EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF TAOS
STATE OF NEW MEXICO

JOHN T. NICHOLS,
DILIA C. MARTINEZ,
PHILLIP H. REYNA,
ERNEST CONCHA,
DANIEL ROMERO,
BONITA (BONNIE) S. KORMAN
EDWARD R. SYLVESTER and JENNIFER P. SYLVESTER
JUDY SUTTON

Plaintiffs,

vs. No. D-820-CV-2014-00325

THE TOWN OF TAOS

and

BOARD OF COUNTY COMMISSIONERS
OF TAOS COUNTY,

Defendants

PLAINTIFFS' REPLY TO BOARD OF COUNTY COMMISSIONERS OF TAOS COUNTY'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

COME NOW Plaintiffs, by and through their counsel of record Graeser & McQueen, LLC and file their reply to Defendant Board of County Commissioners of Taos County's *Response* as follows.

INTRODUCTION

The County misapprehends Plaintiffs' position. Plaintiffs do not suggest that the County will approve the application, nor do they demand that the affected areas be

zoned to allow the proposed use. Understanding the Plaintiffs' requested relief requires understanding the unique aspects of a federal-financed airport project and in particular a Town-owned project located in the county, and how it differs from other development in the county.

The Town seeks to expand its airport. To that end, it hired an airport engineering and planning firm, Armstrong Consultants, to produce an "Off Airport Land Use Plan," Motion Exhibit 14. The Off Airport Land Use Plan includes detailed, unambiguous land use compatibility guidelines.[1] The guidelines render residential uses on residentially-zoned land near the new runway "clearly unacceptable," stating the "**[s]pecified use must not be allowed. Potential safety or overflight nuisance impacts are likely in this area**." Off Airport Land Use Plan, "Criteria."[2] In short, if the new runway project is approved, Plaintiffs and others will find their homes are now a "noncompatible land use"[3] as defined by federal regulations. 14 CFR §150.7.

The stated policies of both the Federal Aviation Administration and the Town of Taos are that land use restrictions must be imposed on the affected property. If the County simply approves the project in the absence of any appropriate planning, it

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[1] Those guidelines are derived from 14 CFR §A150.101, Table 1 (Land Use Compatibility with Yearly Day-Night Average Sound Levels) which "reflect the statistical variability for the responses of large

[2] Similarly, residential uses on other nearby residentially-used and zoned land "**should be allowed only if no reasonable alternative exists. Disclosure of airport proximity and avigation easements must be required as a condition of development**."

[3] *Noncompatible land use* means "the use of land that is identified under this part as normally not compatible with the outdoor noise environment (or an adequately attenuated noise reduction level for the indoor activities involved at the location) because the yearly day-night average sound level is above that identified for that or similar use under appendix A (Table 1) of this part." 14 CFR §150.7.

will engage in "back-door" zoning without the due process protections and safeguards inherent in a quasi-judicial rezoning process.

Plaintiffs are not demanding that the County zone the affected properties in any particular way. Rather, Plaintiffs seek the Court's assistance in ensuring that the County does not zone their properties to transportation/agricultural/recreational /open space[4] by default, without their ability to meaningfully participate in that decision. The County may if it wishes proceed through the planning and zoning process to adopt land use regulations that allow for the airport expansion. Conversely, the County is under no obligation to do so. On that Plaintiffs and the County agree. In the absence of appropriate land use planning and regulation, however, the County cannot approve the Town's application.

The Town had a funding obligation to make a commitment to the federal government, and it did so, stating it "recognizes and willingly accepts the requirement … to coordinate with local jurisdictions to ensure that appropriate action, including the adoption of zoning laws, has or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal Airport operations…" Motion Exhibit 22. This was a commitment to the residents of Taos County as well as the federal government, and allowing the Defendants to proceed on the current track will render that commitment hollow.

[4] These are the only uses listed as "clearly acceptable" or "normally acceptable" in the Off Airport Land Use Plan for Zones B and C.

ARGUMENT

I. An Injunction is Appropriate to Prevent Zoning by Default

A. Plaintiffs demonstrate that irreparable injury will occur in the absence of a preliminary injunction

"In New Mexico, injunctions are granted to prevent irreparable injury for which there is no adequate and complete remedy at law." *Wilcox v. Timberon Protective Association*, 1990-NMCA-137 ¶34, 111 N.M. 478. Plaintiffs have no adequate and complete remedy at law absent an injunction from this Court.

If the County approves the Town's application, the zoning will have occurred by default, without the process due to landowners whose property is being rezoned. That process includes "in addition to the right to individual notice, interested parties in a quasi-judicial zoning matter are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter — i.e., having had no pre-hearing or ex parte contacts concerning the question at issue — and to a record made and adequate findings executed." *Albuquerque Commons Partnership v. City of Albuquerque*, 2008-NMSC-025 ¶34, 184 P.3d 411 (internal punctuation omitted). These are significantly greater protections than simply the right to speak at a hearing, which is all the County is currently offering. Response at 15.

