

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., the Sierra Club, Tammy  
Fiebelkorn, Faren Dancer, Sanders  
Moore, Erika Wolf, and Sommer Batterson,

COURT OF APPEALS OF NEW MEXICO  
FILED

JAN 19 2012

Wendy E. Jones

Appellants,

No. 31383

v.

(consolidated with cases  
31384, 31385, and 31386)

the New Mexico Construction Industries  
Commission, the New Mexico Construction  
Industries Division, and Richard W. Tavelli,

Appellees.

THE APPELLANTS' BRIEF IN CHIEF

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Statement as to the Transcript of Proceedings:

The transcript of proceedings is provided in the Record Proper on several disks containing digital recordings. References to the transcript are to the disk, to the track on the disk, and to the time from the beginning of the disk at which the remarks occur. No track is indicated for disks on which there is only one track.

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IN THE COURT OF APPEALS  
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Southwest Energy Efficiency Project, *et al.*,

Appellants,

v.

No. 31383

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Commission, *et al.*,

Appellees.

THE APPELLANTS' BRIEF IN CHIEF

This is the Brief in Chief of the 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).

I. Summary of proceedings

A. Nature of the case

These are appeals<sup>1</sup> from four decisions of the New Mexico Construction Industries Commission (the Commission), the New Mexico Construction Industries Division (the Division), and Richard W. Tavelli, the Director of the Division (collectively the Appellees). First, the Appellees

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<sup>1</sup> This case includes four consolidated appeals. They are case numbers 31383, 31384, 31385, and 31386.

decided to repeal the New Mexico Electrical Code promulgated in 2010<sup>2</sup> and to replace it with a different New Mexico Electrical Code (NMAC §§14.10.4.1 *et seq.*). Second, the Appellees decided to repeal the New Mexico Energy Conservation Code promulgated in 2010 and to replace it with a different New Mexico Energy Conservation Code (NMAC §§14.7.6.1 *et seq.*). Third, the Appellees decided to repeal the New Mexico Mechanical Code promulgated in 2010 and to replace it with a different New Mexico Mechanical Code (NMAC §§14.9.2.1 *et seq.*). Fourth, the Appellees decided to amend the 2009 New Mexico Plumbing Code (NMAC §§14.8.2.1 *et seq.*). The Codes adopted by these decisions are referred to collectively as the “2011 Replacement Codes”.

B. Course of proceedings below

1. The Appellees’ decision to consider the Code changes.

In April of 2011, the Commission determined that it would consider changes proposed by the Division to the New Mexico Electrical Code, the New Mexico Energy Conservation Code, the New Mexico Mechanical

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<sup>2</sup> The decisions to adopt the Codes promulgated in 2010 were made in 2010. Consideration of those Codes began in 2009, and they are referred to in some of the comments in the Record Proper as the “2009 Codes”. The Energy Conservation Code adopted in 2010 is also referred to as the “New Mexico Energy Conservation Code” or “NMECC”. The 2011 Replacement Energy Conservation Code that was adopted in 2011 is referred to in comments as the “International Energy Conservation Codes” or “IECC”.

Code, and the New Mexico Plumbing Code. Specifically, the Commission decided at its April, 2011 meeting that it would consider the proposed changes, and that it would provide opportunities for public comments on those proposed changes. Minutes of the Commission's April 22, 2011 meeting, Record Proper (RP)<sup>3</sup> 26-29.

2. Public comments.

Members of the public commented on the proposed Code changes in writing (RP 53-1672) and orally at four public hearings<sup>4</sup> held simultaneously on June 2, 2011 in Albuquerque, Farmington, Las Cruces, and Roswell.<sup>5</sup>

a. 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 about the alleged impacts that enacting the 2011 Replacement Codes would have on the construction industry, costs to

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<sup>3</sup> The Record Proper, which includes the entire Record, consists of two binders. References are to the page numbers in the binders.

<sup>4</sup> Although they are referred to as "public hearings", the meetings conducted by the Appellees lacked several features of hearings. *See* pages 32-34 *infra*.

<sup>5</sup> Recordings of the hearings are at pages 45-49 of the Record Proper.

