STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

No. D-0101-CV-2007-01354

**VISTA ENCANTADA NEIGHBORHOOD ASSOCIATION, 301-359 LOMA NORTE ASSOCIATION, MARY ELIZABETH ANDERSON, JOHN L. GARDNER, and ROBERT BLAGG,**

Appellants,

vs.

**CITY OF SANTA FE and SAFE PROPERTY, LLC,**

Appellees.

## MOTION FOR LEAVE TO INTERVENE

1. Pursuant to Rule 1-024(B)(2), Old Santa Fe Association, by its undersigned counsel, moves for leave to intervene as Intervenor/Appellant in support of the pending appeal in the above-captioned cause.

2. Old Santa Fe Association ("OSFA") is a New Mexico non-profit corporation. Since 1926, OSFA has advocated for planning and zoning so as to preserve Santa Fe's character, environment, and residential neighborhoods' quality of life. OSFA's members are residential property owners, and OSFA is the legatee/owner of a residential property. OSFA firmly supports diverse housing opportunities and affordable housing as a civic priority throughout Santa Fe, consistent with the General Plan and pertinent City ordinances administered with impartiality and due process of law.

3. OSFA is impacted and aggrieved by the instant unlawful and precedent-setting approval by the City Council of General Plan and zoning amendments to facilitate a dense two-acre condominium development project on "Mountainous and Difficult Terrain" off Old Taos

Highway, contrary to the General Plan, Land Use Code, and administrative due process of law. OSFA shares common questions of law with the parties to the instant appeal, and is prejudiced by the City Council's action for OSFA's continuing advocacy to protect and preserve Santa Fe's character and quality of life in various contexts.

4. New Mexico case law validates OSFA's standing, as an aggrieved and interested party, to contest the Council's unlawful actions and to participate as Intervenor/Appellant. *See, e.g., Nat'l Trust for Historic Preservation v. City of Albuquerque*, 117 N.M. 590, 594, 874 P.2d 798, 802 (Ct. App. 1994) (National Trust for Historic Preservation, Sierra Club, National Parks and Conservation Association, et. al, each had standing to challenge through-road development because members enjoyed, benefited from and had substantial interest in monument preservation); *Ramirez v. City of Santa Fe*, 115 N.M. 417, 421-22, 852 P.2d 690, 694-95, 695 (Ct. App. 1993) (residential property owners had standing to challenge General Plan amendment because of alleged "threat of aesthetic, quality of life, and property harm"). *Cf. Lewis v. City of Santa Fe*, 2005-NMCA-032, ¶ ¶ 8, 28-30, 108 P.3d 558, 561, 565 (City and Robinson, J., dissenting, support third-party intervention in administrative appeal).

5. For the foregoing reasons, OSFA respectfully moves for leave to intervene as Intervenor/Appellant in support of the pending appeal in the above-captioned cause. Attached to this motion is Intervenor/Appellant's Statement of Appellate Issues.

6. Counsel for all parties have been consulted. This Motion is unopposed by counsel for Appellants Vista Encantada Neighborhood Association, et al., and counsel for Appellee City of Santa Fe. Counsel for SAFE Property, LLC, opposes this motion.

Respectfully submitted,

Frederick M. Rowe
787 Stagecoach Circle
Santa Fe, NM 87501
(505-583-4319)

Daniel Yohalem
1121 Paseo de Peralta
Santa Fe, NM 87501
(505-983-9433)

November 29, 2007

## CERTIFICATE OF MAILING

I hereby certify that the foregoing Appellants'/Interventors' Motion for Leave to Intervene was mailed November 29, 2007 to:

Karl H. Sommer, Esquire
P.O. Box 2476
Santa Fe, New Mexico 87504
Attorney for Appellants
Vista Encantada Neighborhood Association, et. al

Frank D. Katz, Esquire
City Attorney
City of Santa Fe
P.O. Box 909
Santa Fe, New Mexico 87504-0909

David S. Campbell, Esquire
6100 Uptown Boulevard, NE
Suite 500
Albuquerque, New Mexico 87001
Attorney for Safe Property, LLC

FREDERICK M. ROWE

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

No. D-0101-CV-2007-01354

**VISTA ENCANTADA NEIGHBORHOOD ASSOCIATION, 301-359 LOMA NORTE ASSOCIATION, MARY ELIZABETH ANDERSON, JOHN L. GARDNER, and ROBERT BLAGG,**

Appellants,

vs.

