

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  
MOTION TO SUPPLEMENT THE RECORD UNDER SCRA 1-074(I)**

Appellants hereby reply to the Response of the Bernalillo County Commission (“BCC”) and to the Response of Rio Grande Huerta (“RGH”) to Appellants’ Motion to Supplement the Record.

Background

Appellants seek to supplement the Record with various documents, mainly two letters with records, which were presented to the BCC in conjunction with the hearing on Appellants’ appeal, but were not considered by the BCC at the appeal hearing. Appellants raised several issues in their appeal to the BCC, including that BCC Staff advocated improperly for the project violating due process, meetings between BCC staff and the applicants violated the OMA, and the record was inadequate. Appellants submitted the two letters (with records produced by the BCC pursuant to the Inspection of Public Records Act (“IPRA”)) to the BCC in support of their appeal

arguments. The first letter, dated March 6, 2019, alleged that the BCC process violated the Open Meetings Act (“OMA”) and had attachments of 17 pages of the IPRA records to support Appellants’ position. The second letter, dated March 22, 2019, requested that the BCC consider “new evidence” of 146 pages of the IPRA records in conjunction with Appellants’ appeal arguments.

In considering the Motion to add Appellants’ arguments and exhibit evidence to the Record, it is worth noting that the BCC freely accepted and heard “new evidence” (a video) from the applicants at the BCC appeal hearing (R 778-780), shortly before declining even to consider Appellants’ arguments and evidence (R 793).

Appellants request that they be allowed to submit a supplement to their Statement of Appellate Issues if the Record is supplemented.

#### Reply to BCC Response

In its Response, BCC does not dispute that Appellants’ letters with arguments and evidence were submitted to the BCC in connection with the BCC hearing of Appellants’ appeal. The BCC basically argues that Appellants’ arguments and evidence were not worthy of consideration by the BCC. The BCC Response relies mainly on matters outside the Record, set out in Appellants’ letters and exhibit evidence, which the BCC refuses to add to the Record.

The BCC argues that the Motion is a collateral attack on the BCC decision which presents a false and unworkable interpretation of the OMA (p. 1 of BCC Response). The BCC misconstrues Appellants’ Motion, which is made under SCRA 1-074(I), to supplement the record. Violation of the OMA was raised by Appellants as one of several appeal issues (R 716-718, 724-730). Appellants’ March 6, 2019 letter with IPRA evidence about OMA violations apparently was not submitted by BCC Staff to the BCC for the appeal hearing. In the case of

Appellants' March 22 letter with IPRA evidence, the BCC refused to open the envelope with the letter and evidence (R 792-793). The BCC did not make any ruling on Appellants' OMA argument, or other arguments.

The BCC states in its Response that "staff did nothing wrong or improper by meeting with the applicants in this case to help them move their application through its process in the way that would most likely result in approval under the County's governing ordinance" (pp. 1-2 of BCC Response). This statement makes a conclusion about what Appellants' evidence (never considered by the BCC) shows. This statement also presents BCC Staff's obligations under the County Zoning Ordinance ("CZO"), when an applicant is seeking a Special Use Permit ("SUP"), in an excessively favorable way for RGH. BCC Staff manage the SUP application process and the presentation of the SUP application, under authority delegated by the BCC. Appellants dispute, and it is a main background issue in this appeal, that the proper role of BCC Staff is to help maximize RGH's approval prospects for its "co-housing" project, through closed meetings, when "co-housing" is not even an identified use under the CZO. An owner does not have a right to a SUP; an owner has a right to apply for a SUP, which application is to be judged under the applicable requirements of the CZO with notice and a public quasi-judicial hearing process.

The BCC argues that Appellants' argument that the decision process was rigged is improper (p. 2 of BCC Response) (the allegation of the process being rigged was in Appellants' March 22 letter about "new evidence", not in Appellants' March 6 letter about the OMA violations, as stated by the BCC). The validity of Appellants' arguments should be determined by the BCC from the applicable evidence, not offhand by BCC Staff. The BCC's own actions and the BCC's Response to the Motion support Appellants' argument that the process was rigged against Appellants: the BCC did not consider Appellants' letters with arguments and evidence in

support of Appellants' appeal issues, and the BCC's apparent position in its Response is that RGH has a right to the requested SUP and that BCC Staff's role is to help RGH get the best result possible, with strategy developed with the applicants in closed meetings. Failure to hear one party's evidence, when offered, establishes a presumption of prejudice. In re Doe, 1974-NMCA-008, ¶7, 86 N.M. 37.

