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April 4, 2019

Delivered by Hand

Maggie Hart Stebbins, Chair
Bernalillo County Commission
1 Civic Plaza NW, 10th Floor
Albuquerque, NM 87102

RE: WRITTEN RESPONSE TO PENDING APPEALS OF CSU2019-0001 (APPEALS NOS. COA2019-0001—0003)

Dear Commissioners:

Please consider this correspondence as a response to the appeals filed in opposition to the approval by the Bernalillo County Planning Commission (the "CPC") of a Special Use Permit for a Planned Development Area (Residential and Agricultural Uses) for a co-housing development (the "Permit") proposed by Rio Grande Huerta, LLC, ("RGH") to be located on Tract 88A1A1 MRGCD Map 40, Tract 88A1A2 MRGCD Map 40, and Tract 87B1 MRGCD Map 40—commonly known as 1300 Gonzales Rd. SW (the "Property"). Three appeals have been filed and, for the sake of conserving resources, RGH provides the following responses to all of those appeals in this document.

INTRODUCTION AND OVERVIEW

At its February 6, 2019, public hearing, the CPC approved RGH's request for a Special Use Permit for a Planned Development Area (Residential and Agricultural Uses). RGH requested the Permit in order to establish a co-housing community on the Property, allowing for a mix of clustered residential housing, agricultural stewardship, and community-oriented uses. The Property is located in a portion of the South Valley designated as part of the "Established Urban Area" under the Bernalillo County Comprehensive Plan (the "Comprehensive Plan") and also governed by the Southwest Area Plan (the "SWAP"). The Comprehensive Plan supports a "full range of urban land uses" in this area (Policy a) and the "clustering of homes to provide larger shared open areas" is encouraged (Policy f). The clustering of homes is also encouraged under the SWAP to allow residences to be grouped together in order to allow for the preservation

of open space and "up to nine dwelling units per net acre" are permitted on the Property under that plan. Finally, the Comprehensive Plan also supports "quality and innovation in design" for new development, which policy RGH is attempting to further through their proposed environmentally-sound and energy-efficient homes. Thus the Permit facially complies with the plans applicable to the Property.

As part of its approval of RGH's request, the CPC adopted several findings in its Notice of Decision, including: the Property's development will consist of "27 dwelling units inside 5 buildings, a pool and recreation area, agricultural uses including gardens, orchards and greenhouses (Finding 2); the applicant desires to establish a "co-housing" development with shared responsibilities amongst homeowners (Finding 3); the request furthers the goals and policies of the Comprehensive Plan and Southwest Area Plan related to density, land use, housing, developed landscape, energy management and water management (Finding 5); the applicant demonstrated the need to vary height, lot area, or setback requirements due to unusual topography, lot configuration, or site features in order to create cluster housing development, preserve visual or physical access to open space or unique site features as the "site plan includes areas dedicated to open space, agricultural and recreational uses" (Finding 6); and, the applicant adequately demonstrated that changed community conditions support the request and that the request is more advantageous to the community (Finding 7). Thus, the CPC approved the Permit and conditioned that approval on the Property's development complying with the "approved site plan including the multi-family dwelling units, open space, storage, recreational areas, parking, landscaping, fencing, and agricultural areas."

As above noted, three appeals challenge the CPC's approval of the Permit. Under the County Zoning Ordinance (the "Zoning Ordinance"), appeals must clearly articulate the reasons for the appeal and appellants must specifically cite and explain one or more alleged errors:

> (a) An error was made in applying adopted county plans, policies, and ordinances in arriving at the decision; or
>
> (b) A mistake of fact underlying the appealed action or decision as presented; or
>
> (c) The decision was arbitrary, capricious or a manifest abuse of discretion.

As below further discussed, Appellants' challenges fail to meet the above requirements and their collective appeals should be denied.

I. RESPONSE TO COA2019-0001

In their appeal and supplemental submissions, the appellants under COA2019-0001 (the "First Appellants") argue numerous issues ranging from interpretations of the Zoning Ordinance to claims that County Staff acted improperly prior to, and during, the CPC hearing on this issue. Generally, this Response addresses the First Appellants' arguments regarding the CPC's decision under the Zoning Ordinance and will leave the defense of County Staff and the CPC to the

Office of the County Attorney. In their initial Notice of Appeal, the First Appellants provided general arguments against the Permit's approval, which arguments were later supplemented. In their supplemental letter dated March 22, 2019 (the "Supplemental Appeal"), the First Appellants more expansively argued that: "the general special use permit standards were not satisfied"; the requirements of Resolution 116-86 (herein "R-116-86") were not satisfied; the Planned Development Area criteria were not satisfied; the standards for "Cluster Housing Development" were not satisfied; and, the application should have been submitted as a "Specific Use" Special Use Permit or as a zone change. However, as below discussed, these arguments are not well-founded and the First Appellants' appeal should be denied.

