

  
Joey D. Moya

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

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

**S-1-SC-38497**

No. \_\_\_\_\_  
Court of Appeals  
No. A-1-CA-38823  
Second Judicial District Court  
No: D-202-CV-2019-03654

v.

BERNALILLO COUNTY BOARD OF  
COUNTY COMMISSIONERS,  
Appellee-Respondent,

and

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

**PETITION FOR WRIT OF CERTIORARI TO  
THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO**

Submitted By:

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Pursuant to 12-502 NMRA, Appellants-Petitioners (“Petitioners”) submit this Petition for Writ of Certiorari for review of the Bernalillo County District Court’s rulings in this case dismissing Petitioners’ Rule 1-074 NMRA appeal of the approval by the Bernalillo County Commission (“BCC”) of a Special Use Permit (“SUP”) for Planned Development Area (“PDA”) at 1300 Gonzales Road, SW, in Albuquerque, New Mexico. A copy of the Order Denying Writ of Certiorari by the Court of Appeals entered August 31, 2020 is attached as Exhibit 1. The Memorandum Opinion and Order of the District Court entered November 18, 2019 (“Opinion”) is attached as Exhibit 2. The Order of the District Court denying Petitioners’ Motion for Rehearing entered March 2, 2020 (“Order”) is attached as Exhibit 3. A copy of the BCC decision at issue is attached as Exhibit 4.

### QUESTIONS PRESENTED

1. Do the criteria under County Zoning Ordinance (“CZO”) Section 18(B)(23) for a PDA apply for a decision to grant a SUP for a PDA?
2. May the District Court consider new evidence which the BCC refused to consider and was not in the BCC record, for its decision to approve the BCC decision?
3. Did the District Court err in not allowing Petitioners to present arguments concerning the supplemental evidence accepted into the record by the District Court?

4. Did the District Court err in concluding that the BCC did not violate due process by refusing to consider arguments and evidence that BCC Planning Department Staff (“Staff”) “rigged” the decision process, and then concluding that the process was not “rigged”?

5. Did the District Court err in concluding that arguments and evidence of violations of the Open Meetings Act (“OMA”) in the zoning administrative process, raised by Petitioners in their appeal to the BCC, are not relevant or material?

## II

### FACTS MATERIAL TO THE QUESTIONS PRESENTED

This case is an administrative appeal under SCRA 1-074 of a decision made on April 9, 2019 by the BCC to deny Petitioners’ 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 applicants proposed a development of 27 dwelling units within 5 buildings, with amenities, on the site.

Under CZO Section 5 (Definitions), “apartment” is “one or more structures containing two or more dwelling units each”. CZO Section 10 establishes the “R-2 Apartment Zone” for apartments.

The applicable provisions for a SUP begin with CZO Section 18(A):

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 Section 18(B)(32)(a) provides for a “Specific use” SUP applicable to uses, such as apartments, permitted in other sections:

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 CZO has a separate SUP provision for a PDA, Section 18(B)(23), which provides as follows (the “PDA Criteria”):

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.

CZO Section 5 (Definitions) defines “Cluster Housing Development” as:

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.

Beginning apparently in June, 2018, RGH had a series of communications and meetings with Staff about plans for a “co-housing” project. On November 26, 2018, RGH applied for a SUP for a PDA for the “co-housing” project of 5 buildings with 27 dwelling units and amenities. The application did not address the PDA Criteria (“need to vary height, lot area, or setback requirements due to unusual topography, lot configuration, or site features”). However the staff report recited that the PDA Criteria were satisfied. The County Planning Commission (“CPC”) held a hearing on the application on February 6, 2019 at which Staff recommended approval of the “co-housing” project and Petitioners objected on various grounds. The CPC Chair identified the project as “apartments”. The CPC approved the application, with its Notification of Decision dated February 7, 2019. Petitioners filed their appeal of the CPC decision to the BCC on February 22, 2019. Petitioners’ appeal issues included that the PDA Criteria were not satisfied. On March 6, 2019, Petitioners submitted a letter alleging OMA violations (“OMA Letter”). BCC counsel responded to the OMA Letter. Staff did not enter the OMA Letter into the case record. On March 22, 2019 Petitioners submitted two other letters to the BCC for their appeal. One letter, which was admitted into the BCC

record, supplemented Petitioners' appeal and set out arguments against the CPC decision. Issues included that the PDA Criteria were not satisfied, and meetings between Staff and RGH violated the OMA, among other issues. The other letter, not accepted into the record, was a letter ("Evidence Letter") with records produced by the BCC in response to requests under the Inspection of Public Records Act relating to communications and meetings between RGH and Staff ("Planning Records") (146 pages). The Evidence Letter requested cross-examination of witnesses.

The BCC held a hearing on the appeal on April 9, 2019. At the BCC hearing, Staff advised that "co-housing is not a defined use in the County Zoning Code, nor is it something specifically the County could enforce". Petitioner Justin Knox requested the admission of the "new evidence submitted on March 22, 2019". RGH requested consideration of "new evidence" (a video not shown to the CPC), which request was granted by the BCC Chair. Staff did not object to accepting Petitioners' "new evidence submitted on March 22, 2019" into the Record. The BCC Chair and Staff said the following concerning Petitioners' Evidence Letter and the Planning Records:

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.

The BCC Chair and the BCC’s attorney said the following, concluding in the BCC Chair denying consideration of Petitioners’ “new evidence”:

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.

RGH argued that “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”. The BCC did not allow cross-examination of witnesses.

The BCC decision, issued April 11, 2019, essentially copied the CPC decision. Petitioners filed their appeal to District Court on May 6, 2019. On June 17, 2019, Petitioners filed a Motion to Supplement the Record, requesting that the

OMA Letter, the Evidence Letter and the Planning Records be included in the record. On June 26, 2019, Petitioners filed their Statement of Appellate Issues (“SAI”), and the BCC and RGH later filed their Responses. On November 18, 2019, the District Court entered its decision, which granted Petitioners’ Motion to Supplement the Record and denied Petitioners’ appeal. Petitioners filed a Motion for Rehearing on November 22, 2019. The District Court denied the Motion for Rehearing by Order entered March 2, 2020. As directed by the District Court in its Order entered March 2, 2020, Petitioners filed their supplemental records of 171 pages on March 6, 2020.

