IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

No. _____

Second Judicial District Court
No: D-202-CV-2019-03654

vs.

BERNALILLO COUNTY BOARD OF
COUNTY COMMISSIONERS,
Appellee,

and

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

PETITION FOR WRIT OF CERTIORARI TO THE SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEW MEXICO

Submitted By:

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Pursuant to 12-505 NMRA, Appellants submit this Petition for Writ of Certiorari for review of the Bernalillo County District Court's rulings in this case dismissing Appellants' Rule 1-074 NMRA appeal of the approval by the Bernalillo County Commission ("BCC") of a special use permit ("SUP") for 1300 Gonzales Road, SW, in Albuquerque, New Mexico. The District Court's Memorandum Opinion and Order entered November 18, 2019 ("Opinion") is attached as Exhibit 1. The Order denying Appellants' Motion for Rehearing entered March 2, 2020 ("Order") is attached as Exhibit 2. A copy of the BCC decision is attached as Exhibit 3. Copies of the Statement of Appellate Issues ("SAI") filed by Appellants, and the Responses filed by Interested Parties ("RGH") and the BCC are attached as Exhibits 4, 5, and 6. A copy of Appellants' Motion for Rehearing is attached as Exhibit 7. A copy of Appellants' letter submitted to the BCC dated March 6, 2019 ("OMA Letter"), concerning violations of NMSA 1978 Sections 10-15-1through 4, the New Mexico Open Meetings Act ("OMA"), is attached as Exhibit 8. A copy of the response of the BCC through counsel is attached as Exhibit 9. A copy of Appellants' letter dated March 22, 2019 ("Evidence Letter") (without the 146 pages of "Planning Records"), which Evidence Letter and Planning Records were submitted to the BCC on March 22, 2019, is attached as Exhibit 10.

QUESTIONS PRESENTED

1. Did the District Court err in its conclusion that the criteria under County Zoning Ordinance ("CZO") Section 18(B)(23) for a Planned Development Area ("PDA") need not be satisfied to grant a SUP for a PDA?

2. Did the District Court err in considering new evidence which the BCC refused to consider and was not in the BCC record, for its decision to approve the BCC decision?

3. Did the District Court err in not allowing Appellants to present arguments concerning the supplemental evidence accepted into the record by the District Court?

4. Did the District Court err in concluding that the BCC did not violate due process by refusing to consider arguments and evidence that BCC Planning Department Staff ("Staff") "rigged" the decision process, and then concluding that the process was not "rigged"?

5. Did the District Court err in concluding that arguments and evidence of violations of the OMA in the zoning administrative process, raised by Appellants in their appeal to the BCC, are not relevant or material in a zoning appeal?

II

FACTS MATERIAL TO THE QUESTIONS PRESENTED

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 applicants proposed a development of 27 dwelling units within 5 buildings, with amenities, on the site.

The CZO is fairly straightforward for zoning for apartments. Under CZO Section 5 (Definitions), "apartment" is "one or more structures containing two or more dwelling units each". The CZO in Section 10 establishes the "R-2 Apartment Zone" for apartments.

The applicable provisions for a SUP are more complicated. CZO Section 18(A) provides:

> 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 CZO nonetheless has a SUP provision for uses that are permitted in other sections of the CZO: CZO Section 18(B)(32)(a) provides for a "Specific use" SUP applicable to uses, such as apartments, permitted in other sections:

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 CZO has a separate SUP provision for a PDA, Section 18(B)(23), which 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.

CZO Section 5 (Definitions) defines "Cluster Housing Development":

> "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.

Beginning apparently in June, 2018, RGH had a series of communications and meetings with Staff about plans for a "co-housing" project. On November 26,

2018, RGH applied for a SUP for a PDA for the "co-housing" project of 5 buildings with 27 dwelling units and amenities. The CPC held a hearing on the application on February 6, 2019 at which Staff recommended approval of the "co-housing" project and Appellants objected on various grounds. The CPC Chair identified the project as "apartments". The CPC approved the application, with its Notification of Decision dated February 7, 2019. Appellants filed their appeal of the CPC decision to the BCC on February 22, 2019. On March 6, 2019, Appellants through counsel submitted their OMA Letter to the BCC as part of their appeal submissions. BCC counsel responded to the OMA letter, and Staff did not enter the OMA Letter into the case record. On March 22, 2019 Appellants through counsel submitted two other letters to the BCC for their appeal. One letter, which was admitted into the BCC record, supplemented Appellants' appeal and set out Appellants' arguments against the CPC decision: 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 for apartments or as a zone change, the CPC did not apply objective standards, Staff advocated improperly for the project violating due process, meetings between Staff and RGH violated the OMA, and the record was inadequate. The other letter, not accepted into the record, was the Evidence Letter with which were enclosed the Planning

Records, 146 pages, being records produced by the BCC in response to requests under the Inspection of Public Records Act ("IPRA"), relating to communications and meetings between RGH and Staff. The Evidence Letter requested cross-examination of witnesses.

