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

BERNALILLO COUNTY BOARD OF
COUNTY COMMISSIONERS,
Appellee,
and

VALENTINE P. SAIS, RON A. PEREA,
and RIO GRANDE HUERTA, LLC,
Interested Parties.

RIO GRANDE HUERTA'S RESPONSE TO APPELLANTS' STATEMENT OF APPELLATE ISSUES

Rio Grande Huerta, LLC ("RGH"), by and through its counsel of record, Hunt and Davis, P.C., states as follows for its Response to Appellant's Statement of Appellate Issues ("Statement"):

BRIEF INTRODUCTION

This appeal involves the approval of RGH's request for a Special Use Permit for a Planned Development Area (Residential and Agricultural Uses) at 1300 Gonzales Road SW in Albuquerque's South Valley (the "Property"). Record ("R.") 8 & 743. Pursuant to that request, RGH intends to develop a modern agricultural community consisting of twenty-seven (27) dwellings within five (5) structures and corresponding orchards; community gardens; greenhouses; agricultural-equipment-storage spaces; cisterns; and, chicken coops—which community is to be operated as a "co-housing" development. R. 8 - 11. Based on the site plan submitted by RGH;

approved by the Bernalillo County Planning Commission (the "CPC"); and, upheld by the Bernalillo County Board of County Commissioners (the "BCC"), the ultimate-developed condition for the Property will consist of sixty-two percent (62%) open space and agricultural uses; twenty-one percent (21%) building and structures; and, sixteen percent (16%) concrete or porous paving. R. 11; *see also* R. 93-97 (site plan). Under the approved special use permit, RGH must develop the Property in accordance with the specific site development plan that was approved as part of the special use permit request, including development of the agricultural aspects of the plan. R. 759-61 & 765 [1]. Prior to RGH's request, the Property was zoned straight "A-1" or agricultural. (R. 8). However, the Property has not been utilized for its original agricultural purpose since at least the 1930's and presently "has nothing but tumbleweeds [and the] [o]nly wildlife you see there is maybe a roadrunner once in a while." R. 673-74. Thus, RGH's plan of development is to revitalize the Property's original agricultural heritage while providing homes for residents in a co-housing community.

SUPPLEMENT TO THE SUMMARY OF THE PROCEEDINGS

Under Rule 1-074, an appeal's summary of the proceedings should briefly describe the nature of the case, the course of proceedings, and the disposition of the applicable entity. NMRA Rule 1-074 (K)(2). Rule 1-074 also provides that a response may include a summary of the proceedings if appellant's statement is disputed or

[1] Ms. Vereecke: "Madame Chair, Commissioner Quezada, this is a request for a Special Use Permit to allow [a] specific use that is shown on the site plan with particular conditions that would be specific to what is shown on the site plan. So that's all that could be done under this request . . . the expectation is that the site would develop as shown on the site plan and that if there were any modifications, that it would need to come back through one of our processes to change it."

incomplete. *Id* at (L). Here, while Appellant's Summary of the Proceedings is reasonably accurate, it provides a fairly biased view of those proceedings. *See* Statement pp. 3-10. Accordingly, RGH offers the following abbreviated summary to provide the Court with a more balanced overview of the prior hearings on RGH's request.

In November and December of 2018, RGH submitted a Special Use Permit Application for the Property, seeking to create a "planned development area" for residential and agricultural uses. R. 54-57. In doing so, RGH was acting as agents for "members of an extended family" who intended to sell the Property to RGH. R. 66. At the time of submission, the Property consisted of three (3) vacant lots with agricultural zoning totaling approximately 3.7 acres. R. 66. The area surrounding the Property was previously "farm tracts" but has since largely been subdivided into compact R-1 (residential) lots. R. 66. Under the County's Southwest Area Plan, the Property is located in the Established Urban Area and Residential Area 5, permitting a development density of up to nine (9) dwelling units per acre. R. 66. RGH's Special Use Permit was linked directly to RGH's proposed project through the site plan submitted pursuant to the request, which project consists of "cluster housing/co-housing project of 27 units . . . using an eco-village-like model of Net-Zero use, zero-waste strategies and maximum water conservation . . . building footprints on the site plan allow for all porches, terraces, breezeways, etc. . . . [the residences will be] in compact clusters which leaves 62.5% of the site for agricultural uses and shared open space . . . [including] orchards, community

gardens, a vineyard and berry patch, greenhouse, chicken coop, and garden composting . . . [and] [t]he Common House, children's play areas, a natural pool and landscape commons will be shared by the site residents." R. 66-67. Thus, RGH's submission bound any eventual development to its highly-specific plan for a mixed-use residential and agricultural community.

