

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Appellants,

Court of Appeals No. A-1-CA-38823

vs.

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

BERNALILLO COUNTY BOARD
OF COUNTY COMMISSIONERS,

Appellee,


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

Interested Parties.

**RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE SECOND JUDICIAL DISTRICT COURT**

Honorable Denise Barela Shepherd, District Court Judge

HUNT & DAVIS, P.C.



Blake Whitcomb
2632 Mesilla Street NE
Albuquerque, New Mexico
87110
(505) 881-3191
*Attorneys for Respondent
Rio Grande Huerta, LLC*

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INTRODUCTION

Appellants Matthew Cone, Albert Sanchez, Justin Knox, and Gloria Baca's Petition for a Writ of Certiorari to the Second Judicial District Court arises out of the Honorable Denise Barela Shepherd's Memorandum Opinion and Order upholding Board of County Commissioners of Bernalillo County's (the "BCC") approval of a Bernalillo County Planning Commission ("CPC's") decision to grant a special use permit pursuant to an application submitted to the CPC by Respondent Rio Grande Huerta, LLC ("RGH"). In that Memorandum Opinion, Judge Barela Shepherd found that: the BCC did not act arbitrarily or capriciously when it declined to admit purported evidence of an alleged Open Meetings Act ("OMA") violation, given the BCC lacked the authority to adjudicate such a claim; the Bernalillo County Zoning Administrator was not a "policymaking body" for the purpose of an OMA claim in this instance; Appellants received all process to which they were due in their hearings before the CPC and the BCC; and, substantial evidence supported the BCC's determination that RGH's application and accompanying evidence satisfied the requirements for a "Planned Development Area" under § 18(B)(23) of the Comprehensive Zoning Ordinance of Bernalillo County (herein referenced as the "Zoning Ordinance") and the BCC's application of that evidence to the underlying ordinance was neither arbitrary nor capricious.

Petitioners ask this Court to grant certiorari to review Judge Barela Shepherd's decision because they contend that the district court erred by: upholding the BCC's approval of RGH's request for a special use permit (Question Presented No. 1) and in considering or not considering alleged evidence of an OMA violation, which were not considered as part of the underlying zoning request (Questions Presented Nos. 2, 3, 4, & 5). Counsel for RGH admits that he has some trouble understanding Appellants' contentions regarding OMA violations and related documents tendered to the district court. However, counsel believes these issues are best addressed by counsel for the BCC. Accordingly, the following brief response is only directed to Appellants' first issue—the appropriateness of Judge Barela Shepherd's decision as it pertains to the underlying request for a special use permit. As below further discussed, Judge Barela Shepherd correctly determined that substantial evidence supported the BCC's determination that RGH appropriately justified its request for a special use permit.

FACTS MATERIAL TO THE QUESTION PRESENTED

This petition 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"). 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, with residential units clustered around agricultural spaces and communal amenities.

Prior to RGH’s request, the Property consisted of three (3) vacant lots with agricultural zoning totaling approximately 3.7 acres. 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.” The area surrounding the Property was previously also zoned agricultural but has since been subdivided into compact R-1 (residential) lots. Under Bernalillo County’s Southwest Area Plan, the Property is located in the Established Urban Area and in Residential Area 5, permitting a development density of up to nine (9) dwelling units per acre. RGH’s special use permit request was linked directly to RGH’s proposed project through a site plan submitted with 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." Thus, RGH's submission bound any eventual development to its highly-specific plan for a mixed-use residential and agricultural community with a footprint mandating clustered housing.

At hearings before both the CPC and BCC, Marlies Metodi, project manager for RGH, provided extensive testimony regarding how the proposed development would differ from traditional residential or apartment developments, including developing "private owner-occupied homes, clustered around shared space" with a focus on "agriculture, gardening, growing food, and sharing the harvest." Metodi also testified that RGH had selected the Property specifically because it provided an opportunity for agriculture. Furthermore, Metodi 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." 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 sixty-two percent (62%) of the site as usable open space,

including play areas for children, permaculture gardens, native habitat areas, and almost an acre of agricultural lands.”

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.” 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.” 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. Okuma 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.” 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.”

Beyond Metodi and Okuma’s testimony, numerous members of the public testified as to the benefit of using a clustered housing model to promote future agricultural and housing opportunities on the Property, and the proposal had

substantial neighborhood and community support. Ultimately, the CPC voted 4-2 in favor of approving RGH's requested special use permit, and Appellants appealed that decision to the BCC. After an extended hearing, the BCC voted 4-1 to deny each of the appeals and uphold the CPC's approval of the requested special use permit. 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 provide additional protections for agriculturally-zoned land in the South Valley. Following a further appeal to district court, Judge Barela Shepherd upheld the BCC's decision in her Memorandum Opinion and Order.

