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
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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