CPC Hearing

On February 6, 2019, RGH appeared before the CPC for the initial hearing on RGH's request. R. 567-691. At the hearing, Chairman Joe Chavez was openly hostile to the request, making repeated derogatory statements such as "just so that we all understand, this project is an apartment complex" and "so if we leave it at A-1, they can still build that thing or what". R. 579-80; 590. However, the County's Zoning Administrator discussed with the CPC how the request was for a "planned development area facilitating the ability for cluster housing to occur" and that, while there may be some overlap between the requested Special Use Permit and a traditional apartment use, the CPC was being asked to consider the proposed development under the laws applicable to special use permits. R. 588.

While testifying in support of the project as a Planned Development Area, Marlies Metodi, project manager for RGH, provided an extensive explanation of how the proposed development would differ from traditional apartments, including developing "private owner-occupied homes, clustered around shared space" with a focus on "agriculture, gardening, growing food, and sharing the harvest." R. 593-94. Metodi also testified that RGH had selected the Property specifically because it

provided an opportunity for agriculture. R. 594. Metodi also noted that the Southwest Area Plan allowed densities of up to nine (9) dwelling units per acre on the Property and that the proposed development would be well below that density level. R. 597. Furthermore, Peter Rehn, principal architect with RMKM Architecture, correctly stated that the "Southwest Area Plan encourages cluster development as an effective way to preserve agriculture" and that "[t]hrough compact home design and efficient site planning" the requested Planned Development Area maximized the "amount of land preserved for usable agriculture." R. 596-99. Finally, Metodi testified that "[t]his planned development area introduces a variety of home sizes to support a vibrant multigenerational community from infants to elders . . . furthering the Bernalillo County goal of creating a quality urban environment . . . which offers variety and maximum choice on housing, transportation, work areas, and lifestyles while creating a visually pleasing built environment." R. 598.

Faith Okuma, landscape architect for RGH, further testified that residences on the site were designed as clusters of two stories "because the ownership had a concrete discussion about wanting more agricultural space, and so it has been a driver and completely supports the long-term wishes of the County to retain agriculture on that site." R. 599-600. In her testimony, Okuma acknowledged that the request and site plan were unconventional "but it is a way to get more farming in that area" and "get real live agriculture back on that land." R. 600. Okuma also discussed creating a development and grading plan that would maintain and

protect areas of existing trees while preserving and improving views of the neighboring bosque. R. 600-01. Okuna emphasized that "the big thing is that [the proposed site plan] will actually provide the first time for this property in quiet a few decades for the public eventually to actually be able to look into the site and actually see real agriculture happening." R. 602. Thus, although the RGH looked at more "conventional" plans of development, the proposed site plan for a planned development area was the only plan that provided "the ability to do real agriculture." R. 602.

Following the above testimony, County staff again emphasized to the CPC that the request was for a special use permit for a planned development area. R. 602-3. During public comment on the request, there were many speakers both for and against the proposal, ranging from long-time residents opposed to gentrification (R. 624) to UNM professors excited about gray-water reuse, agriculture, and conservation (R. 625). In addition, the Property's present owner testified that the Property is currently dilapidated; that the Property has not been used for farming since the 1930s; that her family has been unsuccessfully attempting to sell the Property to someone for farming uses for years; and, that she's excited that her granddaughter may have the opportunity to play at the development. R. 670-71. Ultimately, the CPC voted 4-2 in favor of approving RGH's requested special use permit, and appellants appealed that decision to the BCC.