The BCC's statement that the Zoning Administrator ("ZA") (Nick Hamm) "offered suggestions not as the Zoning Administrator rendering a decision, but as a member of Planning Staff guiding an applicant" (p. 2 of BCC Response) presents a fact dispute which should be heard by the BCC. The e-mails produced by the BCC pursuant to IPRA and submitted by Appellants to the BCC with Appellants' letter dated March 22, 2019 indicate that the ZA was acting in his ZA capacity, as inquiries were directed to him and received from him as ZA (see attached e-mails of October 15, 2018) (pages 41 and 42 of the "Planning Records"). The notes of the various meetings between BCC Staff including the ZA and the applicants' agents indicate that the ZA took an active role in decisions: "SUP for R-2 uses per Nick" (page 35 of the Planning Records, copy attached); "SUP for PDA Cluster Housing why did NH not want this" (page 55 of the Planning Records, copy attached). The notes for a December 11, 2018 meeting indicate the ZA and other BCC Staff worked with the applicants' agent in recommending how to respond to opposition to the project and how to best label the project, suggesting changes to the application for resubmission, and prepping for the presentation to the CPC (pages 95-98, copies attached). Most of the meetings at issue took place before the applicants submitted their initial SUP Application (on November 26, 2018) (R 57) or their re-submittal, with a changed site plan and justification (on December 17, 2018) (R 8, 54, 57, 59).

The BCC argues that Appellants' arguments are in the nature of "ethical" complaints and the BCC "had no jurisdiction to address" the OMA issue (p. 2 of BCC Response). Appellants raised their due process, inadequate record and OMA issues in their appeal to the BCC, and the IPRA records support those arguments. Appellants did not frame their issues as "ethical" but rather as errors by the CPC in applying applicable BCC policies. The BCC is the governing body and zoning authority and is the proper body to consider appeal arguments from a CPC decision based on lack of due process, an inadequate record before the CPC, and violations of the OMA in the decision process. The BCC has subject matter jurisdiction, indeed some responsibility, to consider OMA claims against the BCC, under NMSA 1978, Section 10-15-3(B) which provides for a public meeting to address a claimed violation of the OMA.

New Mexico public policy under the OMA is that "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(A). 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 ...." NMSA 1978, Section 10-15-1(B). Given the fundamental public policy in favor of open meetings set out in the OMA, the BCC has jurisdiction to consider an OMA claim in the context of a zoning appeal under NMSA 1978, Section 3-21-8 (appeals to zoning authority).

The BCC argues that Appellants' argument about OMA violations should be rejected because Appellants also met with BCC Staff (pp. 2-3 of BCC Response). This argument by the BCC, in the nature of an estoppel argument against Appellants, is not relevant to Appellants'

OMA argument which is that BCC Staff's various meetings with the applicants' agents to interpret the CZO and help obtain approval of the applicants' application, under authority delegated to BCC Staff by the BCC, were governed by, but did not comply with, the OMA. The BCC does not cite any authority that an OMA claim fails if the OMA claimant also had a meeting with the public body charged with the violation.

The BCC suggests that "Appellants oppose the County's decision granting applicants a lawful use of their own property" (p. 3 of BCC Response). Whether the subject SUP is lawful was the subject of Appellants' appeal to the BCC and is the subject of Appellants' appeal in the case at bar. This appeal is before the Court because, among other reasons, the BCC has granted a SUP to RGH which in BCC Staff's words is a "something a little more creative that is apartment-like" interpretation of Section 18(B)(23) of the CZO (R 788), and that interpretation appears to have emerged as BCC policy in closed meetings between the applicants' agents and BCC Staff.

#### Reply to RGH Response

In its Response, RGH does not dispute that Appellants' letters with arguments and evidence that are the subject of the Motion were submitted to the BCC in conjunction with the appeal hearing. RGH argues that the BCC "properly excluded" Appellants' arguments and evidence (p. 2 of RGH Response).