Petitioners submitted a Petition for Writ of Certiorari to the Court of Appeals on March 13, 2020, which was denied on August 31, 2020.

### BASIS FOR GRANTING THE WRIT

Issue 1. The District Court concluded that the PDA Criteria did not apply: a PDA “may include a project that requires variances in height, lot area, or setback requirements, but not necessarily”, based on the word “including”, Opinion 11; “That a cluster housing model can be achieved in this case without the need to vary height, lot area or setback requirements supports the conclusion that Board’s decision to grant the special use permit was reasonable”; and the “proposed development, though it may not satisfy the enumerated criteria of section 18(B)(23), is strongly consistent with the intent as garnered from the criteria”,

Opinion 13. The District Court's disregarding the PDA Criteria conflicts with Burroughs v. Board of County Comm'rs of Bernalillo County, 1975-NMSC-051, ¶24, 88 N.M. 303:

It is our opinion that the granting of a special use permit to Empire Realty by the Commissioners, authorizing the construction and maintenance of an overnight campground in an A-2 rural agricultural zone was an improper exercise of power, since such a use is not permitted under s 16 of the Ordinance. The Commissioners had no authority under the specific provisions of the Ordinance to issue this special use permit.

and High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶¶ 4, 5, 126 N.M. 413, which provides three relevant rules of statutory construction (citations omitted):

The first rule is that the "plain language of a statute is the primary indicator of legislative intent." ...Courts are to "give the words used in the statute their ordinary meaning unless the legislature indicates a different intent." The court "will not read into a statute or ordinance language which is not there, particularly if it makes sense as written." ...The second rule is to "give persuasive weight to long-standing administrative constructions of statutes by the agency charged with administering them." .... The third rule dictates that where several sections of a statute are involved, they must be read together so that all parts are given effect. This includes amendments..."

and Baker v. Hedstrom, 2013-NMSC-043, ¶24: "each word is to be given meaning" in construction of a statute; and West Old Town Neighborhood Ass'n v. City of Albuquerque, 1996-NMCA-107, ¶26, 122 N.M. 495: "The City may not ignore or revise its stated policies and procedures for a single decision, no matter how well-intentioned the goal may be."

Issue 2: The District Court considered arguments and evidence that the BCC refused to consider and were not in the BCC record (Opinion 5-6, Order 2-3), which is in conflict with Montano v. NM Real Estate Appraiser's Bd., 2009-NMCA-009, ¶ 17, 145 N.M. 494 (citations omitted):

This Court has long held that district courts engaged in administrative appeals are limited to the record created at the agency level ... absent a specific statutory provision, the court is confined to the record made in the course of the administrative proceeding. If the record proves inadequate for some reason, remand is the appropriate avenue. ...It is not appropriate for the district court itself to consider new evidence.

Issue 3: The District Court permitted the record to be supplemented only with its Opinion (Opinion 3), and directed filing of the supplemental records only with its Order (Order 6). Under these circumstances, Petitioners were not able to present arguments based on the supplemental evidence with their SAI, which conflicts with Rex, Inc. v. Manufactured Housing Committee for the State of New Mexico, 2003-NMCA-134, ¶ 15, 134 N.M. 533: “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner”; In re Doe, 1974-NMCA-008, ¶7, 86 N.M. 37: “Failure to hear one party’s evidence, when offered, establishes a presumption of prejudice”; and Matter of Termination of Boespflug, 1992-NMCA-138, ¶ 17, 114 N.M.: “We hold it was reversible error for the hearing officer to deny admission of noncumulative, nonhearsay evidence that was relevant to petitioner’s defenses.”

Issue 4: The District Court concluded due process was not violated by the BCC's refusal to hear arguments and evidence about staff "rigging" the process, and rejected that Staff "rigged" the process (Opinion 6-9; Order 2-4), which conflicts with VanderVossen v. City of Espanola, 2001-NMCA-016, ¶¶26, 130 N.M. 287:

Unfortunately ... the City Council declined to resolve the issue....We emphasize that this Court, as well as the district court exercising appellate jurisdiction under Section 39-3-1.1, is not a fact-determining body... When a decision turns on "factual questions that the governing body failed to resolve, the reviewing court must remand for further proceedings."

and Atlixco Coalition v. Maggiore, 1998-NMCA-134, ¶19, 125 N.M. 786, that "a reviewing court is prohibited from supplying a reasoned basis for the agency's action that the agency itself has not given".

The District Court ruling that failure to allow cross-examination was not a violation of due process (Opinion 8) conflicts with State ex rel. Battershell v. City of Albuquerque, 1989-NMCA-045, ¶ 18, 108 N.M. 658: "It was error for the EPC to refuse to permit petitioners reasonable cross-examination of witnesses opposing their application."

Issue 5: The District Court ruled that Petitioners' arguments and evidence of OMA violations by the Planning Department in the BCC decision process have "no bearing on the outcome of this appeal" (Opinion 6) and are not material or relevant (Order 3), which conflicts with:

A. New Mexico State Investment Council v. Weinstein, 2016-NMCA-069, ¶75:

We agree with a 1990 Advisory Opinion by the then-Attorney General that “it is the nature of the act performed by the committee, not its makeup or proximity to the final decision, which determines whether an advisory committee is subject to open meetings statutes.” N.M. Att’y Gen. Op. 90–27 (1990). The current Attorney General’s Open Meetings Act *Compliance Guide* echoes this thinking, stating, even a non-statutory committee appointed by a public body may constitute a “policy[-]making body” subject to the [OMA] 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 [OMA] by delegating its responsibilities for making decisions and taking final action to a committee.