BCC Hearing

On April 9, 2019, the BCC concurrently heard three appeals regarding the CPC's approval of RGH's request, including Appellants' appeal. *See generally* R. 756-843. At that hearing, RGH's project manager, Marlies Metodi, again testified that the focus of the project was to create a "community-driven collaborative housing project" with a focus on "sustainability and agriculture." R. 775-76. Undersigned counsel then discussed with the BCC that "[t]he issue here is the [CPC's] approval of [RGH's] request for a Special Use Permit for a Planned Development Area combining residential and agricultural uses so that [RGH] can create a co-housing community." R. 781. Counsel for RGH further noted that the Property is both located in the Established Urban Area of the Comprehensive Plan, which supports a "full range of urban land uses and the clustering of homes to provide larger shared open areas" and is governed by the Southwest Area Plan ("SWAP"), which supports clustering higher-density residential development to preserve agriculture and open space. R. 781-82. As part of her continued presentation, Metodi similarly noted RGH's "infill site is located in Residential Area 5 of the [SWAP], which calls for the highest residential densities in the planned area, nine dwelling units per acre." R. 804. This testimony was supported through later discussions between the BCC and Planning staff, who noted that all the surrounding areas are developed "at a density much higher than what the A-1 zone would allow for," as the platting of the surrounding properties pre-dated the adoption of the Ordinance. R. 815-18. Metodi also later testified that the

surrounding neighborhoods are "made up of many compact residential lots, most of them 4,000 to 8,000 square feet" and that RGH's proposed development "fits right into the established density and building height patterns of the neighborhood; however, we want to cluster our homes so that in addition we have room for agriculture and open space." R. 828-29. That desire to cluster homes through a Planned Development Area is the key issue in this appeal.

In support of RGH's clustered-housing model, Metodi noted that "[u]nder these adopted plans we could have requested more density and built a traditional residential subdivision where there is no consideration to open space, but instead opted for a site plan with clustered housing that leaves over 62 percent of the site as usable open space, including play areas for children, permaculture gardens, native habitat areas, and almost an acre of agricultural lands." R. 805. In response to continued arguments by appellants regarding justification for cluster housing, undersigned counsel also stated "let me just be clear, the reason that my clients are clustering housing is so that they can have orchards and greenhouses and agriculture on this property[;] [o]therwise, they would just have a grid subdivision, or someone would come in and build a grid subdivision." R. 810-11. Metodi emphasized that people typically think of "open space and wildlife habitat preservation, residential living and agricultural revitalization as separate things" but that RGH's model is designed to integrate those valuable social benefits into a single location. R. 811-12. Metodi also testified that the homes on the Property were being carefully clustered and sited to preserve view corridors of the bosque and

surrounding natural environment. R. 827-28. This community-conscious approach was echoed in the support of the community at the hearing. *See* R. 830-34 (discussing, among other issues, that seventy-five percent (75%) of the neighborhood supports the project and that, within 500 feet of the Property "this support ratio is even higher at over 91 percent.").

Upon holding a vote on the combined appeals, the BCC voted 4-1 to deny each of the appeals and uphold the CPC's approval of the requested Special Use Permit. R. 837-42. Commissioner Quezada, the lone vote in favor of the appeals, noted that "I truly believe that this is probably one of the best uses that's ever come across my desk" and "I think it's a great plan [and] I think we need more communities like this"—but voted against the request because he felt bound by prior promises to protect agriculturally-zoned land in the South Valley. R. 839-40. Furthermore, as part of its denial of Appellant's challenge, the BCC upheld and adopted the CPC's findings in support of RGH's request. R. 840-42 with findings listed, among other places, at R. 711-15.

STANDARD OF REVIEW

Under New Mexico law, an administrative appellant is required to "set forth a specific attack on any finding [of the relevant entity], or such finding shall be deemed conclusive." NMRA Rule 1-074 (K)(3). Here, instead of attacking a specific element of the BCC's decision, Appellants have shallowly attacked several of the BCC's decisions or broadly challenged the BCC's interpretation of the law. *See generally* Statement. New Mexico law provides that an appellant under Rule 1-074

may challenge a decision based on: 1) whether the entity acted fraudulently, arbitrarily or capriciously; 2) whether based upon the whole record, the decision of the entity is not supported by substantial evidence; 3) whether the actions of the entity were outside the scope of that entity's authority; or, 4) whether the action of the entity was not otherwise in accordance with the law. NMRA Rule 1-074 (R); *see also Gallup Westside Development, LLC v. City of Gallup,* 2004-NMCA-010, ¶¶ 10-11, 135 N.M. 30, 84 P.3d 78 (discussing the administrative standard of review in more depth).

