FILED
2nd JUDICIAL DISTRICT COURT
Bernalillo County
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James A. Noel
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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' STATEMENT OF APPELLATE ISSUES
FOR APPEAL OF COA2019-0001/CSU2019-0001

I
STATEMENT OF THE ISSUES

1. The Bernalillo County Commission (the "BCC") erred in not issuing an appropriate written decision under NMSA 1978, Section 39-3-1.1.

2. The BCC erred in failing to consider Appellants' arguments and evidence in support of Appellants' appeal.

3. The BCC decision process was arbitrary, capricious, and abusive of discretion, and denied Appellants due process, because BCC Staff organized and advocated for the application, the record was inadequate, and the BCC did not consider supplemental evidence submitted by Appellants.

4. The BCC and BCC Staff erred in not treating the application as for an "apartments" use under the County Zoning Ordinance ("CZO").

5. The BCC erred in approving a Special Use Permit ("SUP") for the applicants' "co-housing" type development under CZO Section 18 (B)(23).

6. Finding No. 6 of the BCC's decision concerning the criteria for granting a SUP for a "Planned Development Area" ("PDA") for a "co-housing" project under the CZO was not supported by substantial evidence and was otherwise contrary to law.

7. Finding No. 7 of the BCC's decision concerning the criteria for granting a SUP for a PDA for a "co-housing" project under Resolution 116-86 was not supported by substantial evidence and was otherwise contrary to law.

8. The BCC should consider whether BCC Staff meetings with the applicants' representatives violated the New Mexico Open Meetings Act (the "OMA").

II
SUMMARY OF PROCEEDINGS

A. NATURE OF THE CASE

This case is an administrative appeal under SCRA 1-074 of a decision made on April 9, 2019 by the BCC to deny Appellants' appeal, thereby upholding the decision of the County Planning Commission ("CPC") to approve a SUP for a PDA for a "co-housing" project at 1300 Gonzales Rd. SW in Bernalillo County. The site at issue is 3.83 acres and is zoned A-1. A-1 zoning allows 1 dwelling unit per acre. The applicant proposes a development of 27 dwelling units within 5 buildings, with amenities, on the site. Appellants include the neighbor to the immediate north of the site.

The record (herein "Record") in this case is 3,195 pages. After page 843, the Record repeats documents. For example, the transcript of the CPC hearing on February 6, 2019, appears 4 times in the Record (R 567-698; 1410-1541; 2246-2377; 3019-3150). Likewise, hundreds of pages of form petitions are duplicated various times in the Record. Notwithstanding

its length, the Record does not include various papers which were presented to the BCC by Appellants for Appellants' appeal arguments, as set out in Appellants' Motion to Supplement the Record filed June 17, 2019. The Record does not follow the order required by SCRA 1-074(H)(2) ("which shall be organized by date submitted to the agency beginning with the earliest paper or pleading"). The Record does not appear to have many of the usual submissions by applicants to BCC Staff, or communications between BCC Staff and applicants, in connection with a zoning application.

B. COURSE OF PROCEEDINGS

1. As early as August 29, 2018, the applicants were submitting materials to BCC Staff (R 62).

2. The applicants filed their initial SUP Application on November 26, 2018 (R 57) for a "Planned Development Area" and a re-submittal, with a changed site plan and justification, on December 17, 2018 (R 8, 54, 57, 59).

3. The applicants submitted materials about "Cohousing" (R 64), which "means collaborative housing".

4. The applicants submitted their proposed site plan (R 95).

5. The applicants stated that "Neighborhood conditions have changed substantially . . . [the site] has not been farmed for decades, has been on the market for several years and the Sais family must sell it. . . . The combination of residential and agricultural uses is most appropriate according to the Sais family, who will continue to live on the block and who believe the RGH [Rio Grande Huerta] residents will be good neighbors" (R 75).

6. The applicants referenced the Comprehensive ("Comp Plan") and the Southwest Area Plan ("SWAP") in support of their proposed "clustering" of dwelling units (R 75-77).

7. BCC Staff stated as to "Request Justification" (R 11):

> In response to Resolution 116-86, the applicant asserts that changed conditions in the area, specifically, the adoption of, and subsequent amendments to, the Southwest Area Plan, have made the existing zoning ineffective at meeting current planning goals for this area. The applicant also asserts that the proposed Special Use Permit for a Planned Development Area is more advantageous to the community, because it furthers goals and policies of the Comprehensive Plan the Southwest Area Plan. In addition, although this not a "cluster housing" development, per se, the applicant asserts that the cluster housing principles, as defined by the County Zoning Code and described in the Southwest Area Plan are furthered by the proposed building layout.

8. BCC Staff stated "Surrounding the subject property are mainly single-family, residential uses, at R-1 densities, in established subdivisions" (R 11).

9. BCC Staff asserted that various policies support the higher density use (27 dwelling units within 5 buildings) (R 22).

