IN THE COURT OF APPEALS

FOR THE STATE OF NEW MEXICO

Southwest Energy Efficiency Project, Environment New Mexico, Sundancer Creations Custom Builders, LLC, eSolved, Inc., Tammy Fiebelkorn, Faren Dancer, and Sanders Moore,

v.

the New Mexico Construction Industries Commission, the New Mexico Construction Industries Division, and Clay Bailey, Acting Director of the New Mexico Construction Industries Division,

Appellees.

No. 32939
Appeal from the New Mexico Construction Industries Commission; proceeding below conducted by the New Mexico Construction Industries Commission and the New Mexico Construction Industries Division

THE APPELLANTS' BRIEF IN CHIEF

NEW MEXICO
ENVIRONMENTAL LAW CENTER

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
Email: dmeiklejohn@nmelc.org

Attorneys for the Appellants

TABLE OF CONTENTS

Table of Authorities

New Mexico cases

Cases from other jurisdictions

Statutes

Regulations

Rules

IN THE COURT OF APPEALS

FOR THE STATE OF NEW MEXICO

Southwest Energy Efficiency Project, *et al.*,

Appellants,

v. No. 32939

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

Appellees.

THE APPELLANTS' BRIEF IN CHIEF

Introduction

This is the Brief in Chief of the Southwest Energy Efficiency Project, Environment New Mexico, Sundancer Creations Custom Builders, LLC, eSolved, Inc., Tammy Fiebelkorn, Faren Dancer, and Sanders Moore ("the Appellants").

I. Summary of proceedings

A. Nature of the case

This is an appeal from an administrative decision of the New Mexico Construction Industries Commission ("the Commission"), the New Mexico Construction Industries Division ("the Division"), and Clay Bailey, the Acting Director of the New Mexico Construction Industries Division (collectively "the Appellees"). The decision at issue in this matter ("the May, 2013 Decision") was

made by the Commission at a meeting on May 15, 2013.[1] Minutes of the Commission's May 15, 2013 meeting, Record Proper ("RP") 1797-1798. Specifically, the Commission decided at that meeting to re-adopt the following New Mexico building codes that the Commission had adopted on June 10, 2011: the New Mexico Electrical Code (NMAC §§14.10.4.1 *et seq.*), the New Mexico Energy Conservation Code (NMAC §§14.7.6.1 *et seq.*), the New Mexico Mechanical Code (NMAC §§14.9.2.1 *et seq.*), and the New Mexico Plumbing Code (NMAC §§14.8.2.1 *et seq.*) (collectively "the 2011 Building Codes"). *Id.*

Finally, the May, 2013 Decision was a continuation of the proceeding that the Appellees began in 2011. That proceeding resulted in four decisions made by the Commission in June, 2011 to adopt the 2011 Building Codes. Those four decisions were appealed by these Appellants (in Court of Appeals case 31383), and on April 4, 2013 the Court of Appeals issued an Opinion (RP 1759-1770) ("Opinion") in that case setting aside the Commission's four decisions and remanding the matter to the Commission. Opinion, RP 1760-1761, 1769-1770. The May, 2013 Decision was made pursuant to that reversal and remand, and that Decision therefore was a continuation of the 2011 proceeding.

---

[1] Although this decision was made by the Commission, the Division is also required to be involved. *See* NMSA 1978 §§61-13-6.E, 61-13-33.D.

B. Course of previous proceedings

1. The previous Court of Appeals litigation

On April 4, 2013, the Court of Appeals issued its ruling setting aside the Commission's four decisions adopting the 2011 Building Codes. *Id.* On April 19th, the Appellees filed a Motion for Rehearing or, in Addition or in the Alternative, for Clarification. In response to that Motion, on April 23rd the Court of Appeals issued its first Order on Motion for Rehearing (attached as Exhibit 1[2]) in which the Court directed the Appellants to file a responsive brief on or before May 3rd, and the Appellants did file a Response on that date. On May 30th, the Court of Appeals issued its second Order on Motion for Rehearing (Exhibit 2); that Order denied the Motion for Rehearing. Finally, the Court of Appeals issued its mandate in case number 31383 (Exhibit 3) on July 10th.

2. The Commission's administrative proceedings

The decision at issue in this matter is the Commission's May, 2013 Decision to re-adopt the 2011 Building Codes. According to the Commission's Statement of Reasons ("the Statement of Reasons"), that Commission Decision was based on the record in the 2011 administrative proceeding. RP 1817. That point was also made during the Commission's May 15, 2013 meeting, in which Commission

---

[2] The Court of Appeals' orders concerning rehearing and the Court's mandate were attached as exhibits to the Appellants' Docketing Statement, and they are attached as Exhibits 1-3 to this Brief in Chief for the Court's convenience.

Chairman Baker stated that the Commission would make a decision concerning re-adoption of the 2011 Building Codes based on the record that was previously made, and that no statements made during that meeting would be considered evidence. Recording of the May 15, 2013 Commission meeting[3] ("May 2013 Commission Meeting Recording"), 3:30.

For these reasons, the following statement of the proceedings covers the Appellees' 2011 administrative proceeding, the Court of Appeals litigation after the issuance of the Opinion on April 4, 2013, and the administrative proceedings conducted by the Appellees after the Opinion was issued. Both sets of administrative proceedings conducted by the Appellees were conducted pursuant to the Uniform Licensing Act, NMSA 1978 §§61-1-1 *et seq.*[4]

a. The Appellees' solicitation of comments

Beginning on April 29, 2011 and through May 1, 2011, the Division announced a public comment period concerning proposed changes by the Commission to the New Mexico Electrical Code, the New Mexico Energy

---

[3] The recording of the Commission's May 15th meeting was filed with the Court by the Appellants on November 12, 2013. This recording and the recordings of the public comment meetings conducted by the Appellees during the 2011 proceeding are referred to by the labels of the recording disks and by the hour, minutes, and seconds at which the statements involved occurred. The time at which statements occurred varies depending upon features of the computer playing the recording.

[4] The Uniform Licensing Act governs the actions of the Appellees at issue in this appeal. The definition of a "board" governed by the Act includes both the Commission and the Construction Industries Division. NMSA 1978 §61-1-2.A(1).

