

Sandoval County Comprehensive Zoning Ordinance Revision

Ordinance No. 10-11-18.7A, Section 10D.13 (Oil and Gas
Exploration and Production)

Presentation #1
P&Z Commission
July 11, 2017

Addressing the inadequacy of developing a comprehensive ordinance

- Proceeding without Proper Citizen Input
 - Sandoval County citizenry, including the 12 Pueblos and Tribes, as well as the federal government through the Bureau of Land Management, Bureau of Indian Affairs, Indian Health Services and other federal agencies, including The Town of Bernalillo and Village of Corrales, Placitas, La Madera, Pena Blanca, and Algodones.

Request to Improve Ordinance Process :

Sandoval County Board of Commissioners and its Planning and Zoning Commission establish a “partnership” with the directly impacted residents Tribes and Municipalities town and village entities.

Section 1.4 Purpose

The current “Purpose” of the Ordinance leaves a great deal out relative to the County’s police powers arising in protecting the health and safety of the County for current and future residents, Tribes and Pueblos under New Mexico law

- Requesting Findings Review of the following language:
- “...to establish separate land use, environmental, fiscal, adequate public facility, traffic, cultural, historical and archeological, emergency service and preparedness, health and safety, and toxic chemical pollution standards to protect from adverse public nuisance effects and impacts resulting from oil and gas exploration, drilling, extraction or transportation in the County. Oil and gas projects and operations may be found to constitute as applied public nuisances affecting and impacting the health and safety of nearby and countywide residents and resources and such projects are required to fully mitigate all adverse public nuisance effects and impacts prior to obtaining a development order granting development approval. A Land and Environmental Sustainability Matrix (“LESM”) shall be used to specifically determine the extent of any as applied adverse public nuisance effects and impacts for the Albuquerque Basin, Greater Chaco Canyon, and neighboring Pueblos and Tribes.

Continued: Purpose

- No oil and gas project is permitted as of right in the County. Prior to authorizing any oil and gas project operation, the County shall require the owner of the mineral estate, or oil and gas lessee of the mineral estate, to apply for, and obtain: an Oil and Gas Overlay District Classification; subsequent Special Use and Development Permit, Grading and Building Permits; and a Certificate of Completion. In connection with the approval process for obtaining an Oil and Gas Overlay Zoning District Classification, the County shall require the following detailed studies, plan, reports and assessments:
- (a) A General and Area Plan Consistency Report demonstrating consistency with the General Plan and the General Plan Oil and Gas Element's Goals, Objectives, Policies and Strategies and with any applicable Area Plan, including but not limited to the Albuquerque Basin and Greater Chaco Canyon Area Plan;

Continued: Purpose

- (b) An Environmental Impact Report analyzing oil and gas adverse effects and impacts to: wildlife and vegetation natural habitats and corridors; flood plains, floodways, stream corridors and wetlands; steep slopes and hillsides; air and water pollution; global warming, traffic safety and congestion; excessive energy consumption from vehicle miles traveled; priceless archeological, historical and cultural artifacts and resources reflecting Hispanic, Anglo and Indian Pueblo civilizations; toxic chemical pollution and related diseases and conditions affecting the health and safety of current and future residents; open space and scenic vistas;
- (c) A Fiscal Impact Assessment describing the adverse effect and impact upon County revenue and costs necessitated by additional public facility and service costs generated by oil and gas projects and the feasibility for financing such facility and service costs;
- (d) An Adequate Public Facilities and Services Assessment indicating whether current county public facilities and services related to roads, storm water detention, fire, police, and emergency response services are adequate to service proposed oil and gas projects;