10. BCC Staff recommended approval but acknowledged (R 33):

> Staff acknowledges that, due to the complex nature of this request, the history of the subject property, neighborhood character and substantial public input, not all applicable goals and policies are entirely furthered by this request. Specifically, the proposed density, building design and layout are not consistent with the character of the surrounding neighborhood.

11. Numerous petitions and letters were submitted in support of the application (R 123-270).

12. Numerous petitions and letters were submitted against the application (R 272-476).

13. Appellant Matthew Cone set out various reasons for denial of the application by letter (R 375-393), including conflict with the Comp Plan, not meeting SUP requirements, too much density, harm to open space, and excessive traffic.

14. Additional letters for and against the application were submitted by February 6, 2019 (R 479-566).

15. The CPC held a hearing on the application on February 6, 2019 (R 567).

16. BCC Staff presented the case in support of the application (R 578-592).

17. BCC Staff stated that "cohousing is not a defined use in the county zoning code, nor is it something the County could enforce" (R 579), and that "the proposed use is similar to multifamily apartments".

18. BCC Staff apparently agreed that the project constituted "apartments" (R 579-580).

19. CPC Chair Chavez stated: "It's an apartment complex" (R 580).

20. BCC Staff observed (R 581) that the density proposed by the applicants is "approximately seven dwelling units per acre", and that:

> … staff concluded that although differing in character from the surrounding neighborhood, which is mainly single-family detached dwellings, this request furthers many goals and policies of the Comprehensive Plan and the Southwest Area Plan related to density, land use, housing, developed landscape, energy management, and water management.

21. BCC Staff concluded (R 582):

> … staff recommends approval of this request with findings and modified conditions as previously stated, because the subject property is located in the established urban area as designated by the Comprehensive Plan, and the subject property is located in residential area 5 as designated in the Southwest Area Plan, which recommends densities up to nine dwelling units per acre and because changed conditions and planning in the area

> have resulted in more urban densities and development patterns and because the request furthers goals and policies of the plans.

22. BCC Staff argued as to "changed conditions" (R 584), to the effect that the Southwest Area Plan allows for higher density.

23. The applicants' agent testified in favor of the application (R 592-602).

24. The BCC Zoning Administrator ("ZA") (Mr. Hamm) testified in favor of the application (R 587). The ZA claimed there were "similarities" and "overlap" between "cluster housing" and "apartments" (R 588).

25. BCC Staff (Ms. Shumsky) stated: "Staff's recommendation is based solely on the adopted plans and policies." (R 682).

26. BCC Staff (Ms. Shumsky) stated that there were no multi-family apartments in the area (R 689).

27. The CPC approved the application on a 4-2 vote (R 691).

28. The CPC's notification of decision appears at R 2.

29. Appellants (with other appellants (the "CPC Appellants")) submitted an appeal of the CPC decision (R 700), with their reasons for appeal set out at R 716-718.

30. The CPC Appellants through counsel submitted a letter dated March 22, 2019, supplementing their appeal and setting out their arguments against the CPC decision (R 724-730). Issues included that SUP standards were not satisfied, Resolution 116-86 criteria were not satisfied, PDA criteria were not satisfied, "Cluster Housing Development" was misapplied, the application should have been processed as a "specific use" SUP or as a zone change, the CPC did not apply objective standards, BCC Staff advocated improperly for the project violating due process, meetings between BCC staff and the applicants violated the OMA, the record was inadequate, and the 20% rule should apply.

31. Appellants' March 22, 2019 argument letter (R 724-730) mentions two other letters submitted by Appellants in support of their appeal: a March 6, 2019 letter concerning OMA violations (R 729) and a March 22, 2019 letter to submit "new evidence" (R 724). Neither the March 6 OMA letter nor the March 22 new evidence letter are in the Record.

32. Counsel for the applicants responded (R 731-737) to the three appeals filed (R 742) of the CPC decision.

33. The BCC held a hearing on the three appeals on April 9, 2019 (R 743-747; 756).

34. At the BCC hearing, BCC Staff advised that "co-housing is not a defined use in the County Zoning Code, nor is it something specifically the County could enforce" (R 761).

35. BCC Staff argued that the applicant's justification as to "changed conditions" references various plan policies, and that the application furthers "many goals of the Comprehensive Plan and the Southwest Area Plan" (R 761-762).

36. BCC Staff ruled that the "20%" rule for the BCC vote applied (R 764).

37. The applicants' representatives testified in favor of the application (R 774).

38. Appellant Albert Sanchez argued against the application (R 768-771).

39. Appellant Justin Knox argued against the application and requested the admission of the "new evidence submitted on March 22, 2019" (R 774).

40. The applicants requested consideration of "new evidence" (a video not shown to the CPC), which request was granted by the BCC Chair (R 778-780).

