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.

REPLY TO RESPONSES TO
STATEMENT OF APPELLATE ISSUES

Appellants through counsel hereby reply to the Responses to the Statement of Appellate Issues filed by Rio Grande Huerta, LLC ("RGH") and the Bernalillo County Board of County Commissioners ("BCC"). This Reply is organized by Appellants' appeal issues. References to the "Record" or "R" are to the administrative appeal record filed by the BCC in this appeal to the District Court.

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

The BCC argues that there is "no requirement that the BCC issue a judicial opinion" (p. 6 of the BCC Response). However, the BCC is required to issue an adequate quasi-judicial statement of its decision, under Albuquerque Commons Partnership v. City Council of the City

of Albuquerque, 2008-NMSC-025, ¶35, a quasi-judicial zoning case in which the Supreme Court addressed the requirement of an adequate written decision as follows:

> 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."

The BCC does not argue that the BCC's decision in this appeal complied with the standards set out in Albuquerque Commons. The BCC decision did not provide the relevant and important facts upon which its decision was based and did not demonstrate that the BCC had applied the criteria prescribed by its own regulations. The BCC decision basically recited its regulations and did not identify the relevant and important facts upon which the decision is based. The BCC decision did not address any of Appellants' appeal issues. The BCC declined to consider the arguments and evidence presented by Appellants. Appellants request that the Court apply the clearly stated, readily available law of NMSA 1978, Section 39-3-1.1 and Albuquerque Commons to the BCC in this case.

The BCC Response suggests that the issue of failure to provide the requirements for filing an appeal of the BCC's final decision is unimportant because Appellants filed their appeal to District Court timely (p. 6 of the BCC Response). However, the issue of the BCC's failure to provide the requirements for filing an appeal is capable of repetition, and NMSA 1978, Section 39-3-1.1 (B)(3), is clear that the requirements for filing an appeal must be provided.

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

The BCC Response states that the BCC's failure to consider Appellants' arguments and "new evidence" was justified by matters outside the Record: Appellants' "second attempt to attack staff for helping Applicants process their application", "charging staff with ethical violations", an "unfounded claims of violations of the Open Meetings Act, which had already received a response prior to the hearing" (p. 6 of the BCC Response). The District Court is not allowed to go beyond the Record in its consideration of an administrative appeal. 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.

So far as the Record in this case discloses, Appellants requested consideration of appeal issues with written materials which had been submitted to the BCC, and the BCC refused to consider those issues and materials, without giving reasons (R 724, 774, 791- 793). It is obviously improper for the BCC to make quasi-judicial decisions based on off-record, ex parte communications, if that is what happened in this case as stated by the BCC Response. The District Court should reject the BCC's attempts to justify its decision to deny consideration of Appellants' arguments and evidence by reliance on matters outside the Record.

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.

The BCC Response states that RGH "sought to put their property to a lawful use" and that the "lawful use" is a special use permit for a "planned development area" (p. 1 of the BCC Response). These assertions by the BCC misstate the BCC process for a special use permit. That process is a quasi-judicial process under which the applicant submits its evidence for a change in the applicable zoning. Whether the special use permit is a "lawful use" is determined only at the end of the quasi-judicial rezoning process.

The BCC Response cites a letter from BCC counsel (not in the Record) stating that BCC Staff "ultimately advised" the applicants "that the best approach for their co-housing development was to seek a special use permit" (p. 2 of the BCC Response). The BCC Response alleges that "Mr. Hamm never made a single decision regarding this case" (p. 7 of the BCC Response) apparently based on personal knowledge of BCC Staff not evidenced in the Record. As discussed above, the District Court should reject the BCC's attempts to justify its decisions by reliance on matters outside the Record. If the record is inadequate, remand is appropriate. Montano, ¶ 17.

The BCC's Response indicates that BCC Staff had a determinative effect on BCC decisions in the case at bar, acting effectively as decision-maker and gatekeeper. In the case at bar, according to the BCC Response, BCC Staff decided for the BCC that Appellants' Open Meetings Act argument and other arguments based on additional evidence were not worthy of consideration and thus were not submitted to the BCC and were not included in the Record.