However, the BCC itself did not "exclude" Appellants' March 6, 2019 OMA letter and IPRA evidence, or BCC counsel's March 21, 2019 response to the March 6, 2019 letter. BCC Staff just did not include those letters in the Record or present them to the BCC for consideration. BCC Staff apparently decided that Appellants' OMA issue was not going to be

heard by the BCC. The BCC itself did not consider Appellant's arguments or evidence and did not rule on Appellants' OMA appeal issue.

The BCC did not vote to "exclude" Appellants' March 22, 2019 new evidence letter, and the "Planning Records" (146 pages) submitted with the letter. Rather, the BCC declined to even open and view the letter and proposed evidence (R 792-793), due apparently to lack of time and lack of interest. The BCC did not discuss or exclude Appellants' arguments and evidence based on alleged lack of relevance or lack of jurisdiction to hear Appellants' due process, ordinance construction, OMA and other arguments set out in the March 22, 2019 letter and evidence.

RGH also argues that an OMA violation should not be considered in a zoning appeal (p. 2 of RGH Response). This argument is incorrect for several reasons. The BCC has a policy to follow the OMA (Administrative Resolution 2015-1) (if that were necessary given the New Mexico public policy set by the OMA). CZO Section 18(G)(2)(a) provides for appeals to the BCC based on "error in applying adopted . . . policies". NMSA 1978, Section 3-21-8 provides for appeal to the BCC of a zoning decision by an "aggrieved" party. "Aggrieved", at least for purposes of standing, has a broad application under New Mexico law, paraphrased as an "identifiable trifle" in Ramirez v. City of Santa Fe, 1993-NMCA-049, ¶ 9, 115 N.M. 417. Most importantly, the BCC is the responsible governing body for zoning and OMA compliance and should consider alleged OMA violations and failure of due process by BCC Staff acting under authority delegated by the BCC in a quasi-judicial zoning matter, even if only to reject those arguments after considering the evidence.

RGH argues that Appellants' letters and exhibits "rest firmly outside the scope of the Court's review" of the BCC decision under SCRA 1-074 (p. 3 of RGH Response). However, NMSA 1978, Section 39-3-1.1(D)(3) and SCRA 1-074 (R) provide for appellate review by the

district court of zoning decisions based on a standard that the agency did not act in accordance with law. Whether the BCC did not act in accordance with the OMA is a valid question for District Court review. If the District Court decides that it lacks appellate jurisdiction over the OMA claim or any other claim of Appellants, the District Court should consider such claims under its original jurisdiction, see Maso v. State of New Mexico Taxation and Revenue Department, Motor Vehicle Division, 2004-NMCA-025, ¶¶ 14-18, 135 N.M. 152

The District Court is at liberty to remand for the purpose of creating a record that is adequate for review. Lewis v. City of Santa Fe, 2005-NMCA-032, ¶ 20, 137 N.M. 152. The Record should be supplemented to include Appellants' submitted arguments and evidence, and the District Court should remand this appeal to the BCC to consider and rule on Appellants' arguments and evidence on their merits after due hearing as provided by law, or allow Appellants to supplement their Statement of Appellate Issues to address the supplement to the Record or pursue their claims by an amended pleading under the District Court's original jurisdiction.

YNTEMA LAW FIRM P.A.

(Electronically filed)

By /s/ Hessel E. Yntema III  
Hessel E. Yntema III  
Attorney for Appellants  
215 Gold Avenue SW, Suite 201  
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(505) 843-9565  
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I hereby certify that a copy of this Reply to Responses to Motion to Supplement the Record Under SCRA 1-074(I), was mailed to Michael Garcia, Esq., Bernalillo County Legal Dept., 520 Lomas Blvd., NW, 4<sup>th</sup> Floor, Albuquerque, NM 87102-2118 and Blake Whitcomb, Esq., Hunt and Davis PC, 2632 Mesilla St., NE, Albuquerque, NM 87110, this July 10, 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  
Hessel E. Yntema III

## Matthew Winters

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**From:** Marlies Metodi <cohousingabq@gmail.com>  
**Sent:** Monday, October 15, 2018 11:23 AM  
**To:** Stephanie Shumsky  
**Subject:** Re: BC Zoning Code  
**Attachments:** image003.png

Hi Stephanie,

We are gearing up our site planning work for a submittal on November 26th for the January hearing. In the meantime we hired a local team of RMKM Architects, Needbased Architects (Santa Fe) and Surroundings Studio who will help us develop our plans and the submittal. You will hear from Peter at RMKM very soon as we are planning to come back for another staff meeting to review our progress soon.