41. BCC Staff did not object to accepting Appellants' "new evidence" into the Record (R 791).

42. The BCC Chair and BCC Staff said the following concerning Appellants' "new evidence" (R 792):

> CHAIR HART STEBBINS: Can you be a little more specific about what's in the envelope? I'm just curious. I mean, obviously we're not going to have time to read it within the hour we have left in the hearing.
>
> MS. VEREECKE: Madam Chair, this is doc – and I haven't looked at it really carefully, but it is documents about communication among staff and communication between staff and the applicant that the appellant feels are relevant in their case. Although, they did not bring this up in their case. But, it's emails and notes from meetings that took place between the applicant and staff.

43. The applicants through counsel were "fairly neutral" to admission of Appellants' "new evidence" (R 792).

44. The BCC Chair and the BCC's attorney said the following, concluding in the BCC Chair denying consideration of Appellants' "new evidence" (R 793):

> CHAIR HART STEBBINS: Thank you. And I just want to ask staff, so the intent of entering them into the record would be to inform the Commission, which given the time is unlikely.
>
> MR. GARCIA: Madam Chair, yes, that's the purpose of new evidence, if you find that it would help you decide this case. And this is just as a way of suggestion, just to take a quick look at and see if it's something you might consider, and decide at that point whether you would want to accept it as evidence.
>
> CHAIR HART STEBBINS: This is up to the Commissioners. Is there any Commissioner who would like to accept this new evidence at this point in time? I think the Board's decision is that we do not consider it at this point in time.

45. Applicants' counsel argued that "the Southwest Area Plan also allows for development of up to nine dwelling units per acre", and "the opponents …have argued that the

basic R-2 apartment use proposed for the property is permitted in the R-2 zone. This statement ignores the fact of what is really being sought here, which is a co-housing community" (R 782).

46. BCC Staff confirmed that the CZO does not have a definition of co-housing (R 787).

47. BCC Staff (Mr. Gradi) described the options for "apartments" use (R 788):

> The Zoning Code requires that – puts us in a position that if somebody requests apartments, they can do it A, through an apartment zone, an R-2 use and that was one of the options presented to the applicant. Or B, they can do something a little more creative that is apartment-like and they can opt to take it through a planned development-type of trajectory. The planned development trajectory is what this applicant applied for.
>
> There are two manners, three manners rather, that you can apply for an apartment-type use in the County at this point.

48. Mr. Gradi elaborated on BCC Staff's analysis (R 788-789):

> . . . if someone were to apply for a straight R-2 zone change, we would probably not be able to approve that because that would clearly be a spot zone. You would be changing the zoning, the surrounding zoning, would be R-1 and R-2. So that leaves the other option which would be to apply for a Special Use Permit for apartments.

49. Mr. Gradi claimed that the "specific use" SUP would be less stringent than a PDA (R 789-790):

> MR. GRADI: For an R-2 use. And the criteria – that would be something called a Special Use Permit for a specific use, which is Item Number 32 in Section 18 of the Zoning Code, and that would require that they apply for an R-2 use, as enumerated in the Zoning Code. And the criteria for that would probably be less stringent than the current application for a Planned Development Area.
>
> Because if they applied for an R-2 use, the main criteria is that they have to have substantial neighborhood support, not majority, just substantial neighborhood support from homeowners within 200 feet of the subject site and that they have to demonstrate that the site is unusual in some way.
>
> That is probably – if someone were just to do a straight apartment complex without the other features, as the open space, some of the

agriculture areas, the orchards, something like that, that would be the path that we would – that they would probably take.

50. BCC Staff (Ms. Vereecke) testified “there are additional amenities and benefits that otherwise would not be provided with a straight zoning application” and [the proposal] “is a creative beneficial use beyond what would be obtained under a straight zone.” (R 790-791).

51. The BCC denied Appellants’ appeal on a 4-1 vote (R 841).

52. The BCC decision (R 743) was issued April 11, 2019 and this appeal was filed May 6, 2019.

III
ARGUMENT

SCRA 1-074 (R) sets out the standards of review for this appeal:

Standard of review. The district court shall apply the following standards of review:

(1) whether the agency acted fraudulently, arbitrarily, or capriciously;

(2) whether based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence;

(3) whether the action of the agency was outside the scope of authority of the agency; or

(4) whether the action of the agency was otherwise not in accordance with law.

ISSUE 1

The BCC erred in not issuing an appropriate written decision under NMSA 1978, Section 39-3-1.1.

NMSA 1978, Section 39-3-1.1 states in pertinent part (emphasis added):

B. Upon issuing a final decision, an agency shall promptly:

> 1) prepare a written decision that includes an order granting or denying relief **and a statement of the factual and legal basis for the order** . . . . and
>
> 3) serve a document that indicates a copy of the written decision and **the requirements for filing an appeal of the final decision** . . .

The BCC decision (R 743) repeats the findings and conditions of the CPC decision (R 2) and does not provide a statement of the factual and legal basis for the decision as to the appeal issues raised by Appellants. The BCC decision does not provide notice of appeal requirements.