Under New Mexico law, the decisions of an administrative agency—in this case the CPC as ratified by the BCC in its role as the Bernalillo County "zoning authority"—are presumed valid and the burden of proving otherwise rests upon a party seeking to void such a decision. *State ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque,* 1994-NMSC-126, ¶ 20, 119 N.M. 150, 889 P.2d 185. Under the administrative standard of review, the Court may not substitute its judgment for that of the BCC. *Gallup,* 2004-NMCA-010, ¶¶ 10-11. Regarding Appellants' substantial evidence challenge, the Court should review the whole record and view the evidence in a light most favorable to the BCC's decision. *Id.* Although the Court may come to a different conclusion than that reached by the BCC, the Court may only evaluate whether the record supports the result reached, not whether a different result could have been reached. *Id.* Appellants have the burden to demonstrate that no substantial evidence in the record supports the BCC's decision. *Id.* Regarding Appellants' arbitrary and capricious claims, a

decision is arbitrary or capricious if it is unreasonable or without rational basis, when viewed in light of the whole record. *City of Rio Rancho v. Amrep Southwest,* 2011-NMSC-037, ¶ 47, 150 N.M. 428, 260 P.3d 414. Thus, the Court should uphold the Governing Body's decision if any rational basis supports that decision.

ARGUMENT

In their Statement, Appellants asks the Court to review the BCC's decisions as follows: 1) the BCC erred in not issuing an appropriate written decision; 2) the BCC erred in failing to consider Appellants' "new evidence" arguments regarding alleged Open Meetings Act violations by Bernalillo County Planning staff; 3) the BCC erred because Bernalillo County Planning staff were involved in the underlying application process and hearing; 4) the BCC erred because the application should have been rezoning request to R-2 for apartments; 5) the BCC generally erred in approving the requested special use permit as a Planned Development Area; 6) the BCC erred because substantial evidence did not support the request as a "Planned Development Area"; 7) the BCC erred because substantial evidence dd not support the request under Resolution 116-86 (finding No. 7); and, 8) continued arguments that the BCC erred because it should have considered Appellants' Open Meetings Act arguments. Regarding Appellants' procedural, "new evidence", and alleged Open Meetings Act violations, counsel for RGH believes those issues are more properly argued by council for the BCC and, so, undersigned counsel will not provide briefing on those issues. Instead, RGH's arguments will focus on the aspects of its request dealing with zoning and the applicable law. As

further below discussed, the CPC and BCC correctly determined that RGH satisfied the requirements for a Special Use Permit for Planned Development Area (residential and agricultural uses) and, respectfully, the Court should deny Appellants' appeal.

I. The CPC and BCC correctly determined that RGH's request satisfied the requirements for a Planned Development Area under the Ordinance and that determination was supported by substantial evidence.

Prior to RGH request, the Property consisted of three parcels totaling approximately 3.7 acres and was zoned "straight" A-1. Under the "General Provisions" section of the Comprehensive Zoning Ordinance of Bernalillo County (herein referenced as the "Ordinance"), lot area, density of development, and zoning are inexorably linked. *See* Ordinance § 4 (B).[2] Regarding "minimum lot area and lot width" for A-1 zoned property within Bernalillo County, the Ordinance provides that "every lot shall have an average width of not less than 150 feet [and the] minimum lot area of this zone shall be one acre." Ordinance § 7 (D). Furthermore, the residential development of A-1 zoned property is restricted to "one single-family dwelling or H.U.D. Zone Code II manufactured home per lot." *Id* § 7 (B)(2). Thus, under the Property's original zoning, the Property was required to be developed as three or fewer lots having a width of at least 150 feet each—and would have been limited to one single family dwelling or manufactured home on each of those lots. *See e.g.* R. 587-92 (discussion among the CPC and the County's Zoning Administrator regarding the potential use for the property with the requested

[2] § 4 (B): "No lot area shall be so reduced that the yards and open spaces shall be smaller than is required by this ordinance, nor shall the density of population be increased in any manner except in conformity with the area regulations hereby established for the zone in which a building or premises is located.

Special Use Permit versus as an existing A-1 zoned parcel). However, the Ordinance allowed RGH to modify the above referenced requirements through a Special Use Permit for a Planned Development Area, as further below discussed.

