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Bernalillo County
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STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

MATTHEW CONE, ALBERT SANCHEZ, JUSTIN KNOX, and GLORIA BACA,
Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY,
Appellee,

and

VALENTIN P. SAIS, RON A. PEREA, and RIO GRANDE HUERTA, LLC,
Interested Parties.

D-202-CV-2019-03654

MEMORANDUM OPINION AND ORDER

THIS MATTER is an appeal under Rule 1-074 NMRA of a decision by the Board of County Commissioners of Bernalillo County (Board) upholding the County Planning Commission's (CPC's) decision to approve a special use permit. The Court **AFFIRMS** the Board's decision. Appellants' Motion to Supplement the Record is **GRANTED**.

I. FACTS AND BACKGROUND

Valentin P. Sais and Ron A. Perea (Applicants) applied for a special use permit for property located at 1300 Gonzales Road SW in Albuquerque, New Mexico. The property is approximately 3.83 acres in size, currently vacant, and zoned A-1 (rural agricultural). Applicants, who are the owners of the property, intend to sell it for development by Rio Grande Huerta, LLC. The proposed development is a multi-family residential dwelling development described in the application as collaborative housing or "co-housing." The development will consist of twenty-seven dwelling units inside five buildings, a pool and recreation area, agricultural uses including community gardens, orchards and greenhouses, parking areas for vehicle and bicycles, a garage, workshop, storage buildings, and a sign.

The CPC held a hearing on the application on February 6, 2019, and voted to approve the special use permit. The special use permit contains fourteen conditions, including that development comply with the approved site plan. [RP 000002–06.] Appellants appealed the CPC's decision to the Board. [RP 000706–30.][1]

The Board held a public meeting on the appeals on April 9, 2019. At the meeting, the Board heard from County planning staff, from Appellants, from citizens opposed to the special use permit, and from citizens in favor of the special use permit. All three appeals were denied by votes of four to one. [RP 1674–78.] The special use permit was approved by written decision issued April 11, 2019. [RP 000743–47.] Appellants timely appealed to district court.

II. STANDARD OF REVIEW

Rule 1-074(R) NMRA states the district court shall apply the following standards of review:

> (1) whether the agency acted fraudulently, arbitrarily or capriciously;
>
> (2) whether based upon the whole record on review, the decision of the agency is not supported by substantial evidence;
>
> (3) whether the action of the agency was outside the scope of authority of the agency; or
>
> (4) whether the action of the agency was otherwise not in accordance with law.

Rule 1-074(R) NMRA. The reviewing court is obligated to review the entire record to determine whether the zoning authority's decision is supported by substantial evidence. *Paule v. Santa Fe County Bd. of County Comm'rs*, 2005-NMSC-021, ¶ 32, 138 N.M. 82. The Court views the evidence in the light most favorable to the decision. *Id.* "Substantial evidence means relevant evidence that a reasonable mind would accept as adequate to support a conclusion." *Id.* (citation and quotation marks omitted). "The district court does not determine if the opposite result is

[1] Appellants actually submitted three seemingly identical appeals to the Board.

supported by substantial evidence because it may not substitute its judgment for that of the administrative body." *Hart v. City of Albuquerque*, 1999-NMCA-043, ¶ 9, 126 N.M. 753 (citation omitted).

III. DISCUSSION

A. Appellants' Motion to Supplement the Record

Appellants request leave to supplement the record on appeal to include papers presented to the Board at the April 9, 2019 hearing. The Rules of Civil Procedure provide as follows for modification of the record on appeal:

> Correction or modification of the record. If anything material to either party is omitted from the record on appeal by error or accident, the parties by stipulation, or the agency on request, or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court; provided, however, only those materials described in Paragraph H of this rule shall be made part of the record on appeal.

Rule 1-074(I) NMRA. The "record on appeal" is defined as: "a copy of all papers, pleadings, and exhibits filed in the proceedings of the agency, entered into or made a part of the proceedings of the agency, or actually presented to the agency in conjunction with the hearing[.]" Rule 1-074(H)(2) NMRA.

Rio Grande Huerta, LLC and the County oppose supplementation. Rio Grande Huerta, LLC argues the Board properly excluded the documents. The County argues the supplementation request is a collateral attack on the Board's decision.

Because there is no dispute that the documents were actually presented to the Board, the motion to supplement is granted. The Court will permit the record to be supplemented to the extent of the six items listed in the motion to supplement.

B. Appellants' arguments

1. Challenge to the adequacy of the Board's written decision

In Issue No. 1, Appellants argue the Board "erred in not issuing an appropriate written decision under NMSA 1978, § 39-3-1.1." [SAI at 10–12.] Appellants claim the Board's written decision is faulty because it repeats the findings and conditions of the CPC decision, fails to provide notice of appeal requirements, and does not address Appellants' issues.[2]

Section 39-3-1.1 "shall apply only to judicial review of agency final decisions that are placed under the authority of this section by specific statutory reference." NMSA 1978, § 39-3-1.1(A) (1999). Appellants have not identified a specific statutory reference that places the Board's decision under the authority of section 39-3-1.1. Without such authority, the Court will not assume section 39-3-1.1 applies.

Furthermore, the Board's written decision is not faulty merely because it repeats the findings and conditions of the CPC. Appellants exercised their right under the Bernalillo County Zoning Ordinance to appeal the CPC's decision to the Board. Bernalillo County, N.M., Code of Ordinances App'x A (Zoning Ordinance), § 18(G) (denial or approval of a special use permit by the CPC may be appealed to the Board). The question before the Board was whether to approve the CPC's decision, including the conditions imposed on the special use permit. Incorporating the CPC's findings and conditions was consistent with the Board's denial of the appeals.

The Board's written decision is not faulty merely because it does not address Appellants' arguments. The purpose of the written decision is to facilitate meaningful judicial review of the action. *Albuquerque Commons P'ship v. City Council of Albuquerque*, 2008-NMSC-025, ¶ 35, 144 N.M. 99. The Board's written decision in this case satisfies this requirement. The decision indicates the Board considered the specifics of the request, the proposed use, the justification for the special use permit, and the reasons for granting the permit. The decision also includes

[2] The Court addresses separately Appellants' argument under this heading that certain of the Board's findings are not supported by substantial evidence.

fourteen conditions that relate specifically to the proposed use. The written decision is sufficiently complete to permit meaningful appellate review.

Appellants timely exercised their right to obtain judicial review of the Board's decision. The Court therefore declines to reverse on the grounds that the decision omits to discuss appeal rights.

2. Failure to admit "new evidence" and to consider alleged Open Meetings Act violations

In Issues 2 and 8, Appellants argue the Board erred by failing to accept and consider a packet of documents offered at the April 9, 2019 public hearing. The documents Appellants attempted to offer at the public hearing are the same documents that are the subject of Appellants' motion to supplement the record on appeal. The documents relate to Appellants' contention that the County's Zoning Administrator violated the Open Meetings Act (OMA) by holding closed meetings with County staff and with Applicants' agents. The record indicates the Board declined to admit these documents into the record. [RP 001627–29.] The Board made no findings or determinations regarding the alleged OMA violations.

Appellants argue the Board acted arbitrarily and capriciously by refusing to accept the "new evidence." Appellants ask the Court to remand this matter so the Board may consider the documents and the OMA violations allegedly committed by the Zoning Administrator. [SAI at 12–14.]

The Court declines to remand. The Board does not have authority to adjudicate violations of the OMA. NMSA 1978, § 10-15-3(C) (1997) (conferring jurisdiction on the district courts to enforce the Open Meetings Act). Accordingly, it was not arbitrary or capricious for the Board to decline to admit evidence regarding alleged OMA violations or to determine if OMA violations occurred.

Appellants alternatively request leave to amend to "add an OMA claim to this appeal, so that Appellants' OMA claim with Appellants' OMA evidence will be heard by the District Court if not by the [Board]." [SAI at 23.] The request is denied.

The OMA applies to "[a]ll meetings of a quorum of members of any board, commission, administrative adjudicatory body or other policymaking body of any state agency or any agency or authority of any county...held for the purpose of formulating public policy, including the development of personnel policy, rules, regulations or ordinances, discussing public business or taking any action within the authority of or the delegated authority of any board, commission or other policymaking body[.]" NMSA 1978, § 10-15-1(B) (2013). Appellants' position is that the Zoning Administrator, who undisputedly is an individual, is a policymaking body for purposes of the OMA and therefore must comply with its requirements.

The Court expresses no opinion on the merits of this argument but concludes upon review of the record that discussions which may have occurred between the Zoning Administrator and other County staff or with Applicants have no bearing on the outcome of this appeal. No purpose would be served by expanding the scope of this administrative appeal to include claims directed to the Court's original jurisdiction. The decision under review is the Board's decision of April 11, 2019. As discussed throughout this opinion, that decision is supported by the record and was in compliance with the applicable law.

3. Due process in the application process and at the public hearings

In Issue 3, Appellants claim the decision-making process and the April 9, 2019 public hearing were biased and unfair because the Commissioners relied on staff for the particulars of the application. Appellants assert County staff advocated in favor of Applicants and that it was inappropriate for County staff to express support for the special use permit. Appellants argue the

record "suggests substantial review and negotiation between [County] Staff and the applicants' representatives to design the applicants' project to obtain support by [County] Staff and approval by the CPC and the [Board.]" [SAI at 14.] Appellants claim the April 9, 2019 hearing did not comport with due process because it did not include cross-examination. They claim the Board was biased because, with the exception of one Commissioner, the Board agreed with the staff's recommendation.

Appellants are correct that they are entitled to due process. *See Albuquerque Commons P'ship*, 2008-NMSC-025, ¶ 34. For zoning matters that are quasi-judicial in nature procedures "are not required to comport with the same evidentiary and procedural standards applicable to a court of law." *Id.* (citation omitted). "The issue is one of procedural fairness and predictability that is adaptable to local conditions and capabilities." *Id.*

The Court has reviewed the entire record, consisting in excess of 3,000 pages, and finds no indication of bias or unfairness in the proceedings. The County apparently employs staff to investigate applications and to determine if the applications meet the criteria in the County's Zoning Ordinance and other applicable documents. The Court finds nothing improper about staff communicating with applicants regarding the permitting process. The Zoning Ordinance encourages applicants to consult with staff. Zoning Ordinance, § 18(C)(1). The application process is highly regulated, complex, and consists of multiple steps and numerous requirements. *Id.* § 18(C). The application process is facilitated if applicants are educated and informed about the requirements. Appellants and others opposed to the special use permit also communicated with staff. The record indicates staff accepted public comments, including numerous comments from opponents of the special use permit, and compiled them for the CPC's and the Board's review. [RP 000031–32, 000322–93.]

The Court finds no due process violation in the manner in which the two public hearings were conducted. The CPC is the decision-making body for special use permit applications. Zoning Ordinance, § 18(F). The CPC's hearings are public and subject to notice and record-keeping requirements. Zoning Ordinance, § 18(E), (F). If the CPC's decision regarding a special use permit is appealed, as it was in this case, the Board is the final decision-making authority. Zoning Ordinance, § 18(G). The Board's proceedings are public, subject to the OMA and to notice and voting requirements. NMSA 1978, § 10-15-1 (2013); Zoning Ordinance, § 18(G)(4)–(9).

The County staff involved in investigating the special use permit applied for in this case appeared before the CPC at the public hearing on February 6, 2019, and before the Board at the public hearing on April 9, 2019, to explain their reasons for recommending the permit be granted and to answer questions. Appellants object to County staff expressing their recommendations at the hearings. However, the purpose of a public hearing is to allow the recommendations and decision-making rationale to be heard by the public and by the decision-making body. Given that staff recommended granting the permit, they acted consistently with their role by recommending the Board deny the appeals.

Appellants and others opposed to the permit were heard at the same public meetings attended by staff. [RP 001447–1521; RP 001605–43.] Cross-examination of witnesses was not part of the public meeting process. However, Appellants were given a fair opportunity to present opposition to the special use permit. Appellants and other opponents argued to the CPC and to the Board that the proposed development is too dense, that Applicants were proceeding under an inapplicable provision of the Zoning Ordinance, that there is no justification for the special use permit, that it would interfere with access to the bosque, that traffic would be an annoyance, that

it would result in loss of farmland and open space, that it would increase crime, and that it is inconsistent with environmental values and the agricultural heritage of the South Valley.

In short, Appellants were not deprived of due process. The record indicates the application and approval processes were transparent and public. Appellants as well as others opposed to the special use permit were involved throughout and given an opportunity to be heard at every stage of the permitting process.

4. Failure to treat the application as a zone change request or a "specific use" special use permit

In Issue 4, Appellants argue the Board and staff erred by not treating the application as one for apartment use. The Zoning Ordinance defines "apartment" as: "One or more structures containing two or more dwelling units each." Zoning Ordinance § 5 (Definitions). Apartments are not a permissive or a conditional use in the A-1 zone but are allowed in the R-2 Apartment Zone. *Id.* § 10. Appellants' argument under this heading is that Applicants should have sought a zone change rather than a special use permit. They also argue the project should have been considered a "specific use" special use permit under section 18(B)(32), rather than a "Planned Development Area" special use permit under section 18(B)(23).

Applicants sought a special use permit for a Planned Development Area. A special use permit is an authorized means by which an applicant may seek permission to build a project in a location where it otherwise would not be permitted. Zoning Ordinance § 18(A) ("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[.]"). The existence of an alternate means of seeking approval under the Zoning Ordinance, such as a zone change, is not grounds to reverse. The Court's role on appeal is to review the administrative action actually taken, not to determine if an action or process not taken would have been more suitable.

Appellants further argue that the Zoning Ordinance does not define "co-housing" and the Board has no ability to enforce a co-housing use. The Court agrees co-housing is not a defined term but does not agree the Board lacks authority to enforce the proposed use. Applicants submitted a site development plan as part of their application. Compliance with the approved site development plan is a condition of the special use permit. The special use permit is valid only as long as the property is used in accordance with the site development plan. [RP 000744 (Conditions 1–3, 9.)] While the Board may not be able to enforce any particular ownership structure associated with a co-housing project, through the special use permit it is authorized to control and enforce the use and development of the property.

5. Substantial evidence to support Finding 6, in accordance with Section 18(B)(23)

In Issues 5 and 6, Appellants challenge the finding that the proposed development meets the requirements of a "Planned Development Area" under section 18(B)(23). Appellants argue that section 18(B)(23) requires applicants to satisfy the following three criteria: first, the applicant must demonstrate the need to vary height, lot area, or setback requirements; second, that the need must be due to unusual topography, lot configuration, or site features; and third, that the first and second criteria must be necessary 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. Appellants argue that the first and second criteria were not satisfied and therefore the special use permit was granted in error. [SAI at 18–19.]

The Zoning Ordinance lists thirty-two uses for which a special use permit may be granted. Zoning Ordinance § 18(B). Applicants sought a special use permit as a "Planned Development Area" under Section 18(B)(23) which states:

> 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.

Zoning Ordinance §18(B)(23).

Appellants' argument ignores the word immediately following "Planned Development Area"—the word "including." In matters of statutory construction, the word "including" conveys the conclusion that there are other terms includable though not specifically enumerated. *In re Estate of Corwin*, 1987-NMCA-100, ¶¶ 3–4, 106 N.M. 316 (the word "including" is a word of expansion, rather than of limitation). Thus, a "Planned Development Area" may include a project that requires variances in height, lot area, or setback requirements, but not necessarily.

Review of the other special use categories supports the Court's conclusion that a project may be properly categorized as a Planned Development Area even if it does not meet all three criteria. The word "including" is used in only one other instance. Zoning Ordinance § 18(B)(7) (defining criteria for "cemetery" special use permit). The remaining thirty special use permit categories do not contain the word "including." This suggests use of the word "including" in section 18(B)(23) is a deliberate drafting choice that should be given effect.

Appellants argue the Board inappropriately used the Panned Development Area category as a catch-all because the proposed use does not fall into any other category. Though "Planned Development Area" may have some flexibility of meaning, it is not without limitation. *See Burroughs v. Bd. of County Comm'rs of the County of Bernalillo*, 1975-NMSC-051, ¶ 15, 88 N.M. 303 (rejecting attempt to categorize an overnight campground as a "planned development area"). The Court's task on appeal is to determine whether "Planned Development Area" reasonably can be construed to include the proposed project.

"Planned Development Area" is not defined elsewhere in the Zoning Ordinance. The criteria in section 18(B)(23), though not exhaustive, provide guidance regarding the type of project that may be considered a Planned Development Area. Substantial evidence supports the finding that the project at issue here qualifies.

First, by the express terms of the Zoning Ordinance, a special use permit for a Planned Development Area is a means by which to facilitate development in accordance with an approved Master Plan. The record demonstrates that a special use permit is necessary to facilitate development of the subject property as envisioned by the Albuquerque-Bernalillo County Comprehensive Plan, adopted by the Board as Resolution No. 103-88 on August 23, 1988 (Comprehensive Plan), and by the Southwest Area Plan, adopted by the Board as Resolution No. 59-2001 on August 28, 2001.

Appellants do not dispute that the subject property is in an area the Comprehensive Plan designates an Established Urban Area, which proposes development up to a density of five dwelling units per acre. Appellants also do not dispute that the proposed development is within the boundaries of the Southwest Area Plan's Residential Area 5. Residential Area 5 contains the highest proposed densities for the plan area and recommends densities up to nine dwelling units per net acre. [RP 000015.] Because the site is zoned A-1, which limits density to one dwelling unit per acre, a special use permit allowing for higher density development facilitates the goals of these approved plans.