Conservation Code, the New Mexico Mechanical Code, and the New Mexico Plumbing Code. RP 42-44. The notice of the public comment period provided that members of the public could submit written comments on the proposed changes by June 2, 2011, and that they could comment on the proposals at one of four public meetings[5] to be conducted on June 2, 2011. *Id.*

b. Comments submitted to the Appellees

Members of the public commented on the proposed Code changes in writing (RP 53-1672) and orally at four public meetings held simultaneously on June 2, 2011 in Albuquerque, Farmington, Las Cruces, and Roswell.[6]

i. Written comments

Some of the written comments that were received by the Appellees consisted of one or a few sentences asserting that the Commission should or should not make the Code changes being considered. *See, e.g.*, written comments submitted by Jacqueline Blish (RP 825); Margaret Wilson (RP 826); Irma (RP 1416); and Ignacio Montano (RP 1419). Some of the written comments presented arguments

---

[5] The Uniform Licensing Act required the Appellees to conduct public hearings to obtain input on the proposed changes. NMSA 1978 §§61-1-29.B, 61-1-29.D. In this matter, however, the Appellees conducted meetings that were not hearings. These meetings did not provide for participants to provide testimony under oath; they did not include the opportunity for participants to present witnesses or exhibits; and they did not include opportunities for participants to cross-examine other participants. For those reasons, the meetings conducted by the Appellees are referred to as "meetings" and not as "hearings".

[6] Recordings of the public meetings are at pages 45-49 of the Record Proper.

about the alleged impacts that enacting the 2011 Building Codes would have on the construction industry, costs to contractors and home builders, energy efficiency, climate change, the economy, and the environment. *See, e.g.*, written comments submitted by Cheryl Frank (RP 54); Aleisha Khan, Executive Director of the Building Codes Assistance Project (RP 77, 1298[7]); Lora Lucero, Natural Resources Director of the League of Women Voters of New Mexico (RP 83, 1657); Derald Polston, Mark Uselman, and Donald Becker, Co-Chairs of SJCHBA TAC Committee & Directors to the SJCHBA Board, San Juan County Home Builders Association (RP 153, 1561); Joe Dudziak, Chapter President of the Northern New Mexico Association of Public Safety Officials an ICC Chapter (RP 155); Vicki Mora, Chief Executive Officer of Associated General Contractors – New Mexico Building Branch (RP 161, 1569); Tim Shestek, Senior Director – State Affairs, American Chemistry Council (RP 203, 1542); David Miertschin (RP 313, 1413); Kris Miranda (RP 323, 568); Ed Mazria of Architecture 2030 (RP 464, 1671); and Rick Davis, President, R.E. Davis Construction (RP 567, 1262).

A few of the written comments proposed amendments to the Building Codes that were enacted in 2010 ("the 2010 Building Codes") that were repealed by the Commission when it adopted the 2011 Building Codes. *See* comment of Jack C. Milarch, Jr., Executive Vice President/CEO and Mike Buechter, 2011 NMHBA

[7] The Record Proper includes duplicates of many of the written comments that were submitted.

President, New Mexico Home Builders Association, RP 255, 1375. In addition, some comments included supporting material. *See* comment of Joyce Westerbur, RP 179. There also were two petitions submitted concerning the proposal to adopt the 2011 Building Codes. RP 246, 534.

None of the written statements was provided under oath. Also, none of the individuals who submitted written comments was subject to cross-examination or was qualified as an expert. Finally, none of the written comments presented any technical analyses, data, or studies to support the comment's assertions.

ii. The public meetings conducted by the Appellees

The Appellees published an announcement of the public meetings. RP 42-44. The public notice stated that people commenting on the proposed rule changes would be able to express their opinions at the meetings. *Id.* The public notice said nothing about people making comments being sworn or being able to present witnesses or exhibits; it also said nothing about people being able to question or cross-examine other speakers. *Id.*

Each public meeting was presided over by a Division employee (the Presiding Employee) who conducted the public meeting and recorded comments that were made. RP 45, Albuquerque – 1, Part 1@ 0:49; RP 49, Farmington – 1,2,3,4, disk track (TR) 3@ 1:05; RP 47, Las Cruces – 1, Part 1, TR 1@ 1:19; RP

49, Roswell TR 4@ 0:50.[8] At the beginning of each meeting, the Presiding Employee announced that each speaker would have two minutes in which to speak. RP 45, Albuquerque – 1, Part 1@ 1:18; RP 49, Farmington – 1,2,3,4, TR 1@ 1:35; RP 47, Las Cruces – 1, Part 1, TR 1@ 2:03; RP 49, Roswell, TR 4@ 1:26.

The speakers were not placed under oath or affirmation at any of the public meetings. Also, at none of the public meetings did the Presiding Employee indicate that speakers would be given the opportunity to present witnesses or exhibits. In addition, the Presiding Employee did not inform speakers at any of the public meetings that they would be given the opportunity to question or cross-examine other speakers. When a speaker did attempt to question another speaker at the Albuquerque hearing, the Presiding Employee did not permit the speaker to ask questions. Statement of Tod Westic, RP 45, Albuquerque – 1, Part 1@35:25.

iii. Oral comments received by the Appellees

The oral comments made at the four public meetings were similar to the written comments that were submitted. Some of the oral comments were brief statements either for or against the proposed changes. *See, e.g.*, statements of Jim Palmer (RP 45, Albuquerque 1, Part 1, 24:42); Leo Hardy (RP 49, Farmington 1 2 3 4, TR 1 @2:26); Steve Roach (RP 49, Farmington 1,2,3,4, TR 3@29:07); Pat

---

[8] Remarks on the disks are referred to by the minutes and seconds at which the remarks occur because the disks have no counter mechanisms. The times at which specific remarks occur vary depending upon the computer used to play the disks.

Bellestri Martinez (RP 47, Las Cruces – 1, Part 1, TR 1, 14:12); and David Duer (RP 49, Roswell, TR 4, 16:26). Other oral comments presented assertions about the alleged economic, environmental, and other effects of the 2010 Building Codes and the 2011 Building Codes. *See, e.g.*, statements of Rick Davis (RP 45, Albuquerque 1, Part 1@55:57); Charles Wollenberg (RP 45, Albuquerque 1, Part 2@ 42:31); Don Becker (RP 49, Farmington 1,2,3,4 TR 3@ 35:15); Joyce Westerbur (RP 47, Las Cruces 1, Part 3@17:40); and Bob Wooley (RP 49, Roswell, TR 4@ 2:23). In addition, some of these statements proposed amendments to either the 2010 Building Codes or the 2011 Building Codes. *See, e.g.*, statement of Jack Milarch (RP 45, Albuquerque 1, Part 1, 8:42).

