

**STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT**

**RANDY & DESIREE SENA,
TRUSTEES SENA TRUST,**

Appellants,

D-202-CV-2022-06217

v.

**BOARD OF COUNTY COMMISSIONERS,
COUNTY OF BERNALILLO,**

Appellee.

Brief of Amicus Curiae

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Table of Contents

Table Of Authorities..... 3

I. Interest Of Amici Curiae..... 6

II. Statement Of Issues 8

III. Summary Of Proceedings..... 8

IV. Argument..... 10

 A. Summary..... 10

 B. Standard Of Review..... 10

 C. The County Commissioners Properly Upheld The 2022 Zoning Administrator Certification, Denying Appellants’ Proposed Heavy Manufacturing (M-2) Use Of Their Rural-Agricultural (A-1) Zoned Land..... 11

 i. Appellants’ Proposed Use Is Not Authorized Under County Zoning Ordinance. 12

 ii. Appellants’ Proposed Use Is Not Authorized Under The Applicable Special Use Permit..... 15

 iii. The 2005 and 2008 Zoning Administrator’s Actions are Null and Void. 16

 D. Appellants’ Proposed Continuous Mix Asphalt Plant Would Adversely Impact Residents and Neighbors, including *amici curiae*..... 20

V. Conclusion 25

TABLE OF AUTHORITIES

I. New Mexico Case Law

<i>Albuquerque Commons P'ship v. City Council of City of Albuquerque</i> , 2008-NMSC-025, ¶ 52, 144 N.M. 99, 184 P.3d 411	18, 19
<i>Burroughs v. Bd. of Cnty. Comm'rs of Bernalillo Cnty.</i> , 1975-NMSC-051, ¶ 9, 88 N.M. 303, 540 P.2d 233.....	16
<i>Coe v. City of Albuquerque</i> , 1966-NMSC-196, ¶ 8, 76 N.M. 771, 418 P.2d 545.....	11
<i>Downtown Neighborhoods Ass'n v. City of Albuquerque</i> , 1989-NMCA-091, ¶ 14, 109 N.M. 186, 783 P.2d 962.....	10
<i>Matter of the Petition for a Hearing on the Merits Regarding Air Quality Permit No. 3135</i> , 2017 NMCA-011, ¶ 23, 388 P.3d 287	18
<i>Miller v. City of Albuquerque</i> , 1976-NMSC-052, ¶ 21, 89 N.M. 503, 554 P.2d 665.....	18,19
<i>San Pedro Min. Corp. v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.</i> , 1996-NMCA-002, ¶ 26, 121 N.M. 194, 909 P.2d 754. (decided in 1995).....	11,13
<i>Siesta Hills Neighborhood Ass'n v. City of Albuquerque</i> , 1998-NMCA-028, ¶ 6, 124 N.M. 670, 954 P.2d 102.	11,12
<i>West Old Town Neighborhood Ass'n v. City of Albuquerque</i> , 1996–NMCA–107, ¶ 11, 122 N.M. 495, 927 P.2d 529.....	11

II. Federal Case Law

<i>City of Albuquerque v. Browner</i> , 97 F.3d 415, 428 (10th Cir. 1996).....	6, 21,22
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III. Pueblo of Isleta Constitution

PUEBLO OF ISLETA CONST., originally adopted pursuant to 48 Stat. 984 on March 23, 1947, as amended Apr. 6, 2016, available at https://www.isleta.pueblo.com/wp-content/uploads/2018/05/2016poiconstitution-web.pdf	6
--	---

IV. New Mexico Statutes	
NMSA 1978 § 3-21-6(B)	17, 18, 19
NMSA 1978 § 10-15-1.....	17
V. New Mexico Judicial Rules	
Bernalillo County General Rules of Procedure for Quasi-Judicial Hearings, § (B), (J)	19
Rule 1-074(K) NMRA.....	8
Rule 12-320(C) NMRA.....	6
VI. New Mexico Executive Orders	
N.M. Exec. Order No. 2005-056 (Nov. 18, 2005)	20
VII. Municipal Ordinances	
Bernalillo County Code, App. A, § 2	20
Bernalillo County Code, App. A, § 3.....	17
Bernalillo County Code, App. A, § 7.....	13, 14, 20
Bernalillo County Code, App. A, § 6.....	13
Bernalillo County Code, App. A, § 16.....	12
Bernalillo County Code, App. A, § 17.....	12, 20
Bernalillo County Code, App. A, § 18.....	13, 14, 16
Bernalillo County Code, App. A, § 24.....	17, 18, 19
VIII. Court Filings	
<i>In the Matter of the Petition to Amend Title 20, Chapter 11 of the New Mexico Administrative Code to Require Review and Consideration of Health, Environment and Equity Impacts</i> (November 21, 2022), available at https://www.cabq.gov/airquality/air-quality-control-board/public-notice-and-comment opportunities	14, 24
IX. Other Secondary Sources	

Joint Center for Political and Economic Studies, Place Matters for Health in Bernalillo County: Ensuring Opportunities for Good Health for All (September 2012) <https://www.nationalcollaborative.org/wp-content/uploads/2016/02/PLACE-MATTERS-for-Health-in-Bernalillo-County.pdf>..... 22