Continued: Purpose

- (e) A Water Availability Assessment to determine the availability of and impacts to fresh water surface and subsurface resources;
- (f) An Emergency Service and Preparedness Report, identifying the name, location and description of all potentially dangerous facilities and Material Safety Data Sheets describing all additives, chemicals and organics used on the site, including but not limited to pipelines, wells and isolation valves, and providing for a written fire prevention, health and safety response plan for any and all potential emergencies, including explosions, fires, gas or water pipeline leaks or ruptures, hydrogen sulfide methane or other toxic gas emissions or hazardous material spills or vehicle accidents;
- (g) A Traffic Impact Assessment, providing information necessary to assess adverse transportation effects and impacts of traffic generated by proposed oil and gas projects, including isolated and cumulative adverse effects and impacts to the traffic shed and traffic capacity, the passage of public safety and emergency response vehicles and any contribution to hazardous traffic conditions by heavily laden vehicles going to and from the project site; and
- (h) A Geohydrological Report, describing the adverse impacts and effects of oil and gas development with respect to subsurface and ground water resources located within geological formations in sufficient proximity to an oil and gas project; identifying fractured formations that would permit extraneous oil, gas, dirty or gray water, mud or other chemicals, toxic minerals and pollutants to degrade the ground or subsurface water resources, or allow ground or subsurface water resources to be reduced, polluted and unavailable for public or private water supplies.

Continued: Purpose

Development of oil and gas resources shall only be permitted where there is full mitigation of any adverse public nuisance effects or impacts as shown in the reports, plan, studies and assessments.

- To achieve these purposes this Ordinance establishes three distinct processes for development approval of oil and gas projects:
 - (1) an application for discretionary administrative approval of an Oil and Gas Overlay Zoning District Classification;
 - (2) subsequent to development approval of the Oil and Gas Overlay Zoning District Classification and subsequent issuance of a state ADP, an application for a discretionary Special Use and Development Permit (“SUDP”); and
 - (3) obtaining ministerial Grading and Building Permits and a Certificate of Completion.

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- Taking into account these rights and in order to evaluate whether, and if so, the extent to which this Ordinance unconstitutionally impacts subsurface mineral fee interests and oil and gas leases, each applicant for an oil and gas project, if denied at the Overlay Zoning or Special Use and Development Permit stages, shall be required to exhaust all administrative remedies by applying for a beneficial use and value assessment which application shall describe:

Continued: Purpose

- (a) the extent of diminution of use and value with respect to the entirety of the applicant's, owner's, or lessee's real property interests in the same ownership within the County;
- (b) the distinct investment backed expectations of the owner, lessee, or applicant and predecessors in interest;
- (c) the written lease document applicable to oil and gas drilling under an oil and gas lease;
- (d) the availability of transfers of oil and gas well development rights or clustering and collocation of wells to the remainder of the owner's, applicant's, or lessee's entirety of property in the same ownership; and
- (e) any variance or relief necessary to relieve any unconstitutional hardship created."

Section 1.5 “Findings”

- The June Draft Ordinance fails to directly identify and define hydrologic fracturing (“fracking”) anywhere. This exclusion appears to be more than inadvertent. This Ordinance is directly dealing with the realities that fracking brings to the innocent residents who live near such drilling and fracking processing and are forced to live day and night with water, noise, light, and air pollution, of which there are many dangerous and lethal contaminants released into the water and air on a 24/7 basis.
- *The “balance” between the public’s interest with those of oil and gas development, such balance is shamefully weighted towards the oil and gas industry at the expense of the County residents.*

The following Findings should be added to this June Draft Ordinance:

- (I) promotes the purposes of planning and land use regulation by assuring that adequate public facilities and services as defined by this Ordinance including roads, fire, police, storm water detention and emergency and response services will be available at the time of approval of oil and gas projects;
- (J) protects the Albuquerque Basin and Greater Chaco Canyon's priceless, unique, and fragile ecosystem, the preservation of which is of significant value to the citizens of the County and State;
- (K) protects the Albuquerque Basin and Greater Chaco Canyon's unique and irreplaceable historic, cultural and archaeological, water and other natural resources; and
- (L) implements the July 2008 recommendations of the Governor's Executive Task Force to ensure the health, safety, and welfare of all New Mexicans and protect the natural and ecological riches of Sandoval County and the Albuquerque Basin and Greater Chaco Canyon from adverse public nuisance effects and impacts of oil and gas drilling in the Albuquerque Basin and Greater Chaco Canyon as follows:

Continue “Findings”