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<sup>6</sup>); 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 Codes enacted in 2010. *See* comment of Jack C. Milarch, Jr., Executive Vice President/CEO and Mike Buechter, 2011 NMHBA President, New Mexico Home Builders Association, RP 255, 1375. In addition, some comments

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<sup>6</sup> The Record Proper includes duplicates of many of the written comments that were submitted.

included supporting material. *See* comment of Joyce Westerbur, RP 179.

There also were two petitions submitted concerning the proposed Code changes. RP 246, 534.

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

b. Oral comments

i. Conduct of the public hearings.

The Appellees published an announcement of the public hearings. RP 42-44. The public notice stated that people commenting on the proposed rule changes would be able to express their opinions at the hearings. RP 44. 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 hearing was presided over by an employee of the Division (the Presiding Employee) who conducted the public hearing 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.<sup>7</sup> At the beginning of each hearing, the Presiding Employee announced that each speaker would be given 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 hearings. Also, at none of the public hearings 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 hearings 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.

ii. Oral comments

The oral comments made at the four public hearings 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.,*

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<sup>7</sup> Remarks on the disks are referred to by the minutes and seconds at which the remarks occurred because the disks have no counter mechanisms. The time at which specific remarks occurred vary depending upon aspects of the computer used to play the disks.

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 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 Codes adopted in 2010 and the 2011 Replacement 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 Codes or the 2011 Replacement Codes. *See, e.g.*, statement of Jack Milarch (RP 45, Albuquerque 1, Part 1, 8:42).

### 3. The Commission's decisions

The Commission voted to promulgate each of the 2011 Replacement Codes at its meeting on June 10, 2011. At that meeting, before the votes were taken on the Codes, Commission Chairman Randy Baker made a statement (RP 1686, CID CIC Meeting 6/10/2011 disk 2@ 33:45) in which he asserted that the members of the Commission were doing “what is best for New Mexico for the industry and the public at large”, and stated that the

Commission's decision was "a difficult one." Chairman Baker also pointed out, referring to the members of the Commission, that "we have had some discussion on trying to figure out exactly what the best solution is for the New Mexico Code." RP 1686, CID CIC Meeting 6/10/2011 disk 2@34:40.

After Chairman Baker made his remarks, Commissioner Don Kaufman made a motion to adopt the 2011 Replacement Energy Conservation Code. The motion was seconded by Commissioner Kenneth Wooten and passed with only one dissenting vote. Commissioner Don Kaufman then made a motion to adopt the 2011 Replacement Plumbing Code. The motion was seconded by Commissioner Kenneth Wooten, and also passed with one dissent. After that vote, Commissioner Don Kaufman made a motion to adopt the 2011 Replacement Mechanical Code, which was seconded by Commissioner Kenneth Wooten and passed with one dissenting vote. Following the vote on the 2011 Replacement Mechanical Code, the Commission voted to adopt the 2011 Replacement Electrical Code. The motion was made by Commissioner Don Kaufman. It was seconded by Commissioner Kenneth Wooten, and it too passed with only one dissent. RP 1686, CID CIC Meeting 6/10/2011 disk 2@ 35:40-37:15.

None of these motions was the subject of any discussion by the members of the Commission at the meeting on June 10, 2011. There was no

public deliberation about any of the motions; nor was there any indication that any of the Commissioners had reviewed the record before voting. Each of these motions was made, seconded, and voted upon by the members of the Commission without any discussion about the merits of the Code adopted in 2010 or the merits of the 2011 Replacement Code that were the subjects of the vote, without any reference to the written or oral comments received by the Commission, and without any reference to anything else in the record of the Commission proceeding. *Id.*

The draft minutes<sup>8</sup> of the Commission meeting on June 10, 2011 (the Draft June 10<sup>th</sup> Meeting Minutes), which were prepared before these appeals were filed,<sup>9</sup> confirm the lack of discussion by the Commission. Draft June 10<sup>th</sup> Meeting Minutes, 6. The final minutes of the June 10<sup>th</sup> Commission meeting (RP 1675-1681), which were prepared at the Commission meeting on July 27, 2011 after the appeals were filed, do not include Commission Chairman Baker's statement (RP 1680), but they do include his remarks about the numbers of people who supported and who opposed adoption of the 2011 Replacement Codes. *Id.* However, as the recording of the June

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<sup>8</sup> The draft minutes were not filed as part of the Record Proper, but were made part of the Record Proper by the Court's order dated October 19, 2011. The Court's order granted the Appellants' motion dated August 29, 2011.