The possibility of filing an inverse condemnation action, as suggested by the County, Response at 7, is no remedy. "The purpose of injunction is to prevent

[irreparable] injury. After it has occurred, relief comes too late." *Sena v. District Court of Fourth Judicial District*, 1925-NMSC-030 ¶15, 30 N.M. 505. That is particularly true in the case of the potential severe injury to Plaintiffs' homes. Discussion of real estate values aside, the courts are not in the business of putting a price on hearth and home. "An irreparable injury is an injury which cannot be compensated or for which compensation cannot be measured by any certain pecuniary standard. *State v. City of Sunland Park*, 2000-NMCA-044 ¶19, 129 N.M. 151 (internal punctuation omitted).

The County cites federal law for the proposition that injuries to property cannot constitute irreparable injury. Response at 6,7. The potential injury is not to fungible commercial land, but rather the Plaintiffs' unique homes. In a case involving encroachments on real estate, our Supreme Court held "It is settled ... that a given piece of property is considered to be unique, and its loss is **always** an irreparable injury." *Amkco, Ltd., Co. v. Welborn*, 2001-NMSC-012 ¶11, 130 N.M. 155 (emphasis supplied).

This Court has the discretion to recognize the evident and well-defined irreparable injury threatening Plaintiffs' homes. "An injunction is an equitable remedy, left to the sound discretion of the district court so long as the exercise of discretion is consistent with reasonably well established standards of fairness and equity." *Cafeteria Operators, L.P. v. Coronado-Santa Fe Associates*, 1998-NMCA-005 ¶19, 124 N.M. 440 (internal punctuation omitted). Plaintiffs have demonstrated

an "affirmative prospect of injury." *State of New Mexico v. City of Sunland Park*, 2000-NMCA-044 19, 129 N.M. 151. That harm would occur upon approval, not upon completion of the project, contrary to County's assertions.

B. Defendant fails to demonstrate that a preliminary injunction would cause any harm to the County or that proper land use planning and regulation is a "pointless expenditure of County resources."

The County openly states its position that properly planning for the off-site airport expansion impacts amounts to a "pointless expenditure of County resources" that is "unnecessary and unwarranted." Response at 8. This is a remarkable position. The County's sole "harm" argument is that it would have to expend money to engage in its fundamental duties. Response at 8. Planning for and regulating off-site airport impacts is necessary and it is warranted. It would, presumably, carry some expense. However that is expense attendant to the County meeting its obligations to its citizens, not an expense attendant to the improper grant of an injunction.

The County's harm focus is also on the ultimate relief requested. That a County obligation carries an expense is not a basis for ignoring it. The County does not make an argument that it will suffer harm due to a delay in approval of the airport project (if in fact it were to be approved) pending the appropriate land use processes. More to the point, the County does not even attempt to quantify the level of the "pointless expenditure," making it challenging to weigh against the Plaintiffs'

real injury.

C. The public interest strongly favors an injunction

There is a well-defined public interest in preventing back-door zoning. Zoning actions in New Mexico carry several important protections for the affected property owners. Primarily, zoning decisions affecting small areas are quasi-judicial in nature, and thus embrace rights such as the right to present evidence and cross-examine parties. *Battershell v. City of Albuquerque*, 1989-NMCA-045 ¶18, 108 N.M. 658. The County's permit review process grants due process rights to the *applicant* (the Town), but not the affected landowners.

Plaintiffs stand as representatives of a community that might suffer real harm to its way of life and enjoyment of its land. The harm from the back-door zoning that is contemplated is akin to a public nuisance. "[P]ublic nuisance is one which adversely adversely affects public health, welfare, or safety." *Padilla v. Lawrence*, 1984-NMCA-064 ¶ 24, 101 N.M. 556. In the case of a public nuisance, "that injunctive relief may be employed to protect the public health, morals, safety and welfare from irreparable injury by a public nuisance, seems now well established." *State ex rel. Marron v. Compere*, 1940-NMSC-041 ¶10, 44 N.M. 414.

D. Plaintiffs are likely to prevail on the merits because Taos County cannot impose zoning restrictions by default.

Analysis of success on the merits necessarily embraces review of the expanded factors to be considered for a permanent injunction. Those factors include:

> (1) the character of the interest to be protected; (2) the relative adequacy to the plaintiff of an injunction, when compared to other remedies; (3) the delay, if any, in bringing suit; (4) plaintiff's misconduct, if any; (5) the interests of third parties; (6) the practicability of granting and enforcing the order or judgment (*sic*); and (7) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied. *Wilcox*, 1990-NMCA-137 ¶29.

