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March 22, 2019

**Hand-Delivered**
Maggie Hart Stebbins
Chair, Bernalillo County Commission
One Civic Plaza, 10th Floor
Albuquerque, NM 87102

COA2019-0001/ CSU2019-0001
(1300 Gonzales SW)

Dear Chairperson Hart Stebbins and Commissioners:

This office represents Matthew Cone, Albert Sanchez, Amanda Webb Knox, Justin Knox, Gloria Baca and Carlos Baca ("Appellants") in COA2019-0001, which is an appeal of a County Planning Commission ("CPC") decision, for a special use permit for 1300 Gonzales Rd. SW (CSU2019-001). Please place this letter in the record for COA2019-0001.

This letter is to provide argument and to supplement Appellant's prior submittals, for the hearing scheduled for April 9, 2019. The decision by the County Planning Commission ("CPC") was erroneous in applying County plans, was factually mistaken, was arbitrary, capricious and manifestly abusive of discretion, and was contrary to law, as set out below.

At the same time as this letter is submitted, by a separate letter Appellants also are submitting a request that certain "new evidence" (the "Planning Records") be accepted for consideration in the appeal.

References below to page numbers are to the transcript ("TR") of the CPC hearing of February 6, 2019.

To supplement Appellants' appeal arguments:

1. The general Special Use Permit standards were not satisfied. Under the County Zoning Ordinance ("CZO"), special use permits are available under certain conditions for uses not permitted in the regular zones. CZO Section 18(A) for special use permits starts with the statement that "By Special Use Permit, the Bernalillo County Planning Commission may authorize the location of uses in which they are not permitted by other sections of this ordinance." In this appeal, the basic R-2 apartment use proposed for the property is permitted in the R-2 zone. Thus, generally, special use permit treatment is not appropriate for this R-2 use proposal.

Further, the applicant and the CPC's decision did not satisfy the other special use permit standards of CZO Section 18(A), including but not limited to Sections 18(A)(1) and (3), relating to compatibility with and preservation of the A-1 zone, existing uses, the general area and adjacent zones. For example, staff observed:

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> Staff acknowledges that, due to the complex nature of this request, the history of the subject property, neighborhood character and substantial public input, not all applicable goals and policies are entirely furthered by thus request. Specifically, the proposed density, building design and layout are not consistent with the character of the surrounding neighborhood.

Staff testified that there were no similar multifamily uses near the site (TR 123).

2. The Resolution 116-86 criteria were not satisfied. The standards for granting a special use permit under Resolution 116-86 were not satisfied. The special use permit at issue is essentially a zone change as it is for the life of the use.

The applicant did not demonstrate and the CPC did not find that the existing A-1 zoning is inappropriate.

While there was discussion of "changed conditions", there was no evidence of changed conditions that make the existing zoning inappropriate, and the CPC did not describe any such justifying changed conditions.

There was no evidence that and the CPC did not find that there was a public need for the change in classification or that the need will be best served by changing the classification for this property as opposed to other property, which standards appear to be required under Albuquerque Commons Partnership v. City Council of Albuquerque, 2009-NMCA-065, ¶ 16, rev'd on other grounds, 2011-NMSC-002 ("ACP"), for zone changes based on being "more advantageous for the community". See also Ricci v. Bernalillo County Bd. of County Comm'rs, 2011-NMCA-114, ¶ 16, which holds that the ACP standards do not apply to "temporary" special use permits.

The special use permit at issue if approved effectively constitutes a "spot zone" because there appears to be no similar special use permit or similar dense use anywhere near the site. County staff testified that there were no other multifamily facilities in the area (TR 123).

3. The "Planned Development Area" criteria were not demonstrated. The application in this case proceeded, under staff guidance, as a "Planned Development Area". However, the applicant did not demonstrate the required "need to vary height, lot area, or setback requirements due to unusual topography, lot configuration, or site features" for a "Planned Development Area" ("PDA") special use permit under CZO Section 18(B)(23). A special use

permit for a PDA is allowed only under limited, demonstrated circumstances (key language in bold):

> 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.

The language of this allowed special use, considered with the general standards for special use permits, indicates that a PDA may be granted only for sites with specific need to vary height, lot area, or setback requirements due to unusual topography, lot configuration, or site features.

Despite the CPC's finding on this issue, there appears to be no demonstration of "the need to vary height, lot area, or setback requirements due to unusual topography, lot configuration, or site features". In its analysis, County staff misstated the applicable CZO language (TR 15-16):

> In the analysis, staff concluded that although differing in character from the surrounding neighborhood, which is mainly single-family detached dwellings, the request furthers many goals and policies of the Comprehensive Plan and the Southwest Area Plan related to density, land use, housing, developed landscape, energy management, and water management.
>
> As required by zoning code section 18, for a planned development area, the applicant demonstrated the need to vary lot area requirements due to unique site features and in order to create a cluster housing development, preserve visual and physical access to the adjacent open space, and to facilitate development as supported by the Southwest Area Plan.
>
> The applicant provided adequate justification for the request that met the criteria of Resolution 116-86. Specifically 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 the Southwest Area Plan.

The Zoning Administrator Nicholas Hamm later (TR 21) corrected the misstatement of the applicable language, but he also failed to address the key issue of whether there is **need to vary height, lot area, or setback requirements due tounusual topography, lot configuration, or site features**.

