

IN THE COURT OF APPEALS

COURT OF APPEALS OF NEW MEXICO  
FILED

FOR THE STATE OF NEW MEXICO

APR 11 2013

Wendy F Jones

Southwest Energy Efficiency Project, *et al.*,

Appellants,

v.

No. 31383

the New Mexico Construction Industries  
Commission, *et al.*,

Appellees.

THE APPELLANTS' MOTION FOR AN ORDER HOLDING  
THE APPELLEES CONSTRUCTION INDUSTRIES DIVISION  
AND KATHERINE MARTINEZ  
IN CONTEMPT FOR THEIR FAILURE  
TO COMPLY WITH THE COURT OF APPEALS' ORDER

Introduction

Southwest Energy Efficiency Project, Environment New Mexico,  
Sundancer Creations Custom Builders, LLC, eSolved, Inc., the Sierra Club,  
Tammy Fiebelkorn, Faren Dancer, Sanders Moore, Erika Wolf, and Sommer  
Batterson (“the Appellants”) hereby move the Court for an order holding the  
Appellees Construction Industries Division and Katherine Martinez<sup>1</sup> in

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<sup>1</sup> Katherine Martinez replaced Richard Tavelli as the Director of the  
Construction Industries Division.

contempt of Court for their failure to comply with the Court of Appeals' direct order in this matter.<sup>2</sup>

This Motion is made pursuant to NMRA 12-309 (Rule 12-309) and NMRA 12-312 (Rule 12-312) of the Rules of Appellate Procedure, and is based on these Appellees' own assertions that they do not intend to comply with this Court's order.

Pursuant to Rule 12-309.B, counsel for the Appellants has contacted counsel for the Appellees Construction Industries Division and Katherine Martinez to determine their position on the Motion, but counsel for the Construction Industries Division and Katherine Martinez has not responded to the inquiry from counsel for the Appellants. Because of the nature of the Motion, the Appellants believe that it is reasonable to assume that it will be opposed by these Appellees.

### Argument

- I. Rules 12-309 and 12-312 provide for the filing of a motion for contempt of the Court.

Pursuant to Rule 12-309, applications to the Court for an order or other relief shall be made by motion. NMRA 12-309.A. In addition, Rule

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<sup>2</sup> This Motion is not directed to the Appellee Construction Industries Commission because counsel for the Commission has informed counsel for the Appellants that the press release that is one of the bases for this Motion (Exhibit 1) does not accurately represent the Commission's position on this issue.

12-312 provides for the filing of a motion for contempt for failure to comply with an order of the Court. Rule 12-312 provides:

D. Other sanctions. For any failure to comply with these rules or any order of the court, the appellate court may, on motion by appellant or appellee or on its own initiative, take such action as it deems appropriate in addition to that set out in Paragraphs A and B of this rule, including, but not limited to citation of counsel or a party for contempt, refusal to consider the offending party's contentions, assessment of fines, costs or attorney fees, or, in extreme cases, dismissal or affirmance.

NMRA 12-312.D.

The filing of a motion for an order holding a party in contempt is therefore authorized by Rules 12-309 and 12-312.

II. The Appellees have announced that they do not intend to comply with the Court's order.

This case involves the Appellants' challenge to the Appellees' adoption of revisions to State of New Mexico building codes. This Court ruled on the Appellants' challenge to the adoption of those revisions on April 4, 2013. However, as is more fully explained below, the Appellees Construction Industries Division and Katherine Martinez have since announced that they will not comply with this Court's ruling.

A. The Court of Appeals set aside the Appellees' 2011 revisions to the building codes at issue in this matter.

As this Court pointed out in its Opinion issued on April 4, 2013, the subject of these appeals was the Appellees' adoption of revisions to four

building codes, the New Mexico Energy Conservation Code, the New Mexico Plumbing Code, the New Mexico Mechanical Code, and the New Mexico Electrical Code (collectively referred to as “the revisions to the Building Codes”). Court of Appeals Opinion, page 2, line 4 and footnote 1. This Court’s ruling on the adoption of the revisions to the Building Codes is explained at two different points in this Court’s Opinion.

