

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.

**APPELLANTS' MOTION  
FOR REHEARNG PURSUANT TO SCRA 1-074(U)**

Appellants through counsel hereby move the Court, pursuant to NMRA 1-074(U), to rehear or reconsider its decision to affirm the Board's decision, based on the following points of law or fact that in the opinion of Appellants the Court has overlooked or misapprehended:

1. A district court cannot consider new evidence when engaged in an appeal from an administrative proceeding; if, on a district court review of an administrative decision, the record proves inadequate for some reason, remand is the appropriate avenue to create the record.

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.

2. Appellants’ Notice of Appeal filed May 6, 2019 referenced Section 3-21-9 NMSA 1978 and Section 39-3-1.1 NMSA 1978 as the applicable statutes for Appellants’ appeal.

Section 3-21-9 states:

A person aggrieved by a decision of the zoning authority or any officer, department, board or bureau of the zoning authority may appeal the decision pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

3. The Board may consider alleged violations of the Open Meetings Act (“OMA”). Section 10-15-3(B) NMSA 1978 provides for a “public meeting held to address a claimed violation of the Open Meetings Act”. The Board adopts OMA policies at the start of each year (this year, Administrative Resolution 2019-1, adopted January 8, 2019), which recognize that the Board is governed by the OMA. Error in applying Board policies in arriving at a decision is a basis for appeal from the County Planning Commission to the Board, under Section 18(G)(2)(a) of the Board’s Zoning Ordinance.

4. Denial of admission of noncumulative, nonhearsay evidence relevant to a party’s claims by the fact-finder is reversible error. “We hold it was reversible error for the hearing officer to deny admission of noncumulative, nonhearsay evidence that was relevant to petitioner’s defenses.” Matter of Termination of Boespflug, 1992-NMCA-138, ¶ 17, 114 N.M. 771. The Board denied admission of Appellants’ March 22, 2019 letter to the Board and the “Planning Records” evidence enclosed with that letter (listed as Item 3 and Item 4 respectively in Appellants’ Motion to Supplement the Record filed June 17, 2019). Appellants’ March 22, 2019 letter sets out some of the reasons (from Appellants’ perspective) why the County Planning

Commission decision should have been reversed due to the Zoning Administrator's decision-making and lack of due process, based on and with page references to the "Planning Records" evidence, and requested cross-examination of Planning Staff in connection with the "Planning Records".

5. Appellants have not had the opportunity to present appeal arguments to the Court based on the documents identified in Appellants' Motion to Supplement the Record under SCRA 1-074 filed June 17, 2019. Under SCRA 1-074(K)(3), Appellants are required to cite to the record on appeal for their appeal arguments. The Board's record in this appeal is to be supplemented with the documents set out in Appellants' Motion to Supplement, according to the Court's Memorandum Opinion and Order entered November 18, 2019. However, those supplemental documents were not available in the Court record for citation and argument at the time of filing of Appellants' Statement of Appellate Issues (June 26, 2019).

6. The Court has not reviewed and considered Appellants' complete "Planning Records" evidence (146 pages, identified as Item 4 in Appellants' Motion to Supplement the Record filed June 17, 2019). The "Planning Records" were listed in Appellants' Motion to Supplement but were not included as an exhibit to that Motion due to size. The Court's Memorandum Opinion and Order entered November 18, 2019 provides that the documents listed in the Motion to Supplement would be added to the Court record.

7. Concerning the Court's interpretation of County Zoning Ordinance Section 18(B)(23) (Planned Development Area), under Baker v. Hedstrom, 2013-NMSC-043, ¶ 24, the Legislature is presumed not to have used any surplus words in a statute; each word is to be given meaning; and the Court must interpret a statute so as to avoid rendering the Legislature's language superfluous; and under Lantz v. Santa Fe Extraterritorial Zoning Authority, 2004-

NMCA-090, ¶ 7, 136 N.M. 74, judicial interpretation of an ordinance invokes the same rules of construction as interpretation of a statute.

YNTEMA LAW FIRM P.A.

(Electronically filed)

By /s/ Hessel E. Yntema III

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I hereby certify that a copy of Appellants' Motion For Rehearing Pursuant to SCRA 1-074(U) 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 November 22, 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