3. The Commission's actions

a. The Commission's May 15, 2013 meeting

The Commission made its Decision to re-adopt the 2011 Building Codes at its meeting on May 15, 2013. Before the Commission voted on the re-adoption of the 2011 Building Codes issue, several members of the Commission made statements explaining why they intended to vote to re-adopt the 2011 Codes, and there were dialogues between individual members of the Commission and counsel for the Commission. May 2013 Commission Meeting Recording, 33:40, RP 1777-1798. Following those statements and those dialogues, the Commission voted to

re-adopt the 2011 Building Codes and all subsequent amendments to those Codes. RP 1797-1798, May 2013 Commission meeting recording 1:45:00.

b. The Commission's Statement of Reasons

At a meeting of the Commission on June 3, 2013, the Commission approved its Statement of Reasons. There are three notable features of that Statement of Reasons. First, it contains no citations to the record in this matter. Second, although it does purport to refer to the record at several points, some of those references are inaccurate and other references make allegations that are irrelevant to this matter. Third, much of the Statement of Reasons does not consist of a justification for re-adoption of the 2011 Building Codes, but instead presents an argument against the 2010 Building Codes.

4. Elimination of the requirement for installation of a conduit for a solar raceway on each new roof.

The energy conservation code that was in effect before the Commission adopted the 2011 Energy Conservation Code mandated installation of solar ready systems on the roofs of new residences. NMAC §14.7.6.15.C (repealed); comment submitted by Aleisha Khan, Executive Director, Building Codes Assistance Project, RP 77, 1298. The Energy Conservation Code adopted by the Commission in 2011 and re-adopted by the Commission in 2013 does not include that requirement (RP 14-16), and it also is not in any of the other 2011 Building Codes. RP 5, 7-12, 18-24.

II. Argument

There are six reasons why the Commission's re-adoption of the 2011 Building Codes should be reversed. First, the Commission's Statement of Reasons does not provide justification based on the Record for the re-adoption of the 2011 Building Codes. Second, the Commission's Decision to re-adopt the 2011 Building Codes is not supported by substantial evidence in the Record as is required by the Uniform Licensing Act and applicable rulings of New Mexico courts.

Third, the Appellees' conduct of their administrative public meetings violated the mandates of the Uniform Licensing Act that persons appearing at the public hearings on proposed regulations be provided with an opportunity to question speakers at those public hearings and that speakers at those hearings provide sworn testimony.

Fourth, the Commission's re-adoption of the 2011 Building Codes violated the prohibition of the Uniform Licensing Act and applicable court rulings against agency action that is arbitrary, capricious, or an abuse of discretion.

Fifth, the Commission's re-adoption of the 2011 Building Codes without any provision for solar ready roofs violated the Solar Collectors Act. Violation of this requirements means that the Commission's decision was made in violation of the Uniform Licensing Act's prohibition against adoption of regulations in violation of law. NMSA 1978 §61-1-31.C(2).

Sixth, the Rules of Appellate Procedure and applicable court rulings make clear that the Commission did not have jurisdiction at the time that it made its decision to re-adopt the 2011 Building Codes.

A. The Commission has failed to justify its Decision to re-adopt the 2011 Building Codes based on the Record.

1. As an administrative agency the Commission must explain the basis in the administrative record for its Decision.

New Mexico courts have held that administrative agencies must explain the reasons for their decisions. That was the ruling in Court of Appeals case number 31383, in which the Court reversed the Commission's June 2011 decisions to adopt the 2011 Building Codes. RP 1759-1770. That decision was consistent with other rulings of New Mexico courts. *See, e.g.*, Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 321, 373 P.2d 809, 816 (N.M. 1962), Akel v. Human Services Department, 106 N.M. 741, 743, 749 P.2d 1120, 1122 (Ct. App. 1987), *cert denied sub nom.* New Mexico Human Services Department v. Akel, 107 N.M. 74, 752 P.2d 789 (N.M. 1988), Cibola Energy Corporation v. Roselli, 105 N.M. 774, 777-778, 737 P.2d 555, 558-559 (Ct. App. 1987), Fasken v. Oil Conservation Commission, 87 N.M. 292, 294, 532 P.2d 588, 590 (Ct. App. 1975), City of Roswell v. New Mexico Water Quality Control Commission, 84 N.M. 561, 565, 505 P.2d 1237, 1241 (Ct. App. 1972), *cert denied sub nom.* New Mexico Water Quality Control Commission v. Roswell, 84 N.M. 560, 505 P.2d

1236 (N.M. 1973). Moreover, the agency's explanation must be based on the record before the agency. *See* Fasken v. Oil Conservation Commission, *supra*, 87 N.M. 294, 532 P.2d 590; City of Roswell v. New Mexico Water Quality Control Commission, 84 N.M. 564-565, 505 P.2d 1240-1241.

In this matter, however, the Commission's Statement of Reasons does not explain how the Commission's May 2013 Decision is justified by the Record.

2. The Statement of Reasons does not cite the record.

Although the Statement of Reasons makes assertions about the Record, the Statement of Reasons provides no citations to the Record to support those assertions or to support the Decision to re-adopt the 2011 Building Codes. For example, the Statement of Reasons makes allegations about the written and oral comments[9] that supported re-adoption of the 2011 Building Codes (referred to in the Statement of Reasons as the "2009 IECC"), asserting that they were "well-reasoned, credible and persuasive". RP 1817-1818. However, the Statement of Reasons provides no citations to or analysis of the Record to support this assertion. The Statement of Reasons also provides neither Record citations nor analysis to support its assertion that written and oral comments that supported retention of the 2010 Building Codes (referred to in the Statement of Reasons as the "Richardson Codes") were "vague, overly repetitive and unsubstantiated". *Id.*

[9] The Statement of Reasons characterizes the oral comments as testimony (RP 1817), but they were not provided under oath and therefore were not testimony.

Moreover, these are not isolated examples. The Statement of Reasons fails to cite to the Record for its assertions about: flaws in a study allegedly conducted by the Southwest Energy Efficiency Project (RP 1819-1820); the authors of the 2011 Building Codes (RP 1820-1821); energy-efficiency and money saving features of the 2011 Building Codes (RP 1821-1822); the impacts of the 2010 Building Codes on various segments of the population (RP 1823, 1825); the alleged "unworkable" nature of the 2010 Building Codes (RP 1824); problems with the equipment needed for compliance with the 2010 Building Codes (RP 1825); and the numbers and types of buildings that exceed the energy efficiency requirements of the 2011 Building Codes (RP 1827-1828).