A. A "general Special Use Permit" was appropriate for this request and the requirements for a Special Use Permit were satisfied.

In their Supplemental Appeal, the First Appellants initially argue that a special use permit should not have been granted because "the basic R-2 apartment use proposed for the property is permitted in the R-2 zone[;] [t]hus, generally, special use permit treatment is not appropriate for this R-2 proposal." This statement ignores the fact that RGH is not seeking to simply build apartments but, instead, is attempting to create a development that provides housing and agricultural resources for its future residents, together with workshops, greenhouses, and communal living areas—as depicted on the site plan submitted with RGH's request. In this argument and others throughout their Supplemental Appeal, the First Appellants appear to willfully ignore the underlying nature of the Permit. As requested by RGH, the CPC required that development of the site "comply with the approved site plan including the multi-family dwelling units, open space, storage, recreational areas, parking, landscaping, fencing, and agricultural areas." Thus, the CPC did not grant RGH an approval for an apartment complex but, instead, authorized them to develop a co-housing community, incorporating agricultural, open space, and related community features. Accordingly, an "R-2" rezoning request would not have adequately encompassed RGH's plan of development and a Special Use Permit was the appropriate vehicle for that plan.

In their Supplemental Appeal, the First Appellants also argue that "the CPC's decision did not satisfy the other special use permit standards . . . including but not limited to Sections 18(A)(1) and (3)[.]" Although this argument is not substantially expanded on by the First Appellants, the referenced sections of the Zoning Ordinance provide that the CPC may impose conditions to: (1) maintain compatibility with the potential uses of the property and the general area and (3) to preserve the utility, integrity and character of the zone in which the use will be located, without adversely affecting adjacent zones. The above cited sections place no requirements on either RGH or the CPC and, instead, provide the CPC with the authority necessary to impose conditions for the above purposes, if deemed necessary by the CPC. Accordingly, undersigned counsel is unsure how the above referenced sections could "not be satisfied" as alleged by the First Appellants in their Supplemental Appeal, and the First Appellants' appeal should be denied.

B. The requirements of R-116-86 were satisfied.

In their Supplemental Appeal, the Fist Appellants next argue that the requirements of R-116-86 were not satisfied, specifically the requirements under § (E) that:

> The applicant must demonstrate that the existing zoning is inappropriate because:
> (1) there was an error when the existing zone map pattern was created; or
> (2) changed neighborhood or community conditions justify the land use change; or
> (3) a different use category is more advantageous to the community, as articulated in the Comprehensive Plan or other County Master Plan, even though (1) or (2) above do not apply.

As above noted, the CPC expressly found that the "applicant provided adequate justification for the request . . . [s]pecifically, the applicant described changed conditions in the area and how approval of the Special Use Permit is more advantageous to the community than the existing zoning because it furthers goals and policies of the Comprehensive Plan and Southwest Area Plan." The above findings were supported by substantial evidence through ample testimony that the area surrounding the Property was no longer rural or "A-1" in character. In fact, many of the Permit's opponents expressly based their arguments on the theory that the Property was the only remaining large agricultural property in this area and, thus, should be preserved from development for that reason (*e.g.* TR p. 64 "People became visibly upset upon learning about the proposal of yet more development of agriculturally zoned land, and in this case, the last large parcel of Sunset Road"). Other opponents have expressly acknowledge in their appeals that "community conditions have changed with the construction of numerous single family homes and infill on the R-1 city zoned propert[ies] located along Sunset Rd. SW." (COA2019-0003). In addition, the Property's owners testified that the Property had not been farmed since approximately the 1930s—and was in fact a fallow nuisance—further indicating that A-1 zoning is no longer appropriate (TR pp. 104-06). Moreover, the Property is located in the "Established Urban Area" under the Comprehensive Plan, further demonstrating that the present A-1 zoning on the Property is inappropriate[1]. Finally, the Southwest Area Plan recommends densities up to nine (9) dwellings per acre for the Property, which directly contradicts appellants' assertion that the property should retain its A-1 zoning classification. Despite all of this, the plan submitted by RGH seeks to preserve a portion of the agricultural heritage of the Property and create a farming presence on the Property where none currently exists. Accordingly, the CPC correctly found that the request satisfied §§ (E)(2) and (3); those findings were supported through both testimony and the plans applicable to the Property; and, the First Appellants' appeal should be denied.