The BCC's Findings 6 and 7 are essential for the SUP PDA "co-housing" approval, but neither finding provides sufficient facts or legal analysis to support the finding. Appellants raised the issues of failure to satisfy the definitional criteria for a SUP for a PDA; failure to satisfy the key issues under Resolution 116-1986 (is the existing zoning "inappropriate", were there "changed conditions" sufficient to justify the request; were the criteria for "more advantageous to the community" addressed; were the "spot zoning" criteria addressed); the consideration of additional evidence; the inadequate record; and the violations of the OMA (R 716-718, 724-730, 768-774). The BCC did not address Appellants' issues.

The Supreme Court in <u>Albuquerque Commons Partnership v. City Council of the City of Albuquerque</u>, 2008-NMSC-025, ¶35, addresses the requirement of a complete written decision:

> {35} Regardless of the justification, the decision-making body should provide "a clear statement of what, specifically, [it] believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based", and a full explanation of why those facts lead to the decision it makes. <u>South of Sunnyside Neighborhood League</u>, 569 P.2d at 1076. This is critical for facilitating meaningful judicial review of the action, "not for the purpose of substituting judicial judgment for administrative judgment but for the purpose of requiring the [zoning authority] to demonstrate that it has applied the criteria prescribed by . . . its own regulations and has not acted arbitrarily or on an ad hoc basis." See <u>Smith v. Bd. of County Comm'rs of Bernalillo County</u>, 2005-NMSC-012, ¶¶32-33, 137 N.M. 280, 110 P.3d 496 (reversing County's denial of a radio tower permit upon finding that, in denying the permit after having initially

> granted it, officials went against their original interpretation of the relevant ordinance and acted on an ad hoc basis).

Similarly, under VanderVossen v. City of Espanola, 2001-NMCA-016, ¶¶26, 27, 130 N.M. 287, and Atlixco Coalition v. Maggiore, 1998-NMCA-134, ¶19, 125 N.M. 786, a reviewing court is prohibited from supplying a reasoned basis for the agency's action that the agency itself has not given.

ISSUE 2

The BCC erred in failing to consider Appellants' arguments and evidence in support of Appellants' appeal.

The BCC failed to consider Appellants' arguments and evidence in support of Appellants' appeal to the BCC. Appellants requested that "new evidence" be considered (R 718, 729, 774) in connection with Appellants' arguments and issues raised in their appeal to the BCC. BCC Staff did not object to accepting the "new evidence" into the Record (R 791). The BCC Chair and BCC Staff said the following concerning the "new evidence" (R 792):

> CHAIR HART STEBBINS: Can you be a little more specific about what's in the envelope? I'm just curious. I mean, obviously we're not going to have time to read it within the hour we have left in the hearing.
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> MS. VEREECKE: Madam Chair, this is doc – and I haven't looked at it really carefully, but it is documents about communication among staff and communication between staff and the applicant that the appellant feels are relevant in their case. Although, they did not bring this up in their case. But, it's emails and notes from meetings that took place between the applicant and staff.

The applicants through counsel were "fairly neutral" to admission of the "new evidence" (R 792). The BCC Chair and the BCC's attorney said the following, concluding in the BCC Chair denying consideration of the "new evidence" (R 793):

> CHAIR HART STEBBINS: Thank you. And I just want to ask staff, so the intent of entering them into the record would be to inform the Commission, which given the time is unlikely.

> MR. GARCIA: Madam Chair, yes, that's the purpose of new evidence, if you find that it would help you decide this case. And this is just as a way of suggestion, just to take a quick look at and see if it's something you might consider, and decide at that point whether you would want to accept it as evidence.
>
> CHAIR HART STEBBINS: This is up to the Commissioners. Is there any Commissioner who would like to accept this new evidence at this point in time? I think the Board's decision is that we do not consider it at this point in time.

The BCC acted arbitrarily and capriciously in denying Appellants' request that the BCC consider Appellants' "new evidence" without reading Appellants' letter requesting admission of the "new evidence" or reviewing Appellants' proposed (documentary) evidence, shortly after accepting and considering "new evidence" from the applicants (R 778-780). The broad discretion accorded to an agency in conducting its hearing must be exercised judiciously and not arbitrarily. Archuleta v. Santa Fe Police Dep't., 2005-NMCC-006, ¶21. A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record; an agency's ruling is arbitrary and capricious if it fails to consider important aspects of the problem. Rio Grande Chapter of the Sierra Club v. New Mexico Mining Com'n, 2003-NMSC-005, ¶17, 12.

It appears that BCC Staff simply declined to add to the Record Appellants' March 6 OMA letter, referenced by Appellants at R 729, resulting in a failure to consider Appellants' appeal arguments or evidence as to the OMA issue.

A record that is inadequate may be remanded to an administrative body 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. Appellants' Motion to Supplement the Record filed June 17, 2019 summarizes the materials submitted by Appellants to the BCC which were not considered by the BCC. The

case should be remanded to the BCC to consider the materials submitted to the BCC by Appellants for Appellants' appeal to the BCC but not considered by the BCC.

