STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

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

D-202-CV-2019-03654

BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY,
Appellee,
and

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

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 Baca, TCAA

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