First, on pages 3-4 of its Opinion, this Court stated:

Because the Commission failed to state any reason for its adoption of the revisions [to the Building Codes], it did not provide a record sufficient for meaningful appellate review. The revisions [to the Building Codes] are set aside and the matter remanded for proceedings consistent with this Opinion.

Court of Appeals’ Opinion, pages 3-4.

Second, the Conclusion to this Court’s Opinion states:

The revised codes listed in footnote one [the revisions to the Building Codes] are set aside and the matter remanded to the Commission for reconsideration, a new vote, and a statement of reasons for the vote, preferably in written form.

Court of Appeals’ Opinion, pages 11-12, citations omitted.

This Court therefore stated clearly at two separate points that the revisions to the Building Codes are set aside. That means that the revisions to the Building Codes are no longer in effect.

- B. These Appellees have announced that they intend to continue to enforce the revisions to the Building Codes.

Despite this Court's clear statements to the effect that the revisions to the Building Codes are set aside, the Appellees Construction Industries Division and Katherine Martinez have announced twice that they intend to continue to enforce the revisions to the Building Codes. Exhibit 1 to this Motion is a press release issued on April 10, 2013 by the New Mexico Regulation and Licensing Department, which the letterhead indicates includes the State Construction Industries Division. In its second paragraph, the press release states:

The Regulation and Licensing Department, the Construction Industries Division, and the Construction Industries Commission, will continue to enforce the revised 2011 building codes [*i.e.*, the revisions to the Building Codes] until further Notice to the contrary.

Exhibit 1, paragraph 2.

Exhibit 2 to this Motion is a revised press release issued by the Regulation and Licensing Department. It states:

The Construction Industries Division of the Regulation and Licensing Department will continue to enforce the revised 2011 building codes until the Construction Industries Commission has held a special meeting on Wednesday, April 17<sup>th</sup> ... to determine whether or not the Division and Commission will appeal the Opinion to the New Mexico Supreme Court.

Exhibit 2, paragraph 2.

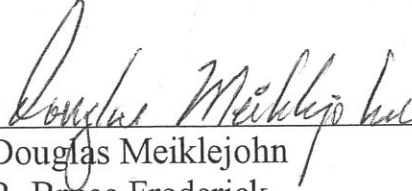
It would be difficult to imagine two more direct statements concerning this Court's ruling. This Court set aside the revisions to the Building Codes, but the Appellees Construction Industries Division and Katherine Martinez have announced that they will continue to enforce the revisions to the Building Codes. That is a clear and direct statement that these Appellees will not comply with the order of this Court.

Conclusion

This Court set aside the revisions to the Building Codes, but the Appellees Construction Industries Division and Katherine Martinez have announced that they will continue to enforce them. These Appellees' direct disregard of this Court's order should be addressed by an order of this Court holding the Appellees Construction Industries Division and Katherine Martinez in contempt, awarding the Appellants their costs and attorneys fees for preparation of this motion, and awarding the Appellants such other relief as is appropriate.

Dated: April 11, 2013.

NEW MEXICO  
ENVIRONMENTAL LAW CENTER



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Douglas Meiklejohn

R. Bruce Frederick

Eric Jantz

Jonathan Block

1405 Luisa Street, Suite 5

Santa Fe, N.M. 87505

Telephone: (505) 989-9022

Facsimile: (505) 989-3769

Attorneys for the Appellants

Certificate of Service

I certify that on April 11, 2013 copies of this Motion were sent by first class mail and electronic mail to:

James McKay  
General Counsel  
Regulation and Licensing  
Department  
2550 Cerrillos Road  
Santa Fe, N.M. 87505  
[james.mckay@state.nm.us](mailto:james.mckay@state.nm.us)

Attorney for the New Mexico  
Construction Industries Division  
and Katherine Martinez

Luis Carrasco  
Richard Word  
Al Lama  
Office of the Attorney General  
P.O. Drawer 1508  
Santa Fe, N.M. 87504-1508  
[lcarrasco@nmag.gov](mailto:lcarrasco@nmag.gov)  
[rword@nmag.gov](mailto:rword@nmag.gov)  
[alama@nmag.gov](mailto:alama@nmag.gov)