Second, one purpose of varying height, lot area or setback requirements for a Planned Development Area is "to create cluster housing development." Zoning Ordinance § 18(B)(23). Thus, a cluster housing project is consistent with a Planned Development Area special use permit.

The parties apparently do not agree on whether the proposed development in this case meets the Zoning Ordinance definition of "cluster housing development."[3] The Court need not address the dispute because it is undisputed that the project embodies cluster housing principles, even if it does not satisfy the Zoning Ordinance definition. Dwelling units will be grouped together rather than dispersed throughout the site, thereby allowing more area to be reserved for open space, agricultural activities and preservation of views, similar to a pueblo or plaza development. [RP 000015.] That a cluster housing model can be achieved in this case without the need to vary height, lot area or setback requirements supports the conclusion that Board's decision to grant the special use permit was reasonable.

Third, cluster housing facilitates the goals and policies of the Southwest Area Plan, which also is consistent with a Planned Development Area special use permit. The cluster housing model is a development approach the Southwest Area Plan favors because it promotes agricultural preservation in the South Valley. [RP 000015.]

Appellants express concern that any development which can be characterized as cluster housing could be permitted as a Planned Development Area. The Court makes no such blanket ruling. The Court's determinations are based on and limited to the record in this case.

In short, the Court does not agree with Appellants' argument that "Planned Development Area" was used as a catch-all category in this case. The proposed development, though it may not satisfy the enumerated criteria of section 18(B)(23), is strongly consistent with the intent as garnered from the criteria. The record in this case supports the conclusion that the Board did not

[3] The Zoning Ordinance defines "cluster housing development" as: "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." Zoning Ordinance § 5 (definitions).

act arbitrarily or capriciously by characterizing the proposed development as a Planned Development Area that facilitates the policies and goals of the Comprehensive Plan and the Southwest Area Plan.

6. Substantial evidence to support Finding 7, in accordance with Resolution 116-86, section 1(E)

A special use permit must be decided in accordance with Resolution 116-86. Zoning Ordinance App'x A, § 1 (reprinted in full at RP 000721–72.] In Issue 7, Appellants challenge the finding that Applicants demonstrated the existing zoning is inappropriate, as required by Resolution 116-86, section 1(E).

To obtain a special use permit, the "applicant must demonstrate that the existing zoning is inappropriate." Resolution § 1(E). Demonstrating that existing zoning is inappropriate may be shown in one of three ways: "(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." Resolution 116-86, § 1(E). The Board found Applicants demonstrated both (2) and (3). [RP 000744 (Finding 7).] Appellants argue substantial evidence does not support the finding.

Substantial evidence supports the finding that the existing A-1 zoning is inappropriate under Section 1(E)(3). A different use category is more advantageous because the existing A-1 zoning is not effective for meeting the planning goals articulated in the Comprehensive Plan and the Southwest Area Plan. The proposed use is for higher density development using a cluster housing model, both of which are goals set forth in these two plans. Because substantial evidence supports one of the justifications under section 1(E), the Court need not consider if applicants demonstrated changed circumstances.

Appellants argue the County failed to make a finding that there was a public need for the special use permit. Appellants also acknowledge, however, that the "public need" requirement has been held not to apply to special use permits. *See Ricci v. Bernalillo County Bd. of Comm'rs*, 2011-NMCA-114, ¶¶ 16–17, 150 N.M. 777 ("public need" is a judicially-adopted enhanced approval criteria that applies to zone changes under Resolution 116-86).

Appellants argue the special use permit constitutes a "spot zone." under Section 1(I) of Resolution 116-86. Section 1(I) places restrictions or "spot zones," which are defined as zone change requests that "would give a zone different from surrounding zoning to one small area, especially when only one premises is involved[.]" Res. 116-86, § 1(I). Section 1(I) does not apply. Applicants sought a special use permit, not a zone change.

IV. CONCLUSION

The Board's decision to grant the special use permit is supported by substantial evidence, was in accordance with law, and was not arbitrary or capricious. Appellants have failed to demonstrate grounds to reverse. Accordingly, the Board's decision is **AFFIRMED**. Appellants' motion to supplement the record is **GRANTED**. The record shall be supplemented within five (5) days from the date of this order.

IT IS SO ORDERED.

DENISE BARELA SHEPHERD
DISTRICT COURT JUDGE

This is to certify that a true and correct copy of the foregoing document was e-filed on Nov. 18, 2019.

Amy Baker, TCAA

D-202-CV-2019-03654

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

MATTHEW CONE, ALBERT SANCHEZ, JUSTIN KNOX, and GLORIA BACA,
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Interested Parties.

D-202-CV-2019-03654

ORDER

THIS MATTER is before the Court on Appellants' Motion for Rehearing. The motion is **DENIED**.

DISCUSSION

The Court issued *a Memorandum Opinion and Order* on November 18, 2019 affirming a decision by the Board of County Commissioners of Bernalillo County (Board) upholding the County Planning Commission's (CPC's) decision to approve a special use permit. Appellants move for rehearing pursuant to Rule 1-074(U) NMRA. Appellants assert seven grounds for rehearing.

* * *

First, Appellants correctly point out that the Court, sitting in review of an administrative agency decision, may not consider new evidence. Appellants argue if the administrative record is inadequate, remand to create a record is the appropriate remedy.

The record is not inadequate in this case. Accordingly, there is no need for remand to create a record.

* * *

Second, Appellants correctly point out that their Notice of Appeal filed May 6, 2019 references Section 3-21-9. Section 3-21-9 specifically places decisions of the Board under the authority of Section 39-3-1.1. NMSA 1978, § 3-21-9 (1999). The Court therefore withdraws the statement on page 4 of the Opinion that "Appellants have not identified a specific statutory reference that places the Board's decision under the authority of section 39-3-1.1."

The Board's written decision does not inform the parties of the requirements for filing an appeal to district court and therefore does not comply Section 39-3-1.1(B)(3). The Board's failure to describe appeal rights in its written decision was error. Though such an omission might not always be harmless, it was harmless in this case. Despite not having been advised of the appeal requirements, Appellants timely exercised their right to appeal and obtained appellate review in accordance with Section 39-3-1.1(D) and Rule 1-074 NMRA. Appellants were not prejudiced and no purpose would be served by reversing or remanding the Board's decision merely to correct the omission of appeal requirements.

* * *

Issues 3 through 6 of the motion for rehearing are directed to Open Meetings Act (OMA) violations Appellants claim occurred during the permitting process. Appellants claim the Zoning Administrator violated the OMA by holding non-public discussions with staff and with the permit applicants.

The Court granted Appellants' motion to supplement the record on appeal with documents Appellants claim support their position that the Zoning Administrator violated the OMA. Among the documents in the supplement are a letter dated March 22, 2019 from Appellants' counsel to the County and 146 pages of "Planning Records" enclosed with the letter.

The letter states the 146 enclosed documents were obtained from the County pursuant to an Inspection of Public Records Act request. The letter further states the documents call into question the Zoning Administrator's motivation in suggesting the application proceed as a special use permit when it really should have been considered a zone change. The letter also claims the Zoning Administrator violated the OMA by meeting with applicants and that County staff improperly assisted applicants with the permitting process. The letter ends with an allegation that staff "rigged" the process in favor of the applicants and it requests permission to cross examine planning staff.

The Court's ruling on Appellants' motion to supplement the record with OMA-related documents does not reflect a determination that the record is inadequate. Rather, it reflects a determination that the supplemental materials meet Rule 1-074(H)(2)'s definition of "record on appeal." As explained in the Court's Opinion, the motion to supplement was granted because neither Appellee nor Interested Parties disputed that the materials were "actually presented" to the Board.

The Court's ruling on the motion to supplement the record does not mean the supplemental documents are relevant. Merely because a party presents documents for consideration does not make them material to the issues.

The Court's ruling on the motion to supplement does not mean the Board erred by refusing to admit the documents. As an initial matter, the letter and documents already had been submitted to the Board prior to the hearing.

Furthermore, alleged OMA violations by the Zoning Administrator are not relevant to the question of whether a special use permit is allowed under the Zoning Ordinance. As set forth in the Court's Opinion, the Board had sufficient information before it to determine that the

proposed development was a "Planned Development Area" as defined by the County's Zoning Code and that a special use permit was needed to facilitate development in accordance with various planning documents. The Board's decision to grant or deny the special use permit in this case did not depend on whether the Zoning Administrator violated the OMA by holding discussions with staff and the applicants. The Board's decision not to accept the records at the April 9, 2019 hearing was not arbitrary or capricious and therefore does not require remand or reversal.

Appellants argue on rehearing that the Board may consider alleged OMA violations. Section 10-15-3(B), cited by Appellants, appears to be a notice requirement individuals must satisfy before applying for enforcement of the OMA through the district courts. NMSA 1978, § 10-15-3(B) (1997) (individual who seeks enforcement of the OMA in district court must first provide written notice of the claimed violation to the public body, and the public body must deny or fail to act on the claim within fifteen days).

Section 10-15-3(B) is not grounds to reconsider the Court's determination that the Board does not have authority to adjudicate OMA violations. The Court denied Appellants leave to add original jurisdiction OMA claims to this administrative appeal, but nothing in the Court's Opinion precludes Appellants from applying to the district court for enforcement of the OMA through injunction, mandamus or other appropriate order.

On rehearing, Appellants argue that alleged OMA violations during the permitting process are grounds to reverse on appeal. The Court does not agree. While expressing no opinion on the merits of Appellants' claim that the Zoning Administrator violated the OMA, the Court concludes such allegations are not grounds to reverse because the Zoning Administrator's conduct and decisions are not under review. The only decision that is subject to review on

appeal is the agency's final decision which in this case is the Board's decision to grant the special use permit. NMSA 1978, § 3-21-9; NMSA 1978, § 39-3-1.1(A), (B), (C), (D). It is the Board's decision which the Court must determine is in accordance with law. As described in the Court's Opinion, the Board's proceedings in this case were public and transparent, and there have been no allegations that the Board violated the OMA.

Appellants argue on rehearing they should have the opportunity to make arguments based on the supplemental documents, and that the Court must review the 146 pages of "Planning Records" that allegedly support their claim that the Zoning Administrator violated the OMA. However, Appellants already have presented their arguments that the Zoning Administrator violated the OMA, that County planning staff improperly communicated with and assisted the applicants, that County staff improperly advocated in favor of the special use permit, that Appellants were denied the opportunity to cross examine County staff, that Appellants were deprived of due process, and that the applicants should have sought a zone change rather than a special use permit. Appellants have been heard on each of these issues. The Court has considered and rejected the arguments as grounds to reverse for the reasons set forth in the Opinion. There is no need for additional argument.

* * *

In their seventh and final point on rehearing, Appellants set forth some established principles of statutory construction, but have not identified any manner in which the Court misapplied these principles in this case.

CONCLUSION

Appellants' Motion for Rehearing is **DENIED**. The Court declines to request responses under Rule 1-074(U) NMRA and has not considered Bernalillo County's response filed

December 3, 2019. Rio Grande Huerta's Motion for Leave to File Response to Appellants' Motion for Rehearing (filed December 3, 2019) and Bernalillo County's Motion for Leave to File Response to Motion for Rehearing Nunc Pro Tunc (filed December 18, 2019) are **DENIED**.

Within five (5) days of the date of this Order, Appellants shall supplement the record in accordance with the Court's ruling on the motion to supplement.

IT IS SO ORDERED.

DENISE BARELA SHEPHERD
DISTRICT COURT JUDGE

This is to certify that a true and correct copy of the foregoing document was e-filed on March 2, 2020.

D-202-CV-2019-03654

County of Bernalillo

State of New Mexico

Planning & Development Services Department

111 Union Square SE, Suite 100
Albuquerque, New Mexico 87102
Office: (505) 314-0350 Fax: (505) 314-0480
www.bernco.gov

NOTIFICATION OF DECISION
BOARD OF COUNTY COMMISSIONERS

April 11, 2019

Matthew Cone
1413 Dennison Rd. SW
Albuquerque, NM 87105

SUBJECT: FILE NO: COA2019-0001/CSU2019-0001

LEGAL DESCRIPTION: Hessel E. Yntema III, Yntema Law Firm P.A., agent for Matthew Cone, Albert Sanchez, Amanda Webb Knox, Justin Knox, Gloria Baca, and Carlos Baca, appeals the decision of the County Planning Commission to recommend approval of a Special Use Permit for a Planned Development Area (Residential and Agricultural Uses) on Tract 88A1A1 MRGCD Map 40, Tract 88A1A2 MRGCD Map 40, and Tract 87B1 MRGCD Map 40, located at 1300 Gonzales Rd. SW, zoned A-1 and containing approximately 3.83 acres. (K-13) (Original request submitted by Rio Grande Huerta LLC)

ACTION: **DENIED THE APPEAL, THEREBY UPHOLDING THE COUNTY PLANNING COMMISSION'S DECISION TO APPROVE A SPECIAL USE PERMIT FOR A PLANNED DEVELOPMENT AREA (RESIDENTIAL AND AGRICULTURAL USES)**

To Whom It May Concern:

At the April 9, 2019 public hearing, the Board of County Commissioners denied the appeal, thereby upholding the County Planning Commission's decision to approve a Special Use Permit for a Planned Development Area (Residential and Agricultural Uses) on Tract 88A1A1 MRGCD Map 40, Tract 88A1A2 MRGCD Map 40, and Tract 87B1 MRGCD Map 40, located at 1300 Gonzales Rd. SW, zoned A-1 and containing approximately 3.83 acres. The decision was based on the following Findings and is subject to the following Conditions.

EXHIBIT
tabbies
3

Findings:

1. This request is for a Special Use Permit for a Planned Development Area (Residential and Agricultural Uses) on Tract 88A1A1 MRGCD Map 40, Tract 88A1A2 MRGCD Map 40, and Tract 87B1 MRGCD Map 40, located at 1300 Gonzales Rd. SW, zoned A-1 and containing approximately 3.83 acres.

2. The site development plan illustrates the location of 27 dwelling units inside 5 buildings, a pool and recreation area, agricultural uses including gardens, orchards and greenhouses, parking for vehicles and bicycles, a garage, workshop, storage buildings and a monument sign.

3. The applicant indicates that the site will accommodate a "co-housing" type development with shared responsibilities amongst homeowners, although this use is not listed in the County Zoning Code.

4. The subject property is located within the Comprehensive Plan's Established Urban Area and within the Southwest Area Plan's Residential Area 5, thereby allowing up to 9 dwelling units per net acre.

5. The request furthers 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.

6. As required by Zoning Code Section 18 for a Planned Development Area, 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, or to facilitate development as allowed by an approved Master Plan. The site plan includes areas dedicated to open space, agricultural and recreational uses.

7. 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 Southwest Area Plan.

8. Although not required, the applicant provided evidence of support in the form of a petition. There is both support and opposition to this request.

9. According to the Albuquerque Bernalillo County Water Utility Authority, the applicant requested a water and wastewater availability statement but it has not been completed as of the printing of this report.

10. The request is consistent with the health, safety and general welfare of the County.

Conditions:

1. Development of the site shall comply with the approved site plan including the multi-family dwelling units, open space, storage, recreational areas, parking, landscaping, fencing and agricultural areas.

2. The Site Development Plan shall be revised, as follows:
   a. Revise "Building Footprint" note and "General" note to read "height will conform to A-1 zone, Section 7.C", which allows heights up to 26' or 2 ½ stories.
   b. The sign shall comply with sign regulations of the C-1 zone.

c. A note shall indicate the type of paving approved by County Public Works.

3. The Landscape Plan shall be revised, as follows:
   a. Clarify the concrete vs. porous paving areas (as on the site development plan).
   b. Revise paving material as approved by PW.
   c. Provide a legend detail for the pedestrian walkway material.
   d. Identify the "Bosque Restoration Area" on the plan.
   e. Identify the square footage of "Agriculture Areas".
   f. Identify the square footage of "Play Field/Blue Gramma Field".
   g. Identify location of the "Chicken Run".

4. The covered parking structure shall comply with Zoning Code Section 22.D.2.e. (fire resistive) since it is located less than 5' from the north property line.

5. Obtain permits required by Bernalillo County Building Ordinance Section 110.

6. Within 60 days of approval, the applicant shall submit to the Public Works Division construction plans (PWCO) for the driveway connection to Gonzalez Road SW and any other work within the County right-of-way.

7. Within 60 days of approval, the applicant shall submit to the Public Works Division a final Grading and Drainage Plan that includes all proposed site features.

8. Prior to issuance of a building permit, water and wastewater utilities shall be approved by ABCWUA.

9. This Special Use Permit shall be issued for the life of the use.

10. A replat is required to combine the three lots into one, prior to issuance of any building permits.

11. Three copies of a revised site development plan, consistent with the conditions of approval, shall be submitted for review and approval to the Zoning Administrator within 60-days of approval of this Special Use Permit.

12. The applicant shall comply with all applicable Bernalillo County ordinances and regulations.

13. The foregoing conditions shall become effective and shall be strictly complied with immediately upon execution or utilization of any portion of the rights and privileges authorized by this Special Use Permit.

14. The applicant shall add a Responsibility for Maintenance Statement to the Landscape Plan.

If you have any questions, please feel free to contact me directly at 314-0387.