Under the Ordinance, the CPC and BCC "may authorize the location of uses in which they are not permitted by other sections of this ordinance . . . [and] vary any other minimum standard it deems necessary" through the issuance of "Special Use Permits". Ordinance § 18 (A). With these permits, the CPC and BCC may also impose such conditions and limitations as they deem necessary: to ensure that the degree of compatibility of property uses; to ensure that the proper performance standards and conditions are, whenever necessary, imposed upon such uses; to preserve the utility, integrity and character of the zone in which the use will be located, without adversely affecting adjacent zones; and, to ensure that the use will not be or become detrimental to the public interest, health, safety, convenience, or the general welfare. *Id.* Such permits may only be issued for a limited set of enumerated uses, ranging from "overnight campground" to "truck plaza" to "pet cemetery." *Id.* One such enumerated use is a "Planned Development Area" creating a "Cluster Housing Development." *Id.*

Under the Ordinance, a Planned Development Area is one type of a special use that includes:

> 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.

Ordinance § 18 (B)(23). Regarding the "cluster housing" referenced within the above definition, the Ordinance provides that a "Cluster Housing Development" is:

> A form of development that permits a reduction in lot area and bulk requirements, provided there is no increase in the number of lots permitted under a conventional subdivision or increase in the overall density of development, unless otherwise permitted by a policy adopted as part of an Area Plan, Sector Development Plan, or Master Plan and the remaining land area is devoted to open space, active recreation, or preservation of environmentally sensitive areas or agriculture.

Ordinance § 5. As below discussed, RGH's request satisfies all of the requirements of both of the above definitions—and was correctly approved by the CPC.

In their Statement, Appellants accurately note the three commonly-accepted rules of statutory construction applicable to zoning ordinances: 1) the plain language of an ordinance is the primary indicator of legislative intent; 2) the court is to give persuasive weight to long-standing administrative constructions of ordinances by the agency charged with administering them[3]; and, 3) when questions involve multiple sections of an ordinance, the sections must be read together to give all of them effect. Statement pp. 17-18 (citing *High Ridge Hinkle Joint Venture v. City of Albuquerque,* 1998-NMSC-050, 126 N.M. 413, 970 P.2d). Using the above rules, New Mexico courts "analyze the ordinance in question, and the intent of those who enacted it." *High Ridge Hinkle*, 1998-NMSC-050, ¶ 6. Accordingly, New Mexico courts seek to interpret such an "ordinance to mean what the legislature intended it

[3] Although a single instance likely does not create a "long-standing administrative construction", undersigned counsel was able to find that the CPC and BCC have previously approved at least one similar mixed-use agriculture, commercial, and multi-family residential development including cluster housing on A-1 zoned property, which approval was adopted as CSU2017-013. Thus, RGH's request is not a "one-off" without precedent.

to mean, and to accomplish the ends sought to be accomplished by it." *Burroughs v. Board of County Commissioners of Bernalillo County,* 1975-NMSC-051, ¶ 13, 88 N.M. 303.

Planned Development Area

In their Statement, Appellants parse the above-referenced definition of Planned Development Area into three "clauses", while maintaining that each clause must be established in order for the BCC to properly approve RGH's request. Statement pp 18-19. Appellants also claim that undersigned counsel "recognized" that RGH had failed to fulfill the first two clauses that Appellants created within the definition of Planned Development Area. *Id.* However, this claim is inaccurate, as undersigned counsel actually argued that the Appellants were ignoring the plain language of the definition of "Planned Development Area", which contains the explicit purposes of "creat[ing] cluster housing development[s]" and "preserv[ing] visual or physical access to open space or unique site features." R. 734-35. Furthermore, undersigned counsel maintains that Appellants' reduction of this definition into three clauses is likely a substantial over-analysis of the issue designed to erect false hurdles for RGH' request. As above noted, New Mexico's rules of statutory construction are intended to assist a court in determining legislative intent so that an ordinance accomplishes its intended purpose. *Burroughs,* 1975-NMSC-051, ¶ 13. Here, it appears that Appellants are attempting to twist the cited ordinances into serving their purposes. Regardless, analysis shows

that RGH fulfills each of the requirements as created by Appellants and the BCC was correct in its approval of the requested Special Use Permit.

