific factual and legal bases for allegations at page 2 of the Petition that the City of Albuquerque Environmental Health Department (“City”) “fail[ed] to provide adequate notice of the permitting action[,]” and at page 4 of the Petitioner that the City “should have taken additional measures to ensure that notice was provided to potentially interested persons[,]” and describe specifically what actions Petitioners contend the City failed to take that would have provided “adequate notice of the permitting action[,]” and identify every person whom Petitioners will call to testify, and every exhibit Petitioners will introduce, in support of the contention.

ANSWER: The City failed to provide public notice of the permitting action in a manner “necessary to assure adequate notice to the affected public.” 20.11.42.13.B(2). The failure to provide adequate public notice prevented interested persons from having the opportunity to submit written comments, evidence or request a hearing, as provided by 20.11.41.14.A NMAC.

20.11.41.14.B states that the Department “shall hold a public hearing if the director determines that there is significant public interest.” Because the Department did not provide notice adequate to the affected public, the Department could not reasonably determine if there was significant public interest such that a public hearing should be held.

The Petitioners will be presenting expert testimony regarding proper and adequate public notice, which will be provided as part of the Petitioners Notice of Intent to Present Technical Testimony, due August 30, 2013.

Interrogatory No. 3: For every neighborhood association (“NA”) or homeowners association (“HOA”) that Petitioners believe opposes Permit No. 1677-M2, identify the official name of the NA or HOA, the name(s) of any individual representative(s) of the NA or HOA with

whom Petitioners have communicated about Permit No. 1677-M2, the position(s) or title(s) of the individual representative(s), the dates on which Petitioners communicated with the individual representative(s) about Permit No. 1677-M2, and describe the substance of those communications including, without limitation, the terms of any agreement or “alliance” (see Exhibit 3 to the Petition) through which the NA or HOA authorized the Petitioners to challenge Permit No. 1677-M2 on behalf of the NA or HOA.

ANSWER: The Petitioners do not have any information responsive to this Interrogatory.

Interrogatory No. 4: With regard to the statement in Exhibit 2 of the Petition that “[i]f this throughput is granted, the Four Hills Neighborhood [sic] will be subject to approximately 30 tons of cancer causing VOC’s[.]” identify every source of information currently known to Petitioners, including without limitation published research, news articles or medical records or reports, that contain an opinion or conclusion that Volatile Organic Compounds emitted from a Gas Dispensing Facility (“GDF”) have caused or might cause cancer in humans.

ANSWER: Pursuant to the Petitioners’ Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation. The Petitioners will not be presenting evidence or argument on the impacts of the increased throughput.

Interrogatory No. 5: State the specific factual and legal bases for the allegation in Exhibit 3 of the Petition that “the size of the station is way too small and congested already and will only lead to completely unsafe and dangerous conditions for the public[.]” and identify

every person whom Petitioners will call to testify, and every exhibit Petitioners will introduce, in support of the allegation.

ANSWER: Pursuant to the Petitioners' Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation. The Petitioners will not be presenting evidence or argument on the topics identified in this Interrogatory.

Interrogatory No. 6: State the specific factual and legal bases for allegation in Exhibit 3 of the Petition that "[t]here are also current problems with record keeping and there [sic] recent modification in 2012[,]" and identify every person whom Petitioners will call to testify, and every exhibit Petitioners will introduce, in support of the allegation.

ANSWER: Pursuant to the Petitioners' Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation. The Petitioners will not be presenting evidence or argument on the topics identified in this Interrogatory.

Interrogatory No. 7: Describe specifically any injury in fact, either to person or property, that each of the Petitioners have suffered or expect to suffer as a result of the issuance of Permit No. 1677-M2, and identify every person whom Petitioners will call to testify, and every exhibit Petitioners will introduce, regarding the alleged injury.

ANSWER: Pursuant to the Petitioners' Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and

public participation. The Petitioners will not be presenting evidence or argument on the topics identified in this Interrogatory.

Interrogatory No. 8: State the specific factual and legal bases for allegation at page 3 of the Petition that “the increased throughput at the Smith’s Tramway location poses serious health, safety and environmental hazards to any citizens who happen to be traveling near the facility[.]” and identify every person whom Petitioners will call to testify, and every exhibit Petitioners will introduce, in support of the allegation.

ANSWER: Pursuant to the Petitioners’ Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation. The Petitioners will not be presenting evidence or argument on the topics identified in this Interrogatory.

Interrogatory No. 9: With regard to the allegation at page 3 of the Petition that “the impacts at this location are cumulative with the impacts from other [Smith’s] locations[.]” describe specifically the “impacts” to which Petitioners refer, identify each location and the specific “impacts” to which Petitioners refer at that location, and identify every person whom Petitioners will call to testify, and every exhibit Petitioners will introduce, in support of the allegation.

ANSWER: Pursuant to the Petitioners’ Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation. The Petitioners will not be presenting evidence or argument on the topics identified in this Interrogatory.

Interrogatory No. 10: Apart from Petitioners' allegations concerning improper or inadequate notice, describe specifically any other factual or legal basis upon which Petitioners contend the City should deny Permit No. 1677-M2 and identify every person whom Petitioners will call to testify, and every exhibit Petitioners will introduce, in support of that contention.

ANSWER: Pursuant to the Petitioners' Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation.

Interrogatory No. 11: If the Albuquerque-Bernalillo County Air Quality Control Board ("Board") remands this case with instructions for the City to hold a Public Information Hearing ("PIH"), summarize what information, testimony, public comment or questions that Petitioners propose to submit at the PIH or that Petitioners would have submitted had a PIH been held prior to the issuance of Permit No. 1677-M2.