- M) that Greater Chaco Canyon has been recognized as a UNESCO World Heritage Site containing significant archaeological resources for protection for the world to enjoy;
- (N) oil and gas drilling in the Albuquerque Basin and Greater Chaco Canyon will have significant impact on archaeological, historical, cultural and environmental resources and sensitive areas;
- (O) water resources in the Albuquerque Basin and Greater Chaco Canyon are at risk as oil and gas drilling in the Albuquerque Basin and Greater Chaco Canyon may negatively affect local water supplies and sources of groundwater;
- (P) due to the importance of the hydrology of the Albuquerque Basin and Greater Chaco Canyon, not only to the citizens of Sandoval County but to the interstate stream system through its contributions to the Rio Grande, it is extremely important to protect the quantity and quality of the surface and ground water resources in the Albuquerque Basin and Greater Chaco Canyon;
- (Q) clean air and water are essential to most resources and activities in the Albuquerque Basin and Greater Chaco Canyon and will be degraded by oil and gas activity;

Continued: Findings

- (R) sensitive environmental systems and cultural, archaeological and historic sites in the Albuquerque Basin and Greater Chaco Canyon require permanent protection from oil and gas projects;
- (S) New Mexico has an interest in strengthening protection to historic, archaeological and cultural resources by issuing new rules and new statutes, if necessary, to put into place greater, and in some cases absolute protection, for highly sensitive and significant historical, cultural and archaeological sites and landscapes;
- (T) under the Wildlife Conservation Act (NMSA 17-2-37 through 17- 2-46), species of wildlife indigenous to the state that may be found to be threatened or endangered by oil and gas drilling require such police power regulation over oil and gas development so as maintain and, to the extent possible, enhance wildlife numbers within the carrying capacity of the habitat;
- (U) the New Mexico Department of Game and Fish recommends enacting setbacks for oil and gas wells of 0.5 miles from important aquatic and riparian habitats such as springs, wetlands, and drainages;
- (V) because oil and gas drilling may cause irreparable harm to the County's water supply and pollution of water and air, causes cancer, lung disease, and respiratory diseases, the oil and gas industry must show documentation of community health effects, and these effects must be scrutinized, and totally mitigated before drilling and extraction occur.

Section 1.6

STATE AND FEDERAL PREEMPTION

- The Ordinance has identified federal and state statutes in setting forth potential supplementary or preemptive regulations over this Ordinance. (A through O). The glaring absence from this list is the identification that the Great Chaco Canyon has as a designated World Heritage Site. This alone requires Sandoval County to take affirmative steps to ensure that the world will be able to understand and enjoy what a world heritage site means and its significance to the world population. A World Heritage Site is a place that is listed by the United Nations Educational, Scientific and Cultural Organization (UNESCO) as of special cultural or physical significance.

Continue: State and Federal Preemption

- In addition to the above, the National Historic Preservation Act, 16 U.S.C §§470 et. seq. contains the Section 106 review process for any potential sites to be included on the National Registry of Historic Places. Such potential sites can and may be identified by any of the Pueblos or Tribes and other potential nominees for inclusion. As an example, the Pueblo of Sandia was successful in having a sandbar in the Rio Grande nominated for inclusion when use of the water had a direct and negative impact on the AMREP discharge NPDES permit in 1987. Hence, the potential impacts that the Ordinance can have on cultural and historical sites must not be overlooked and a clearer and more definitive mechanism needs to be developed when weighing the oil and gas industry request for fracking with the ancient and current practices of our Native Americans. *See, e.g. Prehistoric and Historic Sites Act, NMSA 1978, §§18-8-1 et. seq.* In addition to enumerating the role of the State Historical Preservation Officer, each Tribe and Pueblo has the enumerated power to appoint its own Tribal Historical Preservation Officer who is to work with the State of New Mexico, and in this instance, Sandoval County in investigating and documenting cultural properties on both county, state, tribal and private lands.