3. The Statement of Reasons' misrepresents comments and correspondence received by the Commission.

The Statement of Reasons also relies on several inaccurate characterizations of comments made to the Commission. First, the Statement of Reasons makes a blanket assertion that the written and oral comments supporting re-adoption of the 2011 Building Codes were "well-reasoned, credible and persuasive." RP 1817. The Record itself belies that characterization. For example, the comments submitted by Nancy (nancy@foreclosurebrokers.us) and Real Estate for Sale state:

Roll back the NM Energy Efficiency Building Code

RP 170, 1418.

Similarly, the comment from Irma (Irma@landhomes.net) asserts:

> We are asking that you please roll back the New Mexico Energy Efficient Building Code because New Mexico is not ready for this cost at this time. Please please please roll this back for a few years. In stead [*sic*] of doing something good for New Mexico you are doing something that we are just not ready for. Please understand and put it on hold for now. That will help New Mexico for now.
> Thank you for listening to us!!!!!!!

RP 165, 1416.

These are hardly "well-reasoned, credible and persuasive comments".

Similarly, the Statement of Reasons asserts that all the comments that opposed re-adoption of the 2011 Building Codes were "vague, overly repetitive and unsubstantiated". RP 1817-1818. That is not an accurate characterization of comments such as those submitted by the Building Codes Assistance Project, (RP 1297-1298), CASA – A Center Advancing Sustainable Architecture (RP 1501-1502) or Willson & Willson Architects (RP 1622).

Third, the Statement of Reasons asserts that many of the written comments supporting retention of the 2010 Building Codes were from sources and people from outside of New Mexico and from members of the Sierra Club. RP 1818. In fact, the Record Proper contains about 850[10] written comments urging that the 2010 Building Codes be retained, but only

---

[10] To determine an exact number of comments would require defining how to count because some authors commented more than once. *See, e.g.*, comments of Barbara Apgar and B. Jean Apgar at the same address (RP 118, 896).

about 25 of those comments have addresses indicating that they were submitted by people or sources from outside of New Mexico.[11] Similarly, only one comment favoring retention of the 2010 Building Codes mentions the Sierra Club, and it is a unique letter. RP 371, 774.

4. The Statement of Reasons relies on information that is irrelevant to this matter.

Much of the information upon which the Statement of Reasons relies is irrelevant to the Commission's May 2013 Decision. As an example, the Statement of Reasons purports to rely on expertise of the International Code Council, which allegedly drafted the 2011 Building Codes (RP 1821), but nothing in the Construction Industries Licensing Act or the Uniform Licensing Act indicates that the Commission should rely on the International Code Council. *See* NMSA 1978 §§60-13-6.E, 60-13-9.F, and 60-13-44.

Similarly, the Statement of Reasons states that certain comments received by the Commission were attributed no or very little weight in part because they were submitted by people from outside New Mexico, and that other comments were given more weight in part because they were generated by people who are located in or have activity in New Mexico. RP 1818-1819. However, there is nothing in either the Construction Industries Licensing Act or the Uniform Licensing Act to

[11] Comments with out of state addresses are at pages 630, 644, 712, 721, 827, 937, 958, 1038, 1040, 1054, 1057, 1067, 1068, 1095, 1100, 1123, 1132, 1136, 1145, 1155, 1197, 1214, 1230, 1233, and 1662 of the Record Proper.

indicate that the weight to be accorded a comment depends upon whether the author is a New Mexico resident or has significant activity in the state.

5. The Statement of Reasons' primary focus is an argument against the 2010 Building Codes.

Finally, the Statement of Reasons' major focus is on two other issues that are not relevant to this proceeding – the appropriateness and the validity of the 2010 Building Codes. The Statement of Reasons is 15 pages long. One page – RP 1829 – has a date and a signature only. Six of the other 14 pages are devoted primarily to allegations that the 2010 Building Codes are inappropriate. *See* RP 1821-1825, 1827-1828. One of those pages – RP 1828 – also devotes significant space to an assertion that the 2010 Building Codes were not validly codified.

All of these allegations about the 2010 Building Codes are irrelevant to the Commission's Decision to re-adopt the 2011 Building Codes. Allegations about flaws in the 2010 Building Codes might be relevant to a determination about whether those Codes should have been replaced, but those allegations do nothing to justify the Commission's Decision to re-adopt the 2011 Building Codes.

B. The Record does not provide substantial evidence to support the Commission's re-adoption of the 2011 Building Codes.

The failure of the Statement of Reasons to cite the Record reflects the absence of substantial evidence in the Record to support the Commission's May 2013 Decision to re-adopt the 2011 Building Codes. The Commission's decision

to re-adopt those Codes in the absence of such evidence violates requirements of the Uniform Licensing Act and decisions of New Mexico courts.

1. The Commission's decisions must be supported by substantial evidence in the record as a whole.

The Uniform Licensing Act provides for judicial review of agency adoption of regulations. It states:

> Upon appeal, the court of appeals shall set aside the regulation only if found to be:
> (1) arbitrary, capricious, or an abuse of discretion;
> (2) contrary to law; or
> (3) against the clear weight of substantial evidence of the record.

NMSA 1978 §61-1-31.C.

The Appellants are not aware of any court rulings addressing the standard set by item #3 of this section in the context of adoption of regulations by these Appellees pursuant to the Uniform Licensing Act. However, New Mexico courts have ruled in other contexts that agencies' decisions must be based on substantial evidence. Ferguson-Steere Motor Company v. State Corporation Commission, 63 N.M. 137, 144, 314 P.2d 894, 898-899 (N.M. 1957), Mississippi Potash, Inc. v. New Mexico Department of Labor, 2003 NMCA 14 ¶¶7-8, 61 P.3d 837, 839. The courts also have held that determining whether an agency's decision is supported by substantial evidence requires review of the entire record, not just the evidence supporting the decision. Perkins v. Department of Human Services, 106 N.M. 651,

654, 784 P.2d 24, 27 (Ct. App. 1987), Cibola Energy Corporation v. Roselli, 105 N.M. 774, 776, 737 P.2d 555, 557 (Ct. App. 1987).