Lauro Silva et al., *Bernco, Don't Let Another Polluter Into The South Valley*, ALBUQUERQUE J. (Sept. 11, 2022), <https://www.abqjournal.com/2531117/bernco-dont-let-another-polluter-into-the-south-valley.html>. 14

Pueblo of Isleta, Welcome to the Pueblo of Isleta, <https://www.isletapueblo.com/about-us/> (Jan. 26, 2023)..... 6, 21

Pueblo of Isleta, Upgrade the Outdoors (Jan. 26, 2023), <https://www.isleta.com/lakes-rv-park/>..... 23

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U.S. EPA, Particulate Matter (PM2.5) Trends (Jan. 26, 2023), <https://www.epa.gov/air-trends/particulate-matter-pm25-trends> 23

U.S. Fish and Wildlife Service et. al, Valle de Oro National Wildlife Refuge Environmental and Economic Justice Strategic Plan (April 2018), https://friendsofvalledeoro.org/wp-content/uploads/2020/03/Valle-de-Oro-EEJSP_web_English508.pdf.....22,23

U.S. Indian Health Service, Disparities (Oct. 2019), <https://www.ihs.gov/newsroom/factsheets/disparities>..... 22

I. INTEREST OF AMICI CURIAE

Amici Curiae are residents and neighbors of the zoned land which Appellants seek to develop into a continuous asphalt plant.¹

Lead *amicus*,² the Pueblo of Isleta, is a federally recognized Indian tribe with inherent sovereign authority to self-govern. PUEBLO OF ISLETA CONST., originally adopted pursuant to 48 Stat. 984 on March 23, 1947, as amended Apr. 6, 2016, available at <https://www.isletapueblo.com/wp-content/uploads/2018/05/2016poiconstitution-web.pdf>. The Isleta people have lived on and used the Pueblo's current lands and surrounding areas for centuries, long before the first Spanish explorers arrived. Pueblo of Isleta, Welcome to the Pueblo of Isleta, <https://www.isletapueblo.com/about-us/> (Jan. 26, 2023). Albuquerque's South Valley, where the land in question is located, are lands where the Pueblo's ancestors lived, worked, worshipped, played, and engaged in all the other activities of life for centuries. *Id.* As such, these adjacent lands and their natural resources have historical and cultural significance to the Pueblo. *See City of Albuquerque v. Browner*, 97 F.3d 415, 428 (10th Cir. 1996) (recognizing the Tribe's ceremonial use of the Rio Grande and neighboring lands). Like many tribal communities across the country, the Pueblo has been disproportionately affected by sources of pollution, which are more often located near tribal lands than others'.

¹ Pursuant to Rule 12-320(C) NMRA, *amici curiae* state that in-house counsel to the Pueblo of Isleta drafted this brief. As the Pueblo's in-house counsel's office is comprised only of salaried employees of the Pueblo, no party made a monetary contribution intended to fund the preparation or submission of this brief, other than the Pueblo's payment of wages to its employees. Additionally, no other person other than amici curiae made a monetary contribution to the preparation or submission of this brief.

² Pursuant to Rule 12-320(D) NMRA, notice by prospective lead *amicus curiae* of the intention to participate in this matter was timely provided to the parties via certified mail and email fourteen (14) days prior to the due date of the motion and brief.

Amici, the Mountain View Coalition, is comprised of three groups: the Mountain View Neighborhood Association (“MVNA”), Mountain View Community Action (“MVCA”), and Friends of Valle de Oro (“Friends”). The Mountain View Neighborhood Association includes residents of the Mountain View neighborhood, the area where the Appellants’ proposed operation would be located and adjacent to the Pueblo of Isleta. Mountain View is an environmental justice community recognized by the United States Environmental Protection Agency, meaning individual members of MVNA are adversely impacted by breathing polluted air, resulting in adverse health impacts to themselves and their families due to industrial development in the area. Permitting a new operation would only exacerbate existing conditions impacting *amici* MVNA’s health, quality of life, and property values.

Mountain View Community Action is located in and serves the Mountain View neighborhood. Members of MVCA live and work nearby Appellants’ proposed facility which would add to the existing disproportionate impacts of pollution in the area and exacerbate the negative impacts to MVCA members’ quality of life and quiet enjoyment of their property due to increased traffic in their neighborhoods, asphalt fumes and other noxious odors, and increased dust coming from the proposed facility.

Finally, Friends of Valle de Oro is a non-profit corporation whose mission is to help shape and support development of the Valle de Oro National Wildlife Refuge (“Refuge”), the Southwest’s first urban wildlife refuge located adjacent to the Pueblo of Isleta. Friends aims to promote environmental and cultural awareness by conducting Refuge education and interpretive initiatives, conducting public outreach to raise the Refuge’s profile and form dynamic partnerships, and ensure equitable access to the Refuge. Inherent in Friends’ mission is ensuring that development in the area surrounding the Refuge does not harm the Refuge’s natural or

cultural integrity. Moreover, members of the Friends of Valle de Oro and members of the Friends of Valle de Oro Board of Directors live and work in the Mountain View neighborhood and would be directly impacted by the additional pollution, traffic, fumes and noise resulting from Appellants' proposed operation.