B. Kleinberg v. Board of Education of Albuquerque Public Schools, 1988-NMCA-014, ¶ 1, 107 N.M. 38:

This is an appeal from the New Mexico State Board of Education’s (state board) decision to affirm the Board of Education of the Albuquerque Public Schools’ (local board) confirmation of a teacher’s discharge. While several issues are raised by the teacher, the principal issue is whether the local board complied with provisions of the New Mexico Open Meetings Act...

### ARGUMENT

The issues set out above were raised by Petitioners’ Petition for Writ of Certiorari to the Court of Appeals (Issues 1 and 2 are slightly restated).

The Petition presents significant issues of substantial public interest which should be determined by the Supreme Court concerning judicial review of zoning



decisions, construction of zoning ordinances, stability of zoning, due process in administrative zoning proceedings, the scope of BCC authority for PDAs and SUPs, and the OMA. From Petitioners' perspective, the matter was misguided from the outset: the initial decision-maker, the Planning Department, met with the applicant in closed meetings and advanced a proposed PDA for the apartment project even though the application did not address the PDA Criteria. The CPC approved the application and recited the PDA Criteria formalistically, but did not address the PDA Criteria factually. The BCC did not discuss the PDA Criteria, refused to consider evidence and arguments submitted by Appellants, and simply copied the CPC decision. The District Court rewrote the BCC decision, addressing issues which the BCC refused to address and considering evidence which the BCC refused to consider. The District Court approved the BCC decision on a new basis (not that the PDA Criteria were satisfied, but that satisfaction of the PDA Criteria was not necessary, based on the word "including"), effectively erasing the PDA Criteria. Petitioners are left asking why have the PDA Criteria in the CZO, and decision-making and appeal bodies, if the specific PDA Criteria can be disregarded such that apartments can become a PDA, for easier approval in an A-1 zone.

By comparison, in Burroughs, supra, the Supreme Court analyzed and applied the then PDA language within the context of the zoning ordinance.

### PRAYER FOR RELIEF

Appellants pray that the Supreme Court reverse the District Court's decision, and/or if appropriate remand to the District Court or the BCC for consideration of issues not raised in this Petition if the relief requested is granted.

### STATEMENT OF COMPLIANCE

This Petition complies with Subparagraphs D (3) and E (3) of NMRA Rule 12-502, and was prepared using Times New Roman. The number of words in the Petition is 3,118 obtained from Microsoft Word 2007.

Respectfully submitted,

YNTEMA LAW FIRM P.A.

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Counsel for Appellants-Petitioners

## CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition for Writ of Certiorari was mailed, and sent by electronic mail, to:

Michael I. Garcia, Bernalillo County Attorney's Office, Fourth Floor, 520 Lomas Blvd. NW, Albuquerque, New Mexico 87102-2118, mikgarcia@bernco.gov; and

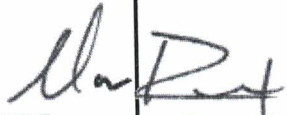
Eric Loman and Megan D. Stanford, Jackson Loman Stanford & Downey, P.C., 201 Third St. NW, Suite 1500, Albuquerque, NM 87102, eric@jacksonlomanlaw.com;

on September 28, 2020, and was electronically filed through the electronic filing system for the Supreme Court, as more fully reflected on the Notice of Electronic Filing.

(Electronically filed)

/s/ Hessel E. Yntema III

Hessel E. Yntema III

  
Mark Reynolds

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MATTHEW CONE, ALBERT SANCHEZ,  
JUSTIN KNOX, and GLORIA BACA,

Appellants-Petitioners,

v.

No. A-1-CA-38823  
Bernalillo County  
D-202-CV-2019-03654

BERNALILLO COUNTY BOARD OF  
COUNTY COMMISSIONERS,

Appellee-Respondent,

and

VALENTIN P. SAIS, RON A. PEREA,  
and RIO GRANDE HUERTA, LLC,

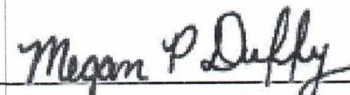
Interested Parties.

ORDER DENYING WRIT OF CERTIORARI

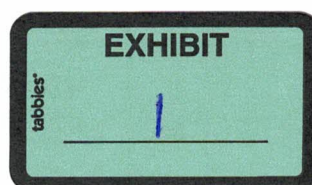
This Court has considered Petitioners' petition for writ of certiorari.

**THE COURT ORDERS** that the petition is **DENIED**.

  
J. MILES HANISEE, Chief Judge

  
MEGAN P. DUFFY, Judge

  
BRIANA H. ZAMORA, Judge





**STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT**

**FILED  
2nd JUDICIAL DISTRICT COURT  
Bernalillo County  
11/18/2019 1:05 PM  
James A. Noel  
CLERK OF THE COURT  
Patsy Baca**

**MATTHEW CONE, ALBERT SANCHEZ,  
JUSTIN KNOX, and GLORIA BACA,  
Appellants,**

**v.**

**D-202-CV-2019-03654**

**BOARD OF COUNTY COMMISSIONERS  
OF BERNALILLO COUNTY,  
Appellee,**

**and**

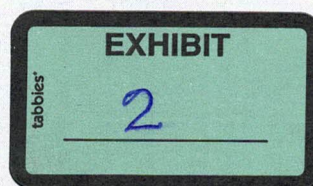
**VALENTIN P. SAIS, RON A. PEREA, and  
RIO GRANDE HUERTA, LLC,  
Interested Parties.**

**MEMORANDUM OPINION AND ORDER**

**THIS MATTER** is an appeal under Rule 1-074 NMRA of a decision by the Board of County Commissioners of Bernalillo County (Board) upholding the County Planning Commission's (CPC's) decision to approve a special use permit. The Court **AFFIRMS** the Board's decision. Appellants' Motion to Supplement the Record is **GRANTED**.

**I. FACTS AND BACKGROUND**

Valentin P. Sais and Ron A. Perea (Applicants) applied for a special use permit for property located at 1300 Gonzales Road SW in Albuquerque, New Mexico. The property is approximately 3.83 acres in size, currently vacant, and zoned A-1 (rural agricultural). Applicants, who are the owners of the property, intend to sell it for development by Rio Grande Huerta, LLC. The proposed development is a multi-family residential dwelling development described in the application as collaborative housing or "co-housing." The development will consist of twenty-seven dwelling units inside five buildings, a pool and recreation area, agricultural uses including community gardens, orchards and greenhouses, parking areas for vehicle and bicycles, a garage, workshop, storage buildings, and a sign.