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

The BCC argues essentially that the dwelling units in this case are not "apartments" and constitute "cluster housing" because apartments "generally do not have dedicated agricultural and orchard area along with greenhouses", citing to the RGH site plan (R 753-755) (p. 5 of the BCC Response). However, CZO Section 5 defines "apartments" as "one or more structures containing two or more dwelling units each" and "cluster housing development" as "a form of development which permits a reduction in lot area and bulk requirements". Under these definitions, the RGH proposal is "apartments" and is not "cluster housing development". The SUP at issue proposes five structures with two or more dwelling units each and does not involve any "reduction in lot area and bulk requirements" (site plan, R 753-755). CZO Section 18(B)(23) refers specifically to "cluster housing development" so presumably that provision refers to the CZO (non-apartment) technical definition of "cluster housing development."

The subject site's A-1 zoning allows the "agricultural and orchard areas along with greenhouses" which according to the BCC Response justify the special use permit ("SUP") for a PDA. The main problem with the SUP, from Appellants' perspective, is the increase in density of RGH's proposed use. Appellants do not object to the proposed agricultural use, but rather to the substantially higher "apartment-like" density, which the BCC and RGH claim is necessary to allow agriculture on the site. The BCC did not find that higher "apartment-like" density on the site was necessary to allow agriculture on the site, and such a finding would have been absurd.

From a broader perspective, a significant problem with the BCC's line of argument is that any standards for BCC decision-making have disappeared. The statement in the BCC's Finding 6 that "The site plan includes areas that are dedicated to open space, agricultural and recreational

uses" (R 744) does not explain why higher density apartments are appropriate at the requested location, and opens the door that any apartment-like project which plans open space, agricultural or recreational uses can obtain a higher density SUP for a PDA.

The CZO provides a straightforward zoning treatment of apartments in the R-2 and some other zones, and as a special use permit under CZO Section 18(B)(32), and BCC Staff and the BCC erred in considering the application as other than "apartments".

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

The BCC and RGH gloss over the facts that "co-housing" is not defined or listed under the CZO and the BCC does not have any ability at this point to regulate or enforce "co-housing" (R 579, 744). If an undefined, unlisted use (such as "co-housing") is proposed, the reasonable approach would be to authorize by legislation the new use in the CZO in an applicable zone category or as a listed SUP with applicable regulations and standards. However BCC Staff with the applicants instead decided to proceed under an ad hoc approach ("something a little more creative that is apartment-like", R 788) via a Planned Development Area ("PDA") special use application. The applicants' counsel insisted that the proposal be considered as "a co-housing community" (R 782). "Planned Development Area" is not defined other than in CZO Section 18(B)(23) (requiring a "need" to vary certain requirements "due to" unusual site features). Under these circumstances, given the availability of apartment zoning (R-2) and a "specific use" SUP for apartments under CZO Section 18(B)(32), BCC Staff unreasonably stretched its interpretations of the CZO to find that the RGH proposal could proceed as a PDA application, and the BCC erred in approving that interpretation. Burroughs v. Board of County Comm'rs of Bernalillo County, 1975-NMSC-051, ¶24, 88 N.M. 303, is the applicable case law. In Burroughs

the Supreme Court held that only special uses permitted under the CZO may be the subject of a SUP, and that an "overnight campground" could not be considered a "planned development area" for purposes of a SUP.

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

In connection with Section 18(B)(23) for a SUP for a PDA, Appellants ask that the District Court consider the actual language at issue of the CZO provision. Grammatically, the provision has three applicable clauses (the "need to", the "due to" and the "in order to" clauses), each of which has to be demonstrated, in relation to the full string of requirements, by the applicant to obtain the SUP. The applicable provision reads:

> Planned Development Area, including residential uses or mixed residential and commercial uses, provided the minimum development lot area is two acres and the applicant demonstrates the need to vary height, lot area, or setback requirements due to unusual topography, lot configuration, or site features in order to create cluster housing development, preserve visual or physical access to open space or unique site features, or to facilitate development as allowed by an approved Master Plan.

The BCC Response generally relies on a broad application of "cluster housing" for satisfaction of the CZO requirements (p. 5 of the BCC Response) (the third "in order to" clause has the term "cluster housing development", which is a defined term in the "Definitions" of the CZO). The BCC Response alleges various circumstances to justify the BCC decision, such as "site layout followed cluster housing principles", "need to vary lot requirements", "natural site features" such as the Atrisco Drain to the east, and "restoration of agriculture" (p. 3 of the BCC Response). Some of these allegations are simply incorrect (apartments are not cluster housing development, the site is to be one lot so there is no need to vary lot requirements, the Atrisco

Drain to the east is not a natural or unusual site feature for the site). None of the alleged circumstances were mentioned by either the CPC or the BCC in their respective decisions, so they are speculative as bases for the decisions. In any event, none of the circumstances can reasonably be said to demonstrate, as substantial evidence, "the need to vary height, lot area, or setback requirements due to unusual topography, lot configuration or site features".