<sup>9</sup> See Appellants' Memorandum in Support of Their Motion to Include Material in the Record Proper, dated August 29, 2011, pages 3-4.

10<sup>th</sup> meeting indicates, those remarks were not made during the June 10<sup>th</sup> meeting, and there was no discussion by the Commissioners during the June 10<sup>th</sup> meeting about the numbers of people who supported or opposed adoption of those Codes. RP 1686, CID CIC Meeting 6/10/2011 disk 2@ 35:40-37:15.

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

The Energy Conservation Code in effect before the adoption of the 2011 Replacement 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 2011 Replacement Energy Efficiency Code does not include that requirement (RP 14-16), and it also is not in any of the other 2011 Replacement Codes. RP 5, 7-12, 18-24.

5. Documentation of the Commission's decisions

Neither the Commission nor any of the other Appellees has issued any statement of reasons or other document explaining or providing justification for the Commission's decisions. The only documents in the Record Proper that address the Commission's decisions are the Draft June 10<sup>th</sup> Meeting Minutes, the final minutes of the Commission meeting on June 10, 2011 (RP 1675-1681), and the draft minutes of the Commission meeting on July 27,

2011.<sup>10</sup> RP 1738-1742. The Draft June 10<sup>th</sup> Meeting Minutes state only which Commissioner made and which Commissioner seconded each motion, and the vote on each motion. Draft June 10<sup>th</sup> Meeting Minutes, 6. That information also is in the final minutes; in addition, the final minutes include Commission Chairman Baker's statements about how many people supported and opposed the Commission's decisions. RP 1680.

C. Disposition below

On June 10, 2011, the Commission adopted the 2011 Replacement Codes. RP 1680, CID CIC Meeting 6/10/2011 Disk 2@ 35:40-37:15.

II. Argument

There are seven bases on which this Court should reverse the Appellees' decisions to adopt the 2011 Replacement Codes. First, the Appellees have failed to explain or provide reasons for those decisions.

Second, the Appellees have violated the requirement of the Uniform Licensing Act, NMSA 1978 §§61-1-1 *et seq.* that regulations not be against the weight of substantial evidence in the record. Third, because the Appellees' actions are not supported by substantial evidence in the record, those actions violated the prohibition set forth in the Uniform Licensing Act

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<sup>10</sup> The 2011 Replacement Codes and the cover sheets with which they were filed with the State Records Center also are in the Record Proper (RP 1694-1709; 1710-1735), but they do not state any basis for the Commission's decisions.

and in New Mexico court rulings against agency action on regulations that is arbitrary, capricious, or an abuse of discretion.

Fourth, the Appellees violated the requirement of the Open Meetings Act, NMSA 1978 §§10-15-1 *et seq.* that Commission decisions be made in open meetings. Fifth, the Appellees' adoption of the 2011 Replacement Codes without any provision for solar ready roofs violated the Solar Collectors Act, NMSA 1978 §§71-6-4 *et seq.*

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

Finally, violation of each of the above requirements means that the Commission's decisions were made in violation of the Uniform Licensing Act's prohibition against adoption of regulations in violation of law.

- A. The Appellees have failed to explain or provide reasons for their decisions.

The New Mexico courts have held on several occasions that administrative agencies must explain the reasons for their decisions so that reviewing courts can conduct meaningful review. *See, e.g., Continental Oil Company v. Oil Conservation Commission*, 70 N.M. 310, 321, 373 P.2d 809, 816 (N.M. 1962), *Fasken v. Oil Conservation Commission*, 87 N.M.

292, 294, 532 P.2d 588, 590 (N.M. 1975), 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), 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).

The rulings in Fasken v. Oil Conservation Commission and City of Roswell v. New Mexico Water Quality Control Commission are particularly relevant to this matter. In Fasken, the Court of Appeals reversed an order of the Oil Conservation Commission because that Commission had not stated the reasons for its ultimate findings. The Court stated:

In cases where the sufficiency of the Commission's findings is in issue or their substantial support is questioned ... the following must appear:

...

B. Sufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings. ...

Such findings are utterly lacking here and reversal is thereby required. We do not have the vaguest notion of how the Commission reasoned its way to its ultimate findings.

