PLANNING & ZONING COMMISSION  
CITY OF TRUTH OR CONSEQUENCES, NEW MEXICO  

PUBLIC HEARING/SPECIAL MEETING  

Wednesday, February 17, 2010  

TIME & PLACE:  
NOTE is hereby given that the City of Truth or Consequences Planning & Zoning Commission will hold a Public Hearing and Special Meeting on Wednesday, February 17, 2010 at 5:30 P.M. in the Civic Center Red Room, 400 W. 4th Street, Truth or Consequences, New Mexico to consider the following:  

PRESIDING OFFICER:  
The meeting was called to order by Bill Howell, Chairman. Judy Harris acted as Secretary.  

ATTENDANCE:  
Upon calling the roll the following members were reported present:  

Bill Howell, Chairman  
Joey Perry, Vice Chairman  
Lee Foerstner, Member  
James Jacobs, Member  
Raymond Ruffini, Member  

Absent:  

Also Present:  

Jay Rubin, City Attorney  
Charlie Friberg, Building Inspector  
Judy Harris, Deputy City Clerk  

QUORUM:  
There being a quorum present the Commission proceeded with the business at hand.  

APPROVAL OF AGENDA:  
Bill Howell, Chairman called for approval of the Agenda.  

"Raymond Ruffini moved to amend the Agenda based on staff legal opinion of February 8th that this Commission does not have jurisdiction to hear this appeal."

Jay Rubin stated he would suggest they approve the agenda and then let him make a few introductory remarks as legal counsel as to how he might help to proceed tonight. He stated he would suggest to go forward and let him speak and help them out a little bit.  

The motion to amend the agenda made by Raymond Ruffini dies for lack of a second.  

Bill Howell, Chairman again called for approval of the Agenda.  

"Lee Foerstner moved to approve the Agenda as submitted."  

Seconded by James Jacobs  
Motion carried unanimously.  

Appeal of Zoning Administrator Decision – Bartoo Sand & Gravel Mining Pits:  

City Attorney Rubin asked James Jacobs if he was going to rescues himself.
Mr. Jacobs asked if he could still sit at the table if he rescued or not or did he have to sit out in the audience.

Mr. Rubin stated he thinks if he doesn’t rescind he needs to denounce that at the outset of the meeting and he thinks it might be more appropriate for him not to be up there.

James Jacobs stated he would rescind.

City Attorney Rubin stated he would like to give a little bit of knowledge for the benefit of the board but also for the benefit of the people in attendance tonight so he will give a little bit of a flavor about really what the background legally has been in this case.

He stated the appeal that was filed by the appellant sites section 11-7-4 of our zoning code and then there’s a subsequent letter written by Ms. Toomey one of the appellants here tonight in which she references section 3-21-8 in State Statutes. Both 11-7-4 and 3-21-8 of the state statute provides for an appeal by “any aggrieved person” that is affected, the word affected is used, by the decision of the administrative officer. Under the State Statute 3-21-8 there is an addition, that’s basically where the Supreme Court would actually put the findings together and actually give you sample cases which address certain terms used in that statute. And there’s an addition under that section 3-21-8 referencing an appellant court case known as Webb v. Fox. Now that case is slightly different than this case because in that case that dealt with a special zoning permit and this is a different situation, however that case is still important because the court had to grapple with the definition of an aggrieved person pursuant to 3-21-8, therefore I think for this proceeding it is a good law that we can look to. And what the court said was that “to be aggrieved, a party must have a personal or pecuniary interest or property right adversely affected by the judgment. The party’s interest must be an immediate, pecuniary and substantial consequence of the judgment, not merely normal or remote.” Now based on that I wrote a letter to Ms. Toomey on January 28th and I read to her that definition of an aggrieved person and I asked her how she fit into that definition. She sent me an e-mail back on February 5th, based upon her response I wrote to Hazel Peterson the Deputy City Clerk and I gave Ms. Peterson based upon that e-mail, just the e-mail by itself, that I felt that Ms. Toomey did not meet the definition of an aggrieved party. So I think the reason I’m bringing this up I think you have a threshold impression before you, before you actually can hear the merits of the actual appeal I think you have to deal with the issue first as to whether the appellants Ms. Toomey and Ms. Audette meet the definition of an aggrieved persons. Now again I’ve already given a preliminary opinion in my letter but I guess we’re here today for you to make decisions as to whether you feel they’re aggrieved persons. I have Ms. Toomey’s e-mail but I think really in order to make a good record here and quite honestly to be fair to the appellants, also to Mr. Bartoo’s counsel Mr. Filosa who’s representing Mr. Bartoo I think it might be appropriate to get maybe some brief testimony, maybe five minutes as a limit from the appellants to let them explain under oath how they feel they’re aggrieved persons and then the board can then vote as to whether you feel they’ve met the definition or not. So that’s my suggestion on how we should proceed tonight, I think that’s the fairest way for everybody.