In the meantime I have one question for the zoning administrator. At our last meeting we discussed to attach our application for a Conditional Use Permit for a Family Day Care Home or a Childcare Center to our Special Use permit application. We have one family that wants to operate a family day care home (up to 6 children) out of their unit and at our meeting the zoning administrator recommended we should right away apply for the childcare center category in case the number of children will go beyond 6 in the future. Since we are planning to have one multifamily parcel, what happens if another family wants to operate a small family day care home in the future? Is that allowed based on the conditional use already approved for our parcel, or are the children counted cumulative fore each family day care home, or is the conditional use permit only valid for the specific family/dwelling that has expressed interest in the family day care home at this point? If you could help us clarify how this applies to a multi-family development we would appreciate it.

Thank you,  
Marlies

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Marlies Metodi  
Project Manager for Cohousing ABQ

Please help us spread the word! Tell your friends and share our website or facebook page. Thank you!  
[www.cohousingABQ.org](http://www.cohousingABQ.org)  
<https://www.facebook.com/cohousingABQ.org/>

On Thu, Sep 6, 2018 at 12:05 PM Stephanie Shumsky <[sshumsky@bernco.gov](mailto:sshumsky@bernco.gov)> wrote:

It was great meeting you today. This is an exciting project. The zoning code is attached...



Stephanie Shumsky, AICP, CFM

Program Planner  
Planning and Development Services

## Matthew Winters

---

**From:** Stephanie Shumsky  
**Sent:** Monday, October 15, 2018 1:42 PM  
**To:** Marlies Metodi  
**Subject:** RE: BC Zoning Code

Sounds good. I forwarded your email to the zoning administrator so he can provide direction. I will let you know what he says. Thank you.

Stephanie Shumsky, AICP  
Program Planner  
Bernalillo County  
(505) 314-0341

**From:** Marlies Metodi <cohousingabq@gmail.com>  
**Sent:** Monday, October 15, 2018 11:23 AM  
**To:** Stephanie Shumsky <sshumsky@bernco.gov>  
**Subject:** Re: BC Zoning Code

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Thank you,  
Marlies

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Marlies Metodi  
Project Manager for Cohousing ABQ

Please help us spread the word! Tell your friends and share our website or facebook page. Thank you!

[www.cohousingABQ.org](http://www.cohousingABQ.org)

<https://www.facebook.com/cohousingABQ.org/>

P.O. Housing Mtg.

9/6/18

- laine
- ryan
- ari
- re
- Julia
- Catherine
- Karyann Dickson
- Narlice Martelle
- Sohnathan Pring
- Nick

intros.  
 project / concept overview  
 Catherine comments

\* get w/ ABCWVA re:  
 H<sub>2</sub>O / wastewater

\* Fire Suppression requirements

Acres: 3.7 ac.  
 30 units  
Total 8.1 DU/AC  
 SWAP  $\frac{1}{16}$  9 DU/AC Area 5, SWAP  
 Est. Urban Area  
 SUP for R-2 uses per Nick

Usable Open Space Requirements:

- 200 SF (efficiency / 1 bdrm)
- 250 SF (2 bdrm)
- 300 SF (3+ bdrms)

Setbacks

- F = 15' along street
- S = 6' btwn res. uses  
 15% of paved area
- R = 15'

+ landscaping / buffering (per SPC 19)

+ Parking 2 Sp / DU min (2 sp / bathroom) (per SPC. 21)

Plan: Submit by end of October for December

Separate landscape plan w/ SUP  
 630 preliminary w/ SUP

SUP for specific uses: D/A 200' Support  
 27 unit conditions

Sept CRC Notes

BL  
MM  
JL  
Renee  
Maxine  
Peter

11/15/18

ISSUES

Jonathan Craig - concerned moving too fast  
pirating issues w/ neighborhood

- not organized / too scattered

SV Neighborhood Coalition  
concerns.