ANSWER: The Petitioners object to this Interrogatory as being beyond the scope of the present appeal. The Petitioners and other members of the public are not required to identify the information, testimony, public comment or questions that would be submitted as part of a PIH prior to a PIH being scheduled.

Interrogatory No. 12: Identify by date of issuance, permittee name and permit number all air quality permitting actions in Albuquerque/Bernalillo County in which any of the Petitioners participated in any way (for example, by submitting a request for a PIH pursuant to 20.11.41.15(F) NMAC or for a hearing on the merits before the Board pursuant to 20.11.81.14

NMAC), other than the permitting actions concerning Permit Nos. 2037, 2037-M1 and 1677-M2 issued to Smith's.

ANSWER: The Petitioners have not participated in any such permitting actions.

Interrogatory No. 13: If any of the Petitioners have called an emergency or non-emergency number to report a problem or concern at any GDF in Albuquerque/Bernalillo County since January 1, 2008, indentify each such call by date, the name and location of the GDF, the name of any government agency(ies) dispatched to the GDF, and the specific nature of the problem or concern and describe the results of any subsequent investigation by any government agency or official dispatched to the GDF as a result of the call.

ANSWER: The Petitioners object to this Interrogatory as being overly broad, not likely to lead to evidence admissible at the hearing in this matter, and beyond the scope of the present appeal which is limited to issues regarding public notice and public hearing on the requested permit modification.

Interrogatory No. 14: If any of the Petitioners have communicated with elected officials, either in writing, in person or during testimony or public comment at a public meeting or hearing, to report a problem or concern at any GDF in Albuquerque/Bernalillo County since January 1, 2008, indentify each such communication by date, the name and location of the GDF, the name(s) of the government official(s), the specific nature of the problem or concern and describe the substance of the communication.

ANSWER: The Petitioners object to this Interrogatory as being overly broad, not likely to lead to evidence admissible at the hearing in this matter, and beyond the scope of the

ANSWER: The Petitioners object to this Interrogatory as being overly broad, not likely to lead to evidence admissible at the hearing in this matter, and beyond the scope of the present appeal which is limited to issues regarding public notice and public hearing on the requested permit modification.

Interrogatory No. 17: Did Petitioner Power first learn of the permitting action at issue in this case from Petitioner Carrasco and/or Petitioner Toledo? If so, describe the the substance of the communications in which Petitioners Carrasco and/or Toledo informed Petitioner Power of the permitting action, the dates of all such communications and the method of communication (e.g. phone, email, in person conversation). If not, describe in detail how Petitioner Power first learned of the permitting action at issue.

ANSWER: Petitioner Power learned of the permitting action from Petitioners Toledo and Carrasco in person. The substance of the communication was that the City refused to hold a public hearing and had already approved the permit modification.

Interrogatory No. 18: Identify who authored or created the "petition to appeal" attached the Petition as Exhibit 2 and describe how each signature contained in Exhibit 2 was obtained, including the substance of any communications between any of the Petitioners and the persons who signed Exhibit 2.

ANSWER: Petitioner Pat Toledo authored the petition. The signatures were obtained by a door-to-door canvassing over the space of about 15 minutes on the final day for filing an appeal. The Petitioners explained the issues regarding lack of notice and talked about the effects

of the increased throughput at another Smith's location on the neighborhood at Carlisle and Constitution.

Interrogatory No. 19: State whether Petitioners intend to offer technical testimony on any of the following topics and, for each topic, identify the person whom Petitioners presently anticipate calling as a technical witness to testify regarding that topic:

- A. Public notice requirements for air quality permitting actions;
- B. Public participation requirements for air quality permitting actions;
- C. The relationship between gasoline throughput and the quality of life of Albuquerque residents, either in the vicinity of the GDF or throughout the city and county;
- D. Whether VOCs emitted from GDFs pose "serious health, safety and environmental hazards to any citizens who happen to be traveling near the [GDF,]" including without limitation whether VOCs emitted from GDFs have caused or might cause cancer in humans;
- E. Issues relating to other permits and government entitlements, such as for building, zoning and traffic.

ANSWER: The Petitioners intend to offer technical testimony on A and B, above. Technical witnesses will be disclosed as part of the Notice of Intent to Present Technical testimony, as required by the July 24, 2013 Prehearing Order.

REQUESTS FOR ADMISSION

Request for Admission No. 1: Admit that neither Petitioner Carrasco nor Petitioner Toledo owns, rents or otherwise has an interest in real property within a two-mile radius of the Smith's GDF located at 200 Tramway Blvd SE.

RESPONSE: Admit x Deny

Request for Admission No. 2: Admit that the Petitioners have never participated in or otherwise challenged an air quality permitting action regarding a GDF not owned or operated by Smith's.

RESPONSE: Admit x Deny

Request for Admission No. 3: Admit that the Petitioners are not aware of any specific evidence supporting the allegation on page 2 of the Petition that Petitioner Power's "quality of life would be adversely affected by the increased throughput of gasoline proposed by the requested permit modification."

RESPONSE: Admit Deny

Pursuant to the Petitioners' Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation. The Petitioners will not be presenting evidence or argument on the impacts of the increased throughput and therefore are not answering this Request for Admission.

Request for Admission No. 4: Admit that the public notice provided by the City for the permitting action in this case complied with the requirements of 20.11.41.14(A)(3) NMAC.

RESPONSE: Admit x Deny ___

Request for Admission No. 5: Admit that the public notice requirements set forth in the New Mexico Solid Waste Act and its implementing regulations are not applicable to the public notice requirements set forth in the New Mexico Air Quality Control Act and its implementing regulations.