C. The Planned Development Area criteria were satisfied as RGH demonstrated a need for cluster housing and access to open space on the Property.

In their Supplemental Appeal, the First Appellants next argue that RGH failed to satisfy the "Planned Development Area" criteria because RGH failed to demonstrate the "need to vary

[1] Under the Zoning Ordinance, the "ESTABLISHED URBAN category allows for a full range of urban land uses, resulting in an overall gross density up to five dwelling units per acre. The intent is to allow urban densities with services to be provided on an orderly basis within the financial capability of the community."

height, lot area, or setback requirements due to unusual topography, lot configuration, or site features[.]" However, in order to make this argument, the First Appellants ignore the remainder of § 18(B)(23) that discusses the above concepts in terms of cluster housing development, preserving "visual or physical access to open space or unique site features", or to facilitate development as allowed by an approved Master Plan. The entirety of the relevant section provides that Special Use permits may be authorized under the Zoning Ordinance for:

> Planned Development Area, including residential uses or mixed residential and commercial uses provided the minimum development lot area is two acres and the applicant demonstrates the need to vary height, lot area, or setback requirements due to unusual topography, lot configuration, or site features in order to create cluster housing development, preserve visual or physical access to open space or unique site features, or to facilitate development as allowed by an approved Master Plan.

Thus, the "requirements" for a Planned Development Area focus not on any specific elements of a site but, instead, on the purposes for varying a site's layout in order to 1) allow for cluster housing; 2) preserve and protect open space; or 3) further the goals of an approved Master Plan. Here, the site plan submitted by RGH entirely relies on cluster housing with an intent to preserve physical access to the agricultural open space—and RGH's submittal could likely be used as a demonstrative exhibit for a "Planned Development Area" under the Zoning Ordinance. Accordingly, the site plan submitted by RGH and approved by the CPC entirely satisfies the requirements for a Planned Development Area, and the First Appellants appeal should be denied.

In their Supplemental Appeal, the First Appellants also cite *Burroghs v. Board of County Commissioners of Bernalillo County,* 1975-NMSC-051, 88 N.M. 303, for the proposition that a "Planned Development Area" should not be used as a "catchall" category of development. In *Burroghs,* the Supreme Court determined that "Planned Development Area" should not be interpreted as including an "overnight campground" given the language of the Zoning Ordinance in 1975, which language included no explanation or definitions of the term "Planned Development Area." Here, unlike the 1975 Zoning Ordinance, the present Zoning Ordinance contains specific elements and purposes for a Planned Development Area, including cluster housing and preservation of open space. Furthermore, rather than attempting to push an inapplicable development type through as a Planned Development Area, RGH is focused on incorporating cluster housing and the preservation of open space into their proposed development, which purposes are the heart of a "Planned Development Area" under the present Zoning Ordinance. Accordingly, RGH's plan is accurately proposed as a Planned Development Area under the Zoning Ordinance, and the First Appellants' appeal should be denied.

D. There are no "specific findings" required for a "cluster housing development" under the Zoning Ordinance and appellants are attempting to create additional requirements where none exist.

In their Supplemental Appeal, the First Appellants state that the "standards for Cluster Housing Development were not satisfied." They also mention the "second prong" of the "Cluster Housing Development criteria." However, the First Appellants provide no citation to any such

criteria and undersigned counsel cannot parse out "prongs" or criteria from the Zoning Ordinance regarding Cluster Housing Developments. Under the Zoning Ordinance, the definition of "Cluster Housing Development" is:

> A form of development that permits a reduction in lot area and bulk requirements, provided there is no increase in the number of lots permitted under a conventional subdivision or increase in the overall density of development, unless otherwise permitted by a policy adopted as part of an Area Plan, Sector Development Plan, or Master Plan and the remaining land area is devoted to open space, active recreation, or preservation of environmentally sensitive areas or agriculture.