Sincerely,

Catherine VerEecke

Catherine VerEecke
Planning Manager

CV/fs

cc: File
Kevin Grovet, Public Works
Raeleen Marie Bierner, Public Works
Blaine Carter, Public Works
Rene Sedillo, Technology Manager
Jeff Senseney, Building
Joel Kurzawa, Project Coordinator
Monica Gonzales, GIS Tech
Hess Yntema, Yntema Law Firm P.A., 215 Gold Ave. SW, Suite 201, Albuquerque, NM 87102
Albert Sanchez, 224 Five Points Rd. SW, Albuquerque, NM 87105
Amanda Webb Knox and Justin Knox, 2016 Poplar Lane SW. Albuquerque, NM 87105
Carlos and Gloria Baca, 1325 Gonzales Rd. SW, Albuquerque, NM 87105
Denicia Sam Cadena, 1305 Trujillo Rd. SW, Albuquerque, NM 87105
Jennifer Cruz, 1512 Cerro Vista Rd. SW, Albuquerque, NM 87105
Evelyn Fernandez, 1585 Trujillo Rd. SW, Albuquerque, NM 87105
Karen Loring, 1407 Gonzales Rd. SW, Albuquerque, NM 87105
Charlotte Walters, 1425 Dennison Rd. SW, Albuquerque, NM 87105
Dory Wegryzn, 1404 Gonzales Rd. SW, Albuquerque, NM 87105
Vecinos del Bosque Neighborhood Association, P.O. Box 12841, Albuquerque, NM 87105
Valentin P. Sais and Ron A. Perea, 1302 Neetsie Dr. SW, Albuquerque, NM 87105
Rio Grande Huerta LLC, Marlise Metodi, 624 Amherst Dr. SE, Albuquerque, NM 87106
Peter Rehn, 4519 Compound North Ct. NW, Albuquerque, NM 87107
Faith Okuma, 3105 El Toboso Dr. NE, Albuquerque, NM 87104
Rod Mahoney, 1838 Sadora Rd. SW, Albuquerque, NM 87105
John Padilla, 1573 Trujillo Rd. SW, Albuquerque, NM 87105
Christy McCarthy, 1413 El Oriente Rd. SW, Apt. A, Albuquerque, NM 87105
Penina Bellen, 2299 Campbell Rd. SW, Albuquerque, NM 87105
Aaron and Olivia Hill, 10804 Wolf Creek Rd. SE, Albuquerque, NM 87123
Felix Lucero, 1020 La Vega SW, Albuquerque, NM 87105
Maggie Seeley, 407 Amherst Dr. SE, Albuquerque, NM 87106
Anne Witherspoon Bolger, 1278 Tapia Rd. SW, Albuquerque, NM 87105
Amily Reem Musallam Berthdd, 1413 Dennison Rd SW, Albuquerque, NM 87105
Marianne Dickinson, 2328 Rio Grande NW, Albuquerque, NM 87104
Martin Ortega, 1417 Neetsie Dr. SW, Albuquerque, NM 87105
Michael O'Hearr, 1734 Hooper Rd. SW, Albuquerque, NM 87105
Ruben Garcia, 832 Madison St. NE, Albuquerque, NM 87110
Marygold Walsh-Dilley, 443 Hermosa Dr. NE, Albuquerque, NM 87108
Pamela Heater, 760 Montclaire Dr. NE, Albuquerque, NM 87110
Lissa Hammit and Salley Trefethen, 501 Walter St. SE, Albuquerque, NM 87102
Deborah Bock, 8301 4th St. NW, #3, Bldg 3, Los Ranchos, NM 87114
Mary and James Brown, 5215 Montano Plaza Dr. NW, Albuquerque, NM 87120
Patti Lentz, 415 Amherst NE, Albuquerque, NM 87106
Aryon Hopkins, 1703 Gonzales Rd. SW, Albuquerque, NM 87105
Jeffrey Holmes, 3227 Rio Grande Blvd. NW, Albuquerque, NM 87107
Suzanna and Joshua Garcia, 1143 Desert Sunflower Dr. NE, Rio Rancho, NM 87144

Johnnee Cunningham and Joan Pickard, 186 Caminito Alegre, Corrales, NM 87048
Jonathan or Ellen Craig, 937 La Font Rd. SW, Albuquerque, NM 87105
Setso Metodi, 624 Amherst Dr. SE, Albuquerque, NM 87105
Gilbert Morales, 13108 Calle Azul SE, Albuquerque, NM 87123
Stevey Hunter, 3227 Rio Grande Blvd. NW, Albuquerque, NM 87107
Beth Moore-Love, 1738 La Vega SW, Albuquerque, NM 87105
David Ryan , 813 Mountain Rd. NW, Albuquerque, NM 87102
Priscilla Sais, P.O. Box 27633, Albuquerque, NM 87125
Steve Cone, 1217 N Chaco Ave., Farmington, NM 87401
Willa Pilar, 744 Montclaire Dr. NE, Albuquerque, NM 87110
Blake Whitcombe, Hunt and Davis PC, 2632 Mesilla St. NE, Albuquerque, NM 87110

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

MATTHEW CONE, ALBERT SANCHEZ,
JUSTIN KNOX, and GLORIA BACA,
Appellants,
vs.

No: D-202-CV-2019-03654
Judge: Denise Barela Shepherd

BERNALILLO COUNTY BOARD OF
COUNTY COMMISSIONERS,
Appellee,
and

VALENTIN P. SAIS, RON A. PEREA,
and RIO GRANDE HUERTA, LLC,
Interested Parties.

APPELLANTS' STATEMENT OF APPELLATE ISSUES
FOR APPEAL OF COA2019-0001/CSU2019-0001

I
STATEMENT OF THE ISSUES

1. The Bernalillo County Commission (the "BCC") erred in not issuing an appropriate written decision under NMSA 1978, Section 39-3-1.1.

2. The BCC erred in failing to consider Appellants' arguments and evidence in support of Appellants' appeal.

3. The BCC decision process was arbitrary, capricious, and abusive of discretion, and denied Appellants due process, because BCC Staff organized and advocated for the application, the record was inadequate, and the BCC did not consider supplemental evidence submitted by Appellants.

4. The BCC and BCC Staff erred in not treating the application as for an "apartments" use under the County Zoning Ordinance ("CZO").

5. The BCC erred in approving a Special Use Permit ("SUP") for the applicants' "co-housing" type development under CZO Section 18 (B)(23).

6. Finding No. 6 of the BCC's decision concerning the criteria for granting a SUP for a "Planned Development Area" ("PDA") for a "co-housing" project under the CZO was not supported by substantial evidence and was otherwise contrary to law.

7. Finding No. 7 of the BCC's decision concerning the criteria for granting a SUP for a PDA for a "co-housing" project under Resolution 116-86 was not supported by substantial evidence and was otherwise contrary to law.

8. The BCC should consider whether BCC Staff meetings with the applicants' representatives violated the New Mexico Open Meetings Act (the "OMA").

II
SUMMARY OF PROCEEDINGS

A. NATURE OF THE CASE

This case is an administrative appeal under SCRA 1-074 of a decision made on April 9, 2019 by the BCC to deny Appellants' appeal, thereby upholding the decision of the County Planning Commission ("CPC") to approve a SUP for a PDA for a "co-housing" project at 1300 Gonzales Rd. SW in Bernalillo County. The site at issue is 3.83 acres and is zoned A-1. A-1 zoning allows 1 dwelling unit per acre. The applicant proposes a development of 27 dwelling units within 5 buildings, with amenities, on the site. Appellants include the neighbor to the immediate north of the site.

The record (herein "Record") in this case is 3,195 pages. After page 843, the Record repeats documents. For example, the transcript of the CPC hearing on February 6, 2019, appears 4 times in the Record (R 567-698; 1410-1541; 2246-2377; 3019-3150). Likewise, hundreds of pages of form petitions are duplicated various times in the Record. Notwithstanding

its length, the Record does not include various papers which were presented to the BCC by Appellants for Appellants' appeal arguments, as set out in Appellants' Motion to Supplement the Record filed June 17, 2019. The Record does not follow the order required by SCRA 1-074(H)(2) ("which shall be organized by date submitted to the agency beginning with the earliest paper or pleading"). The Record does not appear to have many of the usual submissions by applicants to BCC Staff, or communications between BCC Staff and applicants, in connection with a zoning application.

B. COURSE OF PROCEEDINGS

1. As early as August 29, 2018, the applicants were submitting materials to BCC Staff (R 62).

2. The applicants filed their initial SUP Application on November 26, 2018 (R 57) for a "Planned Development Area" and a re-submittal, with a changed site plan and justification, on December 17, 2018 (R 8, 54, 57, 59).

3. The applicants submitted materials about "Cohousing" (R 64), which "means collaborative housing".

4. The applicants submitted their proposed site plan (R 95).

5. The applicants stated that "Neighborhood conditions have changed substantially . . . [the site] has not been farmed for decades, has been on the market for several years and the Sais family must sell it. . . . The combination of residential and agricultural uses is most appropriate according to the Sais family, who will continue to live on the block and who believe the RGH [Rio Grande Huerta] residents will be good neighbors" (R 75).

6. The applicants referenced the Comprehensive ("Comp Plan") and the Southwest Area Plan ("SWAP") in support of their proposed "clustering" of dwelling units (R 75-77).

7. BCC Staff stated as to "Request Justification" (R 11):

> In response to Resolution 116-86, the applicant asserts that changed conditions in the area, specifically, the adoption of, and subsequent amendments to, the Southwest Area Plan, have made the existing zoning ineffective at meeting current planning goals for this area. The applicant also asserts that the proposed Special Use Permit for a Planned Development Area is more advantageous to the community, because it furthers goals and policies of the Comprehensive Plan the Southwest Area Plan. In addition, although this not a "cluster housing" development, per se, the applicant asserts that the cluster housing principles, as defined by the County Zoning Code and described in the Southwest Area Plan are furthered by the proposed building layout.

8. BCC Staff stated "Surrounding the subject property are mainly single-family, residential uses, at R-1 densities, in established subdivisions" (R 11).

9. BCC Staff asserted that various policies support the higher density use (27 dwelling units within 5 buildings) (R 22).

10. BCC Staff recommended approval but acknowledged (R 33):

> 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 this request. Specifically, the proposed density, building design and layout are not consistent with the character of the surrounding neighborhood.

11. Numerous petitions and letters were submitted in support of the application (R 123-270).

12. Numerous petitions and letters were submitted against the application (R 272-476).

13. Appellant Matthew Cone set out various reasons for denial of the application by letter (R 375-393), including conflict with the Comp Plan, not meeting SUP requirements, too much density, harm to open space, and excessive traffic.

14. Additional letters for and against the application were submitted by February 6, 2019 (R 479-566).

15. The CPC held a hearing on the application on February 6, 2019 (R 567).

16. BCC Staff presented the case in support of the application (R 578-592).

17. BCC Staff stated that "cohousing is not a defined use in the county zoning code, nor is it something the County could enforce" (R 579), and that "the proposed use is similar to multifamily apartments".

18. BCC Staff apparently agreed that the project constituted "apartments" (R 579-580).

19. CPC Chair Chavez stated: "It's an apartment complex" (R 580).

20. BCC Staff observed (R 581) that the density proposed by the applicants is "approximately seven dwelling units per acre", and that:

> ... staff concluded that although differing in character from the surrounding neighborhood, which is mainly single-family detached dwellings, this 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.

21. BCC Staff concluded (R 582):

> ... staff recommends approval of this request with findings and modified conditions as previously stated, because the subject property is located in the established urban area as designated by the Comprehensive Plan, and the subject property is located in residential area 5 as designated in the Southwest Area Plan, which recommends densities up to nine dwelling units per acre and because changed conditions and planning in the area

have resulted in more urban densities and development patterns and because the request furthers goals and policies of the plans.

22. BCC Staff argued as to "changed conditions" (R 584), to the effect that the Southwest Area Plan allows for higher density.

23. The applicants' agent testified in favor of the application (R 592-602).

24. The BCC Zoning Administrator ("ZA") (Mr. Hamm) testified in favor of the application (R 587). The ZA claimed there were "similarities" and "overlap" between "cluster housing" and "apartments" (R 588).

25. BCC Staff (Ms. Shumsky) stated: "Staff's recommendation is based solely on the adopted plans and policies." (R 682).

26. BCC Staff (Ms. Shumsky) stated that there were no multi-family apartments in the area (R 689).

27. The CPC approved the application on a 4-2 vote (R 691).

28. The CPC's notification of decision appears at R 2.

29. Appellants (with other appellants (the "CPC Appellants")) submitted an appeal of the CPC decision (R 700), with their reasons for appeal set out at R 716-718.

30. The CPC Appellants through counsel submitted a letter dated March 22, 2019, supplementing their appeal and setting out their arguments against the CPC decision (R 724-730). Issues included that SUP standards were not satisfied, Resolution 116-86 criteria were not satisfied, PDA criteria were not satisfied, "Cluster Housing Development" was misapplied, the application should have been processed as a "specific use" SUP or as a zone change, the CPC did not apply objective standards, BCC Staff advocated improperly for the project violating due process, meetings between BCC staff and the applicants violated the OMA, the record was inadequate, and the 20% rule should apply.

31. Appellants' March 22, 2019 argument letter (R 724-730) mentions two other letters submitted by Appellants in support of their appeal: a March 6, 2019 letter concerning OMA violations (R 729) and a March 22, 2019 letter to submit "new evidence" (R 724). Neither the March 6 OMA letter nor the March 22 new evidence letter are in the Record.

32. Counsel for the applicants responded (R 731-737) to the three appeals filed (R 742) of the CPC decision.

33. The BCC held a hearing on the three appeals on April 9, 2019 (R 743-747; 756).

34. At the BCC hearing, BCC Staff advised that "co-housing is not a defined use in the County Zoning Code, nor is it something specifically the County could enforce" (R 761).

35. BCC Staff argued that the applicant's justification as to "changed conditions" references various plan policies, and that the application furthers "many goals of the Comprehensive Plan and the Southwest Area Plan" (R 761-762).

36. BCC Staff ruled that the "20%" rule for the BCC vote applied (R 764).

37. The applicants' representatives testified in favor of the application (R 774).

38. Appellant Albert Sanchez argued against the application (R 768-771).

39. Appellant Justin Knox argued against the application and requested the admission of the "new evidence submitted on March 22, 2019" (R 774).

40. The applicants requested consideration of "new evidence" (a video not shown to the CPC), which request was granted by the BCC Chair (R 778-780).

41. BCC Staff did not object to accepting Appellants' "new evidence" into the Record (R 791).

42. The BCC Chair and BCC Staff said the following concerning Appellants' "new evidence" (R 792):

> CHAIR HART STEBBINS: Can you be a little more specific about what's in the envelope? I'm just curious. I mean, obviously we're not going to have time to read it within the hour we have left in the hearing.
>
> MS. VEREECKE: Madam Chair, this is doc – and I haven't looked at it really carefully, but it is documents about communication among staff and communication between staff and the applicant that the appellant feels are relevant in their case. Although, they did not bring this up in their case. But, it's emails and notes from meetings that took place between the applicant and staff.

43. The applicants through counsel were "fairly neutral" to admission of Appellants' "new evidence" (R 792).

44. The BCC Chair and the BCC's attorney said the following, concluding in the BCC Chair denying consideration of Appellants' "new evidence" (R 793):

> CHAIR HART STEBBINS: Thank you. And I just want to ask staff, so the intent of entering them into the record would be to inform the Commission, which given the time is unlikely.
>
> MR. GARCIA: Madam Chair, yes, that's the purpose of new evidence, if you find that it would help you decide this case. And this is just as a way of suggestion, just to take a quick look at and see if it's something you might consider, and decide at that point whether you would want to accept it as evidence.
>
> CHAIR HART STEBBINS: This is up to the Commissioners. Is there any Commissioner who would like to accept this new evidence at this point in time? I think the Board's decision is that we do not consider it at this point in time.

45. Applicants' counsel argued that "the Southwest Area Plan also allows for development of up to nine dwelling units per acre", and "the opponents …have argued that the

basic R-2 apartment use proposed for the property is permitted in the R-2 zone. This statement ignores the fact of what is really being sought here, which is a co-housing community" (R 782).

46. BCC Staff confirmed that the CZO does not have a definition of co-housing (R 787).

47. BCC Staff (Mr. Gradi) described the options for "apartments" use (R 788):

> The Zoning Code requires that – puts us in a position that if somebody requests apartments, they can do it A, through an apartment zone, an R-2 use and that was one of the options presented to the applicant. Or B, they can do something a little more creative that is apartment-like and they can opt to take it through a planned development-type of trajectory. The planned development trajectory is what this applicant applied for.
>
> There are two manners, three manners rather, that you can apply for an apartment-type use in the County at this point.

48. Mr. Gradi elaborated on BCC Staff's analysis (R 788-789):

> . . . if someone were to apply for a straight R-2 zone change, we would probably not be able to approve that because that would clearly be a spot zone. You would be changing the zoning, the surrounding zoning, would be R-1 and R-2. So that leaves the other option which would be to apply for a Special Use Permit for apartments.