RESPONSE: Admit x Deny ___

Request for Admission No. 6: Admit that nothing in the New Mexico Air Quality Control Act or in its implementing regulations requires the City to provide direct notice of a GDF permitting action to individual residents or businesses located in the vicinity of the subject GDF.

RESPONSE: Admit ___ Deny x

20.11.42.13.B(2) NMAC requires the Department to provide public notice of the permitting action in a manner "necessary to assure adequate notice to the affected public," which may include individual residences or businesses located in the vicinity of the subject GDF.

Request for Admission No. 7: Admit that nothing in the New Mexico Air Quality Control Act or in its implementing regulations requires Smith's to provide direct notice of a GDF permitting action to individual residents or businesses located in the vicinity of the subject GDF.

RESPONSE: Admit ___ Deny x

20.11.42.13.B(2) NMAC requires the Department to provide public notice of the permitting action in a manner “necessary to assure adequate notice to the affected public,” which may include individual residences or businesses located in the vicinity of the subject GDF.

Request for Admission No. 8: Admit that no NA or HOA has authorized any of the Petitioners to challenge the issuance of Permit No. 1677-M2 on its behalf.

RESPONSE: Admit x Deny ___

Request for Admission No. 9: Admit that the Petitioners are not aware of any specific evidence that Volatile Organic Compounds emitted from a GDF have caused or might cause cancer in humans.

RESPONSE: Admit ___ Deny ___

Pursuant to the Petitioners’ Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation. The Petitioners will not be presenting evidence or argument on the impacts of the increased throughput and therefore are not answering this Request for Admission.

Request for Admission No. 10: Admit that the Petitioners are not aware of any specific evidence supporting the allegation at page 3 of the Petition that “the increased throughput at the Smith’s Tramway location poses serious health, safety and environmental hazards to any citizens who happen to be traveling near the facility.”

RESPONSE: Admit ___ Deny ___

Pursuant to the Petitioners' Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation. The Petitioners will not be presenting evidence or argument on the impacts of the increased throughput and therefore are not answering this Request for Admission.

Request for Admission No. 11: Admit that the Petitioners are not aware of any deficiency in Smith's application to modify Permit No. 1677-M1 (AR 3, pp.0017-18).

RESPONSE: Admit ____ Deny ____

Pursuant to the Petitioners' Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation. The Petitioners will not be presenting evidence or argument on possible reasons for denial of the application.

Request for Admission No. 12: Admit that the Petitioners are not aware of any evidence that Smith's failed to meet one or more requirements under the Air Quality Control Act or its implementing regulations for receiving the increase in throughput requested in Smith's application to modify Permit No. 1677-M1.

RESPONSE: Admit ____ Deny ____

Pursuant to the Petitioners' Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation. The Petitioners will not be presenting evidence or argument on possible reasons for denial of the application.

STATE OF NEW MEXICO
ALBUQUERQUE/BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE TWO PETITIONS FOR
A HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. 2037-MI ISSUED TO
SMITH'S FOOD & DRUG CENTERS, INC.

Georgianna E. Peña-Kues, Petitioner,

No. AQCB 2012-1

and

Andy Carrasco, James A. Nelson and
Summit Park Neighborhood Association,
Petitioners.

No. AQCB 2012-2

**HEARING OFFICER'S RECOMMENDED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

These proposed findings of fact and conclusions of law, drawn from those submitted by Smith's Food & Drug Centers, Inc. (Smith's) and the City of Albuquerque Environmental Health Department's Air Quality Division (Division or AQD), are supported by the administrative record, the transcript of proceedings and exhibits, and the applicable law in this matter.

The findings are organized into sections as follows:

- A. Background Concerning Original Authority-to-Construct Permit No. 2037 p. 2
- B. Development and Construction of the Station p. 6
- C. Throughput History and Necessity for Permit Modification p. 9
- D. Volatile Organic Compounds and Throughput p. 14
- E. Vapor Recovery p. 19
- F. Permit Modification No. 2037M1 Application Process, Public Participation p. 21
- G. The 2/27/12 Public Information Hearing and Continuing Public Engagement p. 24



42. A “major” source is one that emits air contaminants at or above certain thresholds defined in 20.11.42.7(S) NMAC. These thresholds include, in relevant part: (1) 10 tons per year or more of any HAP which has been listed pursuant to Section 112(b) of the Federal Clean Air Act, 42 U.S.C. §§ 7401 et seq. (the “Federal Act”), (2) 25 tons per year or more of any combination of HAPs listed pursuant to Section 112(b) of the Federal Act, and (3) 100 tons per year or more of any regulated air pollutant. 20.11.42.7(S)(1) and (2) NMAC.

43. The Station does not meet any of the thresholds that would trigger the requirement for Smith’s to obtain a major source operating permit pursuant to 20.11.42 NMAC. 20.11.42.7(S)(1) and (2) NMAC.

44. The Station is not a major source as that term is defined in 20.11.42.7(S) NMAC.

45. The NM Act defines a “modification” as “a physical change in, or change in the method of operation of, a source that results in an increase in the potential emission rate of a regulated air contaminant emitted by the source or that results in the emission of a regulated air contaminant not previously emitted[,]” subject to certain exclusions that are not relevant to this case. NMSA 1978, § 74-2-2(M); *see also* 20.11.1.7(MM) NMAC; 20.11.41.7(H) NMAC.

46. 20.11.41.2(B)(3)(c) NMAC provides that, “[f]or all sources subject to this Part, applications for Authority-to-Construct permits shall be filed prior to the commencement of construction, modification, or installation. Regardless of the anticipated commencement date, no construction, modification, or installation shall begin prior to issuance of the permit.” *See also* NMSA 1978, § 74-2-7(A)(1).