The issue in this matter therefore is whether there is substantial evidence in the record as a whole to support the Commission's Decision. Substantial evidence is relevant evidence on which a reasonable mind might rely to reach a conclusion. Ferguson-Steere Motor Company v. State Corporation Commission, *supra*, 63 N.M. at 144, 314 P.2d at 899; Descheenie v. Bowen, 850 F.2d 624, 627 (10th Cir. 1988). Evidence that is uncorroborated hearsay does not constitute substantial evidence. Ferguson-Steere Motor Company v. State Corporation Commission, *supra*, 63 N.M. at 144, 314 P.2d at 899. Evidence also is not substantial evidence if it is merely conclusory. Dalton v. U.S. Department of Labor, 58 F.App'x. 442, 445-446 (10th Cir. 2003); Descheenie v. Bowen, *supra* 850 F.2d at 628.

2. The material in the Record does not constitute substantial evidence that supports the Commission's decisions.

a. Some of the written comments consist of requests or conclusory allegations only.

Some of the written and oral comments in the Record Proper that advocated adoption of the 2011 Building Codes consist of one or several sentences urging the Commission to take that action. As an example, the comments submitted by Nancy (nancy@foreclosurebrokers.us) and Real Estate for Sale state:

Roll back the NM Energy Efficiency Building Code

RP 170, 1418.

Similarly, the comment from Irma (Irma@landhomes.net) asserts:

> We are asking that you please roll back the New Mexico Energy Efficient Building Code because New Mexico is not ready for this cost at this time. Please please please roll this back for a few years. In stead [*sic*] of doing something good for New Mexico you are doing something that we are just not ready for. Please understand and put it on hold for now. That will help New Mexico for now.
> Thank you for listening to us!!!!!!!

RP 165, 1416.

Some of the oral comments made at the public meetings are similar. For example, Dennis Ivie stated at the Farmington public meeting that the government was taking away peoples' rights and that taking away home ownership will put people in a socialized [*sic*] situation. RP 49, Farmington 1,2,3,4 TR 1@45:29. An unidentified speaker at the Las Cruces public meeting asserted that New Mexico cannot afford to go beyond the IECC. RP Las Cruces 1, Part 2@0:00.

None of these comments provides evidence that a reasonable mind would rely upon for a conclusion. The comments submitted by Nancy and by Real Estate for Sale state a request, and neither provides reasons why the Commission should take the requested action. Irma's comment asserts that New Mexico is not ready for the Energy Efficiency Building Code, but provides no reasoning or data to support that assertion. That comment also provides no data or other information to support the assertions that the Energy Efficiency Building Code imposes a cost on

New Mexico, that New Mexico is not ready for it, or that the Energy Efficiency Building Code is not good for New Mexico. There also is no data or information to support either Mr. Ivy's assertions that the government is taking away people's rights and that precluding people from owning a home will lead to a socialist situation or the unidentified individual's allegation that New Mexico cannot afford to go beyond the IECC. These assertions have no substance to them, and merely present conclusions. For those reasons, they do not constitute substantial evidence. Descheenie v. Bowen, *supra* 850 F.2d at 627-628.

b. Some written and oral comments present arguments but not substantial evidence.

Although other comments are more extensive, they too fail to provide substantial evidence to support the Commission's Decision. For example, the comment submitted by the New Mexico Home Builders Association (NMHBA) asserts that there is competition between home builders in New Mexico and those in neighboring states, that the Association "has heard" that certain entities are planning to stop offering incentives for energy equipment, and that the Codes enacted in 2010 would mean that to qualify for the Department of Energy Star program homes would have to be 25% more energy efficient than the code-minimum homes being built. RP 256-257, 1375-1376. The NMHBA comment also alleges that New Mexico can qualify for American Recovery and Reinvestment Act funds even if the Code adopted in 2010 is not in place, and that

the "consensus of NMHBA members" is that the 2010 Code will add $2,500 to the cost of each new home, which will cause building projects to be cancelled and adversely affect the construction industries.[12] Finally, the NMHBA comment urges that the Commission either repeal the Code adopted in 2010 or amend it in specified ways. *Id.*

None of these allegations constitutes substantial evidence. First, the comment's assertion about competition between home builders in New Mexico and home builders elsewhere is conclusory, and is not supported by economic or other data or even anecdotal information about home building in the different locations. Second, the assertions about what Association "has heard" and the "consensus" of the Association members are uncorroborated hearsay. Third, the comment's assertions about eligibility for American Recovery and Reinvestment Act funds are not supported by any analysis of that Act or any explanation of its eligibility criteria. Similarly, the allegations about the effect of the Codes adopted in 2010 on the industry are conclusory and not supported by any data or studies.

For these reasons, none of the assertions presented in the NMHBA comment constitutes substantial evidence according to the standards enunciated in Ferguson-

[12] Similar comments were submitted by the Home Builders Association of Lincoln County (RP 264, 1384), South Eastern NM Home Builders Association (RP 276, 1396), and Building Industry Association of Southern New Mexico (RP 279).

Steere Motor Company v. State Corporation Commission, *supra*, Descheenie v. Bowen, *supra*, and Dalton v. U.S. Department of Labor, *supra*.

The assertions in other written comments also are not substantial evidence. The comment submitted by NAIOP (RP 288-290) alleges that real estate and construction industry groups opposed passage of the 2010 Building Codes, but that does not mean that there was substantial evidence for the proposition that those Codes should not have been adopted. The NAIOP comment also asserts that other jurisdictions in the southwest have not adopted the 2010 Building Codes, but there is no legal or other mandate that New Mexico codes conform to the codes adopted in those other states. In addition, the NAIOP comment sets forth three examples of enhanced energy conservation measures that allegedly increase costs or restrict materials and construction methods (RP 290), but the examples given are neither explained adequately nor supported by data or studies.

The first example involves an "HVAC Option", which may include "small packaged rooftop equipment" that requires "a SEER rating of 15 and furnaces with a thermal efficiency of 92%". The comment provides no explanation of what these terms mean or of the example's conclusion – that products meeting these requirements will be "more expensive, harder to find, and in some cases, not available." RP 290. That is an unsupported conclusion; the example provides no

empirical data or industry studies to support the proposition that these products will be hard or impossible to find.