ISSUE 3

The BCC's decision process was arbitrary, capricious, and abusive of discretion, and denied Appellants due process, because the BCC Staff organized and advocated for the application, the record was inadequate, and the BCC did not consider supplemental evidence submitted by Appellants.

The BCC process for the applicants' proposal for higher density multi-family development in Appellants' lower density single-family dwelling neighborhood was biased and unfair to Appellants. The BCC and the CPC relied almost without question (excepting CPC Commissioner Chavez's questions) of BCC Staff in all the particulars of the application. BCC Staff presented and argued in favor of the application, including in making interpretations, determinations and conclusions and suggesting alternative bases for the proposed development (R 582, 583, 584, 588, 603, 688, 761, 764, 786-789, 790). BCC Staff opened and closed the testimony taken at both the CPC hearing and the BCC hearing, repeatedly expressing BCC Staff support for the application. The Record suggests substantial review and negotiation between BCC Staff and the applicants' representatives to design the applicants' project to obtain support by BCC Staff and approval by the CPC and the BCC (R 8, re-submittal with a changed site plan and justification; R 790-791, the application shows "creative beneficial use"). The ZA was especially pointed and aggressive in support of the application (R 587-592, 688).

It appears that BCC Staff was instrumental in the applicants' proceeding under a "PDA" special use than under a zone change or a "specific use" special use, as the options were

interpreted by BCC Staff at the BCC hearing (R 788-790). It appears that no cross-examination of witnesses or BCC Staff was allowed at the CPC hearing or the BCC hearing.

The Record filed by the BCC is inadequate because there is a dearth of records of the applicants' submissions and communications involving BCC Staff between August 29, 2018 (first contact according to the Record) and December 17, 2018 (the "re-submittal" application), and because the BCC denied consideration of materials submitted by Appellants for the BCC appeal hearing.

Appellants are entitled to due process including an impartial tribunal, without ex-parte contacts, an opportunity to present and rebut evidence, cross-examination, a record made, and adequate findings executed. Albuquerque Commons Partnership v. City Council of the City of Albuquerque, 2008-NMSC-025, ¶34. 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.

ISSUE 4

The BCC and BCC Staff erred in not treating the application as for an "apartments" use.

The CZO in Section 5 defines "Apartments" to be "one or more structures containing two or more dwelling units each". "Apartments" are specifically authorized under CZO Section 10 (R-2 Apartment Zone). Although the applicants' counsel stated that the project was not "apartments" but rather "co-housing" (R 782), BCC Staff conceded that the application was for "apartments" (R 788-790). The CZO does not define "co-housing" and "co-housing" does not appear as a potential special use in the CZO. The BCC cannot enforce "co-housing" (R 579). Neither the Comp Plan nor the SWAP mention "co-housing", and neither the Comp Plan nor the SWAP support the indiscriminate introduction of apartments into single family residential areas,

so the BCC’s and the CPC’s Findings 4 and 5 are erroneous as to a “co-housing” application, not relevant to the application, and not supported by substantial evidence.

The subject site’s A-1 zoning does not allow apartments. The applicant could have sought a zone change to R-2 which allows apartments. Or, the applicant could have sought a SUP. However, “Special Use Permits” are to be granted under the CZO only for certain specified uses. CZO Section 18 (A) states: “By Special Use Permit, The Bernalillo County Planning Commission may authorize the location of uses in which they are not permitted by other sections of this ordinance”. CZO Section18 (B) states: “Such Special Use Permits may authorize only the following uses”, before then enumerating the possible special uses. “Apartments” are not among the enumerated special uses.

CZO Section 18(B) 32(a) provides for a “Specific use” SUP applicable to apartments:

> 32. Specific use.
> a. In certain situations based on unique conditions the owner may apply for any of the specific uses set forth in Sections 10, 12, 13, 14, 15 or 15.5 of this Ordinance. This type of Special Use Permit may not be granted for lots zoned SD or PC, unless prescribed in their related plan. The special use for a specific use may be granted if the owner/applicant proves by clear and convincing evidence that: (1) unique conditions exist that justify the request and (2) there is substantial support from neighborhood residents (or owners of property) within 200 feet of the site for the proposed special use.

The above provisions indicate that the proper approach under the CZO for seeking “apartments” in an A-1 zone is to apply for a zone change to R-2 or for a “Specific use” SUP.

ISSUE 5

The BCC erred in approving a SUP for the applicants’ “co-housing” type development under CZO Section 18 (B)(23).

Appellants’ argument on this issue is based on Burroughs v. Board of County Comm’rs of Bernalillo County, 1975-NMSC-051, ¶24, 88 N.M. 303, which, following rules for

construing ordinances, holds that only special uses permitted under the CZO may be the subject of a SUP. Burroughs involved misuse of the "planned development area" category, like the case at bar. In Burroughs, the Supreme Court held that an "overnight campground" could not be considered a "planned development area" for purposes of a SUP.