STATE OF NEW MEXICO
ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE PETITION FOR
A HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. 1677-M2 ISSUED TO
SMITH'S FOOD AND DRUG CENTERS, INC.

Dempsey Power, Pat Toledo, and Andy
Carrasco, Petitioners,

No. AQCB 2013-6

PETITIONERS' RESPONSES TO
THE CITY OF ALBUQUERQUE'S DISCOVERY REQUESTS

Andy Carrasco, Dempsey Power and Pat Toledo, by and through undersigned counsel of record, hereby provide their joint Responses to the City of Albuquerque's Discovery Requests.

Part 1- INTERROGATORIES

INTERROGATORY NO. 1: Petitioner Dempsey Power, also referred to in the Request for Hearing as Dempsey Powers (Petitioner Power), Pat Toledo (Petitioner Toledo,) and Andy Carrasco (Petitioner Carrasco), please state the names, addresses and telephone numbers of the person or persons who answered any interrogatory on your behalf; refer by number to the individual interrogatory each person answered and state why that person, instead of the Petitioner or Petitioners to whom the interrogatory was directed, answered that specific interrogatory.

ANSWER: Each of the Petitioners answered the questions directed to them on their own behalf with the assistance of Counsel.

INTERROGATORY NO. 2: Petitioner Power, please identify the person or persons who first discussed with you the proposed or already-approved increase in gasoline that may be delivered to, available for sale at or sold at the Smith's Tramway GDF.



ANSWER: Pat Toledo and Andy Carrasco.

INTERROGATORY NO. 3: Petitioner Power, identify the first document you saw that included information regarding the proposed or already-approved increase in gasoline that may be delivered to, available for sale at or sold at the Smith's Tramway GDF.

ANSWER: The Petition to appeal Smith's permit for increase throughput, attached as Exhibit 2 to the Petition for Hearing.

INTERROGATORY NO. 4: Petitioner Power, describe in detail the facts that support or evidence how you are or will be adversely affected by the permitting action in which Smith's Food & Drug Centers, Inc. (Smith's) applied for modification of its Authority-to-Construct (20-11-41 NMAC) Permit #1677-M and the Department published public notice, reviewed the application and related issues and ultimately issued Permit #1677-M2 (hereinafter "permitting action).

ANSWER: Petitioner Power lives in the neighborhood near the Smith's Tramway location and will be impacted by the negative effects of the increased throughput, including increased traffic and increased emissions. Because of the lack of adequate public notice, Mr. Power was not provided the opportunity to participate in the permitting process in a meaningful way, including the opportunity to voice his concerns about the increased throughput through written comments and participation at a public hearing.

INTERROGATORY NO. 5: Petitioner Power, describe in detail the facts that support or evidence how you are or will be adversely affected by the permitting action.

ANSWER: See response to Interrogatory No. 4.

INTERROGATORY NO. 6: Petitioner Power, describe in detail the facts that support or evidence your allegation in the Petition for Hearing that your “quality of life would be adversely affected by the increased throughput of gasoline” at the Smith’s @[sic] Tramway GDF.

ANSWER: See response to Interrogatory No. 4.

INTERROGATORY NO. 7: Petitioner Power, state the legal basis of your objections to the permitting action taken by the Department and cite to specific sections of the federal Clean Air Act, 42 U.S.C. §741 et seq. (Clean Air Act); the Code of Federal Regulations; the New Mexico Air Quality Control Act, NMSA 1978, §§74-2-1 to -17 (1967, as amended through 2009)(NM Air Act); and the Albuquerque-Bernalillo County Air Quality Control Board regulations, Title 20, Chapter 11 NMSA (Air Board Regulations) that support your allegations.

ANSWER: See response to Interrogatory No. 4. The Department failed to provide public notice in a manner that assures adequate public notice to the affected public as required by 20.11.42.13.B(2) NMAC. *See also* 20.11.41.14(A) NMAC. Because of lack of adequate notice, Mr. Power, as an interested person, was not given the opportunity to submit written comments, evidence or to request a public hearing on the application, as provided by 20.11.41.14 NMAC.

INTERROGATORY NO. 8: Petitioner Toledo and Petitioner Carrasco, describe in detail the facts that support or evidence how you are or will be adversely affected by the permitting action.

Albuquerque. Because of the lack of adequate notice, potential opponents of the modification have been hindered in participating in the permitting process. As citizens of the City of Albuquerque who are aware of the permitting action being proposed, the Petitioners have the right to vindicate the general public's right to participate in the permitting process and ensure that the City of Albuquerque provides adequate notice to the affected public, as required by 20.11.42.13.B NMAC. *Martinez v. Maggiore*, 2003-NMCA-043, ¶¶14-20, 133 N.M. 472.

INTERROGATORY NO. 10: Petitioner Toledo and Petitioner Carrasco, describe in detail the facts that support your allegation in the Petition for Hearing that the increase in gasoline throughput authorized by Permit #1677-M2 “poses serious health, safety, and environmental hazards to any citizens who happen to be travelling near” the Smith’s at Tramway GDF.

ANSWER: Pursuant to the Petitioners’ Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation. The Petitioners will not be presenting evidence or argument on the impacts of the increased throughput.

INTERROGATORY NO. 11: Petitioner Toledo and Petitioner Carrasco, in reference to your June 24, 2013 written request to the Department’s Air Quality Division for a public information hearing (PIH), which is Petition for Hearing Exhibit 3, and the statement in Exhibit 3 that the request is being made “in alliance with the 4-Hills neighborhood association”: identify the officers or board members of the neighborhood association (the full name of which is the “Four Hills Village Neighborhood Association” [hereafter, the “Four Hills Village NA]),

who authorized you to request a PIH on behalf or "in alliance with" the Four Hills Village NA or state the date on a majority of the members of the Four Hills Village NA authorized you to request a PIH on behalf of or "in alliance with" the Four Hills Village NA.