(Dol mahoney)

PS area 5 (up to 9 DU / per net AC)  
3.7 ac acre

3.7 ac (gross acreage)

- usable open space
- parking area
- landscape area
- landscape buffer area

= net acreage

sup for PBA cluster housing  
why did NH not want this?

CSU 2019-0001

Robert  
Elvira  
Mari  
Nick

12/11/18

1. Provide comments to applicants
2. Discussion of opposition; recommend work with neighbors; work to address concerns
3. Site Plan Feedback  
access from homes to parking lot.
4. Address concerns from neighbors in justification
5. a du/lave → refers to residential <sup>single family housing</sup> dwellings, not necessarily apartment  
ideally 27 dwelling versus 30 dwellings

single family dwelling - plus accessory living quarter  
 ↙ accessory to primary use  
~~apartment~~  
 would accessory living quarter classification work with apartment?

[ Looking appliance next to water source = kitchen  
 microwave + sink = kitchen ]

6. Condo versus Intentional Community  
 It looks like apartment

7. Centers for spiritual living (w/ common kitchen)  
 demand for innovative housing

8. Resubmit justification on Monday  
 Pushy why 30 units needed v. (27) houses  
 If subdivide to one house per lot, would lose acreage → density would go down.

9. If strong opposition -  
- CPC may 60 day denial  
recommend

- possibility of appeal
- possibility of 6 month timeline
- addressing concerns with neighbors is key.

10. Applicant may request emails of opposition;  
applicant can reach out to reach out to opponents.

11. Consider a facilitated meeting.

12. 4 Groups -  
Concerns From residents

- a) view loss
- b) "commercial developer"
- c) deterioration of ag areas / water rights

→ renderings / photoshop  
from perspective → to see  
show views are impacted

13. Call it "Planned Development Area" for ~~Cluster Housing~~  
for Residential Use & Agricultural uses  
58% agricultural & open uses

- area is not rural area  
close to urban area

14. Sunset Improvements -

Are there improvements planned?

- contact City & County Public Works,

15. Benefits per R-116-86

16. Add a P or 2 about property lines / lot lines



## Bernadette R. Georgescu

---

**From:** Robert Pierson  
**Sent:** Tuesday, December 11, 2018 3:20 PM  
**To:** Marianne Dickinson  
**Cc:** Catherine VerEecke; Stephanie Shumsky; Marlies Metodi; peter rehn  
**Subject:** RE: A few procedure questions

...and we can substitute all new or revised plat and justification (narrative) materials on Monday morning 12/17,  
Yes you will bring in the materials to our front counter and resubmit so you can get an updated cover sheet and new sign  
all public comments for or against will stay with the case file,  
Yes along with any new comments that come in.  
...the same process of mailing the neighborhood notifications before Monday has to be repeated.  
Yes, but it does not have to be certified mail, but I would recommend certified so that you have a paper trail.



**Robert Pierson**  
*Program Planner*  
(505) 314-0334

**From:** Marianne Dickinson <mdickinson50@icloud.com>  
**Sent:** Tuesday, December 11, 2018 1:36 PM

**To:** Robert Pierson <rpierson@berncogov>  
**Cc:** Catherine VerEecke <cvereecke@berncogov>; Stephanie Shumsky <sshumsky@berncogov>; Marlies Metodi <cohousingabq@gmail.com>; peter rehn <prehn@rmkmarch.com>  
**Subject:** A few procedure questions

Hello Robert,  
Thank you for pulling together that very helpful meeting this morning.  
Just to be clear about next steps, we did ask for and received a one month deferral for this case...

...and we can substitute all new or revised plat and justification (narrative) materials on Monday morning 12/17,  
...all public comments for or against will stay with the case file,  
...the same process of mailing the neighborhood notifications before Monday has to be repeated.

Also, will you have time on Friday for a final review of our submittal?

Thank you,  
Marianne  
*Marianne Dickinson*  
*Creative Design~Practical Solutions*  
505.350.9312  
[mdickinson50@icloud.com](mailto:mdickinson50@icloud.com)