**CITY OF SANTA FE and SAFE PROPERTY, LLC,**

Appellees.

## INTERVENOR/APPELLANT'S STATEMENT OF APPELLATE ISSUES

In the view of Old Santa Fe Association ("OSFA"), the Council's May 9, 2007 Decision is arbitrary and unlawful, because:

(1) Contrary to Code requirements, the Council's Decision unlawfully "spot-zoned" a unique two-acre tract in "Mountainous and Difficult Terrain" for a high-density condominium project, despite the developer's failure to demonstrate "changed conditions" within an area encompassing "at least a section of the City" and for a land use of "general applicability".

(2) Contrary to statutory requirements, the City's Decision contains no statement of its "factual and legal basis," compounding the Planning Commission's failure to make required "complete findings of fact," and contravenes administrative due process of law.

(3) Contrary to City mandates for protecting the health and safety of residents by building setbacks from highway corridors, the Council's Decision disregarded this project's perils from freeway traffic noise, fumes, and pollution.

## SUMMARY OF PROCEEDINGS

Intervenor/Appellant generally adopts Appellants' Summary of the Proceedings. Essentially, the City Council's Decision approved the developer's request for a General Plan and zoning code amendment to allow a 19-unit condo project in "Mountainous and Difficult Terrain," *i.e.*, a steep and craggy two-acre ravine dropping off from Old Taos Highway to freeway access via Route 599. The 5 to 3 Council ruling on May 9, 2007, which approved a nearly tenfold increase of dwelling density (from two to nineteen units), rested solely on the developer's inducement to the Council of two affordable housing units on top of the mandatory seven units required under the City's affordable housing program. The Council's "Decision" (Att. A) was issued four months later, but contained no statutory "statement of the factual and legal basis" of its determination, nor did the "Decision" address (1) the City Planning Policy Commission's 4 to 1 opposition to a General Plan amendment allowing a dense project on this craggy terrain; (2) the Planning Commission's failure in its 3 to 2 recommendation for approval to contain Code-required "complete findings of fact"; and (3) the serious health and safety issues posed by this dense condo project next to a freeway interchange.

## ARGUMENT

### I. Contrary to Code requirements, the Council's Decision unlawfully "spot-zoned" a unique two-acre tract in "Mountainous and Difficult Terrain" for a high-density condominium project, despite the developer's failure to demonstrate "changed conditions" within an area encompassing "at least a section of the City" and for a land use of "general applicability".

Under the City's Land Use Code ("Code"), pertinent zoning density changes require a General Plan amendment for "land utilization within an area larger than a single property and of general applicability," which "should be at least a section of the City ***". Code §14-3.2(D)(1)(c).

Manifestly, a two-acre tract for a dense condo project in "Mountainous and Difficult Terrain," *i.e.*, a craggy ravine dropping off from Old Taos Highway to freeway access via Route 599, is not a "section of the City" and entails no land use "of general applicability". Instead, the Council ordained a textbook case of unlawful "spot zoning," *i.e.*, "singling out by a zoning amendment of a small parcel of land" for the benefit of one developer seeking to profit from a condominium project. *See* John R. Nolon & Patricia E. Salkin, Land Use, p. 90 (2006); *Albuquerque v. Paradise Hills Special Zoning Dist. Comm'n*, 99 N.M. 630, 632, 661 P.2d 1329, 1331 (1983) (spot-zoning affects use of a particular piece of property primarily for owner's private interest); *Watson v. Town Council of Bernalillo*, 111 N.M. 374, 378, 805 P.2d 641, 645 (Ct. App. 1991) (spot-zoning occurs if use fails to comply with comprehensive plan or grants discriminatory benefit to land owner). Particularly egregious is "spot-zoning" for a unique steep tract posing not only health and safety hazards, but also serious drainage and sewage concerns. (*Schrage, McGregor*, AR 150-52).[1]