ANSWER: The Petitioners became aware of the permitting action on the very last day that public comments were allowed. Based on initial conversations on that day with the Four Hills Village NA, the Petitioners understood that the Four Hills Village NA would be joining them in their request for a public hearing. However, in subsequent discussions, the Four Hills Village NA confirmed that they were not going to participate in the permitting action.

INTERROGATORY NO. 12: Petitioner Toledo and Petitioner Carrasco, in reference to your June 24, 2013 request for a PIH, describe in detail the facts that support your allegations in Exhibit 3 of the Petition for Hearing that issuing Permit #1677-M1 will "lead to completely unsafe and dangerous conditions for the public."

ANSWER: Pursuant to the Petitioners' Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation. The Petitioners will not be presenting evidence or argument on the impacts of the increased throughput.

INTERROGATORY NO. 13: Petitioner Power, Petitioner Toledo and Petitioner Carrasco, in reference to the document that is attached to the Petition for Hearing as Exhibit 2, describe in detail the facts that support your allegation in the first sentence of the sign-up sheet that "the Four Hills Neighborhood will be subject to approximately 30 tons of cancer causing VOC's."

ANSWER: Pursuant to the Petitioners' Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation. The Petitioners will not be presenting evidence or argument on the impacts of the increased throughput.

INTERROGATORY NO. 14: Petitioner Power, Petitioner Toledo and Petitioner Carrasco, describe in detail the legal basis of your objections to the permitting action taken by the Department and provide citations to specific sections of the Clean Air Act, the Code of Federal Regulations, the NM Air Act, and the Air Board Regulations, and to specific cases that support your answer.

ANSWER: The City failed to provide public notice of the permitting action in a manner "necessary to assure adequate notice to the affected public." 20.11.42.13.B(2). The failure to provide adequate public notice prevented interested persons from having the opportunity to submit written comments, evidence or request a hearing, as provided by 20.11.41.14.A NMAC.

20.11.41.14.B states that the Department "shall hold a public hearing if the director determines that there is significant public interest." Because the Department did not provide notice adequate to the affected public, the Department could not reasonably determine if there was significant public interest such that a public hearing should be held.

Martinez v. Maggiore, 2003-NMCA-043, ¶¶14-20, 133 N.M. 472.

INTERROGATORY NO. 15: Petitioner Power, Petitioner Toledo and Petitioner Carrasco, cite each and every section of the Clean Air Act, the Code of Federal Regulations, the

REQUEST FOR ADMISSION NO. 8: Petitioner Toledo and Petitioner Carasco, admit that you hold no interest in any residence, commercial or other real property within a three mile radius of the Smith's at Tramway GDF.

ADMIT X DENY

REQUEST FOR ADMISSION NO. 9: Petitioner Power, Petitioner Toledo and Petitioner Carrasco, admit that you have no factual or technical basis for the statement in the first sentence of Exhibit 2 of the Petition for Hearing that "the Four Hills Neighborhood will be subject to approximately 30 tons of cancer causing VOC's" as a result of the issuance of Permit #1677-M2.

ADMIT DENY

Pursuant to the Petitioners' Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation. The Petitioners will not be presenting evidence or argument on the impacts of the increased throughput and therefore are not answering this Request for Admission.

REQUEST FOR ADMISSION NO. 10: Petitioner Power, Petitioner Toledo and Petitioner Carrasco, admit that you have no factual or technical basis for the assertion in the first sentence of Exhibit 2 of the Petition for Hearing that, if the increase in gasoline throughput proposed in the application for modification of Permit #1677-M1 is granted, the annual emissions from Smith's at Tramway GDF will consist of "approximately 30 tons of cancer causing VOCs."

ADMIT DENY

Pursuant to the Petitioners' Notice Limiting Issues on Appeal, filed July 30, 2013, the only issues to be addressed at the hearing are those involving public notice and public participation. The Petitioners will not be presenting evidence or argument on the impacts of the increased throughput and therefore are not answering this Request for Admission.

REQUEST FOR ADMISSION NO. 11: Petitioner Power, Petitioner Toledo and Petitioner Carrasco, admit that the Clean Air Act, the Code of Federal Regulations, the NM Air Act, and the Air Board Regulations do not require the Department to provide public notice of a pending application for modification of an Authority-to-Construct permit in addition to the public notice required by 20.11.41.14.A(3) NMAC.

ADMIT _____

DENY X

REQUEST FOR ADMISSION NO. 12: Petitioner Power, Petitioner Toledo and Petitioner Carrasco, admit that the Clean Air Act, the Code of Federal Regulations, the NM Air Act, and the Air Board Regulations do not require the Department to provide a public information hearing or hearing of any kind every time an application for modification of an Authority-to-Construct Permit is pending before the Department.

ADMIT _____

DENY X

20.11.41.14.B states that the Department "shall hold a public hearing if the director determines that there is significant public interest." Because the Department did not provide notice adequate to the affected public, the Department could not reasonably determine if there was significant public interest such that a public hearing should be held.