The BCC held a hearing on the appeal on April 9, 2019. At the BCC hearing, Staff advised that "co-housing is not a defined use in the County Zoning Code, nor is it something specifically the County could enforce". Appellant Justin Knox requested the admission of the "new evidence submitted on March 22, 2019". RGH requested consideration of "new evidence" (a video not shown to the CPC), which request was granted by the BCC Chair. Staff did not object to accepting Appellants' "new evidence submitted on March 22, 2019" into the Record. The BCC Chair and Staff said the following concerning Appellants' Evidence Letter and the Planning Records:

> 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.

The BCC Chair and the BCC's attorney said the following, concluding in the BCC Chair denying consideration of Appellants' "new evidence":

> 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.

RGH argued that "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". The BCC did not allow cross-examination of witnesses.

The BCC decision, issued April 11, 2019, essentially copied the CPC decision. Appellants filed their appeal to District Court on May 6, 2019. On June 17, 2019, Appellants filed a Motion to Supplement the Record, requesting that the OMA Letter, the Evidence Letter and the Planning Records be included in the record. On June 26, 2019, Appellants filed their SAI, and the BCC and RGH later filed their Responses. On November 18, 2019, the District Court entered its decision, which granted Appellants' Motion to Supplement the Record and denied

Appellants' appeal. Appellants filed a Motion for Rehearing on November 22, 2019. The District Court denied the Motion for Rehearing by Order entered March 2, 2020. As directed by the District Court in its Order entered March 2, 2020, Appellants filed their supplemental records of 171 pages on March 6, 2020.

BASIS FOR GRANTING THE WRIT

Issue 1. The District Court concluded that the PDA criteria of CZO Section 18(B)(23) need not be satisfied (a PDA "may include a project that requires variances in height, lot area, or setback requirements, but not necessarily", Opinion 11, and "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", and 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", Opinion 13). This conclusion conflicts with Burroughs v. Board of County Comm'rs of Bernalillo County, 1975-NMSC-051, ¶24, 88 N.M. 303:

> It is our opinion that the granting of a special use permit to Empire Realty by the Commissioners, authorizing the construction and maintenance of an overnight campground in an A-2 rural agricultural zone was an improper exercise of power, since such a use is not permitted under s 16 of the Ordinance. The Commissioners had no authority under the specific provisions of the Ordinance to issue this special use permit.

and High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶¶ 4, 5, 126 N.M. 413, which provides three relevant rules of statutory construction (citations omitted):

> The first rule is that the "plain language of a statute is the primary indicator of legislative intent." …Courts are to "give the words used in the statute their ordinary meaning unless the legislature indicates a different intent." The court "will not read into a statute or ordinance language which is not there, particularly if it makes sense as written." …The second rule is to "give persuasive weight to long-standing administrative constructions of statutes by the agency charged with administering them." …. 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…"

and Baker v. Hedstrom, 2013-NMSC-043, ¶24: "each word is to be given meaning" in construction of a statute; and West Old Town Neighborhood Ass'n v. City of Albuquerque, 1996–NMCA–107, ¶26, 122 N.M. 495: "The City may not ignore or revise its stated policies and procedures for a single decision, no matter how well-intentioned the goal may be."

Issue 2: The District Court considered arguments and evidence that the BCC refused to consider and was not in the BCC record (Opinion 5-6, Order 2-3), which is in conflict with Montano v. NM Real Estate Appraiser's Bd., 2009-NMCA-009, ¶ 17, 145 N.M. 494 (citations omitted):

> This Court has long held that district courts engaged in administrative appeals are limited to the record created at the agency level … 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. …It is not appropriate for the district court itself to consider new evidence.