Attorneys for the New Mexico  
Construction Industries  
Commission

  
Douglas Meiklejohn





**New Mexico Regulation and Licensing Department**  
**OFFICE OF THE SUPERINTENDENT**

Toney Anaya Building ▪ 2550 Cerrillos Road ▪ Santa Fe, New Mexico 87505  
Information (505) 476-4500 ▪ Direct (505) 476-4507 ▪ Fax (505) 476-4511  
[www.rld.state.nm.us](http://www.rld.state.nm.us)

April 10, 2013  
For Immediate Release

**Susana Martinez**  
GOVERNOR

**J. Dee Dennis, Jr.**  
SUPERINTENDENT

**Mary Kay Root, Esq.**  
DEPUTY  
SUPERINTENDENT

**James C. McKay, Esq.**  
CHIEF GENERAL  
COUNSEL

**PRESS RELEASE**

On April 4, 2013, the NM Court of Appeals issued a Memorandum Opinion respecting the Southwest Energy case involving the New Mexico Construction Industries Commission and the adoption of the revised New Mexico Energy Conservation Codes that impact building codes and standards in New Mexico. The NM Court of Appeals Opinion states only that the case was “remanded to the Commission for reconsideration, a new vote, and a statement of reasons for the vote.” The NM Court of Appeals Opinion, however, did not discuss or reference the merits of the revised building codes.

The Regulation and Licensing Department, the Construction Industries Division, and the Construction Industries Commission, will continue to enforce the revised 2011 building codes until further Notice to the contrary. A decision to Appeal the NM Court of Appeals Opinion is under review and no final decision has been made by the State of New Mexico regarding any Appeal.

Contact:  
S.U. Mahesh  
Director of Communications  
Ph: 505-490-0976  
Email: [s.u.mahesh@state.nm.us](mailto:s.u.mahesh@state.nm.us)

Alcohol and Gaming Division  
(505) 476-4875

Boards and Commissions Division  
(505) 476-4600

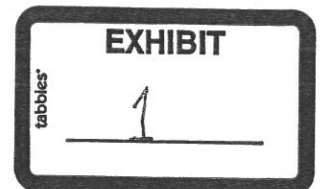
Construction Industries Division  
(505) 476-4700

Financial Institutions Division  
(505) 476-4885

Manufactured Housing Division  
(505) 476-4770

Securities Division  
(505) 476-4580

Administrative Services Division  
(505) 476-4800





**New Mexico Regulation and Licensing Department**  
**OFFICE OF THE SUPERINTENDENT**

Toney Anaya Building ▪ 2550 Cerrillos Road ▪ Santa Fe, New Mexico 87505  
Information (505) 476-4500 ▪ Direct (505) 476-4507 ▪ Fax (505) 476-4511  
[www.rld.state.nm.us](http://www.rld.state.nm.us)

April 10, 2013  
For Immediate Release

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DEPUTY  
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**James C. McKay, Esq.**  
CHIEF GENERAL  
COUNSEL

**REVISED PRESS RELEASE**

On April 4, 2013, the NM Court of Appeals issued a Memorandum Opinion respecting the Southwest Energy case involving the New Mexico Construction Industries Commission and the adoption of the revised New Mexico Energy Conservation Codes that impact building codes and standards in New Mexico. The NM Court of Appeals Opinion states only that the case was “remanded to the Commission for reconsideration, a new vote, and a statement of reasons for the vote.” The NM Court of Appeals Opinion, however, did not discuss or reference the merits of the revised building codes.

The Construction Industries Division of the Regulation and Licensing Department will continue to enforce the revised 2011 building codes until the Construction Industries Commission has held a special meeting on Wednesday, April 17<sup>th</sup> at 10:00 a.m. at the Division’s office located at 5200 Oakland Northeast, in Albuquerque, to determine whether or not the Division and Commission will appeal the Opinion to the New Mexico Supreme Court.

**Alcohol and Gaming Division**  
(505) 476-4875

**Boards and Commissions Division**  
(505) 476-4600

**Construction Industries Division**  
(505) 476-4700

**Financial Institutions Division**  
(505) 476-4885

**Manufactured Housing Division**  
(505) 476-4770

**Securities Division**  
(505) 476-4580

**Administrative Services Division**  
(505) 476-4800

S.U. Mahesh  
Director of Communications  
Ph: 505-490-0976  
Email: [s.u.mahesh@state.nm.us](mailto:s.u.mahesh@state.nm.us)