The second example is similar. It discusses a "lighting power reduction package" that allegedly would violate "state standards for school lighting" (*Id.*), but there is no explanation of what those standards are or why they would be violated. The third example used by NAIOP also lacks analysis. It asserts that a requirement that 3% of a building's energy be produced on site from renewable sources is not practical. This assertion is based on two allegations – that wind is not available in most areas of New Mexico and that solar power may be "problematic" because of land availability, building size, and design issues. *Id.* However, there is no definition of what is meant by "most areas of New Mexico"; there also is no explanation of why land availability, building size, and design issues will make solar power problematic. These are conclusory allegations that are unsupported by any analysis. They are not evidence that a reasonable mind would accept as a basis for making a decision, and they therefore do not constitute substantial evidence as defined by the courts in Ferguson-Steere Motor Company v. State Corporation Commission, *supra*, Descheenie v. Bowen, *supra*, and Dalton v. U.S. Department of Labor, *supra*.

Similarly, the comment submitted by Rick Davis, President of R.E. Davis Construction (RP 567, 1262) asserts without any analysis that the 2010 Codes will

make New Mexico one of the most expensive places to build or remodel in the country and that the 2010 Codes would provide "little energy savings." The comment fails, however, to provide data on comparative building costs or to indicate what factors other than the Codes make up those costs. The comment fails as well to explain what is meant by "little energy savings" or why energy savings resulting from the 2010 Codes would be limited. *Id.* These conclusory allegations without analysis or data do not constitute substantial evidence. Descheenie v. Bowen, *supra*.

The other comments in the Record Proper that include arguments for adoption of the 2011 Building Codes also do not provide substantial evidence for that position. As examples, the comments submitted by Roxanne Rivera-Wiest, President of ABC Contractors (RP 151), Joe Dudziak, Chapter President, Northern New Mexico Association of Public Safety Officials an ICC Chapter (RP 155), Vicki Mora, Chief Executive Officer, Associated General Contractors – New Mexico Branch (RP 161), and Kelle Senyé, ARM, Executive Director, Apartment Association of New Mexico (RP 238), assert that the 2011 Building Codes provide sufficient energy savings, that other states have codes that are less stringent than the 2010 Building Codes, and that adoption of the 2011 Building Codes is necessary to promote the construction industry. However, none of those comments presents data or research to support the allegation that the 2011 Building Codes

will result in energy savings or that the construction industry will be assisted by adoption of those Codes. In addition, none of those comments demonstrates that New Mexico cannot enact codes that are more stringent than other states' codes.

Finally, the oral comments made at the public meetings also fail to provide evidence that could be a basis for the Commission's Decision. At the Albuquerque public meeting, Peter Merrill pointed to a decrease in the number of building permits between 2006 and 2011, and stated that measures need to be taken to get the construction industry "moving again". He provided no evidence, however, to link building codes and the number of building permits issued; nor did he demonstrate that the adoption of the 2011 Building Codes would cause the construction industry "to move". RP 45 Albuquerque – 1, Part 1@13:30. Blake Barnett asserted at the Farmington public hearing that the last thing that builders need is more regulations, but he did not explain why. He also said that hundreds of people shared his concerns, but he provided no corroboration or other evidence for that allegation. RP 49 Farmington 1,2,3,4 TR 1@22:46.

c. The petition urging adoption of the 2011 Building Codes does not present substantial evidence.

The Record Proper includes a petition that contains the names of 378 people who assert that the 2011 Building Codes should be adopted. RP 1263; 1265. Almost 250 of those individuals provided no evidence whatsoever because their names are not accompanied by any statement of reasons why the 2011 Building

Codes should be adopted.[13] In addition, most of the comments that were provided in the petition were general statements about the cost of the 2010 Building Codes and the need to make New Mexico and the construction industry in the state economically competitive. *See, e.g.*, comments accompanying names of Chris Willadsen (R.P. 1266), D.C. Durano (R.P. 1267), Donna J. Bohannan (R.P. 1270), Paul L. Silverman (*Id.*), Michael J. Salmon (R.P. 1272), Robert M. Stockton (R.P. 1273), Chris Anderson (*Id.*), Richard Czoski (R.P. 1277), Tammy Marksberry (R.P. 1278), James C. Manatt, Jr. (R.P. 1281), Ricky E. Davis (R.P. 1282),Steven W. Smith (R.P. 1284-1285), Melissa Padilla-Gomez (R.P. 1287), Maria Guy (R.P. 1288), and Gary J. Martinez (R.P. 1290). All of these comments consist of conclusory statements that are not supported by data, research, or even anecdotal information. The comments therefore do not constitute substantial evidence according to the standards enunciated by the courts in Ferguson-Steere Motor Company v. State Corporation Commission, *supra*, Descheenie v. Bowen, *supra*, and Dalton v. U.S. Department of Labor, *supra*.

d. None of the comments or their authors was subject to analysis or cross-examination.

Finally, none of the written or oral comments favoring adoption of the 2011 Building Codes was subject to any examination or analysis by members of the

[13] Another half dozen spaces on the petition also provided no rationale for re-adoption of the 2011 Building Codes; those spaces were filled by individuals who are listed as being anonymous.

Commission or by anyone else. There was no opportunity for participants in the process to respond to comments, and the Record contains no indication that any of the Commissioners sought that opportunity for themselves. Similarly, participants in the process had no opportunity to question the qualifications or credibility of the authors of comments or to address the reasoning or data provided in the comments, and no members of the Commission sought that opportunity. The Record Proper indicates that the Appellees' proceeding included no opportunities to test the truth or reasoning of comments favoring adoption of the 2011 Building Codes or to question the qualifications of the comments' authors.

C. The Appellees' conduct of their administrative proceedings violated the Uniform Licensing Act's requirements for public hearings.

The manner in which the administrative proceeding below was conducted would have made submission of substantial evidence difficult at best. Written and oral comments were due only 35 days after notice of the public comment period was published. RP 44. Moreover, the public meetings conducted by the Appellees violated two specific mandates of the Uniform Licensing Act for public hearings concerning proposed regulations.

1. The Appellees violated the Uniform Licensing Act's requirement that people speaking at public hearings on proposed regulations be subject to cross-examination.

The Uniform Licensing Act requires that people be able to cross-examine witnesses testifying at public hearings on proposed regulations. The Act states:

> At the hearing, the board shall allow all interested persons reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.

NMSA 1978 §61-1-29.D.