Plaintiffs address several of these factors elsewhere. The character of the interest to be protected is Plaintiffs' fundamental enjoyment and investment in their homes, sacred and recreational areas. The requested injunction ensures that Plaintiffs have the full opportunity to participate in a considered, transparent process on a process that profoundly affects their interests. Plaintiffs permitted no delay in bringing suit: the Town was scheduled to award the contract on September 9, 2014 and this suit was filed, preemptively, on September 8, 2014. Plaintiffs have engaged in no misconduct, and Defendant does not assert unclean hands. There are two potential areas of third-party interest. The first is that of taxpayers in not using public funds for a "pointless expenditure." Response at 8. The second is of hundreds of residents, recreational users and those who recognize the affected areas as sacred. The contrast is obvious. Finally, the injunction requested is practicable, reasonable, limited and enforceable: simply refrain from approving the application until the land use planning and regulation that would allow it is done.

The County argues that it "has not adopted an airport approach plan. Therefore, the County is under no requirement to adopt airport zoning." Response at 10. However, lack of diligence in its planning efforts does not immunize the County

from considering the consequences of its actions.

E. Security is unnecessary because the County has not quantified any potential damage and the Plaintiffs seek to vindicate public rights

The County demands that Plaintiffs give security. The County does not quantify the "significant economic damages" it would suffer, nor is it clear what such damages might be. The County's failure to establish any damages whatsoever due to the delay imposed by a preliminary injunction supports a wavier of the security requirement. In *Continental Oil Company v. Frontier Refining Company*, 338 F.2d 780,782 (10th Cir. 1964) the 10th Circuit Court of Appeals, considering the analogous Federal Rule of Civil Procedure 65(C), held "Under this rule the trial judge has wide discretion in the matter of requiring security and if there is an **absence of proof showing a likelihood of harm**, certainly no bond is necessary" (emphasis supplied).

Likewise, the context of this case and the intent of the Plaintiffs argue against requiring security. *Friends of the Earth, Inc. v. Brinegar,* 518 F.2d 322 (9th Cir. 1975) is directly analogous. In *Brinegar* private citizens and a non-profit organization sought a preliminary injunction against the City of San Francisco to compel the city to engage in environmental review and planning prior to expanding its own airport. After the trial court ordered a bond of $4.5 million to cover delay-related costs, the 9th Circuit Court of Appeals reduced that bond to $1,000 after balancing the conflicting interests and recognizing the public welfare that the

Plaintiffs were trying to protect. This is fairly common in environmental litigation. "Ordinarily, where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered." *Davis v. Mineta*, 302 F.3d 1104,1126 (10th Cir. 2002).

Our Supreme Court has long confirmed that "the giving of security under Rules 65 and 66 is not mandatory, but to a large extent left to the discretion of the court." *Rhodes v. State ex. rel. Bliss*, 1954-NMSC-085 ¶13, 58 N.M. 579. Here the likelihood is that if the individual plaintiffs were required to pay for the County's own processes, the chilling effect on their case would be nearly complete. This Court has both the authority and the moral obligation to waive the security requirement.

II. The County Has a Duty to Plan Intentionally, Rather Than Through Back-Door, De-Facto Zoning

Taos County argues "the only consequence for noncompliance" with federal regulations applicable to the airport expansion "is denial of federal funding." Response at 11. This ignores the severe consequences to nearby landowners who may have their quiet enjoyment ruined, and their land values decimated, without due process.

Curiously, the County asserts in its defense that it has no jurisdiction over either Taos Pueblo lands or federal lands or over flight paths. Response at 11. That is precisely the source of Plaintiffs' major concern. If the County approves the airport expansion, the pilots will fly wherever they want, because it is non-controlled

airspace. Complaint ¶11, Taos County Answer, ¶11. The County will have no ability to direct air traffic to or away from particular areas. That is why it is so critical for the County to carefully and prudently and exercise the jurisdiction that it does have. That jurisdiction includes recognizing the FAA and Armstrong Consultants' recommendations regarding the need for land use restrictions, and addressing those restrictions prior to allowing airport expansion. As the County ably cited, "the designation of plane landing sites… involves local control over land." Response at 12, quoting *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 783 (6th Cir. 1996).

