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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **IN THE MATTER OF THE PETITION**
3 **FOR A HEARING ON THE MERITS**
4 **REGARDING AIR QUALITY PERMIT**
5 **NO. 1655-M1-RV1**

6 **PAT TOLEDO,**

7 Petitioner-Appellant,

8 v.

NO. 35,576

9 **THE CITY OF ALBUQUERQUE and**
10 **SMITH'S FOOD & DRUG CENTERS, INC.,**

11 Respondents-Appellees.

12 **APPEAL FROM THE AIR QUALITY CONTROL BOARD**
13 **Felicia Orth, Hearing Officer**

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8 **MEMORANDUM OPINION**

9 **WECHSLER, Judge.**

10 {1} Petitioner-Appellant Pat Toledo (Toledo) seeks to appeal from the
11 Albuquerque-Bernalillo County Air Quality Control Board's (the Board) order,
12 entered April 14, 2016, addressing the City of Albuquerque Environmental Health
13 Department Air Quality Program's (EHD) motion to reverse and remand EHD's
14 granting of Permit No. 1655-M1-RV1 (the Permit). [II RP 51-54, 75-77, 89-90] In our
15 notice of proposed disposition, we proposed to dismiss the appeal for lack of a final
16 order. Toledo filed a memorandum in opposition to our proposed disposition; the City
17 of Albuquerque (the City) filed a memorandum in support of our proposed
18 disposition; and Smith's Food & Drug Centers, Inc. (Smith's) filed a memorandum
19 in support of our proposed disposition. After due consideration, we dismiss the appeal
20 for lack of a final order.

1 {2} “In civil cases, this Court has jurisdiction over, among other things, any final
2 order after entry of judgment which affects substantial rights[.]” *Khalsa v. Levinson*,
3 1998-NMCA-110, ¶ 12, 125 N.M. 680, 964 P.2d 844 (internal quotation marks and
4 citation omitted). “Whether an order is a ‘final order’ . . . is a jurisdictional question
5 that an appellate court is required to raise on its own motion.” *Id.* “[O]rdinarily an
6 order remanding a case for further proceedings is not considered final for purposes of
7 appeal[.]” *State v. Valerio*, 2012-NMCA-022, ¶ 14, 273 P.3d 12; *but see id.*
8 (recognizing that “a remand order is final in certain circumstances, such as . . . where
9 the remand directs the lower tribunal to perform a task requiring no exercise of
10 discretion”).

11 {3} EHD’s motion to reverse and remand its own granting of the Permit was based
12 on its acknowledgment that the notice requirements had not been followed. [II RP 51-
13 54; *see also* II RP 72-74] EHD asked the Board to “reverse and remand the Permit to
14 EHD so that EHD [could] re-notice the modification in compliance with all notice
15 requirements and decide whether to issue the Permit after it [had] received and
16 reviewed any public comment that [may] result[.]” [II RP 53] On April 14, 2016, the
17 Board entered the order at issue, which provides:

18 The Permit is hereby reversed and remanded to EHD to give
19 required notice to the City, to Bernalillo County, to the New Mexico
20 Environment Department, and to the Environmental Protection Agency
21 under 20.11.41.14(B)(8 and 9).

1
2 Although the permit modification to increase throughput from 3
3 million to 5 million gallons is invalid, Smith’s may continue to operate
4 under the original permit consistent with all permit conditions and air
5 quality regulations.

6 [II RP 76]

7 {4} In our notice of proposed disposition, we proposed to dismiss Toledo’s appeal
8 for lack of a final, appealable order because, following proper notice, EHD will need
9 to decide whether to issue the Permit, which will require an exercise of its discretion.

10 [CN 5-6] In response, Toledo asserts that “[t]he portion of the order that requires
11 appropriate legal notice and opportunity to comment is not objected to, but the
12 remaining portion of the order allowing interim operation cannot be challenged under
13 this Court’s proposed dismissal.” [T MIO 6] His central contention is that Smith’s
14 should cease its interim operation because, according to Toledo, without the permit
15 modification, Smith’s lacks a valid permit to operate while the case is on remand to
16 the EHD. [T MIO 3, 6-7]

17 {5} In its memorandum in support of our proposed dismissal for lack of a final
18 order, the City contends that, following the order at issue, “EHD must decide anew
19 whether to grant the [P]ermit.” [C MIS 2] Therefore, the City agrees that, pursuant to
20 *Valerio*, the Board’s order to reverse and remand is not a final order for purposes of
21 appeal. [C MIS 2-3] In response to Toledo’s contention that Smith’s is operating

1 without a permit, the City asserts that Smith’s does have a valid permit. [C MIS 3-6]

2 According to the City,

3 Smith’s acquired the original Robert’s Oil permit authorizing throughput
4 of three million gallons of gasoline per year. This was Permit No. 1655
5 when owned by Robert’s Oil and became Permit No. 1655-RV1 once
6 EHD processed the administrative revision to change the ownership from
7 Robert’s Oil to Smith’s. The Air Board’s rules allow changes of
8 ownership of permits with no public notice. 20.11.41.28(A)(2)(a and b)
9 NMAC (administrative permit revisions do not require notice by either
10 the applicant or the Department). Hence, Smith’s has a valid permit to
11 operate the former Robert’s Oil gas station with a throughput of three
12 million gallons per year.