During the public meetings conducted by the Appellees below, however, that opportunity was not provided. In the first place, neither the notice of the public hearings (RP 44) nor the Presiding Employees who conducted the public hearings informed people participating in the hearings that they would have the opportunity to cross-examine other speakers. *See* opening remarks of the Presiding Employee at the start of each of the public hearings, RP 45, Albuquerque – 1, Part 1; RP 49, Farmington – 1,2,3,4, TR 3; RP 47, Las Cruces – 1, Part 1, TR 1; RP 49, Roswell TR 4. Moreover, when Tod Westic attempted to question another speaker at the Albuquerque hearing, Mr. Westic was not permitted to do so. RP 45, Albuquerque – 1, Part 1@34:04. The Appellees' administrative process therefore violated this requirement of the Uniform Licensing Act.

2. The conduct of the public meetings violated the Uniform Licensing Act's provision for sworn testimony at public hearings.

The section of the Uniform Licensing Act quoted above also makes clear that presentation of arguments, data, and views at public hearings on proposed regulations is to be provided through testimony. To "testify" is to give information under oath or affirmation. *See* NMRA 11-603. As was

pointed out above (pages 7-8 *supra*), however, none of the oral comments that was made in the Appellees' public meetings was provided under oath or affirmation. That public meeting process therefore violated the Uniform Licensing Act.

D. Violation of the prohibition against agency action that is arbitrary, capricious, or an abuse of discretion.

1. The Uniform Licensing Act and court decisions prohibit adoption of regulations in an arbitrary and capricious manner.

The Uniform Licensing Act provides for reversal of Commission decisions to adopt regulations if those decisions are arbitrary, capricious, or an abuse of discretion. NMSA 1978 §61-1-31.C(1). New Mexico courts have ruled that agency decisions are arbitrary and capricious if they are not based on a rational review of the evidence. Santa Fe Exploration Company v. Oil Conservation Commission, 114 N.M. 103, 115, 835 P.2d 819, 831 (N.M. 1992). *See also* Oil Transport Company v. New Mexico State Corporation Commission, 110 N.M. 568, 573, 798 P.2d 169, 174 (N.M. 1990).

2. The Commission did not conduct a rational review of the evidence in the Record.

The Statement or Reasons reveals that the Commission did not conduct a rational review of the evidence in the Record. The Statement of Reasons does not cite to the Record, and to the extent that it refers to the Record, the Statement of Reasons mischaracterizes some Record items, makes inaccurate statements about

others, and relies on assertions that are irrelevant to the Decision, including arguments against the 2010 Building Codes. *See* pages 16-17, *supra*. None of these mischaracterizations, inaccurate statements, irrelevant assertions, or arguments concerning the 2010 Building Codes indicates that May 2013 Decision was based on the Record.

In addition, none of the correspondence and comments submitted to the Commission constitutes substantial evidence as that phrase has been interpreted by the courts. A rational review of the Record would have revealed that.

E. The Commission's May 2013 Decision violated the Solar Collectors Act and therefore the Uniform Licensing Act.

In 2007, the New Mexico Legislature enacted §71-6-7.1 of the New Mexico Solar Collectors Act, NMSA 1978 §§71-6-4 *et seq*. That section mandates that the State Energy, Minerals, and Natural Resources Department, the Division, and the Commission shall jointly promulgate rules, standards, or codes that:

> establish requirements for new construction that will accommodate the installation of solar collectors to or on the new construction after that construction is otherwise complete ....

NMSA 1978 §71-6-7.1.

In accordance with that mandate, the Commission enacted NMAC §14.7.6.15.C.404.3 as part of the New Mexico Energy Conservation Code in 2010. That section required that each one and two family dwelling unit be built with a "listed non-flexible ¾ inch minimum metallic electrical raceway" to either the roof

for roof-mounted photovoltaic equipment or an outside wall for remote mounted photovoltaic equipment. *Id.* However, that provision was not carried over either to any of the 2011 Building Codes. RP 1710-1734. The Commission's failure to enact that provision as part of the 2011 Building Codes violated the mandate of section 71-6-7.1 NMSA 1978 of the Solar Collectors Act.

Moreover, the Uniform Licensing Act provides that the Court of Appeals shall reverse the adoption of regulations that are contrary to law. NMSA 1978 §61-1-31.C(2). The Commission's failure to comply with this requirement of the Solar Collectors Act renders the Commission's re-adoption of the 2011 Building Codes contrary to law, and the re-adoption of those Codes therefore should be reversed pursuant to section 61-1-31.C of the Uniform Licensing Act.

F. The Commission did not have jurisdiction when it re-adopted the 2011 Building Codes.

Finally, the Commission's May 2013 Decision should be reversed because the Commission did not have jurisdiction at the time that it made that Decision.

The May 2013 Decision was part of the administrative proceeding that was litigated in Court of Appeals case number 31383. However, case number 31383 was still pending in the Court of Appeals when the Commission made its Decision on May 15, 2013 because the Court had granted rehearing but had not ruled on the rehearing motion. In addition, the Court of Appeals had not yet issued its mandate

returning the matter to the Commission. The Commission therefore had no jurisdiction when it acted on May 15, 2013.

1. The Court of Appeals still had jurisdiction over this matter when the Commission re-adopted the 2011 Building Codes.

Rule 12-404 NMRA of the Rules of Appellate Procedure makes clear that this matter was still in the jurisdiction of the Court of Appeals on May 15, 2013 when the Commission re-adopted the 2011 Building Codes. Rule 12-404.A NMRA provides in part:

> A. Motion; when filed. A motion for rehearing may be filed within fifteen (15) days after the filing of the appellate court's disposition, or any subsequent modification of its disposition, unless the time is shortened or enlarged by order. ... If a motion for rehearing is granted, the appellate court clerk shall give notice thereof and any party who has not filed a brief on rehearing may, within fifteen (15) days after notice, file a brief addressed to the issues on rehearing.

NMRA 12-404.A.

In addition, Rule 12-404.C NMRA provides:

> C. Effect on decision or opinion. The granting of a motion for rehearing shall have the effect of suspending the decision or opinion of the court until final determination by the appellate court.

NMRA 12-404.C.

The Court of Appeals' Opinion was issued on April 4, 2013. RP 1759. On April 19th, the Appellees filed a Motion for Rehearing. The Court of Appeals granted rehearing on April 23rd when the Court issued its first Order on Motion for Rehearing (Exhibit 1) directing the Appellants to file a responsive brief by May 3rd.