49. Mr. Gradi claimed that the "specific use" SUP would be less stringent than a PDA (R 789-790):

> MR. GRADI: For an R-2 use. And the criteria – that would be something called a Special Use Permit for a specific use, which is Item Number 32 in Section 18 of the Zoning Code, and that would require that they apply for an R-2 use, as enumerated in the Zoning Code. And the criteria for that would probably be less stringent than the current application for a Planned Development Area.
>
> Because if they applied for an R-2 use, the main criteria is that they have to have substantial neighborhood support, not majority, just substantial neighborhood support from homeowners within 200 feet of the subject site and that they have to demonstrate that the site is unusual in some way.
>
> That is probably – if someone were just to do a straight apartment complex without the other features, as the open space, some of the

agriculture areas, the orchards, something like that, that would be the path that we would – that they would probably take.

50. BCC Staff (Ms. Vereecke) testified "there are additional amenities and benefits that otherwise would not be provided with a straight zoning application" and [the proposal] "is a creative beneficial use beyond what would be obtained under a straight zone." (R 790-791).

51. The BCC denied Appellants' appeal on a 4-1 vote (R 841).

52. The BCC decision (R 743) was issued April 11, 2019 and this appeal was filed May 6, 2019.

III
ARGUMENT

SCRA 1-074 (R) sets out the standards of review for this appeal:

> Standard of review. The district court shall apply the following standards of review:
>
> (1) whether the agency acted fraudulently, arbitrarily, or capriciously;
>
> (2) whether based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence;
>
> (3) whether the action of the agency was outside the scope of authority of the agency; or
>
> (4) whether the action of the agency was otherwise not in accordance with law.

ISSUE 1

The BCC erred in not issuing an appropriate written decision under NMSA 1978, Section 39-3-1.1.

NMSA 1978, Section 39-3-1.1 states in pertinent part (emphasis added):

> B. Upon issuing a final decision, an agency shall promptly:

> 1) prepare a written decision that includes an order granting or denying relief **and a statement of the factual and legal basis for the order** . . . . and
>
> 3) serve a document that indicates a copy of the written decision and **the requirements for filing an appeal of the final decision** . . .

The BCC decision (R 743) repeats the findings and conditions of the CPC decision (R 2) and does not provide a statement of the factual and legal basis for the decision as to the appeal issues raised by Appellants. The BCC decision does not provide notice of appeal requirements.

The BCC's Findings 6 and 7 are essential for the SUP PDA "co-housing" approval, but neither finding provides sufficient facts or legal analysis to support the finding. Appellants raised the issues of failure to satisfy the definitional criteria for a SUP for a PDA; failure to satisfy the key issues under Resolution 116-1986 (is the existing zoning "inappropriate", were there "changed conditions" sufficient to justify the request; were the criteria for "more advantageous to the community" addressed; were the "spot zoning" criteria addressed); the consideration of additional evidence; the inadequate record; and the violations of the OMA (R 716-718, 724-730, 768-774). The BCC did not address Appellants' issues.

The Supreme Court in Albuquerque Commons Partnership v. City Council of the City of Albuquerque, 2008-NMSC-025, ¶35, addresses the requirement of a complete written decision:

> {35} Regardless of the justification, the decision-making body should provide "a clear statement of what, specifically, [it] believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based", and a full explanation of why those facts lead to the decision it makes. South of Sunnyside Neighborhood League, 569 P.2d at 1076. This is critical for facilitating meaningful judicial review of the action, "not for the purpose of substituting judicial judgment for administrative judgment but for the purpose of requiring the [zoning authority] to demonstrate that it has applied the criteria prescribed by . . . its own regulations and has not acted arbitrarily or on an ad hoc basis." See Smith v. Bd. of County Comm'rs of Bernalillo County, 2005-NMSC-012, ¶¶32-33, 137 N.M. 280, 110 P.3d 496 (reversing County's denial of a radio tower permit upon finding that, in denying the permit after having initially

> granted it, officials went against their original interpretation of the relevant ordinance and acted on an ad hoc basis).

Similarly, under VanderVossen v. City of Espanola, 2001-NMCA-016, ¶¶26, 27, 130 N.M. 287, and Atlixco Coalition v. Maggiore, 1998-NMCA-134, ¶19, 125 N.M. 786, a reviewing court is prohibited from supplying a reasoned basis for the agency's action that the agency itself has not given.

ISSUE 2

The BCC erred in failing to consider Appellants' arguments and evidence in support of Appellants' appeal.

The BCC failed to consider Appellants' arguments and evidence in support of Appellants' appeal to the BCC. Appellants requested that "new evidence" be considered (R 718, 729, 774) in connection with Appellants' arguments and issues raised in their appeal to the BCC. BCC Staff did not object to accepting the "new evidence" into the Record (R 791). The BCC Chair and BCC Staff said the following concerning the "new evidence" (R 792):

> CHAIR HART STEBBINS: Can you be a little more specific about what's in the envelope? I'm just curious. I mean, obviously we're not going to have time to read it within the hour we have left in the hearing.
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> MS. VEREECKE: Madam Chair, this is doc – and I haven't looked at it really carefully, but it is documents about communication among staff and communication between staff and the applicant that the appellant feels are relevant in their case. Although, they did not bring this up in their case. But, it's emails and notes from meetings that took place between the applicant and staff.

The applicants through counsel were "fairly neutral" to admission of the "new evidence" (R 792). The BCC Chair and the BCC's attorney said the following, concluding in the BCC Chair denying consideration of the "new evidence" (R 793):

> CHAIR HART STEBBINS: Thank you. And I just want to ask staff, so the intent of entering them into the record would be to inform the Commission, which given the time is unlikely.

> MR. GARCIA: Madam Chair, yes, that's the purpose of new evidence, if you find that it would help you decide this case. And this is just as a way of suggestion, just to take a quick look at and see if it's something you might consider, and decide at that point whether you would want to accept it as evidence.
>
> CHAIR HART STEBBINS: This is up to the Commissioners. Is there any Commissioner who would like to accept this new evidence at this point in time? I think the Board's decision is that we do not consider it at this point in time.

The BCC acted arbitrarily and capriciously in denying Appellants' request that the BCC consider Appellants' "new evidence" without reading Appellants' letter requesting admission of the "new evidence" or reviewing Appellants' proposed (documentary) evidence, shortly after accepting and considering "new evidence" from the applicants (R 778-780). The broad discretion accorded to an agency in conducting its hearing must be exercised judiciously and not arbitrarily. Archuleta v. Santa Fe Police Dep't., 2005-NMCC-006, ¶21. A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record; an agency's ruling is arbitrary and capricious if it fails to consider important aspects of the problem. Rio Grande Chapter of the Sierra Club v. New Mexico Mining Com'n, 2003-NMSC-005, ¶17, 12.

It appears that BCC Staff simply declined to add to the Record Appellants' March 6 OMA letter, referenced by Appellants at R 729, resulting in a failure to consider Appellants' appeal arguments or evidence as to the OMA issue.

A record that is inadequate may be remanded to an administrative body for the purpose of creating a record that is adequate for review. Lewis v. City of Santa Fe, 2005-NMCA-032, ¶20, 137 N.M. 152. Appellants' Motion to Supplement the Record filed June 17, 2019 summarizes the materials submitted by Appellants to the BCC which were not considered by the BCC. The

case should be remanded to the BCC to consider the materials submitted to the BCC by Appellants for Appellants' appeal to the BCC but not considered by the BCC.

ISSUE 3

The BCC's decision process was arbitrary, capricious, and abusive of discretion, and denied Appellants due process, because the BCC Staff organized and advocated for the application, the record was inadequate, and the BCC did not consider supplemental evidence submitted by Appellants.

The BCC process for the applicants' proposal for higher density multi-family development in Appellants' lower density single-family dwelling neighborhood was biased and unfair to Appellants. The BCC and the CPC relied almost without question (excepting CPC Commissioner Chavez's questions) of BCC Staff in all the particulars of the application. BCC Staff presented and argued in favor of the application, including in making interpretations, determinations and conclusions and suggesting alternative bases for the proposed development (R 582, 583, 584, 588, 603, 688, 761, 764, 786-789, 790). BCC Staff opened and closed the testimony taken at both the CPC hearing and the BCC hearing, repeatedly expressing BCC Staff support for the application. The Record suggests substantial review and negotiation between BCC Staff and the applicants' representatives to design the applicants' project to obtain support by BCC Staff and approval by the CPC and the BCC (R 8, re-submittal with a changed site plan and justification; R 790-791, the application shows "creative beneficial use"). The ZA was especially pointed and aggressive in support of the application (R 587-592, 688).

It appears that BCC Staff was instrumental in the applicants' proceeding under a "PDA" special use than under a zone change or a "specific use" special use, as the options were

interpreted by BCC Staff at the BCC hearing (R 788-790). It appears that no cross-examination of witnesses or BCC Staff was allowed at the CPC hearing or the BCC hearing.

The Record filed by the BCC is inadequate because there is a dearth of records of the applicants' submissions and communications involving BCC Staff between August 29, 2018 (first contact according to the Record) and December 17, 2018 (the "re-submittal" application), and because the BCC denied consideration of materials submitted by Appellants for the BCC appeal hearing.

Appellants are entitled to due process including an impartial tribunal, without ex-parte contacts, an opportunity to present and rebut evidence, cross-examination, a record made, and adequate findings executed. Albuquerque Commons Partnership v. City Council of the City of Albuquerque, 2008-NMSC-025, ¶34. Failure to hear one party's evidence, when offered, establishes a presumption of prejudice. In re Doe, 1974-NMCA-008, ¶7, 86 N.M. 37.

ISSUE 4

The BCC and BCC Staff erred in not treating the application as for an "apartments" use.

The CZO in Section 5 defines "Apartments" to be "one or more structures containing two or more dwelling units each". "Apartments" are specifically authorized under CZO Section 10 (R-2 Apartment Zone). Although the applicants' counsel stated that the project was not "apartments" but rather "co-housing" (R 782), BCC Staff conceded that the application was for "apartments" (R 788-790). The CZO does not define "co-housing" and "co-housing" does not appear as a potential special use in the CZO. The BCC cannot enforce "co-housing" (R 579). Neither the Comp Plan nor the SWAP mention "co-housing", and neither the Comp Plan nor the SWAP support the indiscriminate introduction of apartments into single family residential areas,

so the BCC's and the CPC's Findings 4 and 5 are erroneous as to a "co-housing" application, not relevant to the application, and not supported by substantial evidence.

The subject site's A-1 zoning does not allow apartments. The applicant could have sought a zone change to R-2 which allows apartments. Or, the applicant could have sought a SUP. However, "Special Use Permits" are to be granted under the CZO only for certain specified uses. CZO Section 18 (A) states: "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". CZO Section18 (B) states: "Such Special Use Permits may authorize only the following uses", before then enumerating the possible special uses. "Apartments" are not among the enumerated special uses.

CZO Section 18(B) 32(a) provides for a "Specific use" SUP applicable to apartments:

> 32. Specific use.
> a. In certain situations based on unique conditions the owner may apply for any of the specific uses set forth in Sections 10, 12, 13, 14, 15 or 15.5 of this Ordinance. This type of Special Use Permit may not be granted for lots zoned SD or PC, unless prescribed in their related plan. The special use for a specific use may be granted if the owner/applicant proves by clear and convincing evidence that: (1) unique conditions exist that justify the request and (2) there is substantial support from neighborhood residents (or owners of property) within 200 feet of the site for the proposed special use.

The above provisions indicate that the proper approach under the CZO for seeking "apartments" in an A-1 zone is to apply for a zone change to R-2 or for a "Specific use" SUP.

ISSUE 5

The BCC erred in approving a SUP for the applicants' "co-housing" type development under CZO Section 18 (B)(23).

Appellants' argument on this issue is based on Burroughs v. Board of County Comm'rs of Bernalillo County, 1975-NMSC-051, ¶24, 88 N.M. 303, which, following rules for

construing ordinances, holds that only special uses permitted under the CZO may be the subject of a SUP. Burroughs involved misuse of the "planned development area" category, like the case at bar. In Burroughs, the Supreme Court held that an "overnight campground" could not be considered a "planned development area" for purposes of a SUP.

Guided by BCC Staff including the ZA, the applicants sought their SUP under Section 18 (B)(23) as a "Planned Development Area" (and not as a zone change or a "Specific use" SUP as discussed above). BCC Staff determined that this approach was "a little more creative, that it is apartment-like, and they can opt to take it through a planned development-type trajectory" (R 788). This decision by BCC Staff was erroneous because there is no provision for straightforward "apartments" even with amenities to be a PDA, without satisfaction of the specific requirements of Section 18 (B)(23) for a SUP for a PDA.

High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶¶ 4, 5 (citing Burroughs) provides three relevant rules of statutory construction:

> "In construing municipal ordinances or county zoning ordinances . . . the same rule of construction are used as when construing statutes of the legislature[,]" Burroughs v. Board of County Com'rs of Bernalillo County, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975), and "[c]ertainly where the question is simply one of construction, the courts may pass upon it as an issue 'solely of law'". Pan American Petroleum Corp. v. El Paso natural Gas Co., 77 N.M. 481, 487, 424 P.2d 397, 401 (1966) (quoting Great N. Ry. V. Merchants' Elevator Co., 259 U.S. 285, 291, 42 S.Ct. 477. 66 L.Ed. 943 (1922)); see also Mayberry v. Town of Old Orchard beach, 599 A.2d 1153, 1154 (Me. 1991) (interpretation of zoning ordinance a question of law for the court); Conforti v. City of Manchester, 141 N.H. 78, 677 A.2d 147, 149 (N.H. 1996) (same); Kaiser v. Western R/C Flyers, Inc., 239 Neb. 624, 477 N.W.2d 557, 560 (Neb 1991) (same). Here, three rules or tools of statutory construction are relevant.
>
> The first rule is that the "plain language of a statute is the primary indicator of legislative intent." General Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985). Courts are to "give the words used in the statute their ordinary meaning unless the legislature indicates a different intent." State ex rel. Klineline v. Blackhurst, 106 N.M. 732, 735, 749 P.2d 1111, 1114 91988). The court "will not read into a statute or ordinance language which is not there,

> particularly if it makes sense as written." Burroughs, 88 N.M. at 306, 540 P.2d at 236. The second rule is to "give persuasive weight to long-standing administrative constructions of statutes by the agency charged with administering them." TBCH, Inc. v. City of Albuquerque, 117 N.M. 569, 572, 874 P.2d 30, 33 (Ct. App. 1994); see Molycorp, Inc. v. State Corp. Comm'n, 95 N.M. 613, 614, 624 P.2d 1010, 1011 (1981). The third rule dictates that where several sections of a stature are involved, they must be read together so that all parts are given effect. This includes amendments. Methola v. County of Eddy, 95 N.M. 329, 333, 622 P.2d 234, 238 (1980).

Baker v. Hedstrom, 2013-NMSC-043, ¶24, provides an additional rule applicable to this appeal, that "each word is to be given meaning" in construction of a statute.

Turning to the CZO language at issue in this case, CZO Section 18(B)(23) provides:

> 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.

This Section has three clauses to consider: 1) the applicant must demonstrate "the need to vary height, lot area, or setback requirements" (herein the first, "need" clause); 2) the need must be "due to unusual topography, lot configuration, or site features" (herein the second, "due to" clause); and 3) the "need" clause criteria and the "due to" clause criteria must be "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" (herein the third, "in order to" clause).

The applicants' counsel argues that the third, "in order to" clause criteria are the critical controlling criteria to satisfy the PDA standards (R 735), and that those third, "in order to" criteria were satisfied. The applicants' counsel states: "the site plan submitted by RGH relies entirely on cluster housing with an intent to preserve physical access to the agricultural open

space" (R 735). Appellants argue that all three clauses must be satisfied, and that none of the clauses were satisfied. As apparently recognized by the applicants' counsel, the first, "need" clause criteria were not satisfied, because the site plan does not need to vary height, lot area, or setback requirements, and the second, "due to" clause criteria were not satisfied, because the site does not have unusual topography, lot configuration, or site features.

Concerning the third, "in order to" clause criteria, the apartments proposed by the applicants are not "cluster housing development" under the CZO (Section 5, Definitions), which states:

> "Cluster Housing Development" means: Cluster Housing Development. 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.

This definition involves "a reduction in lot area and bulk requirements" and "no increase in the number of lots permitted under a conventional subdivision" which indicates it applies to single-family housing, not to apartments. BCC Staff determined that the applicants' proposal "is not a "cluster housing" development, per se" (R 11).

The applicants' (and the BCC Staff's) reading of the PDA standards being controlled by the third, "in order to" clause produces the inappropriate results that the first and second clauses are rendered superfluous, and that, practically speaking, any development proposal that can be classified as "cluster" housing, including apartments, can be approved as a higher density use PDA. The BCC decision on this issue is contrary to the analysis of Burroughs, ¶ 15, which holds that the PDA category "was not intended as an all inclusive catchall category".

ISSUE 6

The BCC's Finding No. 6 concerning the criteria for a SUP for a PDA was not supported by substantial evidence and was otherwise contrary to law.

The underlying reasons for BCC Staff's recommendation of approval appears to be that the SWAP allows for higher density in the area, and the project proposes more amenities than otherwise might be provided (R 23, 26, 28, 790-791). However, these reasons do not constitute substantial evidence for a PDA SUP. The BCC's Finding No. 6 states:

> As required by Zoning Code Section 18 for a Planned Development Area, the applicant demonstrated the need to vary height, lot area, or setback requirements due to unusual topography, lot configuration, or site feathers 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 site plan includes areas dedicated to open space, agriculture and recreational uses.