For example, this Ordinance and private landowners, including the oil and gas land holders, must comply with New Mexico law in any drilling activities, even on private land it may own:

- § 18-6-10. Cultural properties on private land
- A. It is the declared intent of the legislature that field archeology on privately owned lands should be discouraged except in accordance with the provisions and spirit of the Cultural Properties Act; and persons having knowledge of the location of archeological sites are encouraged to communicate such information to the committee.
- B. It shall be deemed an act of trespass and a misdemeanor for any person to remove, injure or destroy registered cultural properties situated on private lands or controlled by a private owner without the owner's prior permission. Where the owner of a registered cultural property has submitted his acceptance in writing to the committee's registration of that cultural property, the provisions of Section 8 of the Cultural Properties Act shall apply to that registered cultural property.
- C. Where a cultural property is on private land or is otherwise privately owned and the committee determines that such cultural property is worthy of preservation and inclusion on the official register, the committee may recommend the procedure best calculated to ensure preservation. Such procedures may include:
 - (1) providing technical assistance to the owner who is willing to restore, preserve and maintain the cultural property;

Continue: State and Federal Preemption

- (2) acquiring the property or an easement or other right therein by gift or purchase;
- (3) advising the county or municipality within which the cultural property is located on zoning the property as an historic area or district in accordance with the Historic District Act;
- (4) advising the county or municipality within which the cultural property is located on the use of agreements, purchases or the right of eminent domain to obtain control of the cultural property in accordance with the Historic District Act; and,
- (5) acquiring the property for the state by use of the right of eminent domain.

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Section 18-6A-2 of the Cultural Properties Act, includes these definitions:

- B. “cultural property” means a structure, place, site or object having historic, archaeological, scientific, architectural or other cultural significance;
- E. “interpretation” means the inventory, registration, mapping and analysis of cultural properties and public educational programs designed to prevent the loss of cultural properties;
- F. “officer” means the state historic preservation officer;
- G. “preservation” means sustaining the existing form, integrity and material of a cultural property or the existing form and vegetative cover of a cultural property and may include protective maintenance or stabilization where necessary in the case of archaeological sites;
- H. “professional survey” means an archaeological or architectural survey;

Continue: State and Federal Preemption

- I. “protection” means safeguarding the physical condition or environment of a cultural property from deterioration or damage caused by weather or other natural, animal or human intrusions;
- J. “restoration” means recovering the general historic appearance of a cultural property or the form and details of an object or structure by removing incompatible natural or human-caused accretions and replacing missing elements as appropriate;
- K. “stabilization” means reestablishing the structural stability or weather-resistant condition of a cultural property or arresting deterioration that may lead to structural failure;
- L. “state agency” means a department, agency, institution or political subdivision of the state; and
- M. “state land” means property owned, controlled or operated by a state agency.

The Prehistoric and Historic Sites Act, NMSA, 1978 §§18-8-1

et. Seq. This act sets forth and establishes the acquisition, stabilization, restoration or protection of significant prehistoric and historic sites. Notwithstanding private lands, this statute arguably overrides other state laws in protecting our New Mexico heritage, which Sandoval County must consider in drafting any oil and gas ordinance

Continue: State and Federal Preemption

The Surface Owners Protection Act, NMSA 1978, §§70-12-1 et. seq.

has the following definitions:

- A. “oil and gas operations” means all activities affecting the surface owner's land that are associated with exploration, drilling or production of oil or gas, through final reclamation of the affected surface;
- B. “operator” means a person with the legal right to conduct oil and gas operations and includes the agents, employees and contractors of that person;
- C. “reclaim” means to substantially restore the surface affected by oil and gas operations to the condition that existed prior to oil and gas operations, or as otherwise agreed to in writing by the operator and surface owner;
- D. “surface owner” means a person who holds legal or equitable title, as shown in the records of the county clerk, to the surface of the real property on which the operator has the legal right to conduct oil and gas operations;

When read with the above New Mexico statutes regarding cultural preservation and protection of both state and world heritage sites (Greater Chaco Canyon), the oil and gas producers are required to be in compliance with these overriding laws protecting New Mexico, Sandoval County, and Tribes and Pueblo’s cultural heritages. In addition, damages are allowed for violations of the Surface Owners Protection Act, including attorney’s fees and potentially treble damages. §§70-12-7.