Guided by BCC Staff including the ZA, the applicants sought their SUP under Section 18 (B)(23) as a "Planned Development Area" (and not as a zone change or a "Specific use" SUP as discussed above). BCC Staff determined that this approach was "a little more creative, that it is apartment-like, and they can opt to take it through a planned development-type trajectory" (R 788). This decision by BCC Staff was erroneous because there is no provision for straightforward "apartments" even with amenities to be a PDA, without satisfaction of the specific requirements of Section 18 (B)(23) for a SUP for a PDA.

High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶¶ 4, 5 (citing Burroughs) provides three relevant rules of statutory construction:

> "In construing municipal ordinances or county zoning ordinances . . . the same rule of construction are used as when construing statutes of the legislature[,]" Burroughs v. Board of County Com'rs of Bernalillo County, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975), and "[c]ertainly where the question is simply one of construction, the courts may pass upon it as an issue 'solely of law'". Pan American Petroleum Corp. v. El Paso natural Gas Co., 77 N.M. 481, 487, 424 P.2d 397, 401 (1966) (quoting Great N. Ry. V. Merchants' Elevator Co., 259 U.S. 285, 291, 42 S.Ct. 477. 66 L.Ed. 943 (1922)); see also Mayberry v. Town of Old Orchard beach, 599 A.2d 1153, 1154 (Me. 1991) (interpretation of zoning ordinance a question of law for the court); Conforti v. City of Manchester, 141 N.H. 78, 677 A.2d 147, 149 (N.H. 1996) (same); Kaiser v. Western R/C Flyers, Inc., 239 Neb. 624, 477 N.W.2d 557, 560 (Neb 1991) (same). Here, three rules or tools of statutory construction are relevant.
>
> The first rule is that the "plain language of a statute is the primary indicator of legislative intent." General Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985). Courts are to "give the words used in the statute their ordinary meaning unless the legislature indicates a different intent." State ex rel. Klineline v. Blackhurst, 106 N.M. 732, 735, 749 P.2d 1111, 1114 91988). The court "will not read into a statute or ordinance language which is not there,

> particularly if it makes sense as written." Burroughs, 88 N.M. at 306, 540 P.2d at 236. The second rule is to "give persuasive weight to long-standing administrative constructions of statutes by the agency charged with administering them." TBCH, Inc. v. City of Albuquerque, 117 N.M. 569, 572, 874 P.2d 30, 33 (Ct. App. 1994); see Molycorp, Inc. v. State Corp. Comm'n, 95 N.M. 613, 614, 624 P.2d 1010, 1011 (1981). The third rule dictates that where several sections of a stature are involved, they must be read together so that all parts are given effect. This includes amendments. Methola v. County of Eddy, 95 N.M. 329, 333, 622 P.2d 234, 238 (1980).

Baker v. Hedstrom, 2013-NMSC-043, ¶24, provides an additional rule applicable to this appeal, that "each word is to be given meaning" in construction of a statute.

Turning to the CZO language at issue in this case, CZO Section 18(B)(23) provides:

> 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 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.

This Section has three clauses to consider: 1) the applicant must demonstrate "the need to vary height, lot area, or setback requirements" (herein the first, "need" clause); 2) the need must be "due to unusual topography, lot configuration, or site features" (herein the second, "due to" clause); and 3) the "need" clause criteria and the "due to" clause criteria must be "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" (herein the third, "in order to" clause).

The applicants' counsel argues that the third, "in order to" clause criteria are the critical controlling criteria to satisfy the PDA standards (R 735), and that those third, "in order to" criteria were satisfied. The applicants' counsel states: "the site plan submitted by RGH relies entirely on cluster housing with an intent to preserve physical access to the agricultural open

space" (R 735). Appellants argue that all three clauses must be satisfied, and that none of the clauses were satisfied. As apparently recognized by the applicants' counsel, the first, "need" clause criteria were not satisfied, because the site plan does not need to vary height, lot area, or setback requirements, and the second, "due to" clause criteria were not satisfied, because the site does not have unusual topography, lot configuration, or site features.

Concerning the third, "in order to" clause criteria, the apartments proposed by the applicants are not "cluster housing development" under the CZO (Section 5, Definitions), which states:

> "Cluster Housing Development" means: Cluster Housing Development. 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.

This definition involves "a reduction in lot area and bulk requirements" and "no increase in the number of lots permitted under a conventional subdivision" which indicates it applies to single-family housing, not to apartments. BCC Staff determined that the applicants' proposal "is not a "cluster housing" development, per se" (R 11).

The applicants' (and the BCC Staff's) reading of the PDA standards being controlled by the third, "in order to" clause produces the inappropriate results that the first and second clauses are rendered superfluous, and that, practically speaking, any development proposal that can be classified as "cluster" housing, including apartments, can be approved as a higher density use PDA. The BCC decision on this issue is contrary to the analysis of <u>Burroughs</u>, ¶ 15, which holds that the PDA category "was not intended as an all inclusive catchall category".