II. STATEMENT OF ISSUES

Pursuant to Rule 1-074(K) NMRA, the Statement of Issues in this matter is as follows: Whether the Board of Bernalillo County Commissioners' decision denying Appellants' proposed continuous asphalt plant development should be disturbed, where: 1) substantial evidence demonstrates that Appellants' land is zoned as Rural-Agricultural and Appellants' proposed land-use constitutes a Heavy Manufacturing land use; and 2) the county zoning code prohibits Heavy Manufacturing within Rural-Agricultural zoning; and 3) the applicable Special Use Permit prohibits non-agricultural Heavy Manufacturing on the land in question.

III. SUMMARY OF PROCEEDINGS

In 1985, the landowners of the land under review in this matter requested that Bernalillo County re-zone the area from Rural-Agricultural (A-1) to Light Manufacturing (M-1). **[RP 000726]**. The Bernalillo Board of County Commissioners declined to do so. **[RP 000728-31]**. However, in considering the specific agricultural uses sought by the applicant – which were limited to “stock piling of materials processing of byproducts” – the County Commissioners authorized a Special Use Permit contingent on: 1) environmental monitoring; and 2) specific uses permitted under a Site Development Plan. *Id.*

In 1986, the County, consistent with the then-legally required zoning process, approved of a Site Development Plan authorizing specific M-1 uses in line with the land's agricultural zoning, specifically: “bark mulch and organic waste products, a warehouse, office for the storage

of organic waste products.” **[RP 000734]**. Upon approval of the Site Development Plan, the County Zoning Director issued Special Use Permit No. 1017 for the land in question, limiting M-1 uses to those listed in the Site Development Plan. **[RP 000733]**. In 1991, the Site Development Plan was amended to include additional M-1 uses that were in line with the agricultural nature of the land, including “bark storage” and a “temporary shed.” **[RP 000544]**. The 1986 Special Use Permit conditioned on the 1986 Site Development Plan, as amended in 1991, continues to apply to the land in question today. **[RP 000743-753]**.

However, in 2005 and again in 2008, the County Zoning Administrator expanded on Special Use Permit No. 1017, authorizing all M-1 uses, including “light manufacturing, light fabrication, warehousing, and commercial activities,” with none of the original conditions contained in the Site Development Plan. **[RP 000736-40]**. These 2005 and 2008 actions amounted to a re-zoning of the land from A-1 to M-1, despite the Board of County Commissioners’ explicit refusal to do so in 1985, and without providing any opportunity for public participation. In 2022, the County Zoning Administrator restored the original conditions of the applicable Special Use Permit and Site Development Plans, limiting M-1 uses of the A-1 land to “the storage of landscaping and agricultural products as requested in the original application received by Bernalillo County in 1985 and as indicated on the approved site development plan.” **[RP 000741]**. On appeal, the County Board of Adjustment upheld the 2022 Zoning Administrator’s decision. **[RP 000687-99]**. Appellants then appealed the matter to the Board of Bernalillo County Commissioners, which likewise upheld the underlying administrative decision to maintain the land’s rural-agricultural zoning, subject to the limited set of light manufacturing uses approved under Special Use Permit No. 1017. **[RP 0009-50]**. Appellants now seek judicial review of the County Commissioners’ action.

IV. ARGUMENT

A. Summary

This case concerns a landowner's proposal to develop its land in the Albuquerque South Valley into a continuous mix asphalt plant. Thus far, development efforts have been blocked by county zoning authorities and by the county air quality permitting process. Now, landowners seek the use of judicial appellate review – a process which largely excludes engagement by the public and other interested parties – to override the lawful judgment of the county's elected officials.

The Bernalillo Board of County Commissioners properly upheld the 2022 decision of the County Zoning Administrator to deny Appellants' proposal to develop a continuous mix asphalt plant on land zoned as Rural Agricultural, or A-1. Both the Bernalillo County Zoning Code and the terms of the applicable Special Use Permit plainly prohibit Appellants' proposed Heavy Manufacturing (M-2) development. If Appellants were permitted to move forward with construction of a continuous mix asphalt plant, the plant would significantly increase air, water, noise, and soil pollution for the Pueblo of Isleta and neighboring South Valley communities.

B. Standard of Review

Judicial review of a decision of a zoning authority is limited to questions of law. *Downtown Neighborhoods Ass'n v. City of Albuquerque*, 1989-NMCA-091, ¶ 14, 109 N.M. 186, 783 P.2d 962. The District Court's role is simply to determine whether the zoning authority's decision is illegal in whole or in part. *Id.* Appellate review of actions taken by a governing political body, such as the Board of County Commissioners, is undertaken with deference and those decisions are disturbed only if the Court is not satisfied that the action was authorized by law or not supported by substantial evidence. *Siesta Hills Neighborhood Ass'n v. City of*

Albuquerque, 1998-NMCA-028, ¶ 6, 124 N.M. 670, 954 P.2d 102. Zoning actions are quasi-judicial in nature and a reviewing court applies an administrative standard of review. *West Old Town Neighborhood Ass'n v. City of Albuquerque*, 1996-NMCA-107, ¶ 11, 122 N.M. 495, 927 P.2d 529. On appeal, although conflicting evidence is not completely disregarded, the evidence is reviewed in the light most favorable to the administrative body. *See San Pedro Min. Corp. v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, 1996-NMCA-002, ¶ 26, 121 N.M. 194, 909 P.2d 754. (decided in 1995). The reviewing court may not substitute its judgment for that of the administrative body. *See Coe v. City of Albuquerque*, 1966-NMSC-196, ¶ 8, 76 N.M. 771, 418 P.2d 545.