He asked if anybody had any questions about that, problems, members.

Ms. Toomey stated she has question for staff, does not Webb v. Fox have two definitions for aggrieved persons?
Mr. Rubin stated first of all I’m not going to argue with you tonight, I’m going to give my advice to the board and I’m not going to be addressing that, I’ve already given my opinion as to what Webb v. Fox stands for and I think that applies to these proceedings, I’m not going to argue with you anymore about this so Mr. Howell I gave you my opinion on how I think you should proceed tonight so you may go ahead and do what you feel like you need to do.

Mr. Howell stated that since this is an unusual thing before a public hearing I think we’ll postpone the staff presentation to see if we’re going to have the need for the hearing. He stated we’re going to let the opponents swear themselves in and try to explain to us how they are aggrieved persons.

Mr. Rubin stated I think there should be a five minute limit and I think also in fairness to Mr. Bartoo that his attorney should have a right to cross examine after we hear from the appellants on that one issue, just the issue of aggrieved persons, that’s the only issue we’re concerned with the right to the threshold question.

Mr. Howell administered the Oath to Deborah Toomey, 415 W. Riverside, Truth or Consequences.

Ms. Toomey stated Webb v. Fox actually has two definitions of aggrieved persons, because while the majority of Webb v. Fox deals with somebody trying to overturn an ordinance or regulation or rule that means it has already gone through the process for the public to have either voted on it or dealt with it through referendum. But the first part of 3-21-8 also simply deals with requiring enforcement and so if an administrative officer has not enforced our ordinances you become an aggrieved person and Webb v. Fox did deal with the aggrieved person in two ways and so if you have my memo that I responded back to Mr. Rubin.

Webb v. Fox also has two definitions of aggrieved person, the first one when you are doing the overturning of a regulation or an ordinance or a resolution you must have a pecuniary interest, pecuniary means financial. The second definition of aggrieved person is somebody who has... an aggrieved party is also defined as one whose legal right is invaded by an act complained of, etc., and that’s also the definition in Wage’s Law dictionary. Very simply the enforcement of our ordinances is what’s known as a public duty and any member of the public may demand that their ordinances get enforced, whether they live next door or they live ten miles away. Second our statutes gives me that right, specifically 3-21-8; it gives me that right because the ordinance has not been enforced. Now if the ordinance was... I was trying to overturn the ordinance then yes I would need to have a pecuniary interest. Very simply a municipality is required to enforce their regulations, as a matter of fact on the simple aspect of the business registration portion which Bartoo has not been registered to do... to act as a business at 1809 S. Broadway, there must be regulation in order to collect the license fee and that is the City of Albuquerque v. Ranger Desdemona as sited in City of Lovington v. Hall. So if the city is refusing to enforce their business registration ordinances you may not collect a fee for those business registrations. If the city is refusing to enforce the zoning ordinances you may not collect a fee for the zoning ordinances.

Also very simply this is also a constitutional right; both the New Mexico Constitution and the United States Constitution guarantee not only due process of law but equal protection. I know that I was forced to pay my business registration fees every year as should Bartoo, unfortunately he has not. There has been no business registration at 1809 S. Broadway
ever, including today. So as far as this...

Mr. Filosa stated Mr. Howell I'm going to object at this point, she at this point and time is asserting that Mr. Bartoo, Bartoo Sand and Gravel has not paid their registration, that's not true and unless you can make a showing of that...

Ms. Toomey stated I sure can.

Mr. Filosa stated then she's out of order.

Ms. Toomey stated I can make a showing of that, but we'll get to that in the actual...

Mr. Rubin stated Mr. Howell I think you should limit to the one issue of the aggrieved person at this point; I really want to stick to that, I think that's what the argument is.

Mr. Howell stated let's stick to the aggrieved person to decide if we even need to have a public hearing.

Mr. Rubin stated correct.

Mr. Toomey stated but still I would also like to... I request that this be under Battershell Procedures, very simply bias need to be also first established even before this portion, because on this portion people will be voting that I'm sorry I need to deal with the bias on it. So this is a violation of due process, it's a violation of our State Statutes, it's a violation of our local ordinances, and it is a violation of the Constitution, we should be dealing with bias first.

All right I'm done.

Mr. Howell stated you have another minute.

Ms. Toomey stated well then so I gotta say that standing, the Supreme Court agrees with me.

Mr. Howell asked Ms. Audette if she would like to speak.

Mr. Rubin stated I guess the question is, are you allowing cross examination on that one issue or...

Mr. Howell stated we're limiting it to just the aggrieved person.

Mr. Filosa stated just one time Mr. Chairman and members of the board I don't know at this point if she's offered any kind of compelling evidence that she's an aggrieved person.

Mr. Rubin stated well let's get to that, all right okay, if you have any questions of Ms. Toomey?

Mr. Filosa stated not at this time.

Mr. Rubin stated okay then lets...