The Court of Appeals then denied the Motion for Rehearing on May 30th when the Court issued its second Order on Motion for Rehearing. Exhibit 2.

Pursuant to Rule 12-404 NMRA.C, the Court of Appeals' Opinion was suspended from April 23rd until May 30th, and the Court of Appeals still had jurisdiction over the proceeding during that time. For that reason, the Court still had jurisdiction when the Commission made its Decision on May 15th.

2. The Commission lacked jurisdiction because the Court of Appeals had not issued its mandate.

The courts in New Mexico and elsewhere have ruled that an appeal divests a lower tribunal of jurisdiction. The New Mexico Supreme Court stated this position in Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 241, 824 P.2d 1033, 1043 (1992), Corbin v. State Farm Insurance Company, 109 N.M. 589, 592, 788 P.2d 345, 348 (1990), and State ex rel. Bell v. Hansen Lumber Company, Inc., 86 N.M. 312, 312, 523 P.2d 810, 810 (1974). The New Mexico Court of Appeals has taken the same position in Luna v. Homestake Mining Company, 100 N.M. 265, 267, 669 P.2d 741, 743 (Ct. App. 1983).

Courts in other states and federal courts also have applied this rule when the lower tribunal is an administrative agency. *See* Colorado Anti-Discrimination Commission v. Continental Airlines, 143 Colo. 590, 594, 355 P.2d 83, 85-86 (1960), Westside Charter Service, Inc. v. Gray Line Tours of Southern Nevada, 99 Nev. 456, 459, 664 P.2d 351, 353 (1983), Doctors Nursing & Rehabilitation Center

v. Sebelius, 613 F.3d 672, 680-681 (7th Cir. 2010), Goede v. Colvin, 2013 U.S. Dist. LEXIS 57638, p. 2. (E.D., CA, 2013).

Finally, the New Mexico Court of Appeals has indicated that jurisdiction is not returned to the lower tribunal until the appellate court's mandate is issued. State v. Doe, 91 N.M. 356, 357, 573 P.2d 1211, 1212 (Ct. App. 1977), and Bobrick v. State, 83 N.M. 657, 657, 495 P.2d 1104, 1104 (Ct. App. 1972). The Court of Appeals did not issue its mandate in case number 31383 until July 10, 2013. Exhibit 3. The Commission therefore had no jurisdiction prior to July 10th.

III. Conclusion

The Commission has failed to explain the basis for its Decision in the Record, and the Decision is not supported by substantial evidence in the Record as a whole. In addition, the Decision was arbitrary, capricious, and an abuse of discretion, and the administrative process conducted by the Appellees violated the Uniform Licensing Act's procedural requirements. The Decision also violated the Solar Collectors Act and the Uniform Licensing Act. Finally, and the Commission had no jurisdiction when it made its Decision. The Court of Appeals therefore should vacate the Decision to re-adopt the 2011 Building Codes, and rule that it has no force or effect.

Dated: December 27, 2013.

NEW MEXICO
ENVIRONMENTAL LAW CENTER

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 December 27, 2013 copies of this Brief in Chief were mailed to:

James McKay
Justin Woolf
Regulation and Licensing Department
2550 Cerrillos Road
Santa Fe, N.M. 87505

Attorney for the New Mexico Construction Industries Division and for Clay Bailey, Acting Director of the New Mexico Construction Industries Division

Luis Carrasco
Assistant Attorney General
Office of the Attorney General
P.O. Drawer 1508
Santa Fe, N.M. 87504-1508

Attorney for the New Mexico Construction Industries Commission

Douglas Meiklejohn

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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,

Appellants,

v.

NO. 31,383, consolidated with 31,384, 31,385, 31,386

THE NEW MEXICO CONSTRUCTION INDUSTRIES COMMISSION, the NEW MEXICO CONSTRUCTION INDUSTRIES DIVISION, and RICHARD TAVELLI,

Appellees.

ORDER ON MOTION FOR REHEARING

This matter came before the full original panel for consideration of the Motion for Rehearing filed by the Appellees. Appellants shall file a responsive brief on or before May 3, 2013.

Upon receipt of all briefing, the Court in its discretion will set the matter for oral argument.

MICHAEL D. BUSTAMANTE, Judge.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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,

Appellants,

v.

NO. 31,383, consolidated with 31,384; 31,385; and 31,386

THE NEW MEXICO CONSTRUCTION INDUSTRIES COMMISSION, the NEW MEXICO CONSTRUCTION INDUSTRIES DIVISION, and RICHARD W. TAVELLI,

Appellees.

Michael D. Bustamante, Presiding Judge
Linda M. Vanzi, Judge
Timothy L. Garcia, Judge

ORDER ON MOTION FOR REHEARING

Bustamante, Judge.

THIS MATTER came on for review of the Appellees' Motion for Rehearing or, in Addition or in the Alternative, for Clarification. The motion was considered by each of the members of the original panel. The panel has unanimously determined to deny the motion for rehearing.

IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

36347

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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,

Appellants,

vs.

No. 31,383 consolidated With 31,384; 31,385 and 31,386

THE NEW MEXICO CONSTRUCTION INDUSTRIES COMMISSION, THE NEW MEXICO CONSTRUCTION INDUSTRIES DIVISION, and RICHARD W. TAVELLI,

Appellees.

MANDATE TO DISTRICT COURT CLERK
(Applicable items are indicated by an "X" below.)

1. _x_ Attached is a true and correct copy of the original decision entered in the above-entitled cause.

2. _x_ This decision being now final, the cause is remanded to you for any further proceedings consistent with said decision.

3. ___ Writ of Certiorari having been issued by the New Mexico Supreme Court and their decision being final, this cause is remanded to you for any further proceedings consistent with said Supreme Court decision attached hereto.

4. _x_ Cost Bill is assessed as follows:

Appellants are awarded costs on appeal as follows:

Filing Fee	$ 500.00
Total	$ 500.00

ATTEST: A true copy
Clerk of the Court of Appeals
of the State of New Mexico

By direction of and in the name of the Chief Judge of the Court of Appeals, this 10th day of July, 2013.

(SEAL)

Wendy F. Jones

Wendy F. Jones, Chief Clerk of the Court of Appeals of the State of New Mexico

cc: Counsel w/out attachments

EXHIBIT
tabbies
3