The developer's claim of a "changed condition," i.e,. a new freeway interchange to support rezoning to allow nineteen instead of two dwellings, is "an absurdity" (VENA Opp., AR 307-09). To justify a tenfold dwelling densification because of a close new freeway interchange takes gall. Obviously, building two houses on this steep terrain, per its pre-existing zoning, is far better and safer against hazardous freeway fallout than life in a close-packed 19-unit condominium project. (*Calvert*, AR 157-58). Thus, in the absence of probative "changed conditions" and of a sufficiently large area for a land use of "general applicability," this unlawful "spot-zoning" must fail.

---

[1] Nearby condos on far flatter terrain were built long ago, prior to the 1999 General Plan and the instant tract's restrictive 1997 rezoning in "Mountainous and Difficult Terrain".

## II. Contrary to statutory requirements, the City's Decision contains no statement of its "factual and legal basis," compounding the Planning Commission's failure to make required "complete findings of fact," and contravenes administrative due process of law.

Pertinent statutory requirements for the City's quasi-judicial disposition of a land use controversy are plain. According to NMSA § 39-3-1.1(B):

> Upon issuing a final decision, an agency shall **promptly**:
>
> (1) prepare a written decision that includes an order granting or denying relief **and a statement of the factual and legal basis for the order**; *** (emphasis added)

On its face, the City Council's "Decision" falls short. Ostensibly "approved" and signed by the Mayor as of May 9, 2007, the date of the Council's 5 to 3 ruling, the Decision was actually issued in September 2007 and was never adopted by the Governing Body. Hardly "prompt," this cursory "Decision" recites:

> "At the May 9, 2007 public hearing, based upon the Record and the evidence at the hearing, the City of Santa Fe Governing Body determined that the applications for a General Plan amendment and a zoning amendment met the requirements of the City of Santa Fe, ***" (*see* Att. A).

While adding several conditions, this terse fiat not only omits the mandatory "statement of the factual and legal basis;" it also fails to address critical legal issues raised by the project's opponents, let alone address the evidence, expert and otherwise, that this 19-unit condo project next to a freeway posed substantial drainage and sewage concerns beyond obvious health and safety perils. (*Schrage*, *McGregor*, AR 150-52).[2]

---

[2] In stark contrast, the Council's FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER in the *Wal-Mart* case included eight Findings of Fact and five Conclusions of Law. Case #M-2005-17, *Entrada Contenta Development Plan* (November 9, 2005).

Far beyond a violation of NMSA § 39-3-1.1(B), the Decision's conclusory fiat defeats the rationale of Rule 1-074 administrative appeals and judicial review as revised by state legislation in 1998. Without the mandatory statement of the factual and legal bases for a quasi-judicial decision, supported by rulings on key issues, appellate review is a mirage. *See VanderVossen v. City of Espanola*, 2001-NMCA-016, ¶ 26, 24 P.3d 319, 326-27 (§ 39-3-1.1(B) required Council to provide a written factual and legal basis for its decision because reviewing court is not a fact-determining body). Administrative due process is illusory if appellate courts are left in the dark, and cannot perform meaningful judicial review. *See Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 17,20, 965 P.2d 370, 376-77 (required statement of reasons for quasi-judicial administrative decision is to allow for meaningful judicial review; "reviewing court may not supply a reasoned basis for the agency's action that the agency itself has not given."); *VanderVossen, supra,* 2001-NMCA-016 at ¶ 27, 24 P.3d at 327, (Española City Council had "duty imposed by the legislature to provide the factual and legal basis for its decision.").