Finding No. 6 recites the PDA requirements, and relies on "areas dedicated to open space, agriculture and recreational uses" to satisfy the PDA requirements. That the site plan has "areas dedicated to open space, agriculture and recreational uses" does not satisfy PDA requirements. Practically any apartment development can easily have or be considered to have "open space, agriculture and recreational uses". There appears to be no demonstration in the Record as to any of the PDA requirements for "need to vary height, lot area, or setback requirements", or "unusual topography, lot configurations, or site features".

ISSUE 7

Finding No. 7 of the BCC's decision concerning the criteria for granting a SUP for a PDA under Resolution 116-86 was not supported by substantial evidence and was otherwise contrary to law.

The SUP also has to pass muster under Resolution 116-86, which governs SUPs under the CZO. The BCC's Finding No. 7 states:

> 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 Southwest Area Plan.

The key issues under Resolution 116-86 (R 721) relate to Sections 1E ("changed conditions" or "more advantageous to the community") and 1I ("spot zoning"):

> E. 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.
>
> I. A zone change request which would give a zone different from surrounding zoning to one small area, especially when only one premises is involved, is generally called a "spot zone". Such a change of zone may be approved only when:
>
> > (1) the change will clearly facilitate realization of the Comprehensive Plan and any applicable adopted sector development plan or area development plan; or
> >
> > (2) the area of the proposed zone change is different from surrounding land because it could function as a transition between adjacent zones; because the site is not suitable for the uses allowed in any adjacent zone due to topography, traffic, or special adverse land uses nearby; or because the nature of structure already on the premises makes the site unsuitable for the uses allowed in any adjacent zone.

The applicant did not demonstrate and the BCC and the CPC did not find that the existing A-1 zoning is inappropriate. BCC Staff and the applicants argued that the SWAP density

allowance (of up to 9 density units per acre) satisfies the "changed conditions" test. However, the SWAP was not a zone change, does not compel the granting of SUPs, and does not change the actual conditions of the character of the neighborhood. As to the "more advantageous to the community" test, the BCC 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. Even if the ACP standards do not apply for this SUP, some sort of standards should apply, for how the BCC is to determine, in some objective manner, whether a proposal is "more advantageous to the community".

The SUP at issue effectively constitutes a "spot zone" because there appears to be no similar SUP or similar dense apartment use anywhere near the site. BCC Staff testified that there were no other multifamily facilities in the area (R 689), and that a zone change to R-2 would be a "spot zone" (R 789). The BCC did not address or find the "spot zone" criteria set out in the CZO.

ISSUE 8

The BCC should consider whether BCC Staff meetings with the applicants' representatives violated the OMA.

Appellants raised the OMA issue in their appeal to the BCC (R 718, 719), by letter dated March 22, 2019 (R 729), and at the BCC hearing (R 774). Appellants' argument on this issue depends on the correspondence and records submitted by Appellants on March 6, 2019 and

March 22, 2019, which the BCC did not consider as discussed above. There is not much evidence in the Record of any meetings, or of any communications, between BCC Staff and the applicants' representatives, yet together they managed to put on a coordinated presentation attuned to what the CPC and the BCC would approve. Appellants' appeal to the BCC (R 718) stated: "Upon information and belief, 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 Mew Mexico Open Meetings Act". Appellants should be allowed to present their OMA appeal issue, with the evidence duly submitted, to the BCC. The BCC should consider the OMA issue because the BCC is the responsible governing body and zoning authority and Appellants are constituents and parties with standing. If the BCC is not to consider Appellants' OMA issue, Appellants request that they be granted leave to add an OMA claim to this appeal, so that Appellants' OMA claim with Appellants' evidence will be heard by the District Court if not by the BCC.

New Mexico public policy under the OMA is that "all persons are entitled to the greatest possible information regarding the official acts of those officers and employees who represent them". "The formation of public policy ... shall not be conducted in closed meeting." NMSA 1978, Section 10-15-1(A). All meetings of any policymaking body ... of any county ... held for the purpose of formulating public policy ... discussing public business or taking any action within ... the delegated authority of any other policymaking body are declared to be public meetings open to the public at all times ...." NMSA 1978, Section 10-15-1(B).

The ZA (Mr. Hamm) is authorized under CZO Section 3(A) to interpret the CZO:

> A. Interpretation. The Zoning Administrator shall interpret the regulations and restrictions of this ordinance in accordance with the purposes and intent of this ordinance. Disagreement with the Zoning Administrator's interpretations may be appealed to the County Planning Commission and

> then to the Bernalillo County Commission pursuant to the Administration Section of this ordinance.

In the case at bar, BCC Staff including the ZA, acting under delegated authority from the BCC, analyzed and made interpretations, conclusions and recommendations to the BCC, and effectively made policy, for example with BCC Staff's "creative" interpretation of Section 18 (B)(23) (R 581-582, 584, 587, 588, 682, 689, 761, 762, 764, 788-791).

The Court of Appeals considered the OMA in New Mexico State Investment Council v. Weinstein, 2016-NMCA-069, ¶¶72-89, and held that the OMA is to be construed broadly to effectuate its purposes, and that any policy-making body with delegated authority, including a non-quorum subordinate committee without final authority, is governed by the OMA. In N.M. A.G. Op. No. 90-27, dated December 20, 1990, the Attorney General opined that a selection advisory committee was governed by the OMA, where the committee had some decision making authority. The AG's OMA Compliance Guide, Eighth Edition, 2015, p. 9, states as follows:

> In some situations, even a non-statutory committee appointed by a public body may constitute a "policymaking body" subject to the Act if it makes any decisions on behalf of, formulates recommendations that are binding in any legal or practical way on, or otherwise establishes policy for the public body. A public body may not evade its obligations under the Act by delegating its responsibilities for making decisions and taking final action to a committee. This is true even when the public body delegates its authority for holding a meeting or hearing to a single individual. If a hearing would be subject to the Act if convened by the public body, the hearing cannot be closed simply because the public body appoints a single hearing officer to hold the hearing in its place.

The OMA provides for certain exclusions from the open meeting requirements, in NMSA 1978, Section 10-15-1 (H). None of the exclusions apply to determinations by BCC Staff in negotiations and meetings with a development applicant. Paragon Foundation, Inc. v. State of New Mexico Livestock Board, 2001-NMCA-004, ¶26, 138 N.M. 761, supports that action by an authorized representative can constitute an OMA violation. Palenick v. City of Rio Rancho,

2012-NMCA-018, 270 P.3d 1281, reversed on other grounds in Palenick v. City of Rio Rancho, 2013-NMSC-029, 306 P.3d 447, indicates that a OMA violation cannot be cured retroactively, so the BCC's approval of the PDA for "co-housing" does not cure the OMA violation.

IV
STATEMENT OF PRECISE RELIEF SOUGHT

Appellants request that the BCC's decision be: 1) remanded for the BCC to issue an appropriate written decision under NMSA 1978, Section 39-3-1.1; 2) remanded for the BCC to consider Appellants' arguments and evidence which were not considered by the BCC; 3) remanded for creation of an adequate record; 4) reversed because the BCC decision process denied due process to Appellants and was arbitrary and capricious; 5) reversed and remanded because the BCC did not treat the application as for an "apartments" use; 6) reversed because the BCC erred in approving the applicants' proposal under CZO Section 18(B)(23); 7) reversed because Finding No. 6 was not supported by substantial evidence; 8) reversed because Finding No. 7 was not supported by substantial evidence; and 9) reversed and remanded for the BCC to consider whether BCC Staff meetings with the applicants violated the OMA, and if not so reversed and remanded, that Appellants be granted leave to amend this appeal to join an OMA claim so the District Court would hear Appellants' OMA claim with Appellants' OMA evidence; and for such other relief as the Court deems just and proper.

YNTEMA LAW FIRM P.A.

(Electronically filed)

By /s/ Hessel E. Yntema III
Hessel E. Yntema III
215 Gold Avenue SW, Suite 201
Albuquerque, NM 87102
(505) 843-9565
e-mail: hess@yntema-law.com

I hereby certify that this Appellants' Statement of Appellate Issues for Appeal of COA2019-0001/CSU2019-0001 was electronically filed through the electronic filing system for the Second Judicial District Court, on June 26, 2019, which caused counsel of record to be served via electronic means, as more fully reflected on the Notice of Electronic Filing.

(Electronically filed)

/s/ Hessel E. Yntema III
Hessel E. Yntema III

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

MATTHEW CONE, ALBERT SANCHEZ,
JUSTIN KNOX, and GLORIA BACA,
Appellants,
vs.

No: D-202-CV-2019-03654

BERNALILLO COUNTY BOARD OF
COUNTY COMMISSIONERS,
Appellee,
and

VALENTINE P. SAIS, RON A. PEREA,
and RIO GRANDE HUERTA, LLC,
Interested Parties.

RIO GRANDE HUERTA'S RESPONSE TO APPELLANTS' STATEMENT OF APPELLATE ISSUES

Rio Grande Huerta, LLC ("RGH"), by and through its counsel of record, Hunt and Davis, P.C., states as follows for its Response to Appellant's Statement of Appellate Issues ("Statement"):

BRIEF INTRODUCTION

This appeal involves the approval of RGH's request for a Special Use Permit for a Planned Development Area (Residential and Agricultural Uses) at 1300 Gonzales Road SW in Albuquerque's South Valley (the "Property"). Record ("R.") 8 & 743. Pursuant to that request, RGH intends to develop a modern agricultural community consisting of twenty-seven (27) dwellings within five (5) structures and corresponding orchards; community gardens; greenhouses; agricultural-equipment-storage spaces; cisterns; and, chicken coops—which community is to be operated as a "co-housing" development. R. 8 - 11. Based on the site plan submitted by RGH;

approved by the Bernalillo County Planning Commission (the "CPC"); and, upheld by the Bernalillo County Board of County Commissioners (the "BCC"), the ultimate-developed condition for the Property will consist of sixty-two percent (62%) open space and agricultural uses; twenty-one percent (21%) building and structures; and, sixteen percent (16%) concrete or porous paving. R. 11; *see also* R. 93-97 (site plan). Under the approved special use permit, RGH must develop the Property in accordance with the specific site development plan that was approved as part of the special use permit request, including development of the agricultural aspects of the plan. R. 759-61 & 765 [1]. Prior to RGH's request, the Property was zoned straight "A-1" or agricultural. (R. 8). However, the Property has not been utilized for its original agricultural purpose since at least the 1930's and presently "has nothing but tumbleweeds [and the] [o]nly wildlife you see there is maybe a roadrunner once in a while." R. 673-74. Thus, RGH's plan of development is to revitalize the Property's original agricultural heritage while providing homes for residents in a co-housing community.

SUPPLEMENT TO THE SUMMARY OF THE PROCEEDINGS

Under Rule 1-074, an appeal's summary of the proceedings should briefly describe the nature of the case, the course of proceedings, and the disposition of the applicable entity. NMRA Rule 1-074 (K)(2). Rule 1-074 also provides that a response may include a summary of the proceedings if appellant's statement is disputed or

[1] Ms. Vereecke: "Madame Chair, Commissioner Quezada, this is a request for a Special Use Permit to allow [a] specific use that is shown on the site plan with particular conditions that would be specific to what is shown on the site plan. So that's all that could be done under this request . . . the expectation is that the site would develop as shown on the site plan and that if there were any modifications, that it would need to come back through one of our processes to change it."

incomplete. *Id* at (L). Here, while Appellant's Summary of the Proceedings is reasonably accurate, it provides a fairly biased view of those proceedings. *See* Statement pp. 3-10. Accordingly, RGH offers the following abbreviated summary to provide the Court with a more balanced overview of the prior hearings on RGH's request.

In November and December of 2018, RGH submitted a Special Use Permit Application for the Property, seeking to create a "planned development area" for residential and agricultural uses. R. 54-57. In doing so, RGH was acting as agents for "members of an extended family" who intended to sell the Property to RGH. R. 66. At the time of submission, the Property consisted of three (3) vacant lots with agricultural zoning totaling approximately 3.7 acres. R. 66. The area surrounding the Property was previously "farm tracts" but has since largely been subdivided into compact R-1 (residential) lots. R. 66. Under the County's Southwest Area Plan, the Property is located in the Established Urban Area and Residential Area 5, permitting a development density of up to nine (9) dwelling units per acre. R. 66. RGH's Special Use Permit was linked directly to RGH's proposed project through the site plan submitted pursuant to the request, which project consists of "cluster housing/co-housing project of 27 units . . . using an eco-village-like model of Net-Zero use, zero-waste strategies and maximum water conservation . . . building footprints on the site plan allow for all porches, terraces, breezeways, etc. . . . [the residences will be] in compact clusters which leaves 62.5% of the site for agricultural uses and shared open space . . . [including] orchards, community

gardens, a vineyard and berry patch, greenhouse, chicken coop, and garden composting . . . [and] [t]he Common House, children's play areas, a natural pool and landscape commons will be shared by the site residents." R. 66-67. Thus, RGH's submission bound any eventual development to its highly-specific plan for a mixed-use residential and agricultural community.

CPC Hearing

On February 6, 2019, RGH appeared before the CPC for the initial hearing on RGH's request. R. 567-691. At the hearing, Chairman Joe Chavez was openly hostile to the request, making repeated derogatory statements such as "just so that we all understand, this project is an apartment complex" and "so if we leave it at A-1, they can still build that thing or what". R. 579-80; 590. However, the County's Zoning Administrator discussed with the CPC how the request was for a "planned development area facilitating the ability for cluster housing to occur" and that, while there may be some overlap between the requested Special Use Permit and a traditional apartment use, the CPC was being asked to consider the proposed development under the laws applicable to special use permits. R. 588.

While testifying in support of the project as a Planned Development Area, Marlies Metodi, project manager for RGH, provided an extensive explanation of how the proposed development would differ from traditional apartments, including developing "private owner-occupied homes, clustered around shared space" with a focus on "agriculture, gardening, growing food, and sharing the harvest." R. 593-94. Metodi also testified that RGH had selected the Property specifically because it

provided an opportunity for agriculture. R. 594. Metodi also noted that the Southwest Area Plan allowed densities of up to nine (9) dwelling units per acre on the Property and that the proposed development would be well below that density level. R. 597. Furthermore, Peter Rehn, principal architect with RMKM Architecture, correctly stated that the "Southwest Area Plan encourages cluster development as an effective way to preserve agriculture" and that "[t]hrough compact home design and efficient site planning" the requested Planned Development Area maximized the "amount of land preserved for usable agriculture." R. 596-99. Finally, Metodi testified that "[t]his planned development area introduces a variety of home sizes to support a vibrant multigenerational community from infants to elders . . . furthering the Bernalillo County goal of creating a quality urban environment . . . which offers variety and maximum choice on housing, transportation, work areas, and lifestyles while creating a visually pleasing built environment." R. 598.

Faith Okuma, landscape architect for RGH, further testified that residences on the site were designed as clusters of two stories "because the ownership had a concrete discussion about wanting more agricultural space, and so it has been a driver and completely supports the long-term wishes of the County to retain agriculture on that site." R. 599-600. In her testimony, Okuma acknowledged that the request and site plan were unconventional "but it is a way to get more farming in that area" and "get real live agriculture back on that land." R. 600. Okuma also discussed creating a development and grading plan that would maintain and

protect areas of existing trees while preserving and improving views of the neighboring bosque. R. 600-01. Okuna emphasized that "the big thing is that [the proposed site plan] will actually provide the first time for this property in quiet a few decades for the public eventually to actually be able to look into the site and actually see real agriculture happening." R. 602. Thus, although the RGH looked at more "conventional" plans of development, the proposed site plan for a planned development area was the only plan that provided "the ability to do real agriculture." R. 602.

Following the above testimony, County staff again emphasized to the CPC that the request was for a special use permit for a planned development area. R. 602-3. During public comment on the request, there were many speakers both for and against the proposal, ranging from long-time residents opposed to gentrification (R. 624) to UNM professors excited about gray-water reuse, agriculture, and conservation (R. 625). In addition, the Property's present owner testified that the Property is currently dilapidated; that the Property has not been used for farming since the 1930s; that her family has been unsuccessfully attempting to sell the Property to someone for farming uses for years; and, that she's excited that her granddaughter may have the opportunity to play at the development. R. 670-71. Ultimately, the CPC voted 4-2 in favor of approving RGH's requested special use permit, and appellants appealed that decision to the BCC.

BCC Hearing

On April 9, 2019, the BCC concurrently heard three appeals regarding the CPC's approval of RGH's request, including Appellants' appeal. *See generally* R. 756-843. At that hearing, RGH's project manager, Marlies Metodi, again testified that the focus of the project was to create a "community-driven collaborative housing project" with a focus on "sustainability and agriculture." R. 775-76. Undersigned counsel then discussed with the BCC that "[t]he issue here is the [CPC's] approval of [RGH's] request for a Special Use Permit for a Planned Development Area combining residential and agricultural uses so that [RGH] can create a co-housing community." R. 781. Counsel for RGH further noted that the Property is both located in the Established Urban Area of the Comprehensive Plan, which supports a "full range of urban land uses and the clustering of homes to provide larger shared open areas" and is governed by the Southwest Area Plan ("SWAP"), which supports clustering higher-density residential development to preserve agriculture and open space. R. 781-82. As part of her continued presentation, Metodi similarly noted RGH's "infill site is located in Residential Area 5 of the [SWAP], which calls for the highest residential densities in the planned area, nine dwelling units per acre." R. 804. This testimony was supported through later discussions between the BCC and Planning staff, who noted that all the surrounding areas are developed "at a density much higher than what the A-1 zone would allow for," as the platting of the surrounding properties pre-dated the adoption of the Ordinance. R. 815-18. Metodi also later testified that the

surrounding neighborhoods are "made up of many compact residential lots, most of them 4,000 to 8,000 square feet" and that RGH's proposed development "fits right into the established density and building height patterns of the neighborhood; however, we want to cluster our homes so that in addition we have room for agriculture and open space." R. 828-29. That desire to cluster homes through a Planned Development Area is the key issue in this appeal.