In this matter, the decisions of the Bernalillo County Zoning Administrator, Board of Adjustment, and Board of Bernalillo County Commissioners to reject Appellants' proposed Heavy Manufacturing (M-2) use of Rural Agricultural (A-1) land was authorized by law and supported by substantial evidence. Thus, this Court should provide deference to the Bernalillo County Commissioners and uphold the decision to require Appellants to submit a Site Development Plan amendment in order to seek expanded-uses of their land. *See Siesta Hills Neighborhood Ass'n* 1998-NMCA-028, ¶ 6. Such a procedure would entitle *amici curiae* and other interested parties to public notice and comment, a necessary procedural step under New Mexico law.

C. The County Commissioners properly upheld the 2022 Zoning Administrator Certification, Denying Appellants' Proposed Heavy Manufacturing (M-2) Use of their Rural-Agricultural (A-1) Zoned Land.

Appellants seek to use their land in a manner that far exceeds the applicable zoning code, while simultaneously avoiding public review of their proposal. Deference should be provided to the County's lawful order to reject Appellants' land use proposal, as the factual

evidence before the Board of County Commissioners plainly refutes Appellants' position that a continuous asphalt plant is permitted on their Rural-Agricultural (A-1) land. *See Siesta Hills Neighborhood Ass'n*, 1998-NMCA-028, ¶ 6 (standard of judicial review of administrative decisions).

i. Appellants' Proposed Use is not Authorized under County Zoning Ordinance.

Appellants propose to use their A-1 land to develop a continuous asphalt manufacturing plant. **[RP 000100-101 and RP 000381, 000536]**. Although Appellants classify their proposed use as Light Manufacturing (M-1), the proposal in fact constitutes Heavy Manufacturing (M-2) under the County Zoning Ordinance. *See* Bernalillo County Code, App. A, § 17(B)(2)(d)(3) (amended 2012). Regardless, neither M-1 (batch) nor M-2 (continuous mix) asphalt plants are permitted within A-1 zoning in Bernalillo County, even under the applicable Special Use Permit. **[RP 000100-101 and RP 000381, 000536]**.

Appellants intend to use their land to develop a continuous asphalt plant, as demonstrated by the Air Quality Permit application of their Lessee, Star Paving. *See* **[RP 000368-537]**. In their Air Quality Permit application, the Appellants state that their proposed "facility operation" would be "continuous," rather than "batch." **[RP 000381]**. Appellants describe their proposed plant's operation as "typical of a continuous double-barrel drum mix HMA operation." **[RP 000536]**. Further, Appellants use EPA emissions rates for "drum mix plant load-out" rather than for a batch plant to calculate the proposed plant's emissions. **[RP 000413]**.

A continuous mix asphalt plant constitutes Heavy Manufacturing (M-2) under applicable zoning laws. Bernalillo County Code, App. A, § 17(B)(2)(d)(3) (the "manufacture" of "asphalt" is a "heavy manufacturing" use which is only allowed on land zoned M-2); *Compare Id.*, at § 16(B)(3)(a) (amended 2022) (describing an "asphalt batching plant" as a conditional use in the

Light Manufacturing M-1 zone, and requiring an enclosure wall). When viewed in the light most favorable to the County Commissioners, as required by the applicable standard of review, evidence demonstrates that Appellants are seeking an M-2 land use, rather than M-1. *San Pedro Min. Corp.* 1996-NMCA-002, ¶ 26 (decided in 1995). (applicable standard of appellate review).

Appellants' land is zoned as Rural Agricultural (A-1). **[RP 000007]**. The Bernalillo County Zoning Ordinance explicitly prohibits the development of both M-1 and M-2 asphalt plants on A-1 land. *See* Bernalillo County Code, App. A, § 7 (amended 2022) The Rural Agricultural (A-1) Zone is designated to “preserve the scenic and recreational values in the National Forests and similar adjoining land, to safeguard the future water supply, to provide open and spacious development in areas remote from available public services, and to recognize the desirability of carrying on compatible agricultural operations and spacious home developments in areas near the fringes of urban development.” *Id.*, at § 7(A). Any use that fails to comport with this agricultural purpose is prohibited. *Id.*, at §§ 7(B), and 6(E) (“any use not designated a permissive or conditional use in a zone is specifically prohibited from that zone”).

Moreover, the Bernalillo County Zoning Code prohibits even a Special Use Permit to allow for asphalt plants within Rural Agricultural zones. Under the Code, Special Use Permits for “asphalt and batching plant[s]” may only be authorized in regions zoned as either Neighborhood Commercial (C-1), Community Commercial (C-2), or Commercial/Light Industrial Zone (CL-1). *Id.*, at § 18(B)(3) (amended 2017). Appellants do not meet these criteria. **[RP 000007]**.