Continue: State and Federal Preemption

The Water Quality Act, NMSA, 1978 §§74-6-1 *et. seq.* contains the following provisions:

- A. The legislature recognizes the threat to the public health and safety and the environment resulting from pollution of ground water resources as a result of leaking storage tanks. The legislature also recognizes that some owners and operators of facilities containing storage tanks cannot take corrective action without placing their businesses in serious financial jeopardy.
- B. The legislature finds that, because New Mexico is large in area and sparsely populated in some regions, it is in the public interest to take corrective action at contaminated sites so that fuel will continue to be readily available.
- C. The purpose of the Ground Water Protection Act is to provide substantive provisions and funding mechanisms to the extent that funds are available to enable the state to take corrective action at sites contaminated by leakage from storage tanks.

Section 74-6B-8 sets forth the civil liability for violations of the Water Quality Act:

- An owner or operator of a storage tank from which a release has occurred shall be strictly liable for the owner's, operator's and department's cost of taking corrective action at the site.

Continue: State and Federal Preemption

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Continue: State and Federal Preemption

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Continue: State and Federal Preemption

- Also, the Water Quality Act imposes daily fines as sanctions for non-compliance:
- A. Any person who does not comply with the provisions of [Section 74-6-5 NMSA 1978](#), including any regulation adopted pursuant to that section, or any permit issued pursuant to that section, shall be assessed civil penalties up to the amount of fifteen thousand dollars (\$15,000) per day of noncompliance for each violation.
- B. Any person who violates any provision of the Water Quality Act other than [Section 74-6-5 NMSA 1978](#) or any person who violates any regulation, water quality standard or compliance order adopted pursuant to that act shall be assessed civil penalties up to the amount of ten thousand dollars (\$10,000) per day for each violation.
- Criminal penalties are also available for Water Quality Act violations. § 74-6-10.2. Criminal penalties

Continue: State and Federal Preemptions

Archeological Resources Protection Act, 16 USC §§470aa, which states

- (a) The Congress finds that--
 - (1) archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage;
 - (2) these resources are increasingly endangered because of their commercial attractiveness;
 - (3) existing Federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage; and
 - (4) there is a wealth of archaeological information which has been legally obtained by private individuals for noncommercial purposes and which could voluntarily be made available to professional archaeologists and institutions.
- (b) The purpose of this chapter is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before October 31, 1979. [Emphasis supplied].

This Act is very specific when applied to Sandoval County and any oil and gas drilling activities past, present, and future in the County. Inasmuch as there exists a great amount of public land in and around Sandoval County which is federally protected, the proposed Ordinance must comply with federal law in assuring and guaranteeing the preservation and well-being of our valuable archeological resources.

Article 2 - DEFINITIONS

- When compared to other New Mexico counties' oil and gas ordinances, the Sandoval County current list is woefully inadequate and needs to be totally analyzed and rewritten for the anticipated acts and actions of the oil and gas developers.
- As mentioned above, the sad reality is that fracking is not included or even defined. The recommendations for inclusion of additional and comprehensive definitions will be developed anticipated working sessions.

Article 3 - ESTABLISHMENT OF ENERGY DEVELOPMENT AREAS

- The arbitrary designation of the Northwest Energy Development Areas and the Southwest Energy Development Areas is without the consideration of detailing what is federal and Tribal lands. These designations are now incorporated in several maps currently before the Planning and Zoning Commission and ultimately the Board of County Commissioners.
 - **Missing Components:** What is implicitly missing in these maps, for example, are the current fracking and injection wells either on private or public lands.
- The apparent distinction of high population versus low population concentrations suggests the further arbitrariness by this Ordinance in who and what population is “expendable” to the contamination by fracking operations. By virtue of more rural populations corridors, is clearly targeting the lower income and tribal populations who reside in the Northwest Energy Development Area.