RGH argues that Appellant's reading of CZO Section 18(B)(23) attempts to twist the ordinance (p. 15 of the RGH Response). In fact, Appellants request that the District Court (and the BCC) read the CZO section and apply its provisions to the circumstances of the case at bar. RGH backs off, to some extent, from its prior argument that RGH "relies entirely on cluster housing with an intent to preserve physical access to the agricultural open space" (R 735) for the SUP for a PDA. RGH argues that the site plan's elimination of lot lines between two A-1 lots constitutes a need to vary lot area requirements (p. 16 of the RGH Response). A voluntary revision of lot lines by an applicant cannot be sufficient to demonstrate a "need to vary lot area"; otherwise the language of the provision has no real meaning. RGH argues that the second, "due to" clause was met by the applicant but RGH does not identify any "unusual topography, lot configuration, or site features" (p. 16 of the RGH Response) (there are no such unusual features). RGH argues that the third "in order to" clause was satisfied by calling the proposed development "cluster housing" or "on site agriculture" (p. 16-17 of the RGH Response). However, as discussed above, RGH's proposed development is "apartments" and is not "cluster housing development" as defined in the CZO. Proposing some ancillary "on site agriculture" cannot be reasonably considered substantial evidence to support that a proposed higher density SUP for a PDA is "to facilitate development under an approved Master Plan" if the language of the CZO provision is to have any real meaning.

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.

Appellants in their materials to the BCC and in their Statement of Appellate Issues ask that the actual language of Resolution 116-86 be considered and applied. The key language, R 721-722 and cited at p. 21 of Appellants' Statement, concerns whether the existing zoning is inappropriate due to "changed conditions" or because another proposed use is "more advantageous to the community", or is a "spot zone".

The BCC Response argues that "diminishing agriculture and more residential uses in the area" justify the SUP under the "changed circumstances" test (p. 4 of the BCC Response). However this was not cited by the BCC in its decision. If development in a neighborhood according to existing A-1 zoning constitutes "changed conditions" justifying rezoning, then stability of zoning in Bernalillo County is illusory, and no landowner may rely on the stability of the zoning in the surrounding area. "Diminishing agriculture and more residential uses" in a residentially zoned area is not reasonable substantial evidence to support a significant change of use and higher density. The BCC Response also cites the existing owner's lack of use as a reason for the SUP (p. 4 of the BCC Response). However an owner's choice to not use property cannot be considered reasonable sufficient evidence to support a SUP on the unused property.

RGH argues that "infill" development in the area supports the SUP decision under "changed conditions" (pp. 22-23 of the RGH Response). However, this "infill" was not cited by the BCC and it does not appear that any of the "infill" resulted from zone changes or special use permits. The area is developing as zoned. Concerning the "more advantageous to the community" test, RGH does not suggest that the BCC was guided by any standards in its

decision. "More advantageous to the community" cannot be a grab-bag category that the BCC applies however and whenever it wants.

Concerning spot zoning, it appears to be undisputed that there are no multi-family apartments in the area (R 689), which brings the RGH proposal within the "spot zoning" provision of Resolution 116-86. The spot zoning criteria were not discussed by the BCC. As with the other Resolution 116-86 issues, when spot zoning is raised as an issue to the BCC, the BCC should address the issue with facts and analysis.

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

The BCC argues that "Staff's communications … did not violate the Open Meetings Act" (p. 8 of the BCC Response). However, Appellants' arguments and evidence on this issue were not considered in the BCC hearing.

The BCC places great emphasis on its allegation that one of Appellants met with BCC Staff and that somehow disqualifies Appellants' OMA issue (pp. 2, 7, 8 of the BCC Response). However, this allegation by the BCC is based on BCC counsel's off-Record letter, and there does not appear to be any allegation, within or without the Record, that all Appellants met with BCC Staff. In any case whether Appellants met with BCC Staff is not relevant to whether BCC Staff's meetings with the applicants to make determinations on their application for an SUP violated the OMA. If BCC Staff acted in a policy-making context under delegated authority from the BCC in meetings with the applicants, the OMA applies. The BCC should have considered Appellants' arguments and evidence, and BCC counsel's letter, for the OMA issue.

For the foregoing reasons, the BCC decision should be reversed and remanded, and Appellants' arguments and evidence should be heard and decided by the BCC.

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(Electronically filed)

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I hereby certify that a copy of this Reply to Responses to Statement of Appellate Issues 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 August 5, 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
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