In support of RGH's clustered-housing model, Metodi noted that "[u]nder these adopted plans we could have requested more density and built a traditional residential subdivision where there is no consideration to open space, but instead opted for a site plan with clustered housing that leaves over 62 percent of the site as usable open space, including play areas for children, permaculture gardens, native habitat areas, and almost an acre of agricultural lands." R. 805. In response to continued arguments by appellants regarding justification for cluster housing, undersigned counsel also stated "let me just be clear, the reason that my clients are clustering housing is so that they can have orchards and greenhouses and agriculture on this property[;] [o]therwise, they would just have a grid subdivision, or someone would come in and build a grid subdivision." R. 810-11. Metodi emphasized that people typically think of "open space and wildlife habitat preservation, residential living and agricultural revitalization as separate things" but that RGH's model is designed to integrate those valuable social benefits into a single location. R. 811-12. Metodi also testified that the homes on the Property were being carefully clustered and sited to preserve view corridors of the bosque and

surrounding natural environment. R. 827-28. This community-conscious approach was echoed in the support of the community at the hearing. *See* R. 830-34 (discussing, among other issues, that seventy-five percent (75%) of the neighborhood supports the project and that, within 500 feet of the Property "this support ratio is even higher at over 91 percent.").

Upon holding a vote on the combined appeals, the BCC voted 4-1 to deny each of the appeals and uphold the CPC's approval of the requested Special Use Permit. R. 837-42. Commissioner Quezada, the lone vote in favor of the appeals, noted that "I truly believe that this is probably one of the best uses that's ever come across my desk" and "I think it's a great plan [and] I think we need more communities like this"—but voted against the request because he felt bound by prior promises to protect agriculturally-zoned land in the South Valley. R. 839-40. Furthermore, as part of its denial of Appellant's challenge, the BCC upheld and adopted the CPC's findings in support of RGH's request. R. 840-42 with findings listed, among other places, at R. 711-15.

STANDARD OF REVIEW

Under New Mexico law, an administrative appellant is required to "set forth a specific attack on any finding [of the relevant entity], or such finding shall be deemed conclusive." NMRA Rule 1-074 (K)(3). Here, instead of attacking a specific element of the BCC's decision, Appellants have shallowly attacked several of the BCC's decisions or broadly challenged the BCC's interpretation of the law. *See generally* Statement. New Mexico law provides that an appellant under Rule 1-074

may challenge a decision based on: 1) whether the entity acted fraudulently, arbitrarily or capriciously; 2) whether based upon the whole record, the decision of the entity is not supported by substantial evidence; 3) whether the actions of the entity were outside the scope of that entity's authority; or, 4) whether the action of the entity was not otherwise in accordance with the law. NMRA Rule 1-074 (R); *see also Gallup Westside Development, LLC v. City of Gallup,* 2004-NMCA-010, ¶¶ 10-11, 135 N.M. 30, 84 P.3d 78 (discussing the administrative standard of review in more depth).

Under New Mexico law, the decisions of an administrative agency—in this case the CPC as ratified by the BCC in its role as the Bernalillo County "zoning authority"—are presumed valid and the burden of proving otherwise rests upon a party seeking to void such a decision. *State ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque,* 1994-NMSC-126, ¶ 20, 119 N.M. 150, 889 P.2d 185. Under the administrative standard of review, the Court may not substitute its judgment for that of the BCC. *Gallup,* 2004-NMCA-010, ¶¶ 10-11. Regarding Appellants' substantial evidence challenge, the Court should review the whole record and view the evidence in a light most favorable to the BCC's decision. *Id.* Although the Court may come to a different conclusion than that reached by the BCC, the Court may only evaluate whether the record supports the result reached, not whether a different result could have been reached. *Id.* Appellants have the burden to demonstrate that no substantial evidence in the record supports the BCC's decision. *Id.* Regarding Appellants' arbitrary and capricious claims, a

decision is arbitrary or capricious if it is unreasonable or without rational basis, when viewed in light of the whole record. *City of Rio Rancho v. Amrep Southwest,* 2011-NMSC-037, ¶ 47, 150 N.M. 428, 260 P.3d 414. Thus, the Court should uphold the Governing Body's decision if any rational basis supports that decision.

ARGUMENT

In their Statement, Appellants asks the Court to review the BCC's decisions as follows: 1) the BCC erred in not issuing an appropriate written decision; 2) the BCC erred in failing to consider Appellants' "new evidence" arguments regarding alleged Open Meetings Act violations by Bernalillo County Planning staff; 3) the BCC erred because Bernalillo County Planning staff were involved in the underlying application process and hearing; 4) the BCC erred because the application should have been rezoning request to R-2 for apartments; 5) the BCC generally erred in approving the requested special use permit as a Planned Development Area; 6) the BCC erred because substantial evidence did not support the request as a "Planned Development Area"; 7) the BCC erred because substantial evidence dd not support the request under Resolution 116-86 (finding No. 7); and, 8) continued arguments that the BCC erred because it should have considered Appellants' Open Meetings Act arguments. Regarding Appellants' procedural, "new evidence", and alleged Open Meetings Act violations, counsel for RGH believes those issues are more properly argued by council for the BCC and, so, undersigned counsel will not provide briefing on those issues. Instead, RGH's arguments will focus on the aspects of its request dealing with zoning and the applicable law. As

further below discussed, the CPC and BCC correctly determined that RGH satisfied the requirements for a Special Use Permit for Planned Development Area (residential and agricultural uses) and, respectfully, the Court should deny Appellants' appeal.

I. The CPC and BCC correctly determined that RGH's request satisfied the requirements for a Planned Development Area under the Ordinance and that determination was supported by substantial evidence.

Prior to RGH request, the Property consisted of three parcels totaling approximately 3.7 acres and was zoned "straight" A-1. Under the "General Provisions" section of the Comprehensive Zoning Ordinance of Bernalillo County (herein referenced as the "Ordinance"), lot area, density of development, and zoning are inexorably linked. *See* Ordinance § 4 (B).[2] Regarding "minimum lot area and lot width" for A-1 zoned property within Bernalillo County, the Ordinance provides that "every lot shall have an average width of not less than 150 feet [and the] minimum lot area of this zone shall be one acre." Ordinance § 7 (D). Furthermore, the residential development of A-1 zoned property is restricted to "one single-family dwelling or H.U.D. Zone Code II manufactured home per lot." *Id* § 7 (B)(2). Thus, under the Property's original zoning, the Property was required to be developed as three or fewer lots having a width of at least 150 feet each—and would have been limited to one single family dwelling or manufactured home on each of those lots. *See e.g.* R. 587-92 (discussion among the CPC and the County's Zoning Administrator regarding the potential use for the property with the requested

[2] § 4 (B): "No lot area shall be so reduced that the yards and open spaces shall be smaller than is required by this ordinance, nor shall the density of population be increased in any manner except in conformity with the area regulations hereby established for the zone in which a building or premises is located.

Special Use Permit versus as an existing A-1 zoned parcel). However, the Ordinance allowed RGH to modify the above referenced requirements through a Special Use Permit for a Planned Development Area, as further below discussed.

Under the Ordinance, the CPC and BCC "may authorize the location of uses in which they are not permitted by other sections of this ordinance . . . [and] vary any other minimum standard it deems necessary" through the issuance of "Special Use Permits". Ordinance § 18 (A). With these permits, the CPC and BCC may also impose such conditions and limitations as they deem necessary: to ensure that the degree of compatibility of property uses; to ensure that the proper performance standards and conditions are, whenever necessary, imposed upon such uses; to preserve the utility, integrity and character of the zone in which the use will be located, without adversely affecting adjacent zones; and, to ensure that the use will not be or become detrimental to the public interest, health, safety, convenience, or the general welfare. *Id.* Such permits may only be issued for a limited set of enumerated uses, ranging from "overnight campground" to "truck plaza" to "pet cemetery." *Id.* One such enumerated use is a "Planned Development Area" creating a "Cluster Housing Development." *Id.*

Under the Ordinance, a Planned Development Area is one type of a special use that includes:

> 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.

Ordinance § 18 (B)(23). Regarding the "cluster housing" referenced within the above definition, the Ordinance provides that a "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.

Ordinance § 5. As below discussed, RGH's request satisfies all of the requirements of both of the above definitions—and was correctly approved by the CPC.

In their Statement, Appellants accurately note the three commonly-accepted rules of statutory construction applicable to zoning ordinances: 1) the plain language of an ordinance is the primary indicator of legislative intent; 2) the court is to give persuasive weight to long-standing administrative constructions of ordinances by the agency charged with administering them[3]; and, 3) when questions involve multiple sections of an ordinance, the sections must be read together to give all of them effect. Statement pp. 17-18 (citing *High Ridge Hinkle Joint Venture v. City of Albuquerque,* 1998-NMSC-050, 126 N.M. 413, 970 P.2d). Using the above rules, New Mexico courts "analyze the ordinance in question, and the intent of those who enacted it." *High Ridge Hinkle*, 1998-NMSC-050, ¶ 6. Accordingly, New Mexico courts seek to interpret such an "ordinance to mean what the legislature intended it

[3] Although a single instance likely does not create a "long-standing administrative construction", undersigned counsel was able to find that the CPC and BCC have previously approved at least one similar mixed-use agriculture, commercial, and multi-family residential development including cluster housing on A-1 zoned property, which approval was adopted as CSU2017-013. Thus, RGH's request is not a "one-off" without precedent.

to mean, and to accomplish the ends sought to be accomplished by it." *Burroughs v. Board of County Commissioners of Bernalillo County,* 1975-NMSC-051, ¶ 13, 88 N.M. 303.

Planned Development Area

In their Statement, Appellants parse the above-referenced definition of Planned Development Area into three "clauses", while maintaining that each clause must be established in order for the BCC to properly approve RGH's request. Statement pp 18-19. Appellants also claim that undersigned counsel "recognized" that RGH had failed to fulfill the first two clauses that Appellants created within the definition of Planned Development Area. *Id.* However, this claim is inaccurate, as undersigned counsel actually argued that the Appellants were ignoring the plain language of the definition of "Planned Development Area", which contains the explicit purposes of "creat[ing] cluster housing development[s]" and "preserv[ing] visual or physical access to open space or unique site features." R. 734-35. Furthermore, undersigned counsel maintains that Appellants' reduction of this definition into three clauses is likely a substantial over-analysis of the issue designed to erect false hurdles for RGH' request. As above noted, New Mexico's rules of statutory construction are intended to assist a court in determining legislative intent so that an ordinance accomplishes its intended purpose. *Burroughs,* 1975-NMSC-051, ¶ 13. Here, it appears that Appellants are attempting to twist the cited ordinances into serving their purposes. Regardless, analysis shows

that RGH fulfills each of the requirements as created by Appellants and the BCC was correct in its approval of the requested Special Use Permit.

First, Appellants argue that "the applicant must demonstrate the need to vary height, lot area, or setback requirements". Statement p. 18. As above discussed, the lot area requirements for the Property are a single dwelling on a lot of at least one-acre having a width of 150 feet. Here, the site plan approved in connection with the Property's Special Use Permit eliminated lot lines between the residences; clustered those residences within five structures throughout the development; and, increased the number of residences permitted to just over seven (7) per acre. *See* R. 93-97 (site plan). Thus, the lot area requirements applicable to the development were substantially varied. Furthermore, the above-discussed variance was needed to permit agricultural development on the site through a varied lot configuration, as further below discussed.

Second, in what Appellants label the "due to" clause, the above discussed variance in lot area must be "due to unusual topography, lot configuration, or site features." Statement p. 18. Here, representatives of RGH repeatedly testified that the proposed site plan varied lot configuration from that of a traditional subdivision and clustered housing in order to preserve the site features of on-site agriculture and open space, and view corridors of the bosque. R. 593-94; 596-602; 781-82; 805; 810-12; & 827-29. Thus, RGH clearly satisfied the second clause created by Appellants in their reading of the definition of "Planned Development Area."

Third, and finally, in what Appellants call the "in order to" clause, the above showings are to be made for the purpose of either: creating a cluster housing development; preserving visual or physical access to open space or unique site features; or, to facilitate development in accordance with an approved Master Plan. Here, as below further discussed, RGH has designed a cluster housing development as described in the Ordinance, providing the necessary purpose for a Planned Development Area under the Ordinance. However, RGH has also varied its lot area and layout in order to preserve visual and physical access to open space and the unique site feature of on-site agriculture. Accordingly, although only one purpose is required to fulfill the requirements for a Special Use Permit for a Planned Development Area under the Ordinance, RGH fulfills two such purposes—and the BCC correctly upheld RGH's request.

Cluster Housing Development

Similar to their treatment of the Definition Planned Development Area, Appellants scrutinize the definition of "Cluster Housing Development" and conclude that it "only applies to single-family housing, not to apartments." Statement p.19. While RGH will below generally addresses Appellants' "apartment" argument, RGH can briefly refute Appellants' argument regarding "cluster housing" being only applicable to single-family residences. In their Statement, Appellants argue that the applicable definition's reference to an "increase in the number of lots permitted under a conventional subdivision" shows that definition only applies to traditional single-family homes. *Id.* However, the very next line following the references to

"increase in number of lots" and "conventional subdivision" is "or increase in the overall density of development." Ordinance § 5 (underscoring added). Thus, "cluster housing" applies either to conventional single-family subdivisions consisting of separate lots or to developments in which the density of development is not dependent on the number of lots, *i.e.* multifamily developments. Accordingly, Appellants' interpretation of "Cluster Housing Development" is incorrect and RGH's request meets the requirements of the Ordinance for that type of development.

As above discussed, RGH requested a Special Use Permit for a Planned Development Area (Residential and Agricultural uses) in order to create a community combining clustered housing, active agriculture, and open space. Furthermore, RGH appropriately justified that community's variance from traditional lot area requirements through a demonstrated need to preserve the above-referenced on-site agriculture, open space, and view corridors of the bosque. In the following sections, RGH briefly further addresses specific arguments of the Appellants not otherwise above discussed.

II. Regarding Appellants "Issue 4", the BCC correctly approved a Special Use Permit for a Planned Development Area (Residential and Agricultural Uses) for the project, as requested by RGH, and the site plan is not simply for "apartments."

In their "Issue 4", Appellants argue that the BCC incorrectly approved RGH's request for a Special Use Permit for Planned Development Area (Residential and Agricultural Uses) because the request should have been made as a request for a zone change to "R-2" for "apartments." Statement p. 15-16. At the CPC hearing, several speakers opposed to the project appeared to attempt to conflate the ideas of

"greedy developers" and an "apartment complex" and the concept of an "apartment" under the Ordinance. *See e.g.* R. 612 & 616 (disparaging the project as an "apartment complex" or "high density condo project" created by "greedy developers"). Moreover, CPC Chairman Chavez's arguments in opposition to the project at the CPC hearing mirrored these inaccurate claims. *See* R. 579-80 ("It's an apartment complex. Call it whatever you want to."). In their Statement, Appellants often echo these claims. However, similar to the differences between the lay and legal definitions of "slander", the idea of an "apartment complex" as ordinarily used substantially differs from the definition of "apartment" under the Ordinance.

Under the Ordinance, an "apartment" is defined as "one or more structures containing two or more dwelling units each." Ordinance § 5. Thus, duplexes, triplexes, connected garden homes, townhomes, condominiums, multi-family housing, or any other residential structure other than a single building single-family residence on a single lot would arguably be an "apartment" under the Ordinance. Based on the above definition, County Planning Staff acknowledge that the project was "apartment-like" under the Ordinance but that the project also included additional features and benefits such as agricultural areas, open space, and orchards that brought it under the governance of the Ordinance's Special Use Permit for a Planned Development Area section. R. 788-90. Furthermore, as above-argued, the definition of "Cluster Housing Development" is applicable to either single-family or multi-family dwellings. In their Statement, while arguing that RGH's request should be considered "apartments", Appellants also explicitly

acknowledge that RGH's proposed project could be granted through an application for a Special Use Permit. Statement p. 16. However, Appellants argue that the Ordinance contains no special use for "apartments," and then continue to argue that the request was incorrectly approved as a Planned Development Area. *Id* pp. 16-17. Thus, in order to make their circular "apartments" argument work, Appellants' must ignore that RGH sought—and obtained—a Special Use Permit for a Planned Development Area and not "apartments", which approval was appropriate as discussed throughout this submission.

Puzzlingly, Appellants also occasionally argue that RGH should have requested a Special Use Permit for a Specific Use. *Id.* However, Appellants fail to explain *why* that request would have been more appropriate than the Special Use Permit for Planned Development Area that was requested. Accordingly, RGH does not further address that argument here.