Conitnue Article 3 - ESTABLISHMENT OF ENERGY DEVELOPMENT AREAS

- Such territorial distinction invites a cavalier attitude in enforcing the oil and gas ordinances to ensure the public safety which is the cornerstone of the Ordinance as evidenced in the Purpose. The analysis that these communities comprise 10% of the population which includes municipalities, County communities, and Native American Pueblo/Nation communities. Section 3.3 Findings. It is interesting to note that reserve pits are not excluded from protection in the Northwest Energy Development Area Section 3.5 (C)(5) but are so in the Southwest Energy Development Area.
- An additional glaring failure of these provisions is noted in Section 3.5(C) (3) is the lack of a mandatory road plan when it weakly states that the “... County may require the applicant to secure Right of Way (ROW) Permits for County Roads. The application may also be required to secure Right of Way (ROW) permits for municipal and/or State roads where needed. The County may require the applicant to provide a cash bond security, a letter of credit, escrow deposit, or other method acceptable to the County, and or Road Improvement Agreement for us of County roads.” The County must (shall is the accepted statutory language), at the very least, make these requirements affirmative obligations. The absence of the amount of a cash bond security is vague and such omission is a failure of the County’s obligations to protect the health and welfare of Sandoval County.

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Setbacks and noise from well activities

- The Ordinance fails to adequately protect those private individuals with the adequate distance to attempt to protect such residents from noise, water, air, and light pollution. The proposed 750' setback is grossly inadequate and clearly can cause constant contact with pollution caused by the fracking process. In addition, the Counselor area where fracking is already underway, has over an 80 decibels contrary to the stated 55 decibels. Such noise is being produced at a 24/7 rate and causes permanent hearing loss. Even now, these excess limits are not being enforced through any form of economic and civil sanctions.
- The proposed setback provisions bestow a windfall on oil and gas operators because they are far more relaxed than the set back reality of those families trapped by the proximity to their homes from the noise, light, water, and air pollution by these fracking and drilling operators. More stringent setbacks must be required for both the Northwest and Southwest Energy Development Areas.
- Other comments to the provisions of Section 3 will be forthcoming after establishing how the Planning and Zoning Commission proceeds in the study process.

Section 4.10 Additional Financial Securities

Sandoval County has to ensure that these operators will be financial responsible for any contaminations, environmental disasters, or life threatening dangers.

- Each fracking operator must be required to post a comparable amount of a minimum of \$50,000,000, if not more, to ensure the public health and safety to the residents of Sandoval County.
 - An important example in New Mexico ensuring safety and protection of well-being is the requirements that any Tribe and/or Pueblo engaging in Class III gaming is required to have a \$50,000,000 policy. [§8 of the Indian Gaming Regulatory Act, 25 USC §2701, *et. seq.*]. This example of ensuring public safety by a gaming operation for this required amount pales to the incredible permanent destruction to the environment and lives that a fracking disaster can cause. New Mexico learned a tragic lesson when the Gold King Mine spill occurred in 2015 polluting the San Juan River.

Continue: Financial Securities

The Surface Owner's Protection Act, oil and gas operators have significant liability for the loss in value to real property where they exercise reasonable care in their activities. This liability can be as high as the full market value of an affected property.

- The potential and foreseeable contamination causing genetic disruption, tumors, death, and pain and suffering damages can be even higher than the cost of real property. Pacific Gas and Electric learned the multimillion costs from the extensive litigation over chromium hexavalent poisoning. It is anticipated that New Mexico juries will look to hold Sandoval County and the oil and gas producers accountable if the bonds are inadequate and the reality is revealed that the County had the obligation to require substantial bonds to protect the land and its people.
- There seems to be no rational connection between the minimum bond amount and the damages that are foreseeable as a result of oil and gas operations. This lack of proportionality must be addressed.

Final Comments

- These comments regarding the June Draft of the Oil and Gas Ordinance are only a start. There will be more and continued comments in the upcoming weeks and months. The lack of the County and its Planning and Zoning Commission in having a comprehensive working group to study the proposed Sandoval County oil and gas ordinance is a very serious mistake. There are many important groups and agencies which must sit at the table to ensure a meaningful comprehensive ordinance that truly looks at the safety and well-being of the Sandoval County residents when balancing the race to approve and regulate fracking.

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