First, Appellants argue that "the applicant must demonstrate the need to vary height, lot area, or setback requirements". Statement p. 18. As above discussed, the lot area requirements for the Property are a single dwelling on a lot of at least one-acre having a width of 150 feet. Here, the site plan approved in connection with the Property's Special Use Permit eliminated lot lines between the residences; clustered those residences within five structures throughout the development; and, increased the number of residences permitted to just over seven (7) per acre. *See* R. 93-97 (site plan). Thus, the lot area requirements applicable to the development were substantially varied. Furthermore, the above-discussed variance was needed to permit agricultural development on the site through a varied lot configuration, as further below discussed.

Second, in what Appellants label the "due to" clause, the above discussed variance in lot area must be "due to unusual topography, lot configuration, or site features." Statement p. 18. Here, representatives of RGH repeatedly testified that the proposed site plan varied lot configuration from that of a traditional subdivision and clustered housing in order to preserve the site features of on-site agriculture and open space, and view corridors of the bosque. R. 593-94; 596-602; 781-82; 805; 810-12; & 827-29. Thus, RGH clearly satisfied the second clause created by Appellants in their reading of the definition of "Planned Development Area."

Third, and finally, in what Appellants call the "in order to" clause, the above showings are to be made for the purpose of either: creating a cluster housing development; preserving visual or physical access to open space or unique site features; or, to facilitate development in accordance with an approved Master Plan. Here, as below further discussed, RGH has designed a cluster housing development as described in the Ordinance, providing the necessary purpose for a Planned Development Area under the Ordinance. However, RGH has also varied its lot area and layout in order to preserve visual and physical access to open space and the unique site feature of on-site agriculture. Accordingly, although only one purpose is required to fulfill the requirements for a Special Use Permit for a Planned Development Area under the Ordinance, RGH fulfills two such purposes—and the BCC correctly upheld RGH's request.

Cluster Housing Development

Similar to their treatment of the Definition Planned Development Area, Appellants scrutinize the definition of "Cluster Housing Development" and conclude that it "only applies to single-family housing, not to apartments." Statement p.19. While RGH will below generally addresses Appellants' "apartment" argument, RGH can briefly refute Appellants' argument regarding "cluster housing" being only applicable to single-family residences. In their Statement, Appellants argue that the applicable definition's reference to an "increase in the number of lots permitted under a conventional subdivision" shows that definition only applies to traditional single-family homes. *Id.* However, the very next line following the references to

"increase in number of lots" and "conventional subdivision" is "or increase in the overall density of development." Ordinance § 5 (underscoring added). Thus, "cluster housing" applies either to conventional single-family subdivisions consisting of separate lots or to developments in which the density of development is not dependent on the number of lots, *i.e.* multifamily developments. Accordingly, Appellants' interpretation of "Cluster Housing Development" is incorrect and RGH's request meets the requirements of the Ordinance for that type of development.

As above discussed, RGH requested a Special Use Permit for a Planned Development Area (Residential and Agricultural uses) in order to create a community combining clustered housing, active agriculture, and open space. Furthermore, RGH appropriately justified that community's variance from traditional lot area requirements through a demonstrated need to preserve the above-referenced on-site agriculture, open space, and view corridors of the bosque. In the following sections, RGH briefly further addresses specific arguments of the Appellants not otherwise above discussed.

II. Regarding Appellants "Issue 4", the BCC correctly approved a Special Use Permit for a Planned Development Area (Residential and Agricultural Uses) for the project, as requested by RGH, and the site plan is not simply for "apartments."

In their "Issue 4", Appellants argue that the BCC incorrectly approved RGH's request for a Special Use Permit for Planned Development Area (Residential and Agricultural Uses) because the request should have been made as a request for a zone change to "R-2" for "apartments." Statement p. 15-16. At the CPC hearing, several speakers opposed to the project appeared to attempt to conflate the ideas of

"greedy developers" and an "apartment complex" and the concept of an "apartment" under the Ordinance. *See e.g.* R. 612 & 616 (disparaging the project as an "apartment complex" or "high density condo project" created by "greedy developers"). Moreover, CPC Chairman Chavez's arguments in opposition to the project at the CPC hearing mirrored these inaccurate claims. *See* R. 579-80 ("It's an apartment complex. Call it whatever you want to."). In their Statement, Appellants often echo these claims. However, similar to the differences between the lay and legal definitions of "slander", the idea of an "apartment complex" as ordinarily used substantially differs from the definition of "apartment" under the Ordinance.