The City Decision's failures are compounded by the Planning Commission's omission of its own mandatory "complete findings of fact on all applications that would require amendments" of zoning and General Plan. Code §14-3.5(B)(4). Without those findings of fact by the Planning Commission, supporting its recommendations to the Council, the Council's approval has no Code foundation. Strict compliance with the legal process mandated by both state law and city Code is essential for this complex case -- where the Council's 5 to 3 approval ignored a contrary 4 to 1 recommendation by the City Planning Policy Commission ("CPPC") responsible for General Plan revisions (*Walker et.al,*, AR 323), which came after a 3 to 2 favorable recommendation by the Planning Commission, which in turn disregarded the planning staff's repeated recommendations for denial. (AR 45-46, 170-171) Without those mandatory

findings and conclusions up and down the line, the Council's quasi-judicial Decision in this precedent-setting case cannot comport with administrative due process.

The City's administrative shortfalls are underscored by its own Resolution No. 2007-27 (March 28, 2007), which propounds "THE ESSENTIAL ELEMENTS OF QUASI-JUDICIAL DECISIONS WITH PARTICULAR EMPHASIS ON THE NEED TO PREPARE AND ADOPT FINDINGS OF FACT AND CONCLUSIONS OF LAW". (Att. B) Per this Resolution, the City's internal "review process presupposes that quasi-judicial decisions at all levels of City government set forth the reasons and bases for such determinations, including Code or other legal provisions governing the matters to be decided, along with findings of key facts and conclusions which support or refute compliance with pertinent Code provisions or legal criteria." Indeed,

> failure to follow such procedural requirements confuses and complicates quasi-judicial decision making, detracts from a fair, efficient and focused decisional process consistent with due process of law, and can produce confused and potentially arbitrary and capricious rulings that invite further litigation. (*Id.*)

Manifestly, the City of Santa Fe has never adapted its own quasi-judicial procedures to the legislature's 1998 statutory reforms for administrative adjudications and administrative appeals throughout New Mexico. Notably, the City's hearings on quasi-judicial appeals in land use cases are still governed by Robert's Rules of Order, which are designed for legislative hearings and enactments. Significantly, those Rules do not curtail prejudicial claques that taint quasi-judicial impartiality and subvert administrative due process. (*E.g.*, *Jaramillo*, et.al, Council Hearing, May 9, 2007, DVD)

## III. Contrary to City mandates for protecting the health and safety of residents by building setbacks from highway corridors, the Council's Decision disregarded this project's perils from freeway traffic noise, fumes, and pollution.

Conspicuous is the Decision's failure to address the health and safety concerns posed by a 19-unit condominium project next to a freeway interchange. Unrebutted record evidence, expert and otherwise, confirms that this project generates health and safety perils due to noise, fumes, and pollution of freeway traffic, particularly for children. (*Sturchi, Margetson, Kolbor*, AR 23-25). As lamented by Mayor Coss at the close of the Council's public hearing, those hazards raise "an environmental justice issue in building housing for working class families next to a highway interchange***if we do this, we will be throwing out the rest of the rules and the rest of the planning". (AR 162).

Notwithstanding its June 2006 recommendation favoring this project, the Planning Commission on November 1, 2007, validated a non-binding City policy by recommending a Highway Corridor Protection Ordinance which mandates an adjacent 295 feet building setback from Route 599. Superseding the City's previous but non-binding policy guidance for development approvals along the Route 599 right-of-way (*Calvert*, AR 157), the Planning Commission now supports a binding ordinance by the City Council.

Since this project still needs Planning Commission approval for a development plan, this dubious venture may yet crash. Having endorsed a Highway Corridor Protection Ordinance, the Planning Commission could hardly approve a plan encroaching on the Route 599 setback unless drastically redesigned.

Under controlling case law, a supervening ordinance limitation that curtails a pending development is binding. So long as a pending project has not gained "vested rights" by final administrative approval, it must comply with supervening land use ordinance limitations if

adopted by the City Council. *See, e.g., Mandel v. City of Santa Fe*, 119 N.M. 685, 687, 894 P.2d 1041, 1043 (Ct. App. 1995) (subsequent City ordinance limiting building heights was binding because developer had no "vested rights" in project lacking final City approval).