Incident Report

Albuquerque Fire Department

2013-0043331 -000

Basic

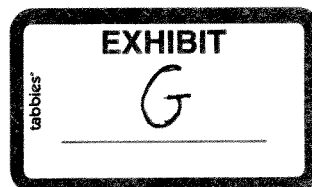
| | | |
|-----------------------------------|--|-----------------------|
| Alarm Date and Time | 14:59:58 | Friday, July 12, 2013 |
| Arrival Time | 15:10:26 | |
| Controlled Date and Time | | |
| Last Unit Cleared Date and Time | 15:31:59 | Friday, July 12, 2013 |
| Response Time | 0:10:28 | |
| Priority Response | Yes | |
| Completed | Yes | |
| Reviewed | Yes | |
| Release to Public | Yes | |
| Fire Department Station | 03 | |
| Shift | B | |
| Incident Type | 411 - Gasoline or other flammable liquid spill | |
| Initial Dispatch Code | 59 | |
| Aid Given or Received | N - None | |
| Action Taken 1 | 43 - Hazardous materials spill control and confinement | |
| Casualties | No | |
| Apparatus - Suppression | 2 | |
| Personnel - Suppression Personnel | 5 | |
| Property Use | 571 - Service station, gas station | |
| Location Type | Address | |
| Address | 1313 CARLISLE BL NE | |
| City, State Zip | ALBUQUERQUE, NM 87108 | |
| Latitude | 106.60424 | |
| Longitude | -035.093820 | |
| Map Page | 59B1 | |

Apparatus - S3

| | | |
|----------------------------------|-------------------------|-----------------------|
| Apparatus ID | S3 | |
| Apparatus Dispatch Date and Time | 15:01:31 | Friday, July 12, 2013 |
| En route to scene date and time | 15:04:24 | Friday, July 12, 2013 |
| Apparatus Clear Date and Time | 15:15:24 | Friday, July 12, 2013 |
| Apparatus priority response | Yes | |
| Number of People | 2 | |
| Apparatus Use | 1 | |
| Apparatus Type | 93 - HazMat unit | |
| Personnel 1 | 940 - MARTINEZ, Ramon | |
| | Position: DR | |
| Personnel 2 | 788 - STRACENER, Ryan W | |
| | Position: CAPT | |

Apparatus - E3

| | | |
|----------------------------------|----------|-----------------------|
| Apparatus ID | E3 | |
| Response Time | 0:06:54 | |
| Apparatus Dispatch Date and Time | 15:01:31 | Friday, July 12, 2013 |
| En route to scene date and time | 15:03:32 | Friday, July 12, 2013 |
| Apparatus Arrival Date and Time | 15:10:26 | Friday, July 12, 2013 |
| Apparatus Clear Date and Time | 15:31:59 | Friday, July 12, 2013 |
| Apparatus priority response | Yes | |
| Number of People | 3 | |
| Apparatus Use | 1 | |



Incident Report

Albuquerque Fire Department

2013-0043331 -000

Apparatus - E3

| | |
|----------------|---------------------------------------|
| Apparatus Type | 11 - Engine |
| Personnel 1 | 1212 - FRALEY, Joe M Position: FF2 |
| Personnel 2 | 1266 - BACA, David A Position: FF |
| Personnel 3 | 701 - TURPEN, Shane M Position: LT |

Authority

| | |
|-------------------|---|
| Reported By | 701 - TURPEN, Shane M 21:52:55 Friday, July 12, 2013 |
| Officer In Charge | - |
| Reviewer | 615 - CREANGE, Scott 10:24:04 Tuesday, July 16, 2013 |

Narratives

| | |
|-------------------|---|
| Narrative Name | New Narrative |
| Narrative Type | Incident |
| Narrative Date | 21:46:04 Friday, July 12, 2013 |
| Author | 701 - TURPEN, Shane M |
| Author Rank | LT |
| Author Assignment | 1 |
| Narrative Text | Arrived on scene to find that this was a false call by neighbor of gas spill. workers were cleaning out water from seperator at pump. this was told to the caller and he continued to state this is hazard and illegal. APD was called and the caller left scene before they arrived. there was no spill. |