Even if the area did meet the underlying commercial zoning requirements for an asphalt plant Special Use Permit, Appellants' proposed use would require Appellants to demonstrate that: 1) unique conditions justified their request; and 2) the proposed use has substantial support

from neighborhood residents. *Id.*, at §18(B)(32)(b). Appellants fail to meet these criteria, as the proposed use is in direct contrast with the zone’s intent to “preserve the scenic and recreational values” of the land. *See Id.*, at § 7(A). Further, neighborhood residents, including the undersigned *amici curiae*, openly oppose Appellants’ proposed land use. Neighborhood residents have described the Appellants’ proposal as “hurt[ing] economic revitalization in the South Valley” and “violat[ing] principles of environmental justice by shifting more pollution, traffic and noise into the backyard of the Pueblo and other South Valley residents.” Lauro Silva et al., *Bernco, Don’t Let Another Polluter Into The South Valley*, ALBUQUERQUE J. (Sept. 11, 2022), <https://www.abqjournal.com/2531117/bernco-dont-let-another-polluter-into-the-south-valley.html>. In fact, neighborhood residents, including *amici curiae*, have petitioned the Albuquerque-Bernalillo County Air Quality Control Board to enact a Health, Environment, and Equity Impact Analysis rule to address the disproportionate impact of air pollution from heavy industry on neighborhoods in the South Valley. *See generally In the Matter of the Petition to Amend Title 20, Chapter 11 of the New Mexico Administrative Code to Require Review and Consideration of Health, Environment and Equity Impacts* (Albuquerque-Bernalillo County Air Quality Control Board (November 21, 2022), available at <https://www.cabq.gov/airquality/air-quality-control-board/public-notices-and-comment-opportunities>). Because Appellants can demonstrate neither a unique justification nor any support from neighborhood residents, Appellants fail to meet the requisite threshold for even an asphalt plant Special Use Permit under the Bernalillo County Zoning Ordinance.

The Bernalillo County Zoning Code explicitly prohibits the Zoning Administrator and the Board of County Commissioners from providing Appellants’ requested relief to permit an M-2

continuous mix asphalt plant on their A-1 property. Thus, the Zoning Administrator's 2022 action was proper, as was the County Commissioners' determination to uphold such action.

ii. Appellants' Proposed Use is not Authorized under the Applicable Special Use Permit.

The Appellants' land is subject to Special Use Permit No. 1017, which requires that the use of the property must conform with environmental monitoring and the Site Development Plan. [RP 000733-35]. Appellants' proposed continuous mix asphalt plant fails to do so.

In authorizing the applicable Special Use Permit in 1985, the Board of County Commissioners contemplated uses specifically related to the zoned land's underlying agricultural nature. Specifically, the application to re-zone sought a limited set of Light Manufacturing (M-1) land uses: "stock piling of materials processing of byproducts." [RP 000726]. These limitations were imposed through a Site Development Plan, upon which Special Use Permit No. 1017 is conditioned. [RP 000733-35]. Specifically, the Zoning Administrator approved of M-1 uses to store "bark mulch and storage of organic waste products." [RP 000734-735]. Similarly, in 1991, the Zoning Administrator approved of an amendment to the Site Development Plan to allow for the additional agriculturally-related M-1 uses of "bark storage," a "temporary shed," "mobil [sic] shed," "loading dock," and mobile office spaces. [RP 000544]. These Site Development Plans are related to, incidental to, and consistent with the region's A-1 zoning, and are thus compliant with the 1985 County Commissioners' issuance of zoning exceptions through its Special Use Permit.

Appellants take the position that the applicable Special Use Permit allows for all Light Manufacturing (M-1) uses, rather than just those agriculturally-related M-1 uses contemplated by the Commissioners in 1985 and in the Site Development Plans in 1986 and 1991. In so doing, Appellants ignore the legal distinction between a special use permit and a zone-change.

While a zone change alters the full-array of uses to be applied to a region, Special Use Permits are used to demonstrate specific exceptions from otherwise applicable zoning. *Burroughs v. Bd. of Cnty. Comm'rs of Bernalillo Cnty.*, 1975-NMSC-051, ¶ 9, 88 N.M. 303, 540 P.2d 233 (explaining that a special use permit constitutes a specific exception from a region's zoning, not an all-inclusive catchall category for uses outside of a region's zoning). In Bernalillo County, Special Use Permits are restricted to only those uses that are "compatible with the existing and potential uses of property within the zone and the general area in which the use is proposed to be located." Bernalillo County Code, App. A, § 18(A).

Under this legal framework, it was plainly proper for the 2022 County Zoning Administrator to apply the 1986 Special Use Permit as limited in scope to the specific set of M-1 uses compatible with the area's agricultural zoning – namely, those uses described in the zone-change application and subsequent site development plans: "stock piling of materials [and] processing of byproducts," "storage of organic waste products," and "for bark mulch, organic waste products, a warehouse, office for storage of organic waste products." *See* [RP 000726-734]. Otherwise, the 1985 County Commissioners would have simply adopted the landowners' request for an M-1 zone change, had they intended to have the effect the Appellants now argue.