The CPC held a hearing on the application on February 6, 2019, and voted to approve the special use permit. The special use permit contains fourteen conditions, including that development comply with the approved site plan. [RP 000002–06.] Appellants appealed the CPC’s decision to the Board. [RP 000706–30.]<sup>1</sup>

The Board held a public meeting on the appeals on April 9, 2019. At the meeting, the Board heard from County planning staff, from Appellants, from citizens opposed to the special use permit, and from citizens in favor of the special use permit. All three appeals were denied by votes of four to one. [RP 1674–78.] The special use permit was approved by written decision issued April 11, 2019. [RP 000743–47.] Appellants timely appealed to district court.

## **II. STANDARD OF REVIEW**

Rule 1-074(R) NMRA states 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 review, 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.

Rule 1-074(R) NMRA. The reviewing court is obligated to review the entire record to determine whether the zoning authority’s decision is supported by substantial evidence. *Paule v. Santa Fe County Bd. of County Comm’rs*, 2005-NMSC-021, ¶ 32, 138 N.M. 82. The Court views the evidence in the light most favorable to the decision. *Id.* “Substantial evidence means relevant evidence that a reasonable mind would accept as adequate to support a conclusion.” *Id.* (citation and quotation marks omitted). “The district court does not determine if the opposite result is

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<sup>1</sup> Appellants actually submitted three seemingly identical appeals to the Board.



supported by substantial evidence because it may not substitute its judgment for that of the administrative body.” *Hart v. City of Albuquerque*, 1999-NMCA-043, ¶ 9, 126 N.M. 753 (citation omitted).

### **III. DISCUSSION**

#### **A. Appellants’ Motion to Supplement the Record**

Appellants request leave to supplement the record on appeal to include papers presented to the Board at the April 9, 2019 hearing. The Rules of Civil Procedure provide as follows for modification of the record on appeal:

Correction or modification of the record. If anything material to either party is omitted from the record on appeal by error or accident, the parties by stipulation, or the agency on request, or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court; provided, however, only those materials described in Paragraph H of this rule shall be made part of the record on appeal.

Rule 1-074(I) NMRA. The “record on appeal” is defined as: “a copy of all papers, pleadings, and exhibits filed in the proceedings of the agency, entered into or made a part of the proceedings of the agency, or actually presented to the agency in conjunction with the hearing[.]”

Rule 1-074(H)(2) NMRA.

Rio Grande Huerta, LLC and the County oppose supplementation. Rio Grande Huerta, LLC argues the Board properly excluded the documents. The County argues the supplementation request is a collateral attack on the Board’s decision.

Because there is no dispute that the documents were actually presented to the Board, the motion to supplement is granted. The Court will permit the record to be supplemented to the extent of the six items listed in the motion to supplement.

#### **B. Appellants’ arguments**

##### **1. Challenge to the adequacy of the Board’s written decision**



In Issue No. 1, Appellants argue the Board “erred in not issuing an appropriate written decision under NMSA 1978, § 39-3-1.1.” [SAI at 10–12.] Appellants claim the Board’s written decision is faulty because it repeats the findings and conditions of the CPC decision, fails to provide notice of appeal requirements, and does not address Appellants’ issues.<sup>2</sup>

Section 39-3-1.1 “shall apply only to judicial review of agency final decisions that are placed under the authority of this section by specific statutory reference.” NMSA 1978, § 39-3-1.1(A) (1999). Appellants have not identified a specific statutory reference that places the Board’s decision under the authority of section 39-3-1.1. Without such authority, the Court will not assume section 39-3-1.1 applies.

Furthermore, the Board’s written decision is not faulty merely because it repeats the findings and conditions of the CPC. Appellants exercised their right under the Bernalillo County Zoning Ordinance to appeal the CPC’s decision to the Board. Bernalillo County, N.M., Code of Ordinances App’x A (Zoning Ordinance), § 18(G) (denial or approval of a special use permit by the CPC may be appealed to the Board). The question before the Board was whether to approve the CPC’s decision, including the conditions imposed on the special use permit. Incorporating the CPC’s findings and conditions was consistent with the Board’s denial of the appeals.

The Board’s written decision is not faulty merely because it does not address Appellants’ arguments. The purpose of the written decision is to facilitate meaningful judicial review of the action. *Albuquerque Commons P’ship v. City Council of Albuquerque*, 2008-NMSC-025, ¶ 35, 144 N.M. 99. The Board’s written decision in this case satisfies this requirement. The decision indicates the Board considered the specifics of the request, the proposed use, the justification for the special use permit, and the reasons for granting the permit. The decision also includes

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<sup>2</sup> The Court addresses separately Appellants’ argument under this heading that certain of the Board’s findings are not supported by substantial evidence.



fourteen conditions that relate specifically to the proposed use. The written decision is sufficiently complete to permit meaningful appellate review.

Appellants timely exercised their right to obtain judicial review of the Board's decision. The Court therefore declines to reverse on the grounds that the decision omits to discuss appeal rights.

**2. Failure to admit "new evidence" and to consider alleged Open Meetings Act violations**

In Issues 2 and 8, Appellants argue the Board erred by failing to accept and consider a packet of documents offered at the April 9, 2019 public hearing. The documents Appellants attempted to offer at the public hearing are the same documents that are the subject of Appellants' motion to supplement the record on appeal. The documents relate to Appellants' contention that the County's Zoning Administrator violated the Open Meetings Act (OMA) by holding closed meetings with County staff and with Applicants' agents. The record indicates the Board declined to admit these documents into the record. [RP 001627–29.] The Board made no findings or determinations regarding the alleged OMA violations.