## CONCLUSION

Beyond the salient health and safety problems of this project, which were prominently raised before the Planning Commission and before the City Council, the Council's approval of these General Plan and zoning changes is contrary to law -- regardless of any so-called "act of political courage". (Appellees' Joint Response, p. 9). For all the foregoing reasons, the City Council's May 9, 2007 ruling should be set aside.[3]

Respectfully submitted,

Frederick M. Rowe
787 Stagecoach Circle
Santa Fe, NM 87501
(505-583-4319)

Daniel Yohalem
1121 Paseo de Peralta
Santa Fe, NM 87501
(505-983-9433)

[3] In light of the substantial public interest issues as to planning, zoning and administrative due process, as mandated by the state legislature in 1998, the Court may opt to certify this appeal in order to obtain definitive appellate guidance for New Mexico district courts. NMSA §39-3-1.1(F); *see Jicarilla Apache Nation v. Rodarte*, 2004-NMSC-035, ¶ 8, 103 P.3d 554, 557 (certification because of statutory changes involving substantial public interest).

## CERTIFICATE OF MAILING

I hereby certify that the foregoing Interventor/Appellant's Statement Of Appellate Issues was mailed _____ to:

Karl H. Sommer, Esquire
P.O. Box 2476
Santa Fe, New Mexico 87504
Attorney for Appellants
Vista Encantada Neighborhood Association, et. al

Frank D. Katz, Esquire
City Attorney
City of Santa Fe
P.O. Box 909
Santa Fe, New Mexico 87504-0909

David S. Campbell, Esquire
6100 Uptown Boulevard, NE
Suite 500
Albuquerque, New Mexico 87001
Attorney for Safe Property, LLC

_____

City of Santa Fe, New Mexico
In The Santa Fe City Council

DECISION

CASE NO. M-2005-44 - Old Taos Highway General Plan Amendment
CASE NO. ZA-2005-20 - Old Taos Highway Rezoning

LEGAL DESCRIPTION: 2.179 acre parcel shown on plat recorded in 1998 in Plat Book 383, Page 020 of Santa Fe County Records

At the May 9, 2007 public hearing, based upon the Record and the evidence at the hearing, the City of Santa Fe Governing Body determined that the applications for a General Plan amendment and a zoning amendment met the requirements of the City of Santa Fe, and took the following action concerning the above referenced applications:

A. Adoption of Resolution No. 2007-42, amending the General Plan Future Land Use map from "Residential – Very Low Density" to "Residential – Medium Density" for a 2.179 acres at 1034 and 1038 Old Taos Highway.

B. Passage of rezoning Ordinance No. 2007-13, approving rezoning from R-2 (Residential, 2 dwelling units per acre) to RM-10 (Multifamily Residential - 10 dwelling units per acre) for a 2.179 acres at 1034 and 1038 Old Taos Highway.

The conditions of zoning approval are as follows:

1. The project is approved for up to nineteen (19) residential units.
2. The project is required to provide affordable housing in accordance with the Santa Fe Homes Program Ordinance. There will be no fewer than seven (7) of the nineteen (19) housing units designated for affordable housing, to be allocated as follows:
   a) The project will comply with the Santa Fe Homes Program, with thirty percent of the total units being provided as affordable; and
   b) Another ten percent of the available dwellings will be priced to be affordable to those earning 120% of the area median income, as established by HUD.
3. If fewer units than nineteen (19) are permitted, there shall be forty percent (40%) affordable units, which includes the thirty percent (30%) required by the Santa Fe Homes Program, plus ten percent (10%) of the units available to persons at one hundred twenty percent (120%) of median income.

EXHIBIT
tabbies
A

4. Buyers of the affordable units shall be qualified through the Community Housing Trust or Homewise, pursuant to the Santa Fe Homes Program Ordinance.
5. The dwelling units shall not be available for short term rentals, and this requirement shall be included in covenants and restrictions.
6. There shall be no terrain management regulation variances granted as part of the final development plan.