Under the Ordinance, an "apartment" is defined as "one or more structures containing two or more dwelling units each." Ordinance § 5. Thus, duplexes, triplexes, connected garden homes, townhomes, condominiums, multi-family housing, or any other residential structure other than a single building single-family residence on a single lot would arguably be an "apartment" under the Ordinance. Based on the above definition, County Planning Staff acknowledge that the project was "apartment-like" under the Ordinance but that the project also included additional features and benefits such as agricultural areas, open space, and orchards that brought it under the governance of the Ordinance's Special Use Permit for a Planned Development Area section. R. 788-90. Furthermore, as above-argued, the definition of "Cluster Housing Development" is applicable to either single-family or multi-family dwellings. In their Statement, while arguing that RGH's request should be considered "apartments", Appellants also explicitly

acknowledge that RGH's proposed project could be granted through an application for a Special Use Permit. Statement p. 16. However, Appellants argue that the Ordinance contains no special use for "apartments," and then continue to argue that the request was incorrectly approved as a Planned Development Area. *Id* pp. 16-17. Thus, in order to make their circular "apartments" argument work, Appellants' must ignore that RGH sought—and obtained—a Special Use Permit for a Planned Development Area and not "apartments", which approval was appropriate as discussed throughout this submission.

Puzzlingly, Appellants also occasionally argue that RGH should have requested a Special Use Permit for a Specific Use. *Id.* However, Appellants fail to explain *why* that request would have been more appropriate than the Special Use Permit for Planned Development Area that was requested. Accordingly, RGH does not further address that argument here.

In their Statement, Appellants also cherry-pick a single statement from undersigned counsel and use that statement to argue that the BCC actually approved a "co-housing" project, which is not a defined term under the Comprehensive Zoning Ordinance of Bernalillo County (herein referenced as the "Ordinance"). Statement p. 15-16. Although representatives and counsel for RGH often reference RGH's eventual goal of creating a co-housing community, those references are made within the context of a zoning request for a Special Use Permit. *See* R. 781 (undersigned counsel: "[t]he issue here is the [CPC's] approval of [RGH's] request for a Special Use Permit for a Planned Development Area combining

residential and agricultural uses so that [RGH] can create a co-housing community."). Furthermore, that special use permit is exactly what was approved by the CPC and, later, upheld, by the BCC. R. 691, 711-15, & 743. Accordingly, Appellants' arguments that the BCC inappropriately approved a "co-housing" development are not well founded.

III. Regarding Appellants' "Issue 5", RGH very purposefully requested a Special Use Permit for a Planned Development Area and that request was not used as a "catchall" category for the proposed development.

Under Appellants' Issues 5 and 6, Appellants attack the CPC and BCC's approval of RGH's request using the definitions of "Planned Development Area" and "Cluster Housing." Statement pp. 16-20. Most of these arguments are above refuted within RGH's general argument. *See* § I hereto. However, within "Issue 5" Appellants also state that their entire argument is based on *Burroughs v. Board of County Commissioners of Bernalillo County*. Statement pp. 16-17.[4] In *Burroughs,* the Supreme Court determined that "Planned Development Area" should not be interpreted as including an "overnight campground" given the language of the Zoning Ordinance in 1975, which included no explanation or definitions of the term "Planned Development Area." *Burroughs,* 1975-NMSC-051, ¶¶ 8-24. Here, unlike the 1975 Zoning Ordinance, the present Ordinance contains specific elements and purposes for a Planned Development Area, including cluster housing and preservation of open space. Furthermore, rather than attempting to push an inapplicable development type through as a Planned Development Area, RGH is focused on incorporating both cluster housing and the preservation of open space

[4] Incidentally, *Burroughs* includes a very good overview on the use of Special Use Permits.

into their proposed development—which purposes are the heart of a "Planned Development Area" under the present Ordinance. *See* R. 593-94; 596-602; 781-82; 805; 810-12; & 827-29 (substantial testimony discussing the creation of cluster housing and preservation of open space). Accordingly, RGH's project was accurately proposed as a Planned Development Area (residential and agricultural uses) and Appellant's comparisons of the present matter to the facts of *Burroughs* are not well founded.

IV. Regarding Appellants' "Issue 7", the requested Special Use Permit for a Planned Development Area was appropriately justified under R 116-86.