Appellants argue the Board acted arbitrarily and capriciously by refusing to accept the "new evidence." Appellants ask the Court to remand this matter so the Board may consider the documents and the OMA violations allegedly committed by the Zoning Administrator. [SAI at 12–14.]

The Court declines to remand. The Board does not have authority to adjudicate violations of the OMA. NMSA 1978, § 10-15-3(C) (1997) (conferring jurisdiction on the district courts to enforce the Open Meetings Act). Accordingly, it was not arbitrary or capricious for the Board to decline to admit evidence regarding alleged OMA violations or to determine if OMA violations occurred.



Appellants alternatively request leave to amend to “add an OMA claim to this appeal, so that Appellants’ OMA claim with Appellants’ OMA evidence will be heard by the District Court if not by the [Board].” [SAI at 23.] The request is denied.

The OMA applies to “[a]ll meetings of a quorum of members of any board, commission, administrative adjudicatory body or other policymaking body of any state agency or any agency or authority of any county...held for the purpose of formulating public policy, including the development of personnel policy, rules, regulations or ordinances, discussing public business or taking any action within the authority of or the delegated authority of any board, commission or other policymaking body[.]” NMSA 1978, § 10-15-1(B) (2013). Appellants’ position is that the Zoning Administrator, who undisputedly is an individual, is a policymaking body for purposes of the OMA and therefore must comply with its requirements.

The Court expresses no opinion on the merits of this argument but concludes upon review of the record that discussions which may have occurred between the Zoning Administrator and other County staff or with Applicants have no bearing on the outcome of this appeal. No purpose would be served by expanding the scope of this administrative appeal to include claims directed to the Court’s original jurisdiction. The decision under review is the Board’s decision of April 11, 2019. As discussed throughout this opinion, that decision is supported by the record and was in compliance with the applicable law.

### **3. Due process in the application process and at the public hearings**

In Issue 3, Appellants claim the decision-making process and the April 9, 2019 public hearing were biased and unfair because the Commissioners relied on staff for the particulars of the application. Appellants assert County staff advocated in favor of Applicants and that it was inappropriate for County staff to express support for the special use permit. Appellants argue the



record “suggests substantial review and negotiation between [County] Staff and the applicants’ representatives to design the applicants’ project to obtain support by [County] Staff and approval by the CPC and the [Board.]” [SAI at 14.] Appellants claim the April 9, 2019 hearing did not comport with due process because it did not include cross-examination. They claim the Board was biased because, with the exception of one Commissioner, the Board agreed with the staff’s recommendation.

Appellants are correct that they are entitled to due process. *See Albuquerque Commons P’ship*, 2008-NMSC-025, ¶ 34. For zoning matters that are quasi-judicial in nature procedures “are not required to comport with the same evidentiary and procedural standards applicable to a court of law.” *Id.* (citation omitted). “The issue is one of procedural fairness and predictability that is adaptable to local conditions and capabilities.” *Id.*

The Court has reviewed the entire record, consisting in excess of 3,000 pages, and finds no indication of bias or unfairness in the proceedings. The County apparently employs staff to investigate applications and to determine if the applications meet the criteria in the County’s Zoning Ordinance and other applicable documents. The Court finds nothing improper about staff communicating with applicants regarding the permitting process. The Zoning Ordinance encourages applicants to consult with staff. Zoning Ordinance, § 18(C)(1). The application process is highly regulated, complex, and consists of multiple steps and numerous requirements. *Id.* § 18(C). The application process is facilitated if applicants are educated and informed about the requirements. Appellants and others opposed to the special use permit also communicated with staff. The record indicates staff accepted public comments, including numerous comments from opponents of the special use permit, and compiled them for the CPC’s and the Board’s review. [RP 000031–32, 000322–93.]



The Court finds no due process violation in the manner in which the two public hearings were conducted. The CPC is the decision-making body for special use permit applications. Zoning Ordinance, § 18(F). The CPC's hearings are public and subject to notice and record-keeping requirements. Zoning Ordinance, § 18(E), (F). If the CPC's decision regarding a special use permit is appealed, as it was in this case, the Board is the final decision-making authority. Zoning Ordinance, § 18(G). The Board's proceedings are public, subject to the OMA and to notice and voting requirements. NMSA 1978, § 10-15-1 (2013); Zoning Ordinance, § 18(G)(4)–(9).

The County staff involved in investigating the special use permit applied for in this case appeared before the CPC at the public hearing on February 6, 2019, and before the Board at the public hearing on April 9, 2019, to explain their reasons for recommending the permit be granted and to answer questions. Appellants object to County staff expressing their recommendations at the hearings. However, the purpose of a public hearing is to allow the recommendations and decision-making rationale to be heard by the public and by the decision-making body. Given that staff recommended granting the permit, they acted consistently with their role by recommending the Board deny the appeals.

Appellants and others opposed to the permit were heard at the same public meetings attended by staff. [RP 001447–1521; RP 001605–43.] Cross-examination of witnesses was not part of the public meeting process. However, Appellants were given a fair opportunity to present opposition to the special use permit. Appellants and other opponents argued to the CPC and to the Board that the proposed development is too dense, that Applicants were proceeding under an inapplicable provision of the Zoning Ordinance, that there is no justification for the special use permit, that it would interfere with access to the bosque, that traffic would be an annoyance, that



it would result in loss of farmland and open space, that it would increase crime, and that it is inconsistent with environmental values and the agricultural heritage of the South Valley.

In short, Appellants were not deprived of due process. The record indicates the application and approval processes were transparent and public. Appellants as well as others opposed to the special use permit were involved throughout and given an opportunity to be heard at every stage of the permitting process.

**4. Failure to treat the application as a zone change request or a “specific use” special use permit**

In Issue 4, Appellants argue the Board and staff erred by not treating the application as one for apartment use. The Zoning Ordinance defines “apartment” as: “One or more structures containing two or more dwelling units each.” Zoning Ordinance § 5 (Definitions). Apartments are not a permissive or a conditional use in the A-1 zone but are allowed in the R-2 Apartment Zone. *Id.* § 10. Appellants’ argument under this heading is that Applicants should have sought a zone change rather than a special use permit. They also argue the project should have been considered a “specific use” special use permit under section 18(B)(32), rather than a “Planned Development Area” special use permit under section 18(B)(23).

Applicants sought a special use permit for a Planned Development Area. A special use permit is an authorized means by which an applicant may seek permission to build a project in a location where it otherwise would not be permitted. Zoning Ordinance § 18(A) (“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[.]”). The existence of an alternate means of seeking approval under the Zoning Ordinance, such as a zone change, is not grounds to reverse. The Court’s role on appeal is to review the administrative action actually taken, not to determine if an action or process not taken would have been more suitable.



Appellants further argue that the Zoning Ordinance does not define “co-housing” and the Board has no ability to enforce a co-housing use. The Court agrees co-housing is not a defined term but does not agree the Board lacks authority to enforce the proposed use. Applicants submitted a site development plan as part of their application. Compliance with the approved site development plan is a condition of the special use permit. The special use permit is valid only as long as the property is used in accordance with the site development plan. [RP 000744 (Conditions 1–3, 9.)] While the Board may not be able to enforce any particular ownership structure associated with a co-housing project, through the special use permit it is authorized to control and enforce the use and development of the property.

**5. Substantial evidence to support Finding 6, in accordance with Section 18(B)(23)**

In Issues 5 and 6, Appellants challenge the finding that the proposed development meets the requirements of a “Planned Development Area” under section 18(B)(23). Appellants argue that section 18(B)(23) requires applicants to satisfy the following three criteria: first, the applicant must demonstrate the need to vary height, lot area, or setback requirements; second, that the need must be due to unusual topography, lot configuration, or site features; and third, that the first and second criteria must be necessary 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. Appellants argue that the first and second criteria were not satisfied and therefore the special use permit was granted in error. [SAI at 18–19.]

The Zoning Ordinance lists thirty-two uses for which a special use permit may be granted. Zoning Ordinance § 18(B). Applicants sought a special use permit as a “Planned Development Area” under Section 18(B)(23) which states:



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.

Zoning Ordinance §18(B)(23).

Appellants' argument ignores the word immediately following "Planned Development Area"—the word "including." In matters of statutory construction, the word "including" conveys the conclusion that there are other terms includable though not specifically enumerated. *In re Estate of Corwin*, 1987-NMCA-100, ¶¶ 3-4, 106 N.M. 316 (the word "including" is a word of expansion, rather than of limitation). Thus, a "Planned Development Area" may include a project that requires variances in height, lot area, or setback requirements, but not necessarily.

Review of the other special use categories supports the Court's conclusion that a project may be properly categorized as a Planned Development Area even if it does not meet all three criteria. The word "including" is used in only one other instance. Zoning Ordinance § 18(B)(7) (defining criteria for "cemetery" special use permit). The remaining thirty special use permit categories do not contain the word "including." This suggests use of the word "including" in section 18(B)(23) is a deliberate drafting choice that should be given effect.

Appellants argue the Board inappropriately used the Planned Development Area category as a catch-all because the proposed use does not fall into any other category. Though "Planned Development Area" may have some flexibility of meaning, it is not without limitation. *See Burroughs v. Bd. of County Comm'rs of the County of Bernalillo*, 1975-NMSC-051, ¶ 15, 88 N.M. 303 (rejecting attempt to categorize an overnight campground as a "planned development area"). The Court's task on appeal is to determine whether "Planned Development Area" reasonably can be construed to include the proposed project.



“Planned Development Area” is not defined elsewhere in the Zoning Ordinance. The criteria in section 18(B)(23), though not exhaustive, provide guidance regarding the type of project that may be considered a Planned Development Area. Substantial evidence supports the finding that the project at issue here qualifies.

First, by the express terms of the Zoning Ordinance, a special use permit for a Planned Development Area is a means by which to facilitate development in accordance with an approved Master Plan. The record demonstrates that a special use permit is necessary to facilitate development of the subject property as envisioned by the Albuquerque-Bernalillo County Comprehensive Plan, adopted by the Board as Resolution No. 103-88 on August 23, 1988 (Comprehensive Plan), and by the Southwest Area Plan, adopted by the Board as Resolution No. 59-2001 on August 28, 2001.

Appellants do not dispute that the subject property is in an area the Comprehensive Plan designates an Established Urban Area, which proposes development up to a density of five dwelling units per acre. Appellants also do not dispute that the proposed development is within the boundaries of the Southwest Area Plan’s Residential Area 5. Residential Area 5 contains the highest proposed densities for the plan area and recommends densities up to nine dwelling units per net acre. [RP 000015.] Because the site is zoned A-1, which limits density to one dwelling unit per acre, a special use permit allowing for higher density development facilitates the goals of these approved plans.

Second, one purpose of varying height, lot area or setback requirements for a Planned Development Area is “to create cluster housing development.” Zoning Ordinance § 18(B)(23). Thus, a cluster housing project is consistent with a Planned Development Area special use permit.



The parties apparently do not agree on whether the proposed development in this case meets the Zoning Ordinance definition of “cluster housing development.”<sup>3</sup> The Court need not address the dispute because it is undisputed that the project embodies cluster housing principles, even if it does not satisfy the Zoning Ordinance definition. Dwelling units will be grouped together rather than dispersed throughout the site, thereby allowing more area to be reserved for open space, agricultural activities and preservation of views, similar to a pueblo or plaza development. [RP 000015.] That a cluster housing model can be achieved in this case without the need to vary height, lot area or setback requirements supports the conclusion that Board’s decision to grant the special use permit was reasonable.

Third, cluster housing facilitates the goals and policies of the Southwest Area Plan, which also is consistent with a Planned Development Area special use permit. The cluster housing model is a development approach the Southwest Area Plan favors because it promotes agricultural preservation in the South Valley. [RP 000015.]

Appellants express concern that any development which can be characterized as cluster housing could be permitted as a Planned Development Area. The Court makes no such blanket ruling. The Court’s determinations are based on and limited to the record in this case.

In short, the Court does not agree with Appellants’ argument that “Planned Development Area” was used as a catch-all category in this case. The proposed development, though it may not satisfy the enumerated criteria of section 18(B)(23), is strongly consistent with the intent as garnered from the criteria. The record in this case supports the conclusion that the Board did not

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<sup>3</sup> The Zoning Ordinance defines “cluster housing development” as: “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.” Zoning Ordinance § 5 (definitions).



act arbitrarily or capriciously by characterizing the proposed development as a Planned Development Area that facilitates the policies and goals of the Comprehensive Plan and the Southwest Area Plan.

**6. Substantial evidence to support Finding 7, in accordance with Resolution 116-86, section 1(E)**

A special use permit must be decided in accordance with Resolution 116-86. Zoning Ordinance App'x A, § 1 (reprinted in full at RP 000721-72.) In Issue 7, Appellants challenge the finding that Applicants demonstrated the existing zoning is inappropriate, as required by Resolution 116-86, section 1(E).

To obtain a special use permit, the "applicant must demonstrate that the existing zoning is inappropriate." Resolution § 1(E). Demonstrating that existing zoning is inappropriate may be shown in one of three ways: "(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." Resolution 116-86, § 1(E). The Board found Applicants demonstrated both (2) and (3). [RP 000744 (Finding 7).] Appellants argue substantial evidence does not support the finding.

Substantial evidence supports the finding that the existing A-1 zoning is inappropriate under Section 1(E)(3). A different use category is more advantageous because the existing A-1 zoning is not effective for meeting the planning goals articulated in the Comprehensive Plan and the Southwest Area Plan. The proposed use is for higher density development using a cluster housing model, both of which are goals set forth in these two plans. Because substantial evidence supports one of the justifications under section 1(E), the Court need not consider if applicants demonstrated changed circumstances.



Appellants argue the County failed to make a finding that there was a public need for the special use permit. Appellants also acknowledge, however, that the “public need” requirement has been held not to apply to special use permits. *See Ricci v. Bernalillo County Bd. of Comm’rs*, 2011-NMCA-114, ¶¶ 16–17, 150 N.M. 777 (“public need” is a judicially-adopted enhanced approval criteria that applies to zone changes under Resolution 116-86).

Appellants argue the special use permit constitutes a “spot zone.” under Section 1(I) of Resolution 116-86. Section 1(I) places restrictions on “spot zones,” which are defined as zone change requests that “would give a zone different from surrounding zoning to one small area, especially when only one premises is involved[.]” Res. 116-86, § 1(I). Section 1(I) does not apply. Applicants sought a special use permit, not a zone change.

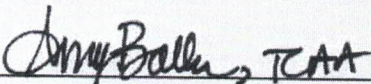
#### IV. CONCLUSION

The Board’s decision to grant the special use permit is supported by substantial evidence, was in accordance with law, and was not arbitrary or capricious. Appellants have failed to demonstrate grounds to reverse. Accordingly, the Board’s decision is **AFFIRMED**. Appellants’ motion to supplement the record is **GRANTED**. The record shall be supplemented within five (5) days from the date of this order.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
**DENISE BARELA SHEPHERD**  
**DISTRICT COURT JUDGE**

This is to certify that a true and correct copy of  
the foregoing document was e-filed on  
Nov. 18, 2019.

  
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D-202-CV-2019-03654



**STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT**

**FILED  
2nd JUDICIAL DISTRICT COURT  
Bernalillo County  
3/2/2020 8:48 AM  
James A. Noel  
CLERK OF THE COURT  
Marissa Marquez**

**MATTHEW CONE, ALBERT SANCHEZ,  
JUSTIN KNOX, and GLORIA BACA,  
Appellants,**

**v.**

**D-202-CV-2019-03654**

**BOARD OF COUNTY COMMISSIONERS  
OF BERNALILLO COUNTY,**

**Appellee,**

**and**

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

**ORDER**

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

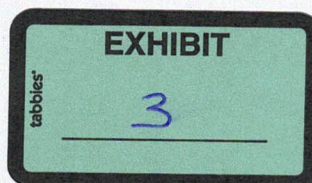
**DISCUSSION**

The Court issued a *Memorandum Opinion and Order* on November 18, 2019 affirming a decision by the Board of County Commissioners of Bernalillo County (Board) upholding the County Planning Commission's (CPC's) decision to approve a special use permit. Appellants move for rehearing pursuant to Rule 1-074(U) NMRA. Appellants assert seven grounds for rehearing.

\* \* \*

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

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





\* \* \*

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

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

\* \* \*

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

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



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

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

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

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

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



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

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

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

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



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

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

\* \* \*

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

### CONCLUSION

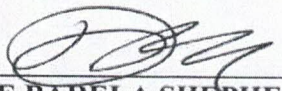
Appellants' Motion for Rehearing is **DENIED**. The Court declines to request responses under Rule 1-074(U) NMRA and has not considered Bernalillo County's response filed



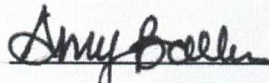
December 3, 2019. Rio Grande Huerta's Motion for Leave to File Response to Appellants' Motion for Rehearing (filed December 3, 2019) and Bernalillo County's Motion for Leave to File Response to Motion for Rehearing Nunc Pro Tunc (filed December 18, 2019) are **DENIED**.

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

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
**DENISE BARELA SHEPHERD**  
**DISTRICT COURT JUDGE**

This is to certify that a true and correct copy of  
the foregoing document was e-filed on  
March 2, 2020.

  
\_\_\_\_\_  
D-202-CV-2019-03654





**County of Bernalillo**  
**State of New Mexico**  
**Planning & Development Services Department**  
111 Union Square SE, Suite 100  
Albuquerque, New Mexico 87102  
Office: (505) 314-0350 Fax: (505) 314-0480  
www.bernco.gov

**NOTIFICATION OF DECISION**  
**BOARD OF COUNTY COMMISSIONERS**

April 11, 2019

Matthew Cone  
1413 Dennison Rd. SW  
Albuquerque, NM 87105

SUBJECT: FILE NO: COA2019-0001/CSU2019-0001

LEGAL DESCRIPTION: Hessel E. Yntema III, Yntema Law Firm P.A., agent for Matthew Cone, Albert Sanchez, Amanda Webb Knox, Justin Knox, Gloria Baca, and Carlos Baca, appeals the decision of the County Planning Commission to recommend approval of a Special Use Permit for a Planned Development Area (Residential and Agricultural Uses) on Tract 88A1A1 MRGCD Map 40, Tract 88A1A2 MRGCD Map 40, and Tract 87B1 MRGCD Map 40, located at 1300 Gonzales Rd. SW, zoned A-1 and containing approximately 3.83 acres. (K-13) (Original request submitted by Rio Grande Huerta LLC)

**ACTION: DENIED THE APPEAL, THEREBY UPHOLDING THE COUNTY PLANNING COMMISSION'S DECISION TO APPROVE A SPECIAL USE PERMIT FOR A PLANNED DEVELOPMENT AREA (RESIDENTIAL AND AGRICULTURAL USES)**

To Whom It May Concern:

At the April 9, 2019 public hearing, the Board of County Commissioners denied the appeal, thereby upholding the County Planning Commission's decision to approve a Special Use Permit for a Planned Development Area (Residential and Agricultural Uses) on Tract 88A1A1 MRGCD Map 40, Tract 88A1A2 MRGCD Map 40, and Tract 87B1 MRGCD Map 40, located at 1300 Gonzales Rd. SW, zoned A-1 and containing approximately 3.83 acres. The decision was based on the following Findings and is subject to the following Conditions.

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**COMMISSIONERS**

Maggie Hart Stebbins, Chair, District 3      Debbie O'Malley, Vice Chair, District 1  
Steven Michael Quezada, Member, District 2      Lonnie C. Talbert, Member, District 4      Charlene E. Pyskopy, Member, District 5

**ELECTED OFFICIALS**

Tanya R. Giddings, Assessor      Linda Stover, Clerk      Cristy J. Carbdn-Gaul, Probate Judge      Manuel Gonzales III, Sheriff      Nancy M. Bearce, Treasurer

**COUNTY MANAGER**

Julie Morgas Baca

**EXHIBIT**

4



## Findings:

1. This request is for a Special Use Permit for a Planned Development Area (Residential and Agricultural Uses) on Tract 88A1A1 MRGCD Map 40, Tract 88A1A2 MRGCD Map 40, and Tract 87B1 MRGCD Map 40, located at 1300 Gonzales Rd. SW, zoned A-1 and containing approximately 3.83 acres.
2. The site development plan illustrates the location of 27 dwelling units inside 5 buildings, a pool and recreation area, agricultural uses including gardens, orchards and greenhouses, parking for vehicles and bicycles, a garage, workshop, storage buildings and a monument sign.
3. The applicant indicates that the site will accommodate a "co-housing" type development with shared responsibilities amongst homeowners, although this use is not listed in the County Zoning Code.
4. The subject property is located within the Comprehensive Plan's Established Urban Area and within the Southwest Area Plan's Residential Area 5, thereby allowing up to 9 dwelling units per net acre.
5. The request furthers 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.
6. 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 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. The site plan includes areas dedicated to open space, agricultural and recreational uses.
7. 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.
8. Although not required, the applicant provided evidence of support in the form of a petition. There is both support and opposition to this request.
9. According to the Albuquerque Bernalillo County Water Utility Authority, the applicant requested a water and wastewater availability statement but it has not been completed as of the printing of this report.
10. The request is consistent with the health, safety and general welfare of the County.

## Conditions:

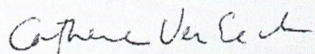
1. Development of the site shall comply with the approved site plan including the multi-family dwelling units, open space, storage, recreational areas, parking, landscaping, fencing and agricultural areas.
2. The Site Development Plan shall be revised, as follows:
  - a. Revise "Building Footprint" note and "General" note to read "height will conform to A-1 zone, Section 7.C", which allows heights up to 26' or 2 ½ stories.
  - b. The sign shall comply with sign regulations of the C-1 zone.



- c. A note shall indicate the type of paving approved by County Public Works.
3. The Landscape Plan shall be revised, as follows:
  - a. Clarify the concrete vs. porous paving areas (as on the site development plan).
  - b. Revise paving material as approved by PW.
  - c. Provide a legend detail for the pedestrian walkway material.
  - d. Identify the "Bosque Restoration Area" on the plan.
  - e. Identify the square footage of "Agriculture Areas".
  - f. Identify the square footage of "Play Field/Blue Gramma Field".
  - g. Identify location of the "Chicken Run".
4. The covered parking structure shall comply with Zoning Code Section 22.D.2.e. (fire resistive) since it is located less than 5' from the north property line.
5. Obtain permits required by Bernalillo County Building Ordinance Section 110.
6. Within 60 days of approval, the applicant shall submit to the Public Works Division construction plans (PWCO) for the driveway connection to Gonzalez Road SW and any other work within the County right-of-way.
7. Within 60 days of approval, the applicant shall submit to the Public Works Division a final Grading and Drainage Plan that includes all proposed site features.
8. Prior to issuance of a building permit, water and wastewater utilities shall be approved by ABCWUA.
9. This Special Use Permit shall be issued for the life of the use.
10. A replat is required to combine the three lots into one, prior to issuance of any building permits.
11. Three copies of a revised site development plan, consistent with the conditions of approval, shall be submitted for review and approval to the Zoning Administrator within 60-days of approval of this Special Use Permit.
12. The applicant shall comply with all applicable Bernalillo County ordinances and regulations.
13. The foregoing conditions shall become effective and shall be strictly complied with immediately upon execution or utilization of any portion of the rights and privileges authorized by this Special Use Permit.
14. The applicant shall add a Responsibility for Maintenance Statement to the Landscape Plan.

If you have any questions, please feel free to contact me directly at 314-0387.

Sincerely,



Catherine VerEecke  
Planning Manager



CV/fs

cc: File

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