RESPONSE TO ARGUMENT FOR GRANTING PETITION

Petitioners contend that the district court erred by allegedly concluding that criteria under the Zoning Ordinance §18(B)(23) for a Planned Development Area "need not be satisfied." However, reading Judge Barela Shepherd's Memorandum Opinion, it is evident that the court made no such conclusion. Rather, Petitioners' true complaint is that the district court did not apply or interpret that section to include the additional requirements desired by Petitioners. As further below discussed, the district court correctly interpreted the ordinance section at issue and

this Court should deny Petitioners request for certiorari based on that interpretation.

In upholding the BCC's decision, the district court was tasked with interpreting Zoning Ordinance §18(B)(23), which states that special use permits may be granted for a:

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.

Based on their parsing of the above section, Petitioners believe that RGH failed to explicitly demonstrate a “need to vary height, lot area, or setback requirements.” In briefing to the district court, RGH argued both that: 1) Petitioners’ interpretation of the above section ignored the plain language and intent of the ordinance 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” and 2) the site plan approved in connection with RGH’s request showed the need to eliminate lot lines between the residences; cluster those residences within five structures throughout the development; and, increased the number of residences permitted to just over seven (7) per acre in order to promote agriculture—which

had the effect of substantially varying lot configurations throughout the development.

Judge Barela Shepherd's Memorandum Opinion generally agreed with RGH's first argument based on the underlying ordinance's inclusion of the word "including" when referencing the criteria involved in evaluating a Planned Development Area. Based on this analysis, the district court determined that "a Planned Development Area may include a project that requires variances of height, lot area, or setback requirements, but not necessarily" (citing *In re Estate of Corwin*, 1987-NMCA-100, ¶ 3-4, 106 N.M. 316 as noting that "including" is a word of expansion, rather than limitation."). Undoubtedly, this analysis is sound and upholds New Mexico courts' mandate that they employ rules of statutory construction to analyze an ordinance with an eye toward the intent of those who enacted it. *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 6, 126 N.M. 413, 970 P.2d. Here, the clear intent of Zoning Ordinance §18(B)(23) is to provide for variety and flexibility in development "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," all of which purposes RGH's request substantially advances. Thus, rather than creating valid arguments, Petitioners' focus on specific


types of variances within the ordinance only serves to erect false barriers to hinder the actual purpose of the underlying ordinance.

In their arguments, Petitioners often cite *Burroghs v. Board of County Commissioners of Bernalillo County*, 1975-NMSC-051, 88 N.M. 303, for the proposition that a “Planned Development Area” should not be used as a “catchall” category of development. In *Burroghs*, the Supreme Court determined that “Planned Development Area” should not be interpreted as including an “overnight campground” given the language of a 1975 Zoning Ordinance, which included no explanation or definitions of the term “Planned Development Area.” *See id.* Here, unlike the 1975 Zoning Ordinance, the present Zoning Ordinance contains specific elements and purposes for a Planned Development Area, including cluster housing and preservation of open space. Furthermore, rather than attempting to push an inapplicable development type through as a Planned Development Area, RGH is focused on incorporating cluster housing and the preservation of agriculture and open space into their proposed development as supported by several Bernalillo County plans, which purposes are the heart of a “Planned Development Area” under the present Zoning Ordinance. Accordingly, the district court correctly determined that RGH’s proposed development is strongly consistent with the intent of a “Planned Development Area” as defined in the Zoning Ordinance—and the BCC was not arbitrary or capricious in coming to the same conclusion.

PRAYER FOR RELIEF

WHEREFORE, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

HUNT & DAVIS, P.C.



Blake Whitcomb
2632 Mesilla Street NE
Albuquerque, New Mexico
87110
(505) 881-3191
Attorneys for Respondent
Rio Grande Huerta, LLC


STATEMENT OF COMPLIANCE

I hereby state that this Response to Petition for Writ for Certiorari is in compliance with NMRA 12-505(E)(1)(2) and (3) and uses Time New Roman 14 as the font and contains 2,042 words obtained from Microsoft Word.



Blake Whitcomb

I hereby certify that I have submitted a true and correct copy of the foregoing pleading through the Court's electronic filing system causing all counsel of record to be served on this 24th day of March, 2020.



Blake Whitcomb