In their Issue 7, Appellants argue that BCC's Finding No. 7 incorrectly determined that RGH demonstrated both that changed conditions in the area justified the RGH's request and that the request was more advantageous to the community because it furthers the goals and policies of the Comprehensive Plan and SWAP. Statement pp. 21-22. Appellants further argue that the SWAP and its recommendation to increase density for the Property were insufficient to justify the BCC's findings of changed conditions. *Id.* However, the SWAP was not the only justification provided regarding changed conditions in the area since the Property was originally zoned for agricultural uses.

At the CPC hearing, Rod Mahoney, President of the Vecinos Del Bosque Neighborhood Association testified that, over the past thirty-five years, there has been a significant amount of improvements and development in the immediate area. R. 606. Mahoney also testified that "this area's had infill over the last 25 years or so in our area, and there's very few locations that are left ultimately for infill." R.

606-7. In addition, Dory Wegrzyn, testified that she had lived in the area for thirty years and that she has "watched the increasing development from the city and county" in the area. R. 613. Penina Ballen testified that, since the early 1980s, the area has hosted infill development including a "high density mobile home park, gated developments with lots of gravel and weed-barrier yards, a few McMansions, and many homes with locked gates[.]" R. 621. Finally, a previous owner of a portion of the Property, Priscilla Sais, discussed the other offers she received to purchase the property to create another gated community like the one that was recently constructed and borders the Property. Similarly, at the BCC hearing, there was considerable testimony regarding the changed conditions in the surrounding area. *See* R. 769-70 (Appellant Albert Sanchez discussed with disappointment the encroachment of development into the area); R. 815-18 (discussions between the BCC and Planning staff, who noted that all the surrounding areas are developed "at a density much higher than what the A-1 zone would allow for," as the platting of the surrounding properties pre-dated the adoption of the Ordinance); and, R. 828-29 (Metodi testified that the surrounding neighborhoods are "made up of many compact residential lots, most of them 4,000 to 8,000 square feet" and that RGH's proposed development "fits right into the established density and building height patterns of the neighborhood" as compared to the surface agricultural zoning). Accordingly, substantial evidence supports the BCC's finding that changed community conditions justified RGH's request.

In their Statement, Appellants also argue against the BCC's finding that the request was more advantageous to the community. Statement p. 22. However, this argument is not based on any incorrect finding but, instead, on a claim that a more stringent standard should be imposed than that provided by Resolution 116-86. *See id.* Thus, Appellants apparently concede that RGH's request fully satisfied the requirement that RGH demonstrate that "a different use category is more advantageous to the community, as articulated in the Comprehensive Plan or other County Master Plan[.]" Furthermore, the cited cases do not support Appellants' underlying argument. *See Ricci v. Bernalillo County Bd. Of County Comm'rs,* 2011-NMCA-114, 150 N.M. 777, 266 P.3d 646 (rejecting a similar attempt to impose more strict requirements upon temporary special use permits). Accordingly, Appellants provide no justification for the Court to adopt their argument that "some sort of standards should apply" to such a determination.

Finally, Appellants state that RGH's request "effectively constitutes a spot zone because there appears to be no similar SUP or similar dense apartment use anywhere near the site." Appellants provide no real discussion or analysis for this argument and, instead, the entire argument consists of three conclusory sentences. Accordingly, Appellants have failed to provide the Court any justification for adopting this argument and it should be rejected.

CONCLUSION

RGH intends to develop an agricultural community consisting of twenty-seven (27) dwellings within five (5) structures and corresponding orchards;

community gardens; greenhouses; agricultural-equipment-storage spaces; cisterns; and, chicken coops—and agriculture and open space will occupy approximately two-thirds of that community's area. In order to maximize these agricultural site features and preserve views of the neighboring bosque, RGH's plan clusters housing within the development. Thus, this project explicitly fulfills the purposes for both a "Planned Development Area" and "Cluster Housing Development" under the Ordinance. Accordingly, the BCC correctly denied Appellants' appeal of the CPC's approval of RGH's Special Use Permit, and RGH respectfully requests that the Court similarly deny Appellants' present appeal.

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I hereby certify that on July 24, 2019, I caused a true and correct copy of the foregoing pleading to be served electronically via this Court's Odyssey File and Serve system upon opposing counsel and further served opposing counsel by email.

Blake Whitcomb