As above discussed, RGH is explicitly seeking to reduce lot area requirements to allow the remaining land on the Property to be devoted to open space, active recreation, and the preservation of agriculture. Furthermore, the density of development requested by RGH is lower than what might be supported under the SWAP (nine dwelling units per acre) and, thus, is "permitted by a policy adopted as part of an Area Plan." Accordingly, the development proposed by RGH meets the definition of Cluster Housing Development under the Zoning Ordinance, and the First Appellants' appeal should be denied.

E. The First Appellants provide no rational argument for why RGH should have requested either a zone change or "specific use" special use permit.

In their Supplemental Appeal, the First Appellants again argue that RGH should have applied for a "Specific Use" permit or a zone change, rather than a Special Use Permit for a Planned Development Area. However, the First Appellants fail to explain why one of these requests would have been more appropriate or, otherwise, cite any law that would support their assertion. As above discussed, the development proposed by RGH conforms to both the Zoning Code's definition of "Cluster Housing Development" and "Planned Development Area." In fact, it would have seemed highly peculiar if RGH had not applied for its Special Use Permit under a Planned Development Area justification, given the development's focus on cluster housing and preservation of open space and agricultural uses. As the First Appellants provide no legal reasoning or argument as to *why* RGH should have applied for a different form of request, the First Appellants' appeal should be denied.

II. RESPONSE TO COA2019-0002

In their Notice of Appeal, the appellants under COA2019-0002 (the "Second Appellants") appear to argue two issues: 1) building heights for the development are improper and 2) the County Planning Staff Report allegedly incorrectly states that the Property is not adjacent to Rio Grande State Park. Regarding building heights, RGH maintains that its development will not exceed heights above "26' or 2 1/2 stories" as required in the CPC's conditions of approval and consents to this restriction. Regarding the State Park, RGH relies on County Planning Staff's expertise as to the identity of the owners of the adjacent properties but maintains that the map attached as Attachment A to the Notice of Appeal does not appear to be a legal document demonstrating rights of ownership. Accordingly, the Second Appellants' appeal should be denied.

III. RESPONSE TO COA2019-0003

In their Notice of Appeal, the appellants under COA2019-0003 (the "Third Appellants") generally make several arguments, all of which can be summarized as "the CPC could have made different findings that we would have like better." Stated differently, the Third Appellants do not allege that an error was made in applying the underlying plans and policies but, instead, argue that the referenced plans and policies might have supported a different result. The Third Appellants cite R-116-86 for "stability of land use and zoning is desirable; therefore, the applicant must provide sound justification for land use changes" and Comprehensive Plan "Policy d" as stating that "new development shall respect existing neighborhood values, natural environmental conditions and carrying capacities, scenic resources, and resources of other social, cultural and recreational concerns." However, the CPC explicitly found both that: 1) changed conditions in the area justified the requested zone change and the change would be more advantageous to the community than the existing zoning and 2) "the request furthers goals and policies of the Comprehensive Plan and Southwest Area Plan related to density, land use, housing, developed landscape, energy management and water management." Furthermore, the Third Appellants explicitly acknowledge the above referenced changed community conditions within their appeal ("community conditions have changed with the construction of numerous single family homes and infill on the R-1 city zoned propert[ies] located along Sunset Rd. SW."). Thus, the Third Appellants arguments are not truly that the CPC made a mistake in its findings but, instead, that the Third Appellants believe the CPC should have made different findings—which is not a valid basis for an appeal under the Zoning Ordinance. Furthermore, the Third Appellants assertions are not supported by any citations to the record or any legal reasoning. Instead, the Third Appellants assert their "beliefs" regarding alleged harm to the "sense of place" of the community and possible increases in traffic counts. Respectfully, these are not valid justifications or bases for an appeal under the Zoning Ordinance. Accordingly, the Third Appellants' appeal should be denied.

Very truly yours,

HUNT & DAVIS, P.C.

Blake Whitcomb
BW:bw

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April 3rd, 2019

County of Bernalillo
Planning and Development Services Department
111 Union Square SE, Suite 100
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Authorization Letter for Representation in Appeal of CSU2019-0001
(1300 Gonzales Road SW)

Dear County Planning Department:

This letter is to authorize Blake Whitcomb, Hunt & Davis, P.C., to represent Rio Grande Huerta LLC in connection with the referenced project.

Very truly yours,

Marlies Metodi, Project Manager for Rio Grande Huerta LLC
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Albuquerque, NM 87106