

VI. Matters From County Attorney

A. Executive Session

**1. Deliberations in Connection with
Administrative Adjudicatory
Proceedings, as Allowed by
Section 10-15-1(H)(3) NMSA 1978.**

**a. CDRC Case #ZMXT 13-5360 Buena
Vista Estates, Inc. & Rockology LLC.**

Henry P. Roybal
Commissioner, District 1

Miguel M. Chavez
Commissioner, District 2

Robert A. Anaya
Commissioner, District 3



Kathy Holian
Commissioner, District 4

Liz Stefanics
Commissioner, District 5

Katherine Miller
County Manager

Date: October 20, 2015
To: Board of County Commissioners
From: Penny Ellis-Green, Growth Management Director and Land Use Administrator *PEG*
Via: Katherine Miller, County Manager
Item: CDRC Case # ZMXT 13-5360 Buena Vista Estates, Inc. & Rockology LLC

BACKGROUND:

Buena Vista Estates, Inc. and Rockology LLC (Applicants) requested zoning approval for a new mining zone pursuant to Article XI of the Land Development Code. The sand and gravel extraction proposed by Applicants required blasting. Public hearings on the application were held in 2014. The application was not acted upon due to Ordinance No. 2014-8, "An Emergency Interim Development Ordinance Imposing a Twelve Month Moratorium on Development Approvals or the Issuance of Development Permits for Specified Developments of Countywide Impact". The moratorium imposed by that ordinance expired on September 16, 2015.

On August 11, 2015, the Board of County Commissioners enacted Ordinance No. 2015-7, which created a new Article XVII of the Land Development Code concerning Developments of Countywide Impact. The subject application is governed by the new Article XVII. Ordinance No. 2015-7 was effective on September 11, 2015.

On September 29, 2015, the Board considered this case. Commissioner Kathy Holian made substantively the following motion, which passed unanimously:

I move that (1) staff inform the applicants that the Board has tentatively concluded that their application should be denied, without prejudice to their ability to apply under Article 17 of the Land Development Code; (2) the applicants and other interested persons be given until October 14, 2015, to submit written argument to the Land Use Administrator as to whether the application should be denied, without prejudice to the applicants' ability to apply under Article 17; and (3) that this case be placed on the agenda of the Board's October.

Applicants were informed of the Board's action on September 29 by letter dated September 30, 2015, a copy of which is attached as Exhibit A.

Applicants timely submitted written argument by letter dated October 13, 2015, a copy of which is attached as Exhibit B.

No other written argument was submitted.

REQUESTED ACTION:

Take action on the Application.

EXHIBITS:

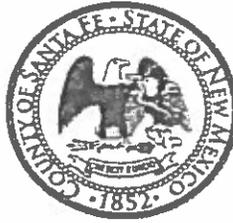
Exhibit A- Letter to Applicant

Exhibit B – Applicant’s written argument

Henry P. Roybal
Commissioner, District 1

Miguel M. Chavez
Commissioner, District 2

Robert A. Anaya
Commissioner, District 3



Kathy Holian
Commissioner, District 4

Liz Stefanics
Commissioner, District 5

Katherine Miller
County Manager

September 30, 2015

BY REGULAR MAIL, EMAIL, AND FACSIMILE

Pete Domenici, Esq.
Domenici Law Firm, PC
320 Gold Avenue SW, Suite 1000
Albuquerque NM 87102
Email: pdomenici@domenicilaw.com
Facsimile: 505.884.3424

James W. Siebert
James W. Siebert and Associates, Inc.
918 Mercer St.
Santa Fe NM 87507
Email: jim@jwsiebert.com
Facsimile: 505.989.7313

Chris Graeser, Esq.
Graeser & McQueen, LLC
PO Box 222
Santa Fe NM 87504
Email: chris@tierralaw.com
Facsimile: 888.781.5968

Re: CDRC Case # ZMXT 13-5360 Buena Vista Estates, Inc. & Rockology LLC

Dear Messrs. Domenici, Siebert, and Graeser:

I am writing to inform you of the action taken by the Board of County Commissioners (Board) at its Regular Meeting on September 29, 2015, in the above-referenced matter.