13 [C MIS 3-4] The City further asserts that the lack of notice in this case affects only the

14 “*application to modify* Permit No. 1655 to authorize throughput of five million
15 gallons. . . . The notice issue does not affect the original Permit No. 1655.” [C MIS

16 4 (emphasis in original)] The City further argues that, “[u]nder the Air Board’s rules,

17 Smith’s could acquire the associated permit and could request a change of ownership

18 without any public notice because there is no change in the air quality impact

19 regardless of who owns a permit.” [C MIS 5] Additionally, the City claims that “the

20 modified permit for five million gallons of throughput . . . was the only decision that

21 was before EHD[.]” [C MIS 5] According to the City, “the original Robert’s Oil

22 Permit No. 1655 for three million gallons . . . was not before EHD.” [C MIS 5] It is

23 the City’s position that Smith’s had acquired Permit No. 1655 from Robert’s Oil,

24 Smith’s submitted a change of ownership application—which does not require public

1 notice—and EHD permitted the change in ownership. [C MIS 5] “Hence, Permit No.
2 1655 became Permit No. 1655-RV1 allowing throughput of three million gallons of
3 gasoline per year at the site of the former Robert’s Oil and now Smith’s gas station.”
4 [C MIS 5-6] Therefore, the City contends that “Smith’s may only operate under the
5 terms of the pre-existing Robert’s Oil permit[.]” [C MIS 5]

6 {6} In its memorandum in support, Smith’s agrees that the order granting the
7 EHD’s motion to reverse and remand is not final. [S MIS 4-6] Smith’s also contends
8 that EHD’s administrative revision and issuance of Permit 1655-RV1 is not before this
9 Court. [S MIS 6-7] Smith’s maintains that the EHD “took two actions in granting the
10 permit under review in this case: (1) processed a permit modification requested by
11 Roberts Oil, increasing the throughput from 3 million to 5 million gallons, and (2)
12 processed an administrative revision, changing the ownership of the permit from
13 Robert’s Oil to Smith’s.” [S MIS 2; *see also* CN 3-4] Subsequently, “Toledo filed a
14 petition appealing, ‘the issuance of Permit 1655-M1-RV1 . . . allowing for [an
15 increase of] throughput [to] 5 million gallons.’” [S MIS 2 (quoting II RP 2)]
16 According to Smith’s, “Toledo’s petition did not seek to revoke the issuance of the
17 original Permit No. 1655 or Permit 1655-RV1.” [S MIS 3] Relying on
18 20.11.41.28(A)(1)-(2) NMAC, Smith’s contends that “[t]here are no public notice

1 requirements for administrative permit revisions made in order to identify a change
2 in ownership.” [S MIS 4]

3 {7} Having considered the information before this Court, we conclude that the order
4 from which Toledo seeks to appeal pertains to the modification of the Permit—and
5 not to the change in ownership of the Permit. [II RP 75-76] The order reverses and
6 remands to the EHD to give the required notice “under 20.11.41.14(B) (8 and 9)[.]”
7 which does not apply to revisions made in order to identify a change in ownership. [II
8 RP 76] *See* 20.11.41.28(A)(1)(b) NMAC (“An administrative permit revision may be
9 used by the department or requested by a permittee to revise a permit that has been
10 issued pursuant to 20.11.41 NMAC in order to: . . . identify a change in ownership,
11 name, address or contact information of any person identified in the permit[.]”); *see*
12 *also* 20.11.41.28(A)(2)(a)-(b) NMAC (“An administrative permit revision shall: (a)
13 not be subject to Subsection B of 20.11.41.13 NMAC, *Applicant’s Public Notice*
14 *Requirements* [and] (b) not be subject to 20.11.41.14 NMAC, *Public Notice by*
15 *Department - Public Participation*[.]”).

16 {8} As discussed in our notice of proposed disposition, on remand, EHD will need
17 to decide whether to modify the Permit, which is more than a ministerial action,
18 rendering the order at issue a non-final order. *See High Ridge Hinkle Joint Venture v.*
19 *City of Albuquerque*, 1994-NMCA-139, ¶ 14, 119 N.M. 29, 888 P.2d 475 (providing

1 that “[a]n order remanding for further non-ministerial proceedings before a lower
2 tribunal” is not a final order). Consequently, this appeal is premature. *See id.* ¶¶ 13-26
3 (dismissing a neighborhood association’s appeal because its claim had been remanded
4 for reconsideration by the City Council).

5 {9} For the reasons stated in this opinion and in our notice of proposed summary
6 disposition, we dismiss for lack of a final order. *See Thornton v. Gamble*, 1984-
7 NMCA-093, ¶ 15, 101 N.M. 764, 688 P.2d 1268 (“If we do not have jurisdiction, we
8 must dismiss.”).

9 {10} **IT IS SO ORDERED.**

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11

JAMES J. WECHSLER, Judge

12 **WE CONCUR:**

13
14

M. MONICA ZAMORA, Judge

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16

J. MILES HANISEE, Judge