Under Burroughs v. Board of County Commissioners of Bernalillo County, 1975-NMSC-051, ¶ 15, 88 N.M. 303, "planned development area" is not an "all-inclusive catchall category", and the County Commission should reject staff's proposed catchall use of the PDA special use category.

4. The standards for "Cluster Housing Development" were not satisfied.

Mr. Hamm relied on the definition of "cluster development" to justify the "Planned Development Area" (TR 21-22):

> The other definition that really comes into play here is that of cluster housing, and that's defined as, "A form of development that permits a reduction in lot area and bulk group requirements provided there is no increase in the number of lots permitted under a conventional subdivision or increasing the overall density of a development unless otherwise permitted by a policy adopted as part of an area plan, sector development plan, master plan, and the remaining land area's devoted to open space, active recreation, and preservation of environmentally sensitive areas or recreation [sic]" So - - and that's the definition of "cluster housing."
>
> So through planned development area facilitating the ability for cluster housing to occur, that's how we end up with the listed use in section 18 that's being considered today.
>
> Granted, there may be similarities between that definition and that of an apartment, and the county zoning code defines that as, "One or more structures containing two or more dwelling units each." So there may be a little bit of overlap there, and that I think has to be conceded, but it is being considered today as a section 18 listed use.

Mr. Hamm's analysis concedes that the use is permitted in other sections of the CZO but misses that "cluster housing development" is a limited, restricted type of development requiring particular findings. Declaring a PDA does not compel an automatic increase in density. It is not clear how or when a "cluster housing development" could be available for an A-1 zoned site with no unusual topography, lot configuration, or site features. Mr. Hamm's analysis suggests

that any usual residential area could become "cluster housing" to obtain substantially higher density.

Appellants dispute that the second prong of "Cluster Housing Development" criteria has been met: there is no county "policy" that allows the site's A-1 zoning to be rezoned to a substantially denser zoning absent other significant circumstances, and the proposed use is not intended to preserve agriculture.

5. The application should be processed as a "Specific use" Special Use Permit or as a zone change. As conceded by Mr. Hamm (TR 22), the proposed use is essentially apartments allowed in the R-2 zone. The application for the proposed use should have been considered under CZO Section 18(B)(32)(a) as a "Specific use" special use permit application. The applicant did not meet the "Specific use" special use permits standards of unique conditions that justify the request and substantial support from neighborhood residents within 200 feet of the site.

Mr. Hamm also argued that approval was justified because a zone change was justified (TR 37, lines 19-23):

> One could make a robust case for the existing zoning to be inconsistent with those designations and thereby - - it blows towards approving a zone change that would allow for higher density development just - - just based upon the plans that the county itself has adopted.

The decision to proceed with a "PDA" application rather than a "Specific use" application or a straight zone change appears to have been made by staff.

Both a "Specific use" special use permit application and a zone change application have more stringent proof requirements than a PDA special use permit application, so staff's determination that the applicant proceed under the PDA provision was relevant to the CPC's consideration and also effectively limited the CPC's decision process.

6. The CPC did not apply objective standards. The CPC did not apply any reasonable measurable objective standards for its decision to grant the PDA special use permit. The CPC majority basically accepted the staff advocacy and recommendation without analysis or change. The CPC's decision was ad hoc, arbitrary and capricious.

7. Staff improperly advocated for the project violating due process. County staff, and thus the CPC, denied Appellants a fair hearing and due process by staff making determinations in favor of, and advising, coaching, and

advocating for the applicant's special use permit application, as evidenced by the Planning Records and the hearing transcript. County staff directly argued in favor of the application, including in making factual determinations and conclusions and suggesting alternative bases for the proposed development(TR 15; TR 22; TR 37; TR 114-115; TR 122; TR 123). Staff opened and closed the testimony taken at the hearing. The various decisions underlying the staff recommendation were not properly noticed or reported.

8. Staff decisions violated the Open Meetings Act. County staff acting on behalf of and with delegated authority from the County Commission formed County policy in various meetings with the applicant or the applicant's agents, in violation of the New Mexico Open Meetings Act. The Zoning Administrator (Mr. Hamm) is authorized under the CZO to interpret the provisions of the CZO. Under the CZO, such Zoning Administrator decisions are to be made in connection with a public hearing and are appealable. In this case Mr. Hamm apparently made a closed meeting interpretation of the CZO: that the application was justified for and should be allowed as a "Special use" special use permit. That interpretation then was apparently reversed or overridden in other closed meetings, so that the development was categorized as a PDA (despite Mr. Hamm observing that it is essentially an apartment complex) (TR 22). All interpretations of the CZO by the Zoning Administrator and any staff recommendation should be made in connection with open meetings if meetings are involved, and properly noticed and reported.

Appellants previously have submitted a letter dated March 6, 2019, concerning Open Meetings Act violations.

9. The record is inadequate to support the CPC decision. County staff and the applicant or the applicant's agents had numerous substantive meetings and correspondence about this matter which substantive meetings and correspondence were not evidenced in the record considered by the CPC. These meetings resulted in various critical decisions, as set out in the Planning Records and evidenced by staff's testimony at the hearing. The CPC should have been presented with all the applicant's submissions and all supporting information for the staff recommendation for the PDA application.

10. The 20% Rule should apply to this appeal. Appellants intend to invoke the "20% rule" and are gathering the applicable petition signatures for submission.

Appellants intend to provide argument from one or more of the Appellants themselves at the April 9 hearing.

Very truly yours,

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