End of Report

BOYCOTT SMITHS

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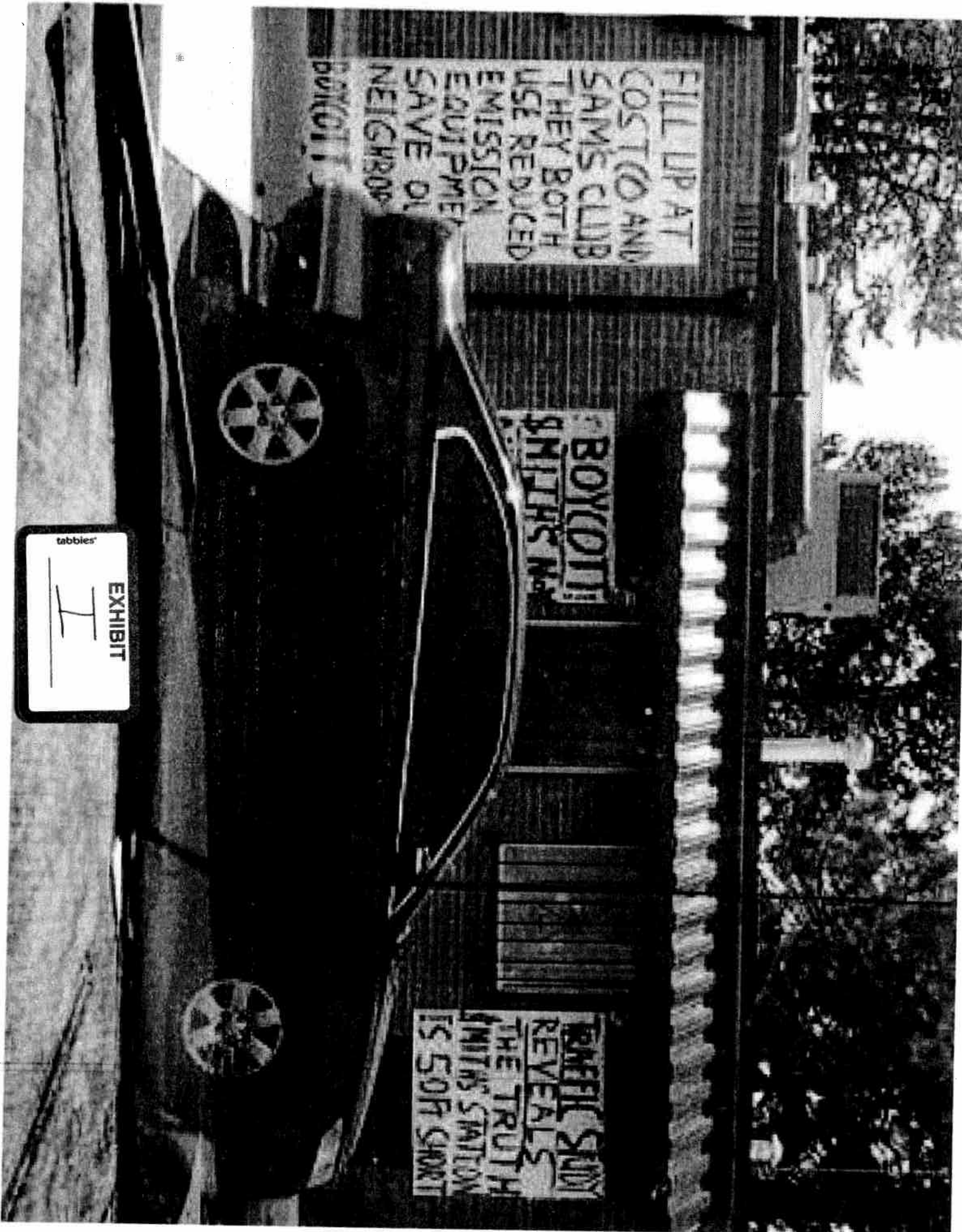
FILL UP AT
COSTCO AND
SAM'S CLUB
THEY BOTH
USE REDUCED
EMISSION
EQUIPMENT
SAVE ON
NEIGHBOR
BOYCOTT

BOYCOTT
SMITH'S

TRAFLET STUDY
REVEALS
THE TRUTH
SMITH'S STATION
IS 50% SHORT

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EXHIBIT
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SMITHS WILL
OF SHAME
VIOLATES
AIR QUALITY
BANKRUPT
LOCAL BUSINESS
DANGEROUS TO
BIKES AND
CHILDREN
CREATES
POLLUTION

BOYCOTT SMITHS

MAKING SURE
LOCAL BUSINESS
SMITHS DON'T
DANGEROUS FROM
REFUSES TO
SHUT DOWN
DANGEROUS
SMITHS CAN
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EXHIBIT
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MAYOR BERRY
DOES NOTHING
SHUTS DOWN
UNSAFE MOTEL
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BOO BERRY!

EXHIBIT

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FILL UP AT
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TRAFFIC STUDY
REVEALS
THE TRUTH
SMITHS STATION
IS 50 FT SHORT

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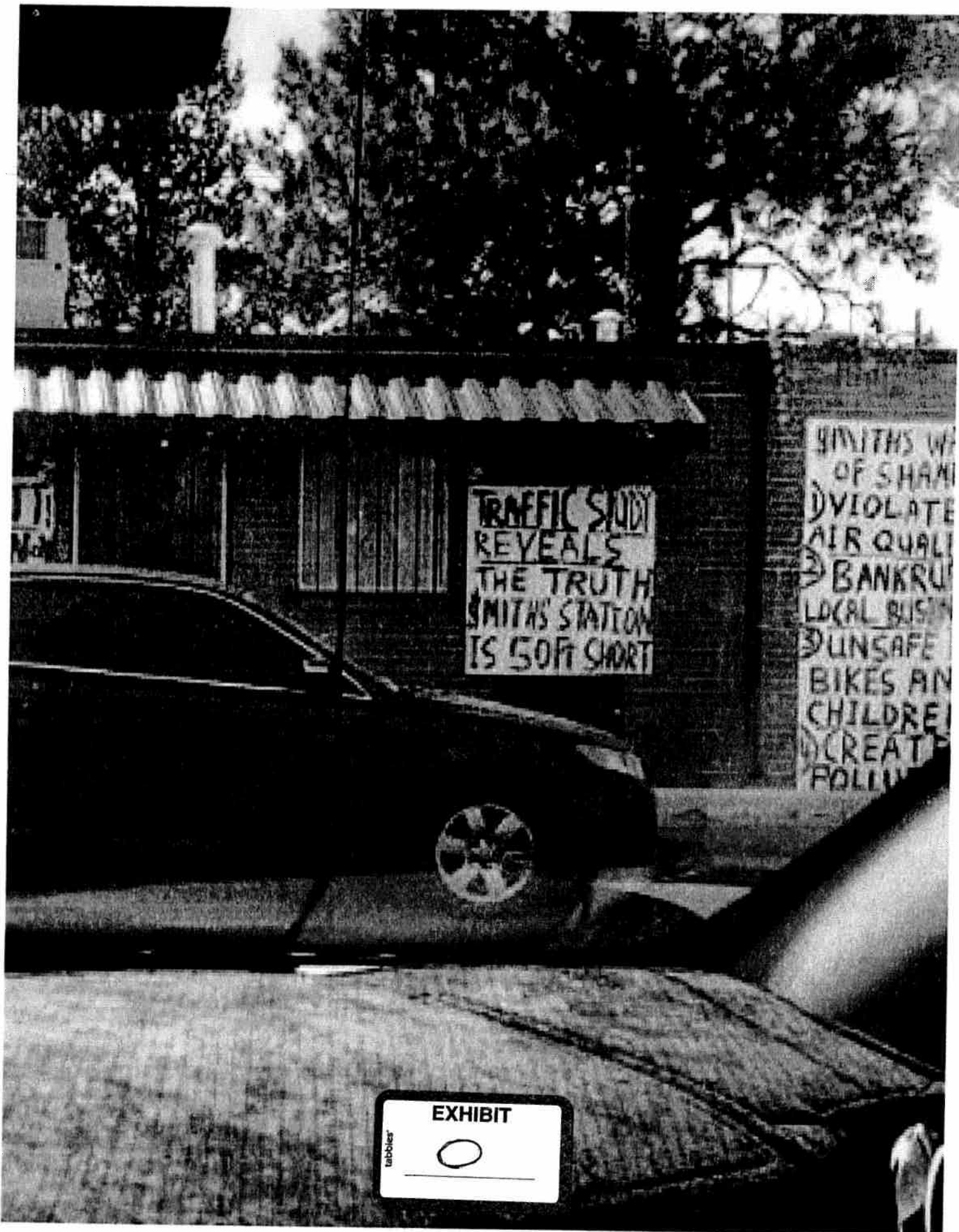
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BOYCOTT
SMITHS No
AIR PERMIT
IN VIOLATION