ISSUE 6

The BCC's Finding No. 6 concerning the criteria for a SUP for a PDA was not supported by substantial evidence and was otherwise contrary to law.

The underlying reasons for BCC Staff's recommendation of approval appears to be that the SWAP allows for higher density in the area, and the project proposes more amenities than otherwise might be provided (R 23, 26, 28, 790-791). However, these reasons do not constitute substantial evidence for a PDA SUP. The BCC's Finding No. 6 states:

> As required by Zoning Code Section 18 for a Planned Development Area, the applicant demonstrated the need to vary height, lot area, or setback requirements due to unusual topography, lot configuration, or site feathers 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. The site plan includes areas dedicated to open space, agriculture and recreational uses.

Finding No. 6 recites the PDA requirements, and relies on "areas dedicated to open space, agriculture and recreational uses" to satisfy the PDA requirements. That the site plan has "areas dedicated to open space, agriculture and recreational uses" does not satisfy PDA requirements. Practically any apartment development can easily have or be considered to have "open space, agriculture and recreational uses". There appears to be no demonstration in the Record as to any of the PDA requirements for "need to vary height, lot area, or setback requirements", or "unusual topography, lot configurations, or site features".

ISSUE 7

Finding No. 7 of the BCC's decision concerning the criteria for granting a SUP for a PDA under Resolution 116-86 was not supported by substantial evidence and was otherwise contrary to law.

The SUP also has to pass muster under Resolution 116-86, which governs SUPs under the CZO. The BCC's Finding No. 7 states:

> The applicant provided adequate justification for the request that met the criteria of Resolution 116-86. Specifically, the applicant described changed conditions in the area and how approval of the Special Use Permit is more advantageous to the community than the existing zoning because it furthers goals and policies of the Comprehensive Plan and Southwest Area Plan.

The key issues under Resolution 116-86 (R 721) relate to Sections 1E ("changed conditions" or "more advantageous to the community") and 1I ("spot zoning"):

> E. The applicant must demonstrate that the existing zoning is inappropriate because:
>
> > (1) there was an error when the existing zone map pattern was created; or
> >
> > (2) changed neighborhood or community conditions justify the land use change; or
> >
> > (3) a different use category is more advantageous to the community, as articulated in the Comprehensive Plan or other County Master Plan, even though (1) or (2) above do not apply.
>
> I. A zone change request which would give a zone different from surrounding zoning to one small area, especially when only one premises is involved, is generally called a "spot zone". Such a change of zone may be approved only when:
>
> > (1) the change will clearly facilitate realization of the Comprehensive Plan and any applicable adopted sector development plan or area development plan; or
> >
> > (2) the area of the proposed zone change is different from surrounding land because it could function as a transition between adjacent zones; because the site is not suitable for the uses allowed in any adjacent zone due to topography, traffic, or special adverse land uses nearby; or because the nature of structure already on the premises makes the site unsuitable for the uses allowed in any adjacent zone.

The applicant did not demonstrate and the BCC and the CPC did not find that the existing A-1 zoning is inappropriate. BCC Staff and the applicants argued that the SWAP density

allowance (of up to 9 density units per acre) satisfies the "changed conditions" test. However, the SWAP was not a zone change, does not compel the granting of SUPs, and does not change the actual conditions of the character of the neighborhood. As to the "more advantageous to the community" test, the BCC and the CPC did not find that there was a public need for the change in classification or that the need will be best served by changing the classification for this property as opposed to other property, which standards appear to be required under Albuquerque Commons Partnership v. City Council of Albuquerque, 2009-NMCA-065, ¶16, rev'd on other grounds, 2011-NMSC-002 ("ACP"), for zone changes based on being "more advantageous for the community". See also Ricci v. Bernalillo County Bd. of County Comm'rs, 2011-NMCA-114, ¶16, which holds that the ACP standards do not apply to "temporary" special use permits. Even if the ACP standards do not apply for this SUP, some sort of standards should apply, for how the BCC is to determine, in some objective manner, whether a proposal is "more advantageous to the community".

The SUP at issue effectively constitutes a "spot zone" because there appears to be no similar SUP or similar dense apartment use anywhere near the site. BCC Staff testified that there were no other multifamily facilities in the area (R 689), and that a zone change to R-2 would be a "spot zone" (R 789). The BCC did not address or find the "spot zone" criteria set out in the CZO.

ISSUE 8

The BCC should consider whether BCC Staff meetings with the applicants' representatives violated the OMA.

