IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

Appellants-Petitioners,

v.

No. S-1-SC-38497
NMCA No. A-1-CA-38823
D-202-CV-2019003654

BERNALILLO COUNTY BOARD OF COMMISSIONERS,

Appellee-Respondent,

and

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

Interested Parties

INTERESTED PARTY RIO GRANDE HUERTA, LLC'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

Respectfully Submitted By:

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Introduction and Background

Interested Party Rio Grande Huerta, LLC ("RGH") is made up of future residents of Co-Housing ABQ, which will be a residential development of housing units clustered around shared farms, gardens and other communal amenities. RGH acquired approximately 3.7 acres of vacant land in Albuquerque's south valley to create what will be a small and close-knit community. Although zoned for agricultural use, the land has not been farmed since at least the 1930s[1]. RGH applied for a "Special Use Permit ("SUP") for a Planned Development Area (Residential and Agricultural Uses)." After reviewing the application and holding a public hearing, in which many members of the public spoke in support of the project, the Bernalillo County Planning Commission ("CPC") approved the SUP with fourteen conditions. Petitioners, who own land in the vicinity and oppose the project, appealed that decision to the Bernalillo County Board of County Commissioners ("BCC" or "County"). Following a public hearing during which those in favor and opposed were allowed to speak, the BCC affirmed the CPC. The SUP was formally approved on April 11, 2019.

Pursuant to Rule 1-074 NMRA, Petitioners appealed the BCC's approval of the SUP to the Second Judicial District Court. On November 8, 2019, the District

[1] RGH adopts the more thorough recitation of facts contained in Respondent Bernalillo County Board of Commissioner's Response.

Court issued its Memorandum Opinion and Order affirming the BCC. See Memorandum Opinion and Order, attached as Exhibit A. The District Court very thoroughly addressed each of the Petitioners' arguments, rejecting them all under the standards set forth in Rule 74 and related case law.

Petitioners then looked to the Court of Appeals under Rule 12-505 NMRA, which denied their Petition for Writ of Certiorari on August 31, 2020. Petitioