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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MATTHEW CONE, ALBERT SANCHEZ,
JUSTIN KNOX, and GLORIA BACA,
Appellants/Petitioners,

v.

BERNALILLO COUNTY BOARD OF
COUNTY COMMISSIONERS,
Appellee/Respondent,

And

VALENTIN P. SAIS, RON A. PEREA,
And RIO GRANDE HUERTA, LLC,
Interested Parties.

No. S-1-SC-38497
Court of Appeals
No. A-1-CA-38823
Second Judicial District Court
No. D-202-CV-2019-03654

BERNALILLO COUNTY BOARD OF COUNTY COMMISSIONERS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Submitted by:

Bernalillo County Attorney's Office
W. Kenneth Martinez
County Attorney
Michael I. Garcia
Assistant County Attorney, Adv.
520 Lomas Blvd., NW, 4th Floor
Albuquerque, NM 87102
505.314.0180
mikgarcia@bernco.gov

I. Facts/Background.

In this case Rio Grande Huerta, LLC (Applicants) sought to put their property to a lawful use, and sought the guidance of County Planning and Development staff, on how to do that. That lawful use is a special use permit for a Planned Development Area (PDA) for 3.83 acres zoned A-1, which use is governed by the Bernalillo County Zoning Code, § 18(B)(23):

> 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 configurations, 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.

Id. (italics added). RP 97 Though portrayed by Appellants as though this were devious, Staff met and communicated with the applicants on a number of occasions and ultimately advised them that the best approach to obtain approval for their proposed co-housing development was to seek a special use permit for a PDA. See *March 26, 2019 Letter from undersigned counsel, attached to Appellant's Motion to Supplement the Record*. Staff customarily gives its recommendation to the County Planning Commission and the Board of Commissioners as to whether a given development should be approved or not. Indeed, there is even a specific

space on the form placed for Staff's recommendation. RP 33 In this case Staff recommended approval. RP 33

Staff also met with Appellants, specifically Appellant Cone in this case, who opposed the Applicants' proposed use of their own property. At the hearings, most of the objections had to do with keeping the area agricultural and opposition to "apartments," though contrary to Appellants' arguments, nothing required the County to treat cluster housing in a manner identical to apartments. RP 579-80 Also, notwithstanding the objections, approval of the PDA would result in actual agricultural use of the property for the first time in nearly 90 years. RP 673-74 And while co-housing is not defined in the Zoning Code, cluster housing is certainly recognized and allowed in §18(B)(23) as shown above in italics.

The County will address other facts here as they need clarification below.

II. Discussion.

A. Standard of Review.

Under Rule 1-074 NMRA 2014, the district court will affirm the decision of an administrative agency if it is supported by substantial evidence in the whole record; is within its scope of authority, and otherwise according to law; and if the agency did not act fraudulently, arbitrarily, or capriciously. Rule 1-074(R); NMSA 1978, § 39-3-1.1; Gallup Westside Development, LLC, v. City of Gallup, 2004-

NMCA-10, ¶ 10, 135 N.M. 30. Here, substantial evidence in the record supported the decision of the County Commission, and the decision was according to law; nor was the decision arbitrary, capricious or fraudulent. The Court should therefore affirm the Commission's decision.

B. Substantial evidence supported allowing the special use permit for a cluster housing Planned Development Area under §18(B)(23) and R 116-86.

As the district court noted, there was substantial evidence to support the special use permit for a Planned Development Area. *Memorandum Opinion and Order, pp. 6-14*. The Planning Staff Report that recommended approval of the PDA is located at RP 8-36. This Staff Report demonstrates a thorough accounting and analysis of the facts and provides substantial evidence to support the PDA, and would offer the Court a very accurate summary of the Planning Department's review and processing of the application. Specifically, however, for the present moment, substantial evidence exists to support the PDA because of these reasons: The site layout followed cluster housing principles, which was encouraged in the area under the Southwest Area Plan RP 33; because of the need to vary lot requirements to accommodate a cluster housing development along with natural site features such as the Atrisco Drain to the east; RP 33, 66 the PDA would preserve agricultural land use, scenic vistas (i.e., preserve visual access to open space) and conservation of water and energy; RP 69 the compact 27-unit

footprint—a varied lot configuration under §18(B)(23)—would enable the restoration of agriculture on the site. RP 69

Moreover, changed circumstances in the form of diminishing agriculture and more residential uses in the area justified the change under Resolution 116-86. The subject properties and adjacent ones had not been farmed for decades. RP 75. Indeed, a review of the surrounding area reveals residential uses and parks for the vast majority of properties in the area, not farms. RP 61 The surrounding area had been developed with densities much higher than the A-1 designation allowed. RP 829-29 Also, the proposed use was more advantageous to the community because the land would actually be put to a beneficial residential and agricultural use whereas it had previously lain dormant for decades with nothing growing but tumbleweeds. A majority of the neighbors within 200 feet of the site expressed support of the PDA as compatible and transitional use between residential, agricultural and open space uses nearby, as did scores of other individuals. RP 77, RP 122-270 There were opponents. RP 278 Notably, there is no majority determination, which would appear to have favored Applicants in any event.

Appellants argue that the Applicants should have pursued approval for apartments. This argument creates a false dilemma. Specifically, just because apartments were one possible land use they could have applied for does not mean Applicants were precluded from applying for a different use. Moreover,

Appellants' argument places them in the awkward position of demanding a more intense use with more density than they now complain of. It also has the defect of asking the Court to substitute its judgment for that of the BCC. See KOB TV, LLC v. City of Albuquerque 2005-NMCA-049, ¶29 (When a court reviews the evidence in a decision of an administrative body it does so in the most favorable light and does not substitute its judgment for that of the administrative body). But cluster housing is a use recognized by the County's PDA special use ordinance at § 18 and it is not limited to single family dwelling units under § 5, but includes multiple family units on a single lot. See also *Rio Grande Huerta's Response at p. 18*. Notably, there is an exception for cluster housing to the prohibition against the increase in lots or overall density for the "preservation of environmentally sensitive areas or agriculture." § 5. Said another way, it is appropriate to increase density to preserve agriculture.

Appellants' statutory construction argument takes many turns and twists, but the simple reading of the ordinances shows that the term "cluster housing" contemplates multiple units on one lot (§5); that cluster housing is contemplated within a PDA (§18); that there was a need to vary lot requirements to accommodate the cluster housing development along with natural site features such as the Atrisco Drain to the east. RP 33, 66 This arrangement of the cluster housing would preserve agricultural land use, scenic vistas (visual access to open

space) and conservation of water and energy. RP 69 The compact 27-unit footprint was intended to vary lot configuration and to enable the restoration of agriculture on the site. RP 69 These factors easily satisfy the elements of a PDA under §18(B)(23), without straining ordinary meaning to accomplish it.

While this development shares the characteristic of multifamily dwelling with apartments, there are notable differences. First, apartments generally do not have dedicated agricultural and orchard areas along with greenhouses. RP 753-55 They also do not generally have shared living areas and kitchens. Apartments are not generally arranged to accommodate inter-family relationships as this development is. Thus, it is apparent that the PDA is something other than the usual apartment, and a cluster housing development in a PDA is an appropriate land use designation for this development. As such, the special use permit was appropriate under Resolution 116-86.

The foregoing demonstrates the central facts and legal rationale in this case, and it supports both factually and legally the BCC's decision, and answers Appellants' Issue 1.

C. The District Court was under no obligation to legitimize Appellants' baseless Open Meetings Act claims.

Regarding Issue 2 of Appellants' Petition, the County is unclear as to the precise argument. If Appellants are arguing that the district court should have

entertained argument and evidence that the zoning administrator (ZA) held closed meetings and violated the Open Meetings Act, the district court dealt appropriately with that argument. *Memorandum Opinion and Order, p. 5*. First, it is false both as a matter of fact and law to allege that the ZA held a closed meeting to discuss options with the Applicants. The matter was not before the ZA for adjudication and was never going to be, and this point is undisputed; it proceeded from the Planning Department to the County Planning Commission, not from the ZA to the Board of Adjustment, as the Code provides for decisions of the ZA. Zoning Code, §24. Notably, Appellants have produced no decision by the ZA about this matter to support their argument. There is none. He was simply assisting applicants as a member of Planning staff, which is routine. Second, the Board of County Commissioners had no jurisdiction to address an Open Meetings Act claim in a Zoning Meeting. NMSA 1978, § 10-15-3(C) (1997) (district courts have jurisdiction to enforce OMA claims). In short, Appellants are asking the BCC and the district court to commit error to validate their pretend OMA claim.

These points also refute Issue 3, where Appellants apparently argue that it was a violation of due process for the district court not to review evidence that had nothing to do with the merits of the case and could not be addressed in an administrative appeal, and where a remand would have been futile anyway, since the BCC had no jurisdiction to hear the OMA claims. Appellants' OMA claims in

any event had nothing to do with the solid legal bases for granting the PDA; they were simply a collateral attack on a process where they lost on the merits.

The County acknowledges some difficulty in responding to Appellants' accusation in Issue 4 that County Planning staff somehow "rigged"—Appellants' word—the process against them by consulting with the Applicants, as the County's own ordinance directs staff to do. Bernalillo County Zoning Code, Section § 18(C)(1)(" It is recommended that the applicant consult with the County Zoning or Planning staff before filing an application to be informed of any requirements of policies relevant to the request.") There is the sheer gall of Mr. Cone's accusing staff of rigging the process by affording applicants the same courtesy he received, and what remains is an argument that is, charitably speaking, frivolous. Nevertheless, Planning staff who followed the County's own ordinances by meeting with applicants and opponents alike were not rigging any process. Nor is it rigging the process for a staff member who also happens to be the ZA to consult with applicants on a case that is not and never will be before him. Nor is it a closed meeting under the OMA where no quorum is convened, no policy is made, and no decision rendered. New Mexico State Investment Council v. Weinstein, 2016-NMCA-069, ¶75. (Again, Appellants have produced no ruling by the ZA, or any member of staff, concerning this property to support this argument.) It is not rigging the process to recommend approval of applications that meet County

criteria, which the BCC is free to accept, reject, or modify. Zoning Code, § 25(I). What is objectionable, however, is the attempt to confuse and conflate staff's obligation under the Zoning Code—to consult with applicants and the public alike—into some alleged devious purpose.

To the extent Appellants in Issue 5 are conflating the lack of cross-examination regarding their OMA claims with cross-examination regarding the merits of the PDA, undersigned counsel is aware of nothing in the proceedings where Appellants asked for cross-examination on the merits of the PDA and were denied. But the denial of cross-examination and refusal of new evidence related to the OMA, which the BCC could not adjudicate, is not a violation of due process. Rather, it would have been error for the BCC to attempt to adjudicate an OMA claim, and it would have been error for the district court to require such.

Again, not one member of Staff who met with the Applicants or Appellants was in a position to grant or deny one aspect of the application. See NMSA 1978, § 10-15-1(A) ("The formation of policy or the conduct of business by vote shall not be taken in a closed meeting"). Certainly no vote took place among staff. Nor do Appellants assert that any member of the CPC or of the BCC met with Applicants regarding this issue. The OMA simply does not come into play. There is a strange lack of self-awareness involved in these allegations when Mr. Cone himself met and communicated with Staff about the appeals process and public

records issues. See *March 26, 2019 Letter from undersigned counsel, attached to Appellant's Motion to Supplement the Record*. Even though Appellants apparently have one standard for themselves and a different one for Applicants, it is appropriate for applicants and members of the public (and even Appellants) to meet with Staff about a given application.

Appellants' argument yields the absurd: If the OMA applies any time a public employee, who has no decision-making authority, meets with a member of the public to discuss a land use matter, or really any other matter that is or might become judicial or quasi-judicial, then probably scores or hundreds of meetings would have to be noticed and published in each jurisdiction in the State every day. The OMA requires no such thing and the ridiculous consequences of such a rule demonstrate why. Nor does it require Staff to refuse help to applicants in navigating County processes or to ignore concerns of opponents. In sum, nothing in the OMA prevents public employees with no policy or decision-making authority from responding to members of the public without noticing up a hearing.

III. Prayer for Relief.

For the reasons above, the County respectfully asks the Court to affirm the decisions of the Board of County Commissioners and of the district court in every respect.

Statement of Compliance

This Response complies with NMRA 2020 Rule 12-502(D) and (E). It was written with 14-point Times New Roman font. There are 10 pages total in the body of the Response; there are 2,504 total words as indicated by Microsoft Word.

BOARD OF COUNTY COMMISSIONERS
OF BERNALILLO COUNTY
W. Kenneth Martinez
County Attorney

/s/ Michael I. Garica

Michael I. Garcia
Assistant County Attorney, Adv.
520 Lomas Blvd. NW, 4th Floor
Albuquerque, NM 87102-2118
(505) 314-0180
mikgarcia@bernco.gov

CERTIFICATION
I hereby certify that the foregoing
Pleading was provided via USPS First Class Mail
and Served via Odyssey File & Serve, to all counsel
of record on this date of November 24, 2020

/s/ Michael I. Garica

Michael I. Garcia