87 N.M. 294, 532 P.2d 588, internal citations and quotation omitted.

Similarly, in the City of Roswell case, the Court of Appeals reversed the adoption of regulations by the Water Quality Control Commission

because that Commission had not indicated why it made the decision at issue. The Court of Appeals stated:

This record reveals only the notice of the public hearing, the testimony of the various experts and others, some exhibits, and the regulations. We have no indication of what the [Water Quality Control] Commission relied upon as a basis for adopting the regulations. ... These regulations are conclusions without reasons.

84 N.M. 565, 505 P.2d 1241, internal citations and quotation omitted.

The Record Proper here is very similar to that in the Fasken and City of Roswell cases. As was pointed out on pages 10-11 above, the Record Proper in this matter contains no statement of the reasons for the decisions made by the Commission, of the evidence relied upon by the Commission, or of the law that the Commission purported to follow in making its decisions. The recording of the June 10, 2011 Commission meeting at which the decisions were made reveals that there was no discussion at the meeting among the Commissioners about why those decisions were made. RP 1686, CID CIC Meeting 6/10/2011, disk 2@ 35:40-37:15. The only communication other than the votes on the 2011 Replacement Codes was Commission Chairman Baker's statement summarized on pages 7-8 *supra* and quoted on page 30 *infra*. *Id.*

The Draft June 10<sup>th</sup> Meeting Minutes confirm the absence of any discussion of reasons for the Commission's actions. Those Minutes provide

only the motions and the votes for adoption of the 2011 Replacement Codes. Draft June 10<sup>th</sup> Meeting Minutes, 6. The only material added by the final minutes of the June 10<sup>th</sup> meeting is Commission Chairman Baker's remarks about the numbers of people who favored and who opposed the changes that were adopted by the Commission. RP 1680. However, Chairman Baker added those remarks to the final minutes of the June 10<sup>th</sup> meeting at the Commission meeting on July 27<sup>th</sup> (RP 1738-1739), more than a month and a half after the June 10<sup>th</sup> meeting. In addition, there is no indication that the Commission relied upon those numbers in making its decisions.

Because the Appellees have provided no basis for the Commission's actions, the adoption of the 2011 Replacement Codes should be reversed.

- B. The Record Proper does not provide substantial evidence for the adoption of the 2011 Replacement Codes.
  - 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.<sup>11</sup> 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

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<sup>11</sup> The Uniform Licensing Act is made applicable to the Appellees by NMSA 1978 §61-1-2.A(1).

record.

NMSA 1978 §61-1-31.C.

The Appellants are not aware of any rulings concerning adoption of regulations by these Appellees pursuant to the Uniform Licensing Act, but New Mexico courts have ruled in other contexts that administrative 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 involves 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 presented by these appeals therefore is whether there is substantial evidence in the record as a whole to support the Commission's decisions. 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 (10<sup>th</sup> Cir. 1988). Evidence that is uncorroborated hearsay or rumor 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 or if it is overwhelmed by other evidence. Dalton v.

U.S. Department of Labor, 58 F.App'x. 442, 445-446 (10<sup>th</sup> Cir. 2003);

Descheenie v. Bowen, *supra* 850 F.2d at 628.

2. The material in the Record Proper does not constitute substantial evidence that supports the Commission's decisions.
  - a. Some of the written comments consist of requests or conclusory allegations only.

In this matter, the Commission's decisions are not supported by substantial evidence in the Record Proper. Some of the written and oral comments that advocated adoption of the 2011 Replacement 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](mailto:nancy@foreclosurebrokers.us)) and Real Estate for Sale both state:

Roll back the NM Energy Efficiency Building Code

RP 170, 1418.

Similarly, the comment from Irma ([Irma@landhomes.net](mailto: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 hearings are similar. For example, Dennis Ivie stated at the Farmington public hearing 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. As another example, an unidentified speaker at the Las Cruces public hearing 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 decisions. 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.<sup>12</sup> 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.

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<sup>12</sup> 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).

For these reasons, none of the assertions presented in the NMHBA comment constitutes substantial evidence according to the standards enunciated in Ferguson-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 Codes adopted in 2010, 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 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 Replacement 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 Replacement Codes provide sufficient energy savings, that other states have codes that are less stringent than the Codes adopted in 2010, and that adoption of the 2011 Replacement Codes is necessary to promote the construction industry. However, none of those comments presents data or research to support the allegation that the 2011 Replacement 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 is prohibited from enacting codes that are more stringent than the codes in other states.