Appellants raised the OMA issue in their appeal to the BCC (R 718, 719), by letter dated March 22, 2019 (R 729), and at the BCC hearing (R 774). Appellants' argument on this issue depends on the correspondence and records submitted by Appellants on March 6, 2019 and

March 22, 2019, which the BCC did not consider as discussed above. There is not much evidence in the Record of any meetings, or of any communications, between BCC Staff and the applicants' representatives, yet together they managed to put on a coordinated presentation attuned to what the CPC and the BCC would approve. Appellants' appeal to the BCC (R 718) stated: "Upon information and belief, County staff acting on behalf of and with delegated authority from the County Commission formed County policy in various meetings with the applicant or the applicant's agents, in violation of the Mew Mexico Open Meetings Act". Appellants should be allowed to present their OMA appeal issue, with the evidence duly submitted, to the BCC. The BCC should consider the OMA issue because the BCC is the responsible governing body and zoning authority and Appellants are constituents and parties with standing. If the BCC is not to consider Appellants' OMA issue, Appellants request that they be granted leave to add an OMA claim to this appeal, so that Appellants' OMA claim with Appellants' evidence will be heard by the District Court if not by the BCC.

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).

The ZA (Mr. Hamm) is authorized under CZO Section 3(A) to interpret the CZO:

> A. Interpretation. The Zoning Administrator shall interpret the regulations and restrictions of this ordinance in accordance with the purposes and intent of this ordinance. Disagreement with the Zoning Administrator's interpretations may be appealed to the County Planning Commission and

> then to the Bernalillo County Commission pursuant to the Administration Section of this ordinance.

In the case at bar, BCC Staff including the ZA, acting under delegated authority from the BCC, analyzed and made interpretations, conclusions and recommendations to the BCC, and effectively made policy, for example with BCC Staff's "creative" interpretation of Section 18 (B)(23) (R 581-582, 584, 587, 588, 682, 689, 761, 762, 764, 788-791).

The Court of Appeals considered the OMA in New Mexico State Investment Council v. Weinstein, 2016-NMCA-069, ¶¶72-89, and held that the OMA is to be construed broadly to effectuate its purposes, and that any policy-making body with delegated authority, including a non-quorum subordinate committee without final authority, is governed by the OMA. In N.M. A.G. Op. No. 90-27, dated December 20, 1990, the Attorney General opined that a selection advisory committee was governed by the OMA, where the committee had some decision making authority. The AG's OMA Compliance Guide, Eighth Edition, 2015, p. 9, states as follows:

> In some situations, even a non-statutory committee appointed by a public body may constitute a "policymaking body" subject to the Act if it makes any decisions on behalf of, formulates recommendations that are binding in any legal or practical way on, or otherwise establishes policy for the public body. A public body may not evade its obligations under the Act by delegating its responsibilities for making decisions and taking final action to a committee. This is true even when the public body delegates its authority for holding a meeting or hearing to a single individual. If a hearing would be subject to the Act if convened by the public body, the hearing cannot be closed simply because the public body appoints a single hearing officer to hold the hearing in its place.

The OMA provides for certain exclusions from the open meeting requirements, in NMSA 1978, Section 10-15-1 (H). None of the exclusions apply to determinations by BCC Staff in negotiations and meetings with a development applicant. Paragon Foundation, Inc. v. State of New Mexico Livestock Board, 2001-NMCA-004, ¶26, 138 N.M. 761, supports that action by an authorized representative can constitute an OMA violation. Palenick v. City of Rio Rancho,

2012-NMCA-018, 270 P.3d 1281, reversed on other grounds in Palenick v. City of Rio Rancho, 2013-NMSC-029, 306 P.3d 447, indicates that a OMA violation cannot be cured retroactively, so the BCC's approval of the PDA for "co-housing" does not cure the OMA violation.

IV
STATEMENT OF PRECISE RELIEF SOUGHT

Appellants request that the BCC's decision be: 1) remanded for the BCC to issue an appropriate written decision under NMSA 1978, Section 39-3-1.1; 2) remanded for the BCC to consider Appellants' arguments and evidence which were not considered by the BCC; 3) remanded for creation of an adequate record; 4) reversed because the BCC decision process denied due process to Appellants and was arbitrary and capricious; 5) reversed and remanded because the BCC did not treat the application as for an "apartments" use; 6) reversed because the BCC erred in approving the applicants' proposal under CZO Section 18(B)(23); 7) reversed because Finding No. 6 was not supported by substantial evidence; 8) reversed because Finding No. 7 was not supported by substantial evidence; and 9) reversed and remanded for the BCC to consider whether BCC Staff meetings with the applicants violated the OMA, and if not so reversed and remanded, that Appellants be granted leave to amend this appeal to join an OMA claim so the District Court would hear Appellants' OMA claim with Appellants' OMA evidence; and for such other relief as the Court deems just and proper.

YNTEMA LAW FIRM P.A.

(Electronically filed)

By /s/ Hessel E. Yntema III
Hessel E. Yntema III
215 Gold Avenue SW, Suite 201
Albuquerque, NM 87102
(505) 843-9565
e-mail: hess@yntema-law.com

I hereby certify that this Appellants' Statement of Appellate Issues for Appeal of COA2019-0001/CSU2019-0001 was electronically filed through the electronic filing system for the Second Judicial District Court, on June 26, 2019, which caused counsel of record to be served via electronic means, as more fully reflected on the Notice of Electronic Filing.

(Electronically filed)

/s/ Hessel E. Yntema III
Hessel E. Yntema III