IT IS HEREBY ORDERED that the General Plan Amendment and Rezoning for 1034 and 1038 Old Taos Highway are approved with the conditions noted above.

APPROVED this 9th day of May, 2007

DAVID COSS, MAYOR

ATTEST:

YOLANDA Y. VIGIL, CITY CLERK

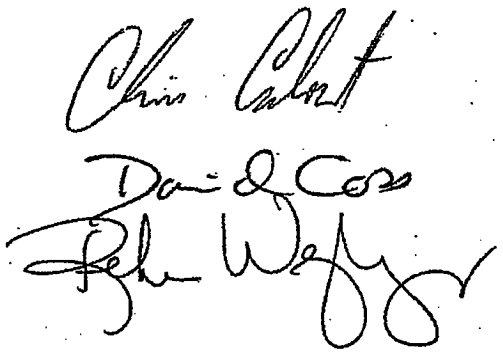
APPROVED AS TO FORM:

FRANK D. KATZ, CITY ATTORNEY

CITY OF SANTA FE, NEW MEXICO

RESOLUTION NO. 2007 - 27

INTRODUCED BY:



A RESOLUTION

**DIRECTING THE CITY ATTORNEY TO ADVISE AND INSTRUCT THE GOVERNING BODY AND DECISION MAKING BODIES OF THE CITY OF SANTA FE ABOUT THE ESSENTIAL ELEMENTS OF QUASI-JUDICIAL DECISIONS WITH PARTICULAR EMPHASIS ON THE NEED TO PREPARE AND ADOPT FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

**WHEREAS,** the Santa Fe City Code authorizes delegation of authority by the governing body to commissions or boards to make quasi-judicial decisions or determinations as to the compliance of particular actions with pertinent code provisions; and

**WHEREAS,** such decisions or determinations, though final, are subject to review by the governing body upon appeal; and

**WHEREAS,** this review process presupposes that quasi-judicial decisions at all levels of city government set forth the reasons and bases for such determinations, including code or other legal provisions governing the matters to be decided, along with findings of key facts and conclusions which support or refute compliance with pertinent code provisions or legal criteria;



EXHIBIT tabbies B

and

**WHEREAS,** failure to follow such basic procedural requirements confuses and complicates quasi-judicial decision making, detracts from a fair, efficient and focused decisional process consistent with due process of law, and can produce confused and potentially arbitrary and capricious rulings that invite further litigation.

**NOW, THEREFORE, BE IT RESOLVED BY THE GOVERNING BODY OF THE CITY OF SANTA FE that:**

Section 1. Commissions or boards that make quasi-judicial final decisions shall prepare findings of fact and conclusions of law supporting the decision making body's final determination prior to review by the governing body.

Section 2. The City Manager shall not place an item on the Governing Body's agenda if the findings of fact and conclusions of law described above are not available for inclusion in the Governing Body's meeting packet.

**BE IT FURTHER RESOLVED that:**

Section 1. Within sixty (60) days of adoption of this resolution, the City Attorney is directed to advise and instruct the Governing Body and all decision making bodies of the city about the essential elements of quasi-judicial decision making, with particular emphasis on the need for adoption of findings of fact and conclusions of law, based on the hearing record, to support or refute compliance of particular activities with pertinent code provisions or other legal requirements.

Section 2. The City Attorney shall schedule study sessions with appropriate training materials for members of all city decision making bodies making quasi-judicial determinations and their support staff to familiarize them with the foregoing requirements.

Section 3. The City Attorney shall report back to the Governing Body within six months of the date of adoption of this resolution the results of the foregoing mandated training

program, along with recommendations for further appropriate action by the Governing Body.

**PASSED, APPROVED and ADOPTED this** 28th **day of** March, **2007.**

**DAVID COSS, MAYOR**

**ATTEST:**

**YOLANDA VIGIL, CITY CLERK**

**APPROVED AS TO FORM:**

**FRANK KATZ, CITY ATTORNEY**

**mdb/N/Resolutions/Quasi-Judicial**