Finally, the oral comments made at the public hearings also fail to provide evidence that could be a basis for the Commission's decisions. At the Albuquerque public hearing, 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 Replacement 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 Codes does not present substantial evidence.

The Record Proper includes as well a petition that contains the names of 378 people who assert that the 2011 Replacement 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 Replacement Codes should be adopted.<sup>13</sup> In addition, most of the comments that were provided in the petition were general statements about the cost of the codes that were adopted in 2010 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.

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<sup>13</sup> Another half dozen of the spaces on the petition also provide no rationale for adoption of the 2011 Replacement Codes; those spaces were filled by individuals who are listed as being anonymous.

1290). All of these comments consist of statements of conclusions 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 Replacement Codes was subject to any examination or analysis by members of the Commission or by anyone else. There was no opportunity for participants in the process to respond to comments, and the Record Proper 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 Replacement Codes or to question the qualifications of the comments' authors.

C. The Commission's decisions violated the prohibition against action that is arbitrary, capricious, or an abuse of discretion.

1. The Uniform Licensing Act prohibits 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). The Commission's decisions at issue here were not based on such a review, and those decisions therefore should be reversed.

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

a. The Record Proper contains no evidence of a rational review of the evidence.

There is no evidence in the Record Proper that the Commission members conducted any review of evidence or anything else in this matter. The Commission made its decisions to adopt the 2011 Replacement Codes at its meeting on June 10, 2011. Prior to the votes on those decisions,

Commission Chairman Randy Baker made a statement asserting that the members of the Commission were acting in the best interests of New Mexico, the construction industry, and the public, addressing discussions that the Commissioners had about what they should do, and alleging that the Commissioners' decisions were difficult ones. RP 1686, CID CIC Meeting 6/10/2011 disk 2@34:40. Following that statement, Commissioner Don Kaufman made four separate motions, one for adoption of each of the 2011 Replacement Codes. Each of those motions was seconded by Commissioner Kenneth Wooten and each motion passed with one dissenting vote. RP 1686, CID CIC Meeting 6/10/2011 disk 2@ 35:40-37:15.

There was no discussion about any of these motions or votes during the June 10<sup>th</sup> meeting. There also was no statement or other indication on the record that members of the Commission had reviewed anything in the record before the meeting. *Id.* The members of the Commission voted on each of the motions without any discussion about the basis for the motion. The Commissioners also did not discuss the merits of each 2010 Code that was being considered or the merits of the 2011 Replacement Code that was being enacted. *Id.* Moreover, the absence of any discussion or review of the record by the members of the Commission is confirmed by the Draft June

10<sup>th</sup> Meeting Minutes, which make no mention of discussion, review of the Record Proper, or reference to anything in the Record Proper.

- b. A rational review of the Record Proper would have revealed the absence of substantial evidence supporting the Commission's decisions.

As is explained on pages 17-26 above, the Record Proper does not contain substantial evidence that supports the decisions made by the Commission. Some of the comments that were made during the public comment process and that urged the adoption of the 2011 Replacement Codes set forth requests and general conclusions. *See* pages 17-19, 25-26, *supra*. More extensive comments made during that process lack the explanations, data, research, and supporting material that are needed for the comments to constitute substantial evidence. *See* pages 19-25, *supra*. A review of the Record Proper by the Commission would have revealed the absence of substantial evidence to support adoption of the 2011 Replacement Codes, and the Commission's decisions to adopt those Codes indicates that the Commission members did not conduct such a review.

D. The Commission's actions violated the Open Meetings Act.

The New Mexico Open Meetings Act, NMSA 1978 §§10-15-1 *et seq.* mandates that state agencies make their decisions in meetings that are open to the public. NMSA 1978 §10-15-1.A. The Open Meetings Act also

provides that decisions of state agencies that are not made in open meetings are invalid. NMSA 1978 §10-15-3.A.

In this matter, the Record Proper indicates that the members of the Commission did not discuss their decisions at the June 10, 2011 meeting before the members voted on those decisions at that meeting. RP 1686, CID CIC Meeting 6/10/2011 disk 2@ 35:40-37:15. Not only was each vote taken without any discussion, but the remarks made by Chairman Baker make clear that the members of the Commission discussed the 2011 Replacement Codes and made their decisions before the consideration of those Codes at the June 10<sup>th</sup> meeting. In his statement preceding the votes on the 2011 Replacement Codes, Chairman Baker stated:

So with that I just wanted to make everybody aware that we have had some discussion on trying to figure out exactly what the best solution is for the New Mexico Code. ... But I think it is important to point out that there were some areas that we were concerned with. This was handed down to us from a previous administration and I just want to make sure you all understand that it is difficult for us to make these decisions.