A situation in which the County approves an application that carries significant zoning ramifications, without addressing those zoning ramifications head-on, is akin to illegal contract zoning:

> A contract in which a municipality promises to zone property in a specified manner is illegal because, in making such a promise, a municipality preempts the power of the zoning authority to zone the property according to prescribed legislative procedures. Our statutes require notice and a public hearing prior to passage, amendment, supplement, or repeal of any zoning regulation. NMSA 1978, § 3-21-6(B) (Repl.Pamp. 1985). The statutes also grant to citizens and parties in interest the opportunity to be heard at the hearing. *Id.* By making a promise to zone before a zoning hearing occurs, a municipality denigrates the statutory process because it purports to commit itself to certain action before listening to the public's comments on that action. Enforcement of such a promise allows a municipality to circumvent established statutory requirements to the possible detriment of affected landowners and the community as a whole. Dacy v. Village of Ruidoso, 1992-NMSC-066 ¶17, 114 N.M. 699.

III. The County's Land Use Regulations Do Not Protect Plaintiffs' Interests

A. The County LUR's performance and compatibility standards do not address the Town's land use compatibility guidelines

The LUR's performance standards, LUR §4.8 (County of Taos, New Mexico Ordinance 2014-01 (June 10, 2014)), do not address the land use restrictions concomitant with an airport expansion at all. The County makes every effort to describe its three stages of *de novo* review, Plaintiffs' "ample opportunity to participate and be heard," Response at 7, and the compatibility and performance standards applicable to that review. What the County has not said is that it has discretion to deny the application because of its impacts on surrounding property owners and users, as detailed in the Off Airport Land Use Plan.

The LUR compatibility standard is, "The development shall be sensitive to and consistent with the existing traditional and historic uses in the neighborhood, or the applicant shall be able to demonstrate that the development would provide a substantial benefit to, or support to, or would not have a substantial impact on the immediate neighborhood." LUR Section 4.7.1(A). If the County cannot offer its assurance that this compatibility standard permits denial of the application on the basis of the incompatibility shown in the Off Airport Land Use Plan, then Plaintiffs are left with no meaningful input on a decision that could decimate the enjoyment and value of their properties. If the County made this statement, and the Town concurred, the County's argument that the Plaintiffs could have meaningful input in the parallel administrative proceeding might be stronger.

B. The LUR Requires a Major Development Permit

Taos County's argument against requiring a major development permit is a logical fallacy. LUR 4.1.1.B.4 allows public facilities and infrastructure to proceed on an administrative permit. LUR 4.1.1.D requires a major development permit for projects exceeding a certain size. The proposed airport expansion would cross that threshold. The County asserts that Section 4.1.1.B.4 is rendered meaningless if the airport expansion project is properly considered under a major development permit.

The County's logic is that all public infrastructure would qualify under Section 4.1.1.D (major development) thus rendering Section 4.1.1.B.4 (administrative development permit) superfluous in the context of public projects. This logic assumes that *all* public infrastructure projects also qualify as major development. This is a faulty assumption. Any public infrastructure project less than 80,000 square feet of improvements, five acres of land or five million dollars qualifies for administrative permit. That presumptively encompasses the bulk of local public projects. It is only the larger ones, such as the airport expansion, that require a major development permit.

A "statute must be read as a whole. Each section or part should be construed in connection with every other part or section so as to produce a harmonious whole, and the court is to give effect to all provisions of a statute and to reconcile different provisions so as to make them consistent." *State v. Sinyard*, 1983-NMCA-150 ¶6, 100 N.M. 694 (internal citations omitted). Even if a conflict did exist, under both the

LUR (Section 1.2.4) and state statute (NMSA 1978, Section 3-21-11) conflicts in land use regulations are resolved in favor of the more restrictive, or higher, standards. The Town must obtain a major development permit for the airport expansion project.

4. Conclusion

Land use regulation under the LUR process carries significant due process protections for the landowners. They do not have those same protections as citizens giving input on development permit applications. Approving the Town's application would amount to a rezoning without following the zoning rules. The County should not be allowed to abdicate its authority and obligation to do appropriate land use planning.

Plaintiffs do not assert that application approval by county is predetermined- to the contrary, Plaintiffs cannot see how it could be approved as compatible given the Off Airport Land Use Plan. Plaintiffs do not assert that the County has a legal duty to adopt airport specific zoning before it may consider the Town's application. Rather, the County cannot approve the application in the absence of zoning conforming to the Off Airport Land Use Plan's *land use compatibility guidelines*. If the County were to deny the application, no land use planning would be required. However, for the reasons aptly stated in the County's response, the Court cannot direct the outcome of that process.

The only protection available to Plaintiffs is to ensure that the County engages in

appropriate planning. After that, the County will either adopt zoning that permits the application to be approved without back-door zoning, or it will reject the rezoning option, which would require denial of the application to be consistent with the lack of appropriate zoning. The County conflates the two processes and misses the critical nuance. Plaintiffs seek to preemptively avoid potential conflict.

The County allows for the potential that "airport zoning would be good policy." Response at 3. Misdirection should not support avoiding sound policy.

I certify that this pleading was served on all counsel of record through the Tylerhost e-fling system.

Respectfully submitted,

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