EXHIBIT

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TRAFFIC STUDY
REVEALS
THE TRUTH
SMITHS' STATION
IS 50 FT SHORT

SMITHS WAY
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\$MITHS WALL
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1) VIOLATES
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2) BANKRUPTS
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3) UNSAFE FOR
BIKES AND
CHILDREN!
4) CREATES
POLLUTION!

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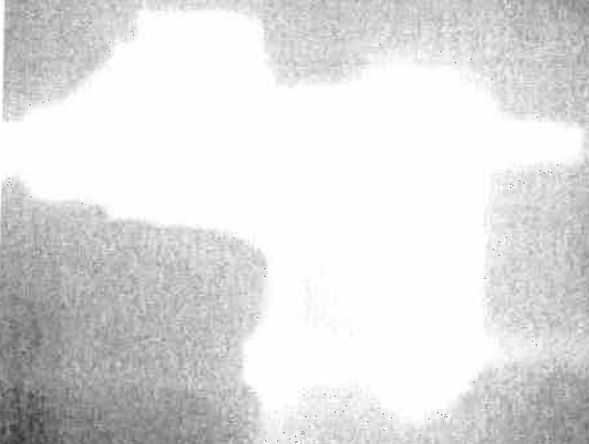
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ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD

No. AQCB 2012-1
No. AQCB 2012-2

IN THE MATTER OF THE TWO PETITIONS FOR
A HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. 2037-M1 ISSUED TO
SMITH'S FOOD & DRUG CENTERS, INC.

Georgianna E. Pena-Kues, Petitioner,

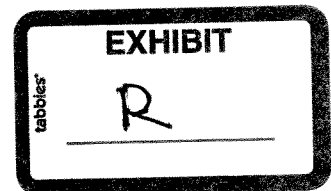
and

Andy Carrasco, James A. Nelson and
Summit Park Neighborhood Association,
Petitioners

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 21st day of
August, 2012, the above-entitled matter came on for
hearing before the Albuquerque-Bernalillo County Air
Quality Control Board, taken at the Vincent E. Griego
Chambers of the Albuquerque-Bernalillo County Government
Center, One Civic Plaza, Albuquerque, New Mexico, at the
hour of 9:13 a.m.

Volume 1



1 MR. SALAZAR: Just briefly, please,
2 Mr. Carrasco.

3 CROSS EXAMINATION

4 BY MR. SALAZAR:

5 Q. I understood part of your testimony, sir, to
6 be that you and Smith's had at one point in time
7 discussed your request that they purchase your property;
8 is that correct?

9 A. No, sir. What happened is one of their
10 Realtors, when they first were going to build it,
11 approached me -- because I was there before Smith's.
12 And that's very important. The reason why -- I was
13 there before Smith's.

14 I had a doctor in there with a two-year lease
15 with a five-year option. And I was not -- I hope people
16 take into consideration my integrity. I did not let
17 Smith's buy them out. I did not kick them out for the
18 cause of money. I said it is not for sale.

19 So they Mickey Moused it to figure out how
20 they could put the trucks on, and it turned out to be a
21 very dangerous situation.

22 Q. Briefly, Mr. Carrasco, the question I have is
23 at any point in time, did you, yourself, ask for any
24 particular dollar amount for a sale or not?

25 A. I called their corporate office and said that

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(505) 243-5018 - Fax (505) 243-3606

1 I was tired of the nonsense going on, I would be -- I
2 would entertain offers, I would do it based off of what
3 they paid for the lot next door.

4 I currently have seven of those lots. Plus,
5 I'm also a builder, and I've been a broker for 30 years.

6 Q. I was just asking if there was a dollar figure
7 you requested, sir.

8 A. Yes.

9 Q. What was that?

10 A. 3.2 million. If they piss me off, I want
11 three times that amount. Guess what. They pissed me
12 off.

13 Q. Okay. Thank you.

14 You had earlier also testified that Smith's
15 had given you -- I think the quote was \$100, and it had
16 something to do with a gate or barricade or something?
17 Is that --

18 A. What happened is Smith's approach -- I went
19 over there and talked to their manager, told him
20 everything that was transpiring, and I was trying to be
21 a good neighbor.

22 And they said, "Why don't we do this. We'll
23 pay to blockade your property, so you can chain it off
24 at night."

25 And sometimes I do a little bit on the thing.

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