Commissioner Kathy Holian made a statement and motion, the substance of which was as follows:

In CDRC Case # ZMXT 13-5360, the application was made under Article 11 of the Land Development Code rather than the recently enacted Article 17 of the Land Development Code, does not comply with the submittal requirements of Article 17, and did not follow the review procedures established in Article 17. Consequently, it seems to me the application should be denied, without prejudice to the applicants' ability to apply for a DCI Overlay Zoning District and DCI Conditional Use Permit under Article 17. In fairness to the applicants, however, they should be given an opportunity to explain why the Board should not deny their existing application.

Accordingly, I move that (1) staff inform the applicants that the Board has tentatively concluded that their application should be denied, without prejudice to their ability to apply under Article 17 of the Land Development Code; (2) the applicants and other interested persons be given until October 14, 2015, to submit written argument to the Land Use Administrator as to whether the application should be denied, without prejudice to the applicants' ability to apply under Article 17; and (3) that this case be placed on the agenda of the Board's October



Messrs. Domenici, Siebert, and Graeser
September 30, 2015
Page 2 of 2

27, 2015, meeting, at which time the Board will consider any written arguments submitted and take final action on the referenced CDRC case.

The motion passed 4-0.

If you would like to submit written argument for the Board's consideration, you must do so on or before October 14, 2015. Written argument should be submitted to the attention of Penny Ellis-Green, Land Use Administrator. Ms. Ellis-Green's contact information is as follows:

Penny Ellis-Green, Land Use Administrator
Santa Fe County
Growth Management Department
102 Grant Avenue
Santa Fe NM 87501
Fax: 505.986.6389
Email: pengreen@santafecountynm.gov

Please call me if you want to discuss.

Sincerely,



Gregory S. Shaffer
Santa Fe County Attorney

cc (via email):

Penny Ellis-Green, Santa Fe County Land Use Administrator
Robert W. Becker, Esq. (rbecker@ylawfirm.com)

Pete V. Domenici, Jr.
pdomenici@domicilaw.com

Jeanne Cameron Washburn
jwashburn@domicilaw.com

Lorraine Hollingsworth
lhollingsworth@domicilaw.com

Reed Easterwood
reasterwood@domicilaw.com
Law Clerk, Licensed to practice law in

DOMENICI LAW FIRM, P.C.
ATTORNEYS AT LAW
320 Gold Avenue SW, Suite 1000
Albuquerque, New Mexico 87102-3228

(505) 883-6250 Telephone

(505) 884-3424 Facsimile

October 20, 2015

Via Email pengreen@santafecountynm.gov and U.S. Mail

Penny Ellis-Green, Land Use Administrator
Santa Fe County
Growth Management Department
102 Grant Avenue
Santa Fe, NM 87501

Re: CDRC Case # ZMXT 13-5360
Buena Vista Estates & Rockology, LLC.

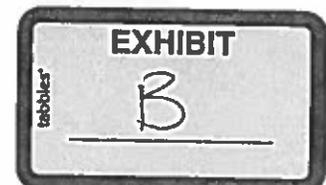
Dear Ms. Ellis-Green:

For consideration by the Board of County Commissioners, Buena Vista Estates & Rockology, LLC.'s submits its response to the September 30, 2015 denial of the application for permit in the CDRC Case # ZMXT 13-5360, as follows:

History

On November 8, 2013, Buena Vista submitted its permit application to County of Santa Fe under Santa Fe County Development Code Article XI to create a mining zone to allow the extraction of aggregate for use as a construction material. The proposed mine site is on 50 acres of the 1,359 parcel. Article XI, §1.1 of the Santa Fe County Development Code, which was in effect at the time the Application was submitted, states: "*mineral extraction activity for construction materials, including but not limited to, stone, sand, gravel, aggregate, or other similar naturally occurring materials, (hereinafter: construction materials) shall be allowed anywhere in the County, provided the requirements of this Ordinance are met.*"

Based on a review of the application and Article XI of the Santa Fe County Land Development Code, the Building and Development Services staff, recommended approval of the Application subject to two additional conditions; the staff found that the use of 50 acres of land, within a 1,359 parcel, for a mining use is reasonably compatible with other uses in the vicinity; the designated 50 acre site is particularly suited for mining uses, in comparison with other areas of the County. The review comments from State Agencies and County Staff established that the Application is in compliance with State and County requirements and Article XI, §1 of the Land Development Code.



