

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.

ORDER

THIS MATTER is before the Court on Appellants' Motion for Rehearing. The motion is **DENIED**.

DISCUSSION

The Court issued a *Memorandum Opinion and Order* on November 18, 2019 affirming 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. Appellants move for rehearing pursuant to Rule 1-074(U) NMRA. Appellants assert seven grounds for rehearing.

* * *

First, Appellants correctly point out that the Court, sitting in review of an administrative agency decision, may not consider new evidence. Appellants argue if the administrative record is inadequate, remand to create a record is the appropriate remedy.

The record is not inadequate in this case. Accordingly, there is no need for remand to create a record.

* * *

Second, Appellants correctly point out that their Notice of Appeal filed May 6, 2019 references Section 3-21-9. Section 3-21-9 specifically places decisions of the Board under the authority of Section 39-3-1.1. NMSA 1978, § 3-21-9 (1999). The Court therefore withdraws the statement on page 4 of the Opinion that “Appellants have not identified a specific statutory reference that places the Board’s decision under the authority of section 39-3-1.1.”

The Board’s written decision does not inform the parties of the requirements for filing an appeal to district court and therefore does not comply Section 39-3-1.1(B)(3). The Board’s failure to describe appeal rights in its written decision was error. Though such an omission might not always be harmless, it was harmless in this case. Despite not having been advised of the appeal requirements, Appellants timely exercised their right to appeal and obtained appellate review in accordance with Section 39-3-1.1(D) and Rule 1-074 NMRA. Appellants were not prejudiced and no purpose would be served by reversing or remanding the Board’s decision merely to correct the omission of appeal requirements.

* * *

Issues 3 through 6 of the motion for rehearing are directed to Open Meetings Act (OMA) violations Appellants claim occurred during the permitting process. Appellants claim the Zoning Administrator violated the OMA by holding non-public discussions with staff and with the permit applicants.

The Court granted Appellants’ motion to supplement the record on appeal with documents Appellants claim support their position that the Zoning Administrator violated the OMA. Among the documents in the supplement are a letter dated March 22, 2019 from Appellants’ counsel to the County and 146 pages of “Planning Records” enclosed with the letter.

The letter states the 146 enclosed documents were obtained from the County pursuant to an Inspection of Public Records Act request. The letter further states the documents call into question the Zoning Administrator's motivation in suggesting the application proceed as a special use permit when it really should have been considered a zone change. The letter also claims the Zoning Administrator violated the OMA by meeting with applicants and that County staff improperly assisted applicants with the permitting process. The letter ends with an allegation that staff "rigged" the process in favor of the applicants and it requests permission to cross examine planning staff.

The Court's ruling on Appellants' motion to supplement the record with OMA-related documents does not reflect a determination that the record is inadequate. Rather, it reflects a determination that the supplemental materials meet Rule 1-074(H)(2)'s definition of "record on appeal." As explained in the Court's Opinion, the motion to supplement was granted because neither Appellee nor Interested Parties disputed that the materials were "actually presented" to the Board.

The Court's ruling on the motion to supplement the record does not mean the supplemental documents are relevant. Merely because a party presents documents for consideration does not make them material to the issues.

The Court's ruling on the motion to supplement does not mean the Board erred by refusing to admit the documents. As an initial matter, the letter and documents already had been submitted to the Board prior to the hearing.

Furthermore, alleged OMA violations by the Zoning Administrator are not relevant to the question of whether a special use permit is allowed under the Zoning Ordinance. As set forth in the Court's Opinion, the Board had sufficient information before it to determine that the

proposed development was a “Planned Development Area” as defined by the County’s Zoning Code and that a special use permit was needed to facilitate development in accordance with various planning documents. The Board’s decision to grant or deny the special use permit in this case did not depend on whether the Zoning Administrator violated the OMA by holding discussions with staff and the applicants. The Board’s decision not to accept the records at the April 9, 2019 hearing was not arbitrary or capricious and therefore does not require remand or reversal.

Appellants argue on rehearing that the Board may consider alleged OMA violations. Section 10-15-3(B), cited by Appellants, appears to be a notice requirement individuals must satisfy before applying for enforcement of the OMA through the district courts. NMSA 1978, § 10-15-3(B) (1997) (individual who seeks enforcement of the OMA in district court must first provide written notice of the claimed violation to the public body, and the public body must deny or fail to act on the claim within fifteen days).

Section 10-15-3(B) is not grounds to reconsider the Court’s determination that the Board does not have authority to adjudicate OMA violations. The Court denied Appellants leave to add original jurisdiction OMA claims to this administrative appeal, but nothing in the Court’s Opinion precludes Appellants from applying to the district court for enforcement of the OMA through injunction, mandamus or other appropriate order.

On rehearing, Appellants argue that alleged OMA violations during the permitting process are grounds to reverse on appeal. The Court does not agree. While expressing no opinion on the merits of Appellants’ claim that the Zoning Administrator violated the OMA, the Court concludes such allegations are not grounds to reverse because the Zoning Administrator’s conduct and decisions are not under review. The only decision that is subject to review on

appeal is the agency's final decision which in this case is the Board's decision to grant the special use permit. NMSA 1978, § 3-21-9; NMSA 1978, § 39-3-1.1(A), (B), (C), (D). It is the Board's decision which the Court must determine is in accordance with law. As described in the Court's Opinion, the Board's proceedings in this case were public and transparent, and there have been no allegations that the Board violated the OMA.

Appellants argue on rehearing they should have the opportunity to make arguments based on the supplemental documents, and that the Court must review the 146 pages of "Planning Records" that allegedly support their claim that the Zoning Administrator violated the OMA. However, Appellants already have presented their arguments that the Zoning Administrator violated the OMA, that County planning staff improperly communicated with and assisted the applicants, that County staff improperly advocated in favor of the special use permit, that Appellants were denied the opportunity to cross examine County staff, that Appellants were deprived of due process, and that the applicants should have sought a zone change rather than a special use permit. Appellants have been heard on each of these issues. The Court has considered and rejected the arguments as grounds to reverse for the reasons set forth in the Opinion. There is no need for additional argument.

* * *

In their seventh and final point on rehearing, Appellants set forth some established principles of statutory construction, but have not identified any manner in which the Court misapplied these principles in this case.

CONCLUSION

Appellants' Motion for Rehearing is **DENIED**. The Court declines to request responses under Rule 1-074(U) NMRA and has not considered Bernalillo County's response filed

December 3, 2019. Rio Grande Huerta's Motion for Leave to File Response to Appellants' Motion for Rehearing (filed December 3, 2019) and Bernalillo County's Motion for Leave to File Response to Motion for Rehearing Nunc Pro Tunc (filed December 18, 2019) are **DENIED**.


Within five (5) days of the date of this Order, Appellants shall supplement the record in accordance with the Court's ruling on the motion to supplement.

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 March 2, 2020.



D-202-CV-2019-03654