Because neither an M-1 nor M-2 asphalt plant fall within the agriculturally-related M-1 uses authorized under Special Use Permit No. 1017 or under the 1986 and 1991 Site Development Plans, the County's administrative action denying Appellants' requested-use should be upheld.

iii. The 2005 and 2008 Zoning Administrator's Actions are Null and Void.

In 2005 and 2008, the County Zoning Administrator certified all M-1 uses for Appellants' land. However, because the development of an asphalt plant violates the Bernalillo

County Zoning Code, Special Use Permit No. 1017, and the applicable Site Development Plans, the County's 2005 and 2008 administrative actions amounted to a zoning amendment without public participation, in violation of New Mexico law. *See* NMSA 1978 § 3-21-6(B). Given this, the Zoning Administrator's 2005 and 2008 actions are null and void, and were properly treated as such by the 2022 Zoning Administrator. *See* Bernalillo County Code, App. A, § 24(C)(1) (amended 2016) (the failure of a Zoning Administrator to follow the necessary procedure renders the Administrator's actions null and void).

The 2022 Zoning Administrator properly restored the criteria of Special Use Permit No. 1017 to Appellants' land, as he was explicitly required to do. *See* Bernalillo County Code, App. A, § 3(A) (amended 2004). Thus, the County Commissioners properly upheld the 2022 Zoning Administrator's denial of Appellants' proposed land-use.

C. Appellants' Land Use Proposal must be Subject to Public Scrutiny.

The position of *amici curiae* is not that Appellants should be foreclosed of any opportunity to expand on the allowable uses applicable to the land, but rather that Appellants must follow the lawful public process to do so.

The New Mexico Open Meetings Act provides that members of the public are entitled to the greatest possible information about the conduct of government and shall have the opportunity to attend and listen to deliberations of a public body. NMSA 1978 § 10-15-1(A) (2013). The law's public meeting requirements applies to local government bodies, including the Bernalillo County Board of Adjustment and the Board of County Commissioners. Similarly, New Mexico's zoning laws require any zoning amendments to be subject to "public hearing at which all parties in interest and citizens shall have an opportunity to be heard." § 3-21-6(B). The Bernalillo County Zoning Code specifically requires that applications for Special Use Permits, Conditional

Use Permits, zoning changes, and administrative amendments to site development plans be subject to a public hearing. Bernalillo County Code, App. A, § 24(A)(4).

Public input is essential to providing due process of law in zoning decisions, and it is especially important in permitting actions that substantially impact the public interest. *See Matter of the Petition for a Hearing on the Merits Regarding Air Quality Permit No. 3135*, 2017-NMCA-011, ¶ 23, 388 P.3d 287. The New Mexico Supreme Court has recognized that local governments must follow the legally-required procedure in order to provide due process of law and fairness, particularly in zoning decisions. *Miller v. City of Albuquerque*, 1976-NMSC-052, ¶ 21, 89 N.M. 503, 554 P.2d 665 (“By failing to comply with its own published procedures, specifically by failing to give reasons for the proposed change, the [Environmental Planning Commission] deprived petitioner of notice and the opportunity to prepare an adequate defense. This was a denial of procedural due process.”). *See also Albuquerque Commons P'ship v. City Council of City of Albuquerque*, 2008-NMSC-025, ¶ 52, 144 N.M. 99, 184 P.3d 411 (the City’s failure to comply with the proper zoning process resulted in a zoning decision that “lacked procedural fairness and did not comport with due process of law.”)

Throughout this matter’s decades-long history, the only opportunity for interested parties to present their position was provided in 1985, during the county’s hearings regarding the landowner’s zone-change application. The only notice provided to the public at that time was that the landowners sought the ability to use their agriculture-zoned land for the limited purpose of “stock piling of materials or processing of byproducts.” [RP 000726]. Although the Board of County Commissioners was unwilling to re-zone the region to M-1 in 1985, the Commissioners issued limited relief to allow some M-1 uses under a Special Use Permit. [RP 000728-31]. That decision was issued pursuant to the public hearing process. *Id.*

Nearly four decades later, Appellants now seek to broaden their permissible uses beyond those contemplated by the 1985 County Commissioners. Although Appellants' proposal represents a drastic departure from the land's agricultural zoning, the land's historic use, the terms of the Special Use Permit, and the terms of the 1986 and 1991 Site Development Plans, the public has not yet been invited to weigh-in on the matter. Instead, the public, including *amici curiae*, was precluded from public comment before the 2022 Board of County Commissioners, as the Commissioners restricted their consideration to the record. Bernalillo County General Rules of Procedure for Quasi-Judicial Hearings, § (B), (J) (disallowing new evidence outside of the facts in the record to be presented on appeal). Similarly, interested parties are largely excluded now from this appeal before the State District Court.