RP 1686, CID CIC Meeting 6/10/2011 Disk 2@ 34:40.

Chairman Baker could hardly have addressed the Open Meetings Act issue more directly. He stated that members of the Commission “have had some discussion”, that there “were areas [they] were concerned with” and that it is “difficult for [them] to make these decisions.” These remarks,

coupled with the absence of any discussion about the issues before the votes on the 2011 Replacement Codes, indicate clearly that the Commission members discussed the issues and made their decisions on the 2011 Replacement Codes before those Codes were considered in public in the June 10<sup>th</sup> Commission meeting.

The Commission's failure to make its decisions at the June 10, 2011 meeting violated the Open Meetings Act. NMSA 1978 §10-15-1. For that reason, the Commission's decisions are invalid. NMSA 1978 §10-15-3.A.

E. The Commission's adoption of the 2011 Replacement Codes violated the Solar Collectors 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 the 2011 Energy Conservation Code or to any of the other 2011 Replacement Codes. RP 1710-1734.

The Commission’s failure to enact that provision as part of the 2011 Replacement Codes violated the mandate of section 71-6-7.1 NMSA 1978 of the Solar Collectors Act.

- F. The Appellees’ proceeding violated the Uniform Licensing Act’s provisions for conduct of public hearings in rule making proceedings.
  - 1. The conduct of the public hearings violated the Act’s provision for sworn testimony at public hearings.

The Uniform Licensing Act requires that people expressing their views at public hearings on proposed regulations provide sworn testimony.

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.

This provision indicates 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 5-6 *supra*), however, none of the oral comments that were made in the Appellees’ public hearings was provided under oath or affirmation. That public hearing process therefore violated the Uniform Licensing Act.

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

The section of the Uniform Licensing Act quoted above explicitly mandates that individuals participating in hearings conducted as part of Commission rulemaking proceedings have the opportunity to question other people speaking at those hearings. That opportunity was not provided in the public hearings conducted by the Appellees. Pages 5-7, *supra*.

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.

For these reasons, the Appellees' public hearing process violated the Uniform Licensing Act in this respect also.

- G. The Commission's decisions violated the Uniform Licensing Act's prohibition against adoption of regulations in violation of law.

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 Appellees' violation of each of the requirements outlined above renders the adoption of the 2011 Replacement Codes contrary to law, and the adoption of those Codes therefore should be reversed pursuant to section 61-1-31.C of the Act.

### III. Conclusion

The Appellees have provided no statement of the reasons for the Commission's decisions to adopt the 2011 Replacement Codes. In addition, those decisions were not based upon substantial evidence in the Record Proper, and they were arbitrary, capricious, and abuses of discretion. The manner in which the decisions of the Commission were made also violated the Open Meetings Act and the Uniform Licensing Act's requirements, and

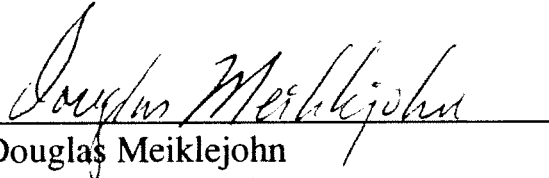
the resulting 2011 Replacement Codes violate the Solar Collectors Act.

Finally, for each of these reasons, the Commission's enactment of the 2011 Replacement Codes violated the Uniform Licensing Act's prohibition against adoption of regulations that are contrary to law.

For each of these reasons, the Court of Appeals should reverse the Commission's decisions enacting the 2011 Replacement Codes. The Court of Appeals should vacate all of those four decisions, and rule that they have no force or effect.

Dated: January 19, 2012.

NEW MEXICO  
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A handwritten signature in cursive script, reading "Douglas Meiklejohn", is written over a horizontal line.

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Certificate of Service

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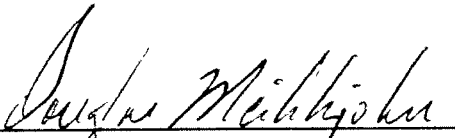
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