Public hearings were conducted on the application and on August 12, 2014, at the end of the hearings, the Board of County Commissioners of Santa Fe County (the "Board") announced it would issue findings of fact, conclusions of law and a final decision.

One month later, on September 16, 2014, the BCC adopted a 12-month Moratorium on the issuance of development approvals and permits for specific developments of countywide impact (DCIs). The Moratorium applied only to landfills, junkyards and sand and gravel extraction activity requiring blasting and was in effect until September 16, 2015. The only application that was pending that was impacted by the moratorium was that of Buena Vista.

One month before termination of the 12-month moratorium, on August 12, 2015, the BBC adopted Ordinance No. 2015-7, Article XVII. Article XVII amends the County land development code to create regulations that apply to "developments of countywide impact". This ordinance regulates junkyards, landfills and sand and gravel mining that use blasting as DCIs. It imposes substantial and onerous new requirements on DCIs, including the requirement that an operation identified as a DCI has to apply for a "DCI Overlay Zoning District" or for a DCI Conditional Use Permit. The Ordinance also contains extensive regulations that "establish operational, location, reclamation and general standards" for sand and gravel operations that are identified as DCIs. Existing sand and gravel extractions are exempt for the new Ordinance. Article XVII specifically identifies property located in the Galisteo Basin. Buena Vista property is located in the Galisteo Basin. Article XVII targets "any applications that are pending on the effective date of this Ordinance that have not been approved." Buena Vista has the only pending application that has not been approved by the Board.

Argument

Buena Vista properly brought its application under Article XI of the Land Development Code. Article XI was controlling at the time of the submittal of the application. All public hearings on the application were conducted under Article XI. Article XI remained in place during the moratorium. Article XVII was adopted on August 12, 2015 and the Board has tentatively determined that the Buena Vista application should be denied for Buena Vista's failure to comply with the submittal requirements of Article XVII. The Buena Vista application has been pending before the Board for over two years and is in compliance with the terms and conditions of Article XI.

The Board's reliance on the DCI Ordinance in Article XVII of the Land Development Code for denial of the Buena Vista application constitutes the targeting of a specific project or downzoning; actions that are illegal and unconstitutional. The specific targeting and downzoning does not meet the state and federal statutory and constitutional protections to which Buena Vista, as property owners, is entitled. Buena Vista's property is located in Galisteo Basin and the Ordinance specifically targets and focuses on the Basin. No other areas of the County are specifically identified in the Ordinance Article XVII.

Article XVII targets "any applications that are pending on the effective date of this Ordinance that have not been approved." Buena Vista is the only outstanding application pending at the time of the effective date of Article XVII.

As cited in *Albuquerque Commons Partnership v. City Council*, 2008-NMSC-025, 144 N.M. 99, "New Mexico courts have often used the term "downzoning" as shorthand for those

actions that require justification pursuant to the “change or mistake” rule and the zoning authority’s own regulations for zoning amendments...The “change or mistake” rule, adopted by this Court in *Miller v. City of Albuquerque*, 89 N.M. 503, and reaffirmed in *Davis*, dictates that the proponent of a zoning change, ... must show that such a change is justified due to either a change in conditions in the community or a mistake in the original zoning...The characteristic common to those zoning actions which we have held must be justified by a change or mistake appears to be that they have focused on specific properties or small groups of properties within an otherwise similarly situated class, restricting or allowing uses in ways that do not apply to the surrounding area or similar area within the city.” Article XVII specifically targets Buena Vista in restricting its use of its property as compared with other property owners similarly situated.

But for the Board’s reliance on Article XVII for its denial of the Buena Vista application, the Buena Vista application would have been approved. The Board’s reliance on Article XVII for its denial of the Buena Vista application is arbitrary, capricious, contrary to law, an abuse of discretion and not supported by substantial evidence. Buena Vista respectfully requests approval of its application for permit in CDRC Case # ZMXT 13-5360.

Thank you.

Sincerely,
/s/ Pete V. Domenici, Jr.
Pete V. Domenici, Jr., Esq.

/JCW