The plain language of New Mexico law and the Bernalillo County Zoning Code requires public participation and strict adherence to the zoning process on any decision to amend zoning, which is ultimately what Appellants seek. *See* NMSA 1978 § 3-21-6(B); Bernalillo County Code, App. A, § 24(A)(2)(j)(3), (A)(4). *See also* *Miller*, 1976-NMSC-052, ¶ 21; *Albuquerque Commons P'ship*, 2008-NMSC-025, ¶ 52. The Zoning Administrator affirmed this upon directing Appellants that their proposed-use would require a site development plan amendment, a process that would provide for both public notice and opportunity for public comment. **[RP 000742]**; Bernalillo County Code, App. A, § 24(A)(4). This would allow *amici curiae* and other interested parties to meaningfully participate in the Appellants' proposal and would properly allow the County to render a decision in line with the Zoning Ordinance, county plan, and community and resident interests.

However, Appellants are attempting to circumvent that public process through this appeal. The Court should deny Appellants' attempt to forego the process that the public is entitled to in this underlying matter.

D. Appellants' Proposed Continuous Mix Asphalt Plant Would Adversely Impact Residents and Neighbors, including *amici curiae*.

If this Court were to reverse the decision of the Bernalillo Board of County Commissioners and authorize Appellants' requested land use, pollution levels in the South Valley would significantly increase, placing the health of the surrounding community at risk.

The State of New Mexico is committed to a policy of environmental justice, which "afford[s] all of its residents, including communities of color and low-income communities, fair treatment and meaningful involvement in the development, implementation, and enforcement of environmental laws, regulations, and policies regardless of race, color, ethnicity, religion, income or education level." N.M. Exec. Order No. 2005-056 (Nov. 18, 2005). Similarly, the stated purpose of the Bernalillo County Zoning Ordinance includes promoting health and general welfare, providing adequate light and air, and encouraging the most appropriate use of land in the unincorporated areas of Bernalillo County. Bernalillo County Code, App. A, § 2 (amended 2004).

Appellants do not seek to construct a batch asphalt plant. Instead, they intend to develop an even greater nuisance – a continuous mix asphalt plant, manufacturing 300 tons per hour of hot mix asphalt from virgin aggregate, reclaimed asphalt pavement, adhesive additive, and asphalt cement. [RP 000368-69]. Continuous mix plants operate for longer periods of time and produce much more asphalt, pollution, and traffic than batch plants, and are thus zoned as Heavy Manufacturing (M-2) rather than Light Manufacturing (M-1) in Bernalillo County. Bernalillo County Code, App. A, § 17(B)(2)(d)(3). M-2 land uses present a risk to human and

environmental health that is far beyond the scope of Rural Agricultural (A-1) zone that applies to Appellants' land.

The facilities proposed by Appellants are located less than a mile from Pueblo of Isleta lands and resources. The South Valley area is where the Pueblo's ancestors have lived, worked, worshipped, played, and engaged in all other activities of life, and so these adjacent lands have great historical and cultural significance to the Pueblo. Pueblo of Isleta, Welcome to the Pueblo of Isleta, <https://www.isletapueblo.com/about-us/> (Jan. 26, 2023). Today, members of the Pueblo continue to engage in traditional lifeways on the Pueblo and surrounding lands, including gathering plants for traditional medicine and ceremonies. *See generally Browner*, 97 F.3d 415, 428 (10th Cir. 1996); U.S. Fish and Wildlife Service, "Valle de Oro National Wildlife Refuge" ("The Tiwa people have stewarded these lands for generations and, in the case of Valle de Oro National Wildlife Refuge, continue to play a vital role in its protection, restoration, and prosperity").

However, the Pueblo of Isleta and its neighboring communities are continually forced to conform to the squeeze of development. The industrial and commercial land uses in the South Valley have polluted the air, water, and lands of the area. U.S. EPA, Cleanup Complete at Portions of South Valley Superfund Site in Albuquerque, New Mexico (Sept. 23, 2019), <https://www.epa.gov/newsreleases/cleanup-complete-portions-south-valley-superfund-site-albuquerque-new-mexico> (describing the years long effort to "clean[] up Superfund legacy contamination affecting Albuquerque's South Valley community"). The pollution from industrial development in the South Valley disproportionately impacts the Pueblo of Isleta because it harms plant and animal life that support the Pueblo's cultural and religious practices. Pueblo of Isleta, Welcome to the Pueblo of Isleta, <https://www.isletapueblo.com/about-us/> (Jan. 26, 2023);

See Browner, 97 F.3d 415, 42 (10th Cir. 1996) (recognizing the Pueblo of Isleta’s cultural and religious use of the Rio Grande). Industrial pollution also disproportionately impacts the Pueblo because many Isleta tribal members suffer from the impacts of generational poverty or trauma imposed upon them, which makes tribal members more susceptible to disease. *See generally*, U.S. Indian Health Service, Disparities (Oct. 2019), <https://www.ihs.gov/newsroom/factsheets/disparities/>. *See also* Joint Center for Political and Economic Studies, Place Matters for Health in Bernalillo County: Ensuring Opportunities for Good Health for All (September 2012) <https://www.nationalcollaborative.org/wp-content/uploads/2016/02/PLACE-MATTERS-for-Health-in-Bernalillo-County.pdf> (noting that low-income and minority communities in Bernalillo County have a greater risk of being exposed to environmental pollutants and have a greater risk of suffering negative health impacts as a result).