Mr. Howell stated we're going to let Ms. Audette speak.

Mr. Howell administered the Oath to Kim Audette, 618 Van Patten, Truth or Consequences.
Ms. Audette stated this is a map from FEMA; it's a flood map, as you can see the flood zone runs down to the river from the mining area through to the downtown. We've had this problem before. There's a hundred year flood coming up by I thinks its 19... 2017. So first off...

Mr. Howell stated ma'am would you stick to the aggrieved person.

Ms Audette stated I'm worried about property damage too; I have property at 618 Van Patten. The United States Supreme Court decisions are applicable to do process matters. New Mexico Constitution Article 2 number 20, private property is protected under the Constitution; additionally my right to do business is protected under that very same constitutional article. I perform a function for the community called Tax Help, it brings in one million dollars per year to low incomes, I can not do this if the air is full of dust from mining, I'm down wind from these guys. The right to practice a profession or vocation is a property right, that was established in Roberts v. State Board of Embalmers in 1967. Now this becomes... this question of our standing when we have a question also about the standing of two more commissioners on the Planning & Zoning Board...

Mr. Howell stated we're sticking to the aggrieved person ma'am; we're not talking about the board.

Ms. Audette, stated yes I'm aggrieved, believe me I'm aggrieved.

Mr. Howell stated we're not talking about the commission.

Ms. Audette stated that's Devaney v. Thriftway Marketing Corporation. Now procedural due process includes the concept of the opportunity to be heard and to present our defense, that's Noah v. City of Albuquerque another ancient concept from 1975. So my main aggrievement right now is that at minimum the tryers of fact must be disinterested, Ruffini and Howell are not disinterested parties; that's Reid v. New Mexico Board of Examiners of Optometry, 1979.

And that's all I have to say about my status of aggrievement.

Mr. Rubin stated you need to ask Mr. Filosa if he has any questions for Ms. Audette.

Mr. Howell stated, Mr. Filosa.

Mr. Filosa stated that at this point in time it seems to me they have not made any kind of showing they have been damaged with respect to a pecuniary interest or an interest that is damaged. She talks about flood claim that's going to be in 2017, that's seven years from now, so that's all speculative and it's not... right now it's not apparent and so forth so at this point if you think the definition in Savior v. New Mexico Peterbilt which is recorded at 101 New Mexico 84 it says, any party aggrieved may appeal from a final order or judgment. To be aggrieved, a party must have a personal or pecuniary interest or property right adversely affected by the judgment. Ruidoso State Bank v. Brumlow, 81 N.M. 379 and it says, the party's interest must be immediate, pecuniary, and substantial, not nominal or a remote consequence of judgment.

All Ms. Audette is talking about, she's thinking there might be a flood five, ten, fifteen years from now. At this point in time they don't meet the definition of an aggrieved point because if they're going to say that they're aggrieved and they have that interest they need to bring tax returns, they need to bring bank statements, they need to bring invoices and things of that nature that are documentation which show that they
have been damaged, and that hasn’t been done. All they’ve done is got up and said I am an aggrieved party, that’s not enough Mr. Chairman and member of the board.

Mr. Howell stated let’s discuss among ourselves whether we think there is an aggrieved person before we have the hearing.

Mr. Ruffin stated I do not; I can start the discussion with that. I believe that they did not make a case that they are an aggrieved person in this at all.

Mr. Howell asked if anyone else had a comment on that.

Mr. Foerstner stated he doesn’t feel personally qualified on legal issues here...

Mr. Ruffin stated we have an opinion from a counsel.

Mr. Foerstner stated yes we’ve got counsel opinion but I’m not even sure why we’re here in the first place, this property can’t be down zoned by us it’s grandfathered, it’s been used continuously having people that are here prepared to give testimony to all of that stuff, but since we’re all here I’m inclined to say let’s proceed and get to it and give everybody their say. That’s just my opinion.

Ms. Perry stated based on the testimony presented today I don’t feel that the arguments for aggrieved persons were conclusive so I don’t feel that the people bringing the claim convinced me that they were aggrieved persons under the law.

Mr. Howell stated I also feel the same way after reading Mr. Rubin’s recommendations to us and after hearing their testimony I do not see that they meet the aggrieved persons statute and therefore I feel that we should not have a public hearing.

Mr. Ruffin stated does that need to be in a motion form?

Mr. Rubin stated yes you need to take action, the action you’re making a finding.

“Raymond Ruffini moved that we do not carry on with this agenda because he doesn’t believe that they are aggrieved.”

Seconded by Joey Perry
Motion carried.

ADJOURNMENT: There being no further business to come before the Commission, Bill Howell, Chairman called the meeting adjourned.

APPROVAL: PASSED AND APPROVED this 2 day of March, 2010, on motion duly made by Joey Perry, and seconded by Lee Foerstner and carried, as corrected.

Bill Howell, Chairman