In their Statement, Appellants also cherry-pick a single statement from undersigned counsel and use that statement to argue that the BCC actually approved a "co-housing" project, which is not a defined term under the Comprehensive Zoning Ordinance of Bernalillo County (herein referenced as the "Ordinance"). Statement p. 15-16. Although representatives and counsel for RGH often reference RGH's eventual goal of creating a co-housing community, those references are made within the context of a zoning request for a Special Use Permit. *See* R. 781 (undersigned counsel: "[t]he issue here is the [CPC's] approval of [RGH's] request for a Special Use Permit for a Planned Development Area combining

residential and agricultural uses so that [RGH] can create a co-housing community."). Furthermore, that special use permit is exactly what was approved by the CPC and, later, upheld, by the BCC. R. 691, 711-15, & 743. Accordingly, Appellants' arguments that the BCC inappropriately approved a "co-housing" development are not well founded.

III. Regarding Appellants' "Issue 5", RGH very purposefully requested a Special Use Permit for a Planned Development Area and that request was not used as a "catchall" category for the proposed development.

Under Appellants' Issues 5 and 6, Appellants attack the CPC and BCC's approval of RGH's request using the definitions of "Planned Development Area" and "Cluster Housing." Statement pp. 16-20. Most of these arguments are above refuted within RGH's general argument. *See* § I hereto. However, within "Issue 5" Appellants also state that their entire argument is based on *Burroughs v. Board of County Commissioners of Bernalillo County*. Statement pp. 16-17.[4] In *Burroughs,* 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 included no explanation or definitions of the term "Planned Development Area." *Burroughs,* 1975-NMSC-051, ¶¶ 8-24. Here, unlike the 1975 Zoning Ordinance, the present 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 both cluster housing and the preservation of open space

[4] Incidentally, *Burroughs* includes a very good overview on the use of Special Use Permits.

into their proposed development—which purposes are the heart of a "Planned Development Area" under the present Ordinance. *See* R. 593-94; 596-602; 781-82; 805; 810-12; & 827-29 (substantial testimony discussing the creation of cluster housing and preservation of open space). Accordingly, RGH's project was accurately proposed as a Planned Development Area (residential and agricultural uses) and Appellant's comparisons of the present matter to the facts of *Burroughs* are not well founded.

IV. Regarding Appellants' "Issue 7", the requested Special Use Permit for a Planned Development Area was appropriately justified under R 116-86.

In their Issue 7, Appellants argue that BCC's Finding No. 7 incorrectly determined that RGH demonstrated both that changed conditions in the area justified the RGH's request and that the request was more advantageous to the community because it furthers the goals and policies of the Comprehensive Plan and SWAP. Statement pp. 21-22. Appellants further argue that the SWAP and its recommendation to increase density for the Property were insufficient to justify the BCC's findings of changed conditions. *Id.* However, the SWAP was not the only justification provided regarding changed conditions in the area since the Property was originally zoned for agricultural uses.

At the CPC hearing, Rod Mahoney, President of the Vecinos Del Bosque Neighborhood Association testified that, over the past thirty-five years, there has been a significant amount of improvements and development in the immediate area. R. 606. Mahoney also testified that "this area's had infill over the last 25 years or so in our area, and there's very few locations that are left ultimately for infill." R.

606-7. In addition, Dory Wegrzyn, testified that she had lived in the area for thirty years and that she has "watched the increasing development from the city and county" in the area. R. 613. Penina Ballen testified that, since the early 1980s, the area has hosted infill development including a "high density mobile home park, gated developments with lots of gravel and weed-barrier yards, a few McMansions, and many homes with locked gates[.]" R. 621. Finally, a previous owner of a portion of the Property, Priscilla Sais, discussed the other offers she received to purchase the property to create another gated community like the one that was recently constructed and borders the Property. Similarly, at the BCC hearing, there was considerable testimony regarding the changed conditions in the surrounding area. *See* R. 769-70 (Appellant Albert Sanchez discussed with disappointment the encroachment of development into the area); R. 815-18 (discussions between the BCC and Planning staff, who noted that all the surrounding areas are developed "at a density much higher than what the A-1 zone would allow for," as the platting of the surrounding properties pre-dated the adoption of the Ordinance); and, R. 828-29 (Metodi testified that the surrounding neighborhoods are "made up of many compact residential lots, most of them 4,000 to 8,000 square feet" and that RGH's proposed development "fits right into the established density and building height patterns of the neighborhood" as compared to the surface agricultural zoning). Accordingly, substantial evidence supports the BCC's finding that changed community conditions justified RGH's request.

In their Statement, Appellants also argue against the BCC's finding that the request was more advantageous to the community. Statement p. 22. However, this argument is not based on any incorrect finding but, instead, on a claim that a more stringent standard should be imposed than that provided by Resolution 116-86. *See id.* Thus, Appellants apparently concede that RGH's request fully satisfied the requirement that RGH demonstrate that "a different use category is more advantageous to the community, as articulated in the Comprehensive Plan or other County Master Plan[.]" Furthermore, the cited cases do not support Appellants' underlying argument. *See Ricci v. Bernalillo County Bd. Of County Comm'rs,* 2011-NMCA-114, 150 N.M. 777, 266 P.3d 646 (rejecting a similar attempt to impose more strict requirements upon temporary special use permits). Accordingly, Appellants provide no justification for the Court to adopt their argument that "some sort of standards should apply" to such a determination.

Finally, Appellants state that RGH's request "effectively constitutes a spot zone because there appears to be no similar SUP or similar dense apartment use anywhere near the site." Appellants provide no real discussion or analysis for this argument and, instead, the entire argument consists of three conclusory sentences. Accordingly, Appellants have failed to provide the Court any justification for adopting this argument and it should be rejected.

CONCLUSION

RGH intends to develop an agricultural community consisting of twenty-seven (27) dwellings within five (5) structures and corresponding orchards;

community gardens; greenhouses; agricultural-equipment-storage spaces; cisterns; and, chicken coops—and agriculture and open space will occupy approximately two-thirds of that community's area. In order to maximize these agricultural site features and preserve views of the neighboring bosque, RGH's plan clusters housing within the development. Thus, this project explicitly fulfills the purposes for both a "Planned Development Area" and "Cluster Housing Development" under the Ordinance. Accordingly, the BCC correctly denied Appellants' appeal of the CPC's approval of RGH's Special Use Permit, and RGH respectfully requests that the Court similarly deny Appellants' present appeal.

HUNT & DAVIS, P.C.

Blake Whitcomb
2632 Mesilla NE
Albuquerque, NM 87110
(505) 881-3191
Attorney for Interested Party Rio Grande Huerta, LLC
blake@huntdavislaw.com

I hereby certify that on July 24, 2019, I caused a true and correct copy of the foregoing pleading to be served electronically via this Court's Odyssey File and Serve system upon opposing counsel and further served opposing counsel by email.

Blake Whitcomb

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

MATTHEW CONE, et al.,

Appellants,

vs. No. D-202-CV-2019-03654

BERNALILLO COUNTY BOARD
OF COUNTY COMMISSIONERS,

Appellee,

And

VALENTINE P. SAIS, et al.,

Interested Parties.

BERNALILLO COUNTY'S RESPONSE TO STATEMENT OF APPELLATE ISSUES

Appellee Bernalillo County Board of County Commissioners (the County), through its undersigned attorney, respectfully submits this Response to Statement of Appellate Issues. For the reasons that follow, the County respectfully asks the Court to affirm the decision of the County Commission.

I. Facts/Background.

This case is about landowners, Rio Grande Huerta, LLC (Applicants), who sought to put their property to a lawful use, and sought the guidance of County Planning and Development staff, on how to do that. That lawful use is a special use permit for a Planned Development Area (PDA) for 3.83 acres zoned A-1, which use is governed by the Bernalillo County Zoning Code, § 18(B)(23):

> 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 configurations, 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.

Id. (italics added). RP 97 Staff met and communicated with the applicants on a number of occasions and ultimately advised them that the best approach to obtain approval for their proposed co-housing development was to seek a special use permit for a PDA. See *March 26, 2019 Letter from undersigned counsel, attached to Appellant's Motion to Supplement the Record.* Staff customarily gives its recommendation to the County Planning Commission and the Board of Commissioners as to whether a given development should be approved; in this case Staff recommended approval. RP 33 Indeed, there is even a specific space on the form placed for Staff's recommendation. RP 33

Staff also met with Appellants in this case who opposed the applicants' proposed use of their own property. At the hearings, most of the objections had to do with keeping the area agricultural and opposition to "apartments." RP 579-80 Notwithstanding the objections, approval of the PDA would result in actual agricultural use of the property for the first time in nearly 90 years. RP 673-74 And while co-housing is not defined in the Zoning Code, cluster housing is certainly recognized and allowed in §18(B)(23) as shown above in italics.

Between Appellant and Rio Grande Huerta, LLC, the Court has a large picture of the facts. Accordingly, the County will not repeat those facts here except to the extent they need clarification below.

II. Discussion.

A. Standard of Review.

Under Rule 1-074 NMRA 2014, the district court will affirm the decision of an administrative agency if it is supported by substantial evidence in the whole record; is within its scope of authority, and otherwise according to law; and if the agency did not act fraudulently, arbitrarily, or capriciously. Rule 1-074(R); NMSA 1978, § 39-3-1.1; Gallup Westside Development, LLC, v. City of Gallup, 2004-NMCA-10, ¶ 10, 135 N.M. 30. Here, substantial evidence in the record supported the decision of the County Commission, and the decision was according to law; nor was the decision arbitrary, capricious or fraudulent. The Court should therefore affirm the Commission's decision.

B. Substantial evidence supported allowing the cluster housing Planned Development Area under §18(B)(23) and R 116-86.

The Planning Staff Report that recommended approval of the PDA is located at RP 8-36. This Staff Report demonstrates a thorough accounting and analysis of the facts and provides substantial evidence to support the PDA, and the County respectfully urges the Court to review it. Specifically, however, substantial evidence exists to support the PDA because the site layout followed cluster housing principles, which was encouraged in the area under the Southwest Area Plan RP 33; and because of the need to vary lot requirements to accommodate a cluster housing development along with natural site features such as the Atrisco Drain to the east. RP 33, 66 . The PDA would preserve agricultural land use, scenic vistas (i.e., preserve visual access to open space) and conservation of water and energy. RP 69 The compact 27-unit footprint—a varied lot configuration under §18(B)(23)—would enable the restoration of agriculture on the site. RP 69

Moreover, changed circumstances in the form of diminishing agriculture and more residential uses in the area justified the change under Resolution 116-86. The subject properties and adjacent ones have not been farmed for decades. RP 75. Indeed, a review of the surrounding area reveals residential uses and parks for the vast majority of properties in the area, not farms. RP 61 The surrounding area had been developed with densities much higher than the A-1 designation allowed. RP 829-29 Also, the proposed use was more advantageous to the community because the land would actually be put to a beneficial residential and agricultural use whereas it had previously lain dormant for decades with nothing growing but tumbleweeds. A majority of the neighbors within 200 feet of the site expressed support of the PDA as compatible and transitional use between residential, agricultural and open space uses nearby, as did scores of other individuals. RP 77, RP 122-270 There were opponents. RP 278 Notably, there is no majority determination, which would appear to have favored Applicants in any event.

Appellants argue that the Applicants should have pursued approval for apartments. This argument creates a false dilemma. Specifically, just because apartments were one possible land use they could have applied for does not mean Applicants were precluded from applying for a different use. Moreover, Appellants' argument places them in the awkward position of demanding a more intense use with more density than they now complain of. It also has the effect of asking the Court to substitute its judgment for that of the BCC. See KOB TV, LLC v. City of Albuquerque 2005-NMCA-049, ¶29 (When a court reviews the evidence in a decision of an administrative body it does so in the most favorable light and does not substitute its judgment for that of the administrative body). But cluster housing is a use recognized by the County's PDA special use ordinance at § 18 and it is not limited to single family dwelling units under § 5, but includes multiple family units on a single lot. See also *Rio Grande Huerta's Response at p.*

18. Notably, there is an exception for cluster housing to the prohibition against the increase in lots or overall density for the "preservation of environmentally sensitive areas or agriculture." § 5. Said another way, it is appropriate to increase density to preserve agriculture.

Appellants' statutory construction argument takes many turns and twists, but the simple reading of the ordinances shows that the term "cluster housing" contemplates multiple units on one lot (§5); that cluster housing is contemplated within a PDA (§18); that there was a need to vary lot requirements to accommodate the cluster housing development along with natural site features such as the Atrisco Drain to the east. RP 33, 66 This arrangement of the cluster housing would preserve agricultural land use, scenic vistas (visual access to open space) and conservation of water and energy. RP 69 The compact 27-unit footprint was intended to vary lot configuration and to enable the restoration of agriculture on the site. RP 69 These factors easily satisfy the elements of a PDA under §18(B)(23), and no straining of ordinary meaning is necessary to accomplish it.

While this development shares the characteristic of multifamily dwelling with apartments, there are notable differences. First, apartments generally do not have dedicated agricultural and orchard areas along with greenhouses. RP 753-55 They also do not generally have shared living areas and kitchens. Apartments are not generally arranged to accommodate inter-family relationships as this development is. Thus, it is apparent that the PDA is something other than the usual apartment, and a cluster housing development in a PDA is an appropriate land use designation for this development. As such, the special use permit was appropriate under Resolution 116-86.

The foregoing demonstrates the central facts and legal rationale in this case and it supports both factually and legally the BCC's decision. Every other issue in the case is ancillary and the County will deal with them in following.

C. The BCC's Notice of Decision is proper written decision under NMSA 1978, § 39-3-1.1.

The Notice of Decision contained the factual and legal bases for the decision. In 23 years of practice, the undersigned can represent that the one in this case is one of the more substantial ones. There is, however, no requirement that the BCC issue a judicial opinion. Moreover, Appellants suffered no prejudice in appealing the BCC's decision as evidenced by their timely appeal here under Rule 1-074 NMRA.

D. The BCC did not err in refusing to hear new evidence unrelated to the merits of the appeal.

Under the BCC's Rules of Procedure for quasi-judicial hearings, the BCC may hear new evidence if it so decides. RP 2382-83 In the present case, Appellants' new evidence consisted of a second attempt to attack staff for helping Applicants process their application, and unfounded claims of violations of the Open Meetings Act, which had already received a response prior to the hearing, and which did not need to be addressed at the land use hearing. Indeed, insofar as Appellants were charging staff with ethical violations, those charges could not be addressed at the Zoning Meeting, but needed to be put before the Code of Conduct Board, as the BCC had no jurisdiction. See Bernalillo County Code, § 2-126, et seq., Code of Conduct. Said another way in Rule 1-074 terminology, the ethical complaints were outside the scope of authority of the BCC. In any event, the purpose of those allegations was to paint the process with a shadow rather than to address the merits of the application. Accordingly, the BCC properly exercised its discretion in refusing the new evidence.

E. Planning Staff's recommendations do not equate to BCC decisions.

Planning Staff in probably every case that goes through the County's process makes a recommendation for or against a given project. The BCC is free to accept or reject these recommendations as certain members of the CPC and BCC did and there is nothing Staff could do about it. Appellants also repeat a misleading statement that the "ZA" pointedly and aggressively supported the application. *Statement of Appellate Issues, p. 14.* Along with Appellants' choice of adverbs, this assertion is misleading because Mr. Nick Hamm, who happens to be the zoning administrator, never made a single decision regarding this case. It never passed under his authority and never would, because the case was never before him as the ZA. Rather, as a member of Planning Staff, which he also is, he simply made recommendations as to the best approach for applicants to take toward getting approval. Again, Appellants assert a rule they themselves did not follow, as they also communicated with Staff regarding their concerns, appeals, and their public records requests. The truth is that applicants and opponents and proponents alike are free to meet with Staff and no rule prohibits this. Indeed, the alternative would be to keep members of the public in the dark about County processes, which is neither necessary nor desirable.

F. Staff properly treated the development as a PDA.

Appellants incorrectly assert that staff conceded the application was for apartments. Actually, Mr. Enrico Gradi, the Director of Planning, stated that it was an "apartment-type" development. RP 788 And Ms. Catherine Vereecke stated that the special use permit requirements including the amenities, orchards, and gardening, meant that "it couldn't just be

turned into apartments." RP 790 Quite to the contrary of Appellants' assertion, Staff repeatedly emphasized the differences between this development and apartments.

G. Staff's communications with Applicants and Appellants did not violate the Open Meetings Act (OMA).

As the County showed in its Response to Appellant's Motion regarding this issue, not one member of Staff who met with the Applicants or Appellants was in a position to grant or deny one aspect of the application. See NMSA 1978, § 10-15-1(A) ("The formation of policy or the conduct of business by vote shall not be taken in a closed meeting"). Certainly no vote took place among staff. Nor do Appellants assert that any member of the CPC or of the BCC met with Applicants regarding this issue. Accordingly, the OMA simply does not come into play. More to the point, however, is the inappropriateness of the baseless attack on Staff for simply doing their jobs. And again, there is the curiousness of these allegations when Mr. Cone himself met and communicated with Staff about the appeals process and public records issues. See *March 26, 2019 Letter from undersigned counsel, attached to Appellant's Motion to Supplement the Record.* The double standard aside, it is perfectly appropriate for applicants and members of the public (and even Appellants) to meet with Staff about a given application.

Appellants' argument quickly arrives at the absurd: If the OMA applies any time a public employee, who has no decision-making authority, meets with a member of the public to discuss a land use matter, or really any other matter that is or might become judicial or quasi-judicial, then probably scores or hundreds of public meetings would have to be noticed and published in each jurisdiction in the State every day. The OMA requires no such thing and the absurd consequences of such a rule demonstrate why. Nor does it require Staff to refuse help to applicants in navigating County processes or to ignore concerns of opponents. In fact, this would create the opposite of the transparency the OMA was designed to effect.

In any event, the simple answer to this issue is that nothing in the OMA applies to public employees with no policy or decision-making authority to prevent their meeting and communicating with members of the public.

III. Conclusion.

For the reasons above, the County respectfully asks the Court to affirm the decision of the Board of County Commissioners in every respect.

BOARD OF COUNTY COMMISSIONERS
OF BERNALILLO COUNTY
W. Kenneth Martinez
County Attorney

Michael I. Garcia
Assistant County Attorney, Adv.
520 Lomas Blvd. NW, 4th Floor
Albuquerque, NM 87102-2118
(505) 314-0180
mikgarcia@bernco.gov

CERTIFICATION
I hereby certify that the foregoing
pleading was provided electronically
to all counsel of record
this date of July 30, 2019

Michael I. Garcia

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

MATTHEW CONE, ALBERT SANCHEZ,
JUSTIN KNOX, and GLORIA BACA,

Appellants,

vs.

No: D-202-CV-2019-03654
Judge: Denise Barela Shepherd

BERNALILLO COUNTY BOARD OF
COUNTY COMMISSIONERS,

Appellee,

and

VALENTIN P. SAIS, RON A. PEREA,
and RIO GRANDE HUERTA, LLC,

Interested Parties.

APPELLANTS' MOTION
FOR REHEARNG PURSUANT TO SCRA 1-074(U)

Appellants through counsel hereby move the Court, pursuant to NMRA 1-074(U), to rehear or reconsider its decision to affirm the Board's decision, based on the following points of law or fact that in the opinion of Appellants the Court has overlooked or misapprehended:

1. A district court cannot consider new evidence when engaged in an appeal from an administrative proceeding; if, on a district court review of an administrative decision, the record proves inadequate for some reason, remand is the appropriate avenue to create the record.

Montano v. NM Real Estate Appraiser's Bd., 2009-NMCA-009, ¶ 17, 145 N.M. 494, states:

> This Court has long held that district courts engaged in administrative appeals are limited to the record created at the agency level. *See, e.g., Zamora,* 120 N.M. at 782–83, 907 P.2d at 186–87 (observing that the scope of review in administrative appeals is generally limited to the record created before the agency, and rejecting an invitation to abandon or limit that principle); *Rowley v. Murray,* 106 N.M. 676, 679, 748 P.2d 973, 976 (Ct. App. 1987) (stating that, absent a specific statutory provision, the court is confined to the record made in the course of the administrative proceeding). If the record proves inadequate for some reason,

> remand is the appropriate avenue. *See Lewis v. City of Santa Fe,* 2005–NMCA–032, ¶ 20, 137 N.M. 152, 108 P.3d 558 ("[T]he district court is at liberty to remand for the purpose of creating a record that is adequate for review."). It is not appropriate for the district court itself to consider new evidence. *Martinez v. N.M. State Eng'r Office*, 2000–NMCA–074, ¶ 48, 129 N.M. 413, 9 P.3d 657.

2. Appellants' Notice of Appeal filed May 6, 2019 referenced Section 3-21-9 NMSA 1978 and Section 39-3-1.1 NMSA 1978 as the applicable statutes for Appellants' appeal. Section 3-21-9 states:

> A person aggrieved by a decision of the zoning authority or any officer, department, board or bureau of the zoning authority may appeal the decision pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

3. The Board may consider alleged violations of the Open Meetings Act ("OMA"). Section 10-15-3(B) NMSA 1978 provides for a "public meeting held to address a claimed violation of the Open Meetings Act". The Board adopts OMA policies at the start of each year (this year, Administrative Resolution 2019-1, adopted January 8, 2019), which recognize that the Board is governed by the OMA. Error in applying Board policies in arriving at a decision is a basis for appeal from the County Planning Commission to the Board, under Section 18(G)(2)(a) of the Board's Zoning Ordinance.

4. Denial of admission of noncumulative, nonhearsay evidence relevant to a party's claims by the fact-finder is reversible error. "We hold it was reversible error for the hearing officer to deny admission of noncumulative, nonhearsay evidence that was relevant to petitioner's defenses." Matter of Termination of Boespflug, 1992-NMCA-138, ¶ 17, 114 N.M. 771. The Board denied admission of Appellants' March 22, 2019 letter to the Board and the "Planning Records" evidence enclosed with that letter (listed as Item 3 and Item 4 respectively in Appellants' Motion to Supplement the Record filed June 17, 2019). Appellants' March 22, 2019 letter sets out some of the reasons (from Appellants' perspective) why the County Planning

Commission decision should have been reversed due to the Zoning Administrator's decision-making and lack of due process, based on and with page references to the "Planning Records" evidence, and requested cross-examination of Planning Staff in connection with the "Planning Records".

5. Appellants have not had the opportunity to present appeal arguments to the Court based on the documents identified in Appellants' Motion to Supplement the Record under SCRA 1-074 filed June 17, 2019. Under SCRA 1-074(K)(3), Appellants are required to cite to the record on appeal for their appeal arguments. The Board's record in this appeal is to be supplemented with the documents set out in Appellants' Motion to Supplement, according to the Court's Memorandum Opinion and Order entered November 18, 2019. However, those supplemental documents were not available in the Court record for citation and argument at the time of filing of Appellants' Statement of Appellate Issues (June 26, 2019).

6. The Court has not reviewed and considered Appellants' complete "Planning Records" evidence (146 pages, identified as Item 4 in Appellants' Motion to Supplement the Record filed June 17, 2019). The "Planning Records" were listed in Appellants' Motion to Supplement but were not included as an exhibit to that Motion due to size. The Court's Memorandum Opinion and Order entered November 18, 2019 provides that the documents listed in the Motion to Supplement would be added to the Court record.

7. Concerning the Court's interpretation of County Zoning Ordinance Section 18(B)(23) (Planned Development Area), under Baker v. Hedstrom, 2013-NMSC-043, ¶ 24, the Legislature is presumed not to have used any surplus words in a statute; each word is to be given meaning; and the Court must interpret a statute so as to avoid rendering the Legislature's language superfluous; and under Lantz v. Santa Fe Extraterritorial Zoning Authority, 2004-

NMCA-090, ¶ 7, 136 N.M. 74, judicial interpretation of an ordinance invokes the same rules of construction as interpretation of a statute.

YNTEMA LAW FIRM P.A.

(Electronically filed)

By /s/ Hessel E. Yntema III

Hessel E. Yntema III
Attorney for Appellants
215 Gold Avenue SW, Suite 201
Albuquerque, NM 87102
(505) 843-9565
e-mail: hess@yntema-law.com

I hereby certify that a copy of Appellants' Motion For Rehearing Pursuant to SCRA 1-074(U) was mailed to Michael Garcia, Esq., Bernalillo County Legal Dept., 520 Lomas Blvd., NW, 4th Floor, Albuquerque, NM 87102-2118 and Blake Whitcomb, Esq., Hunt and Davis PC, 2632 Mesilla St., NE, Albuquerque, NM 87110, this November 22, 2019, and was electronically filed through the electronic filing system for the Second Judicial District Court, which caused counsel of record to be served via electronic means, as more fully reflected on the Notice of Electronic Filing.

(Electronically filed)
By /s/ Hessel E. Yntema III

YNTEMA LAW FIRM P.A.
ATTORNEY AT LAW

HESSEL E. YNTEMA, III

March 6, 2019

Received 3/6/19
Berna Georgescu

RECEIVED
2019 MAR -6 AM 11:18
BERNALILLO COUNTY
COMMISSION/MANAGER

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

Julie Morgas Baca
Bernalillo County Manager
One Civic Plaza NW
Albuquerque, NM 87102

Enrico Gradi
Director
Bernalillo County Planning & Development Services
111 Union Square SE, Suite 100
Albuquerque, NM 87102

Nicholas Hamm
Zoning Administrator
Bernalillo County Zoning Administration
111 Union Square SE, Suite 100
Albuquerque, NM 87102

Claim of Violations of Open Meetings Act
in CSU2019-0001

Dear Ms. Hart Stebbins, Ms. Morgas Baca, Mr. Gradi and Mr. Hamm:

This office represents Matthew Cone, Albert Sanchez, Amanda Webb Knox, Justin Knox, Gloria Baca and Carlos Baca ("Appellants") in connection with this letter. Appellants are 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.

It appears a material zoning policy interpretation and other zoning decisions under the County Zoning Ordinance ("CZO") for the referenced special use permit application were made in closed meetings contrary to the New Mexico Open Meetings Act ("OMA"). This letter is to provide notice of the alleged OMA violations pursuant to Section 10-15-3, NMSA 1978.

The Bernalillo County Commission ("BCC") is a policymaking body under the OMA and is subject to the OMA. The BCC has delegated authority to the Zoning Administrator and to County staff under the CZO. For example, as to the delegation of authority to the Zoning Administrator, Section 3(A) of the CZO states:

Section 3. – Interpretation and conflict.

215 Gold Ave. SW
Suite 201
Albuquerque, NM 87102
Phone (505) 843-9565
Fax (505) 242-2879
firm@yntema-law.com
hess@yntema-law.com

YNTEMA
LAW FIRM P.A.
ATTORNEY AT LAW

> A. Interpretation. The Zoning Administrator shall interpret the regulations and restrictions of this ordinance in accordance with the purposes and intent of this ordinance. Disagreement with the Zoning Administrator's interpretation may be appealed to the County Planning Commission and then to the Bernalillo County Commission pursuant to the Administration Section of this ordinance.

The Zoning Administrator is subject to the OMA for decisions made under his delegated authority to interpret the regulations of the CZO. It would appear that other County staff-related bodies with delegated policymaking authority such as the "Case Review Committee" ("CRC") also are subject to the OMA.

For the referenced special use permit application, the Zoning Administrator apparently met in closed meetings with County staff and the applicant's agents and interpreted the CZO that the applicant's development application should proceed as an application for a special use permit under Section 18(B)(23) ("Planned Development Area") rather than under Section 18(B)(32) ("Specific use") or a straight zone change. Closed meetings for the project apparently were held on June 15, 2018, September 6, 2018, October 26, 2018, and November 15, 2018. There may have been other closed meetings. The meeting held on October 26, 2018 apparently was a CRC meeting. Copies of notes taken by staff members Catherine VerEecke and Stephanie Shumsky, respectively, for the meetings are attached as Exhibit A and Exhibit B. The closed meetings formed public policy and determined the basic elements and conditions for the special permit use, and prepped the applicant for the CPC hearing.

The Zoning Administrator's interpretation that the applicant's requested use should be treated as an application for a special use permit for a "Planned Development Area" rather than for a special use permit for a "Specific use" or a zone change resulted in staff's recommendation of approval for a "Planned Development Area" and in a substantially different standard of proof for the CPC hearing.

As best Appellants can tell, Appellants and the public were not given appropriate notice of the meetings or of the Zoning Administrator's interpretation of the CZO.

Appellants request that if the Zoning Administrator is to interpret the CZO as to the applicant's requested use, that interpretation be done at an open public hearing pursuant to the OMA and the CZO; that any meeting of staff including the CRC with the applicant for substantive decisions relating to the application

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ATTORNEY AT LAW

be an open public meeting compliant with the OMA; and that the County respond to this letter within the statutory fifteen (15) days.

Very truly yours,

YNTEMA LAW FIRM P.A.

By Hessel Yntema
Hessel E. Yntema III

Enclosures
cc w/encl: Michael Garcia, Esq.
Blake Whitcomb, Esq.

County of Bernalillo
State of New Mexico
County Attorney's Office
Steve Schiff District Attorney Building
520 Lomas, NW, 4th Floor
Albuquerque, New Mexico 87102
Office: (505) 314-0180 Fax: (505) 242-0828
www.bernco.gov

March 21, 2019

Hessell E. Yntema, III
215 Gold Ave. SW Suite 201
Albuquerque, NM 87102

Re: Your letter of March 6, 2019

Dear Mr. Yntema:

We have received your letter of March 6, which alleges that the Zoning Administrator violated the Open Meetings Act by talking with applicants in CSU2019-0001. It appears your client misapprehends the process this case took, since at no time did it proceed through the Zoning Administrator. As a result, these allegations are wide of the mark for several reasons.

First, Mr. Nicholas Hamm, who happens to be the County's Zoning Administrator, was not acting as the ZA in this instance, but merely as a member of the Planning and Development Services staff, informing the applicants of the different approaches they could take in applying for their special use permit before the County Planning Commission. This is true because Mr. Hamm did not decide any aspect of this case as the ZA; rather, the matter proceeded from the Planning Department to the County Planning Commission, which made the recommendation of approval. Accordingly, Mr. Hamm was not a "public body" under the OMA when he offered options to an applicant.

Moreover, his meeting with the applicant was no more "closed" than were your client's meetings and discussions with PDS staff closed, when your client met with staff to discuss IPRA requests and the appeals process.

Especially to the point, however, is the fact that PDS staff made no determination whatsoever to approve or deny the applicant's request at any of the meetings you mention, nor did they have authority to make any such decision—this was a matter for the CPC, which clearly held an open meeting. This decision-making or policy-making authority is an essential element of an OMA claim, and is notably absent here.

Thank you for your consideration in this matter.

Sincerely,

Michael I. Garcia
Assistant County Attorney, Adv.

cc: Maggie Hart-Stebbins, Chair, Bernalillo County Commissioner
Julie Morgas Baca, Bernalillo County Manager
Enrico Gradi, Bernalillo County Planning & Development Services Director
Nicholas Hamm, Bernalillo County Zoning Administration
Blake Whitcomb, Esq.

YNTEMA LAW FIRM P.A.
ATTORNEY AT LAW

HESSEL E. YNTEMA, III

March 22, 2019

HAND-DELIVERED
Maggie Hart Stebbins
Chair, Bernalillo County Commission
One Civic Plaza, 10th Floor
Albuquerque, NM 87102

Request for Admission of Planning Records
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 under the County Zoning Ordinance ("CZO") for 1300 Gonzales Rd. SW (CSU2019-001). Please place this letter in the record for COA2019-0001.

This letter is to request admission of "new evidence" relating to the County's decision-making for the applicant's application (herein the "Planning Records"). The Planning Records consists of 146 pages (enclosed and page numbered; references below are to pages of the Planning Records). The Planning Records were not presented to the CPC. Appellants obtained the Planning Records after the CPC hearing (held on February 6, 2019), from the County in response to requests under the Inspection of Public Records Act.

Appellants submit that the Planning Records are relevant to the appeal and the decision for the special use permit application. The Planning Records show. among other points, that:

1. The County's Zoning Administrator (Nicholas Hamm) apparently ruled that the application should proceed as an application for a special use permit for "Specific uses", which would be under CZO Section 18(B)(32). The Planning Records show the following: p. 34: "specific use"; p. 35: "SUP for R-2 uses per Nick", "SUP for Specific uses: 1) N/A 200′ Support, 2) unique conditions"; p. 45: "Support from property owners w/in 200′ required". However, the determination that a "Specific use" special use permit was required was later changed apparently by staff to that a "Planned Development Area" special use permit under CZO Section 18(B)(23) (with a different standard of proof more favorable to the applicant) would be required. The Planning Records show: p. 51: "need to change to Special Use Permit for PDA"; p. 55: "SUP for PDA Cluster Housing Why did NH not want this?"; p. 96: "Call it Planned Development Area";

215 Gold Ave. SW
Suite 201
Albuquerque, NM 87102
Phone (505) 843-9565
Fax (505) 242-2879
firm@yntema-law.com
hess@yntema-law.com

YNTEMA
LAW FIRM P.A.
ATTORNEY AT LAW

2. The application really is for R-2 uses in an A-1 zone (p. 34: "R-2 uses – apartments"; p. 51: "driven by R-2 requirements"; p. 47:"with the special use permit we are seeking the (sic) add the multi-family categories of the R2 zone to the A1 zone");

3. County staff and the Zoning Administrator met with the applicant's representatives in numerous closed meetings, to discuss and effectively decide policy, with delegated authority from the County Commission under the CZO, in violation of the Open Meetings Act; and

4. County staff improperly assisted, encouraged and coached the applicant (for example, pp. 104, 107, 127, assisting the applicant in contacting objecting neighbors and monitoring and responding to opponents; pp. 64-66 and 72-73, editing and revising the applicant's proposed submissions; and p. 145, releasing the staff report early and preferentially to the applicant).

The Planning Records generally show that staff rigged the CPC process in favor of the applicant. Appellants should be allowed cross-examination of Planning staff in connection with the Planning Records.

Appellants request that the County Commission accept the Planning Records into the case record for the hearing on their appeal scheduled for April 9, 2019.

Very truly yours,

YNTEMA LAW FIRM P.A.

By Hessel Yntema

Hessel E. Yntema III

cc: w/encl: (by electronic mail):
Michael Garcia, Esq.
Blake Whitcomb, Esq.
cc: (by regular mail):
Dory Wegrzyn (1404 Gonzales Rd. SW, Alb. NM 87105)
Vecinos del Bosque N.A. (P.O. Box 12841, Alb. NM 87105)