In recent years, there has been some progress in improving the environmental conditions and land use in the South Valley, including the creation of the Valle de Oro National Wildlife Refuge. U.S. Fish and Wildlife Service et. al, Valle de Oro National Wildlife Refuge Environmental and Economic Justice Strategic Plan (April 2018), https://friendsofvalledeoro.org/wp-content/uploads/2020/03/Valle-de-Oro-EEJSP_web_English508.pdf (“[Valle de Oro] is located on a former dairy farm in Albuquerque’s South Valley in a heavily industrial community, populated by a majority people of color.”) The Pueblo of Isleta is also actively working to improve the accessibility and use of its lands in this area, including by developing fishing and picnicking lakes and other businesses which rely on a clean, safe, and healthy environment. *See* Pueblo of Isleta, Upgrade the Outdoors (Jan. 26, 2023), <https://www.isleta.com/lakes-rv-park/>. The Pueblo has plans for additional developments that will rely on a safe and healthy environment, free of air, noise, and land

pollution, including ball fields, a golf complex, and other sporting facilities. All of these facilities and important Pueblo of Isleta resources will be less than a mile from where the Appellant intends to build its continuous asphalt plant. **[RP 000363 n.1]**. The proposed continuous mix asphalt plant and its smokestack will be visible from all major roads leading into the Pueblo. *Id.* Any pollutants or contaminants produced at the proposed asphalt plant will threaten the Pueblo of Isleta's air quality, the health of its tribal members, and the attractiveness of the Pueblo's landscape and businesses to potential customers.

Appellants' proposed operation is likely to release particulate matter that endangers public health, as continuous mix asphalt plants generate carbon monoxide, nitrogen dioxide, and sulfur dioxide, all of which would directly impact the health and quality of life of *amici curiae*. *See generally* **[RP 000368-537]** and U.S. EPA, Particulate Matter (PM2.5) Trends (Jan. 26, 2023), <https://www.epa.gov/air-trends/particulate-matter-pm25-trends>.

Additionally, the development would also likely lead to increased road and noise pollution that would be disruptive to the human environment and wildlife in the area, including at the Valle de Oro National Wildlife Refuge. *See* U.S. Fish and Wildlife Service et. al, Valle de Oro National Wildlife Refuge Environmental and Economic Justice Strategic Plan (April 2018). Contractor and supply trucks driving continuously to the plant will not only kick up more particulate matter, but will themselves cause increased air pollution emissions and traffic for communities living in the area. Interstate I-25 is located between the Pueblo and the proposed asphalt plant site, and is a major transportation route for cars and trucks. *See* Joint Center for Political and Economic Studies, Place Matters for Health in Bernalillo County: Ensuring Opportunities for Good Health for All (noting the increase in environmental hazards for Bernalillo County communities close to I-25). Air pollution generated from increased traffic to

and from Appellants' continuous asphalt plant would risk adverse health impacts in surrounding communities, specifically *amici curiae*. U.S. EPA, Near Roadway Air Pollution and Health: Frequently Asked Questions (August 2014), <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100NFFD.PDF?Dockey=P100NFFD.PDF> (noting that people who live near major roads appear to have an increased incidence and severity of asthma, cardiovascular disease, impaired lung development in children, birthweight complications, and premature death). This would further exacerbate health conditions caused by existing emissions from the industrial facilities that already surround the Pueblo of Isleta and South Valley, leading to even higher levels of toxic air pollution for Tribal Members and other *amici*. See *In the Matter of the Petition to Amend Title 20, Chapter 11 of the New Mexico Administrative Code to Require Review and Consideration of Health, Environment and Equity Impacts* (Albuquerque-Bernalillo County Air Quality Control Board (November 21, 2022) (low-income communities and minority communities in Bernalillo County have a greater risk of exposure to environmental pollutants, are disproportionately impacted by air pollution, and suffer disproportionate health problems because of those impacts).

Public review of Appellants' land-use proposal is not only required under New Mexico law, but is necessary to ensure that *amici curiae* and other interested parties have the opportunity to express their environmental and health concerns with Appellants' proposal. Throughout the underlying administrative action, Appellants have minimized the environmental impacts of their proposal. Appellants' claims have not been properly vetted by the public because Appellants have attempted to circumvent the public review process for their proposal. The proposed development should be subject to public scrutiny, in order to ensure that land uses with the potential to impact the South Valley's development are consistent with the public's wishes. For

these reasons, *amici curiae* urge this Court to deny Appellants' appeal and uphold the County's underlying decision.

V. CONCLUSION

Amici curiae respectfully request that this Court deny the Appellants' appeal and uphold the Bernalillo County Commissioners' decision as both lawful and required under the County's Zoning Ordinance, the applicable Special Use Permit, and the applicable Site Development Plans. The Appellants should be required to subject their land-use request to public scrutiny before they are permitted to use their A-1 land for M-2 uses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Brief of Amicus Curiae** was electronically filed in the State of New Mexico's electronic filing systems, which in turn caused all counsel of record to be electronically served, on this February 14, 2023.

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