Issue 3: The District Court permitted the record to be supplemented only with its Opinion (Opinion 3), and directed filing of the supplemental records only with its Order (Order 6). Under these circumstances, Appellants were not able to present arguments based on the supplemental evidence with their SAI, which conflicts with Rex, Inc. v. Manufactured Housing Committee for the State of New Mexico, 2003-NMCA-134, ¶ 15, 134 N.M. 533: "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner"; In re Doe, 1974-NMCA-008, ¶7, 86 N.M. 37: "Failure to hear one party's evidence, when offered, establishes a presumption of prejudice"; and Matter of Termination of Boespflug, 1992-NMCA-138, ¶ 17, 114 N.M: "We hold it was reversible error for the hearing officer to deny admission of noncumulative, nonhearsay evidence that was relevant to petitioner's defenses."

Issue 4: The District Court concluded due process was not violated by the BCC's refusal to hear arguments and evidence, and rejected that Staff "rigged" the process (Opinion 6-9; Order 2-4), which conflicts with VanderVossen v. City of Espanola, 2001-NMCA-016, ¶¶26, 130 N.M. 287:

> Unfortunately … the City Council declined to resolve the issue….We emphasize that this Court, as well as the district court exercising appellate jurisdiction under Section 39–3–1.1, is not a fact-determining body… When a decision turns on "factual questions that

> the governing body failed to resolve, the reviewing court must remand for further proceedings."

and Atlixco Coalition v. Maggiore, 1998-NMCA-134, ¶19, 125 N.M. 786, that "a reviewing court is prohibited from supplying a reasoned basis for the agency's action that the agency itself has not given".

The District Court ruled that failure to allow cross-examination was not a violation of due process (Opinion 8), which conflicts with State ex rel. Battershell v. City of Albuquerque, 1989-NMCA-045, ¶ 18, 108 N.M. 658: "It was error for the EPC to refuse to permit petitioners reasonable cross-examination of witnesses opposing their application."

Issue 5: The District Court ruled that Appellants' arguments and evidence of OMA violations in the BCC decision process have "no bearing on the outcome of this appeal" (Opinion 6) and are not material or relevant (Order 3), which conflicts with:

A. New Mexico State Investment Council v. Weinstein, 2016-NMCA-069, ¶75:

> We agree with a 1990 Advisory Opinion by the then-Attorney General that "it is the nature of the act performed by the committee, not its makeup or proximity to the final decision, which determines whether an advisory committee is subject to open meetings statutes." N.M. Att'y Gen. Op. 90–27 (1990). The current Attorney General's Open Meetings Act *Compliance Guide* echoes this thinking, stating, even a non-statutory committee appointed by a public body may constitute a "policy[-]making body" subject to the [OMA] 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 [OMA] by delegating its responsibilities for making decisions and taking final action to a committee.

B. Kleinberg v. Board of Education of Albuquerque Public Schools, 1988-NMCA-014, ¶ 1, 107 N.M. 38:

> This is an appeal from the New Mexico State Board of Education's (state board) decision to affirm the Board of Education of the Albuquerque Public Schools' (local board) confirmation of a teacher's discharge. While several issues are raised by the teacher, the principal issue is whether the local board complied with provisions of the New Mexico Open Meetings Act…

C. NMSA 1978, Section 10-15-1(A): "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(B): "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 …."

ARGUMENT

Appellants' SAI presented Issue 1 at 15-22, Issue 4 at 12-15, and Issue 5 at 22-25. Appellants' Motion for Rehearing presented Issue 2 at 1-2, Issue 3 at 3, Issue 4 at 2-3, and Issue 5 at 2.

Issue 1 presents the question of whether the apparently detailed, strict criteria of CZO Section 18(B)(23) (for a PDA) are meaningful. Overall, this Petition presents significant issues of substantial public interest involving the construction of zoning ordinances, due process in administrative zoning proceedings, the scope of BCC authority for SUPs, judicial review of zoning decisions, and the OMA.

PRAYER FOR RELIEF

Appellants pray that the Court of Appeals reverse the District Court's decision, and/or if appropriate remand to the District Court or the BCC for consideration of issues not raised in this Petition if the relief requested is granted.

STATEMENT OF COMPLIANCE

This Petition complies with Subparagraph E (3) of NMRA Rule 12-505, and was prepared using Times New Roman. The number of words in the Petition is 3,141, obtained from Microsoft Word 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition for Writ of Certiorari was mailed, and sent by electronic mail, to:

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on March 13, 2020, and was electronically filed through the electronic filing system for the Court of Appeals, as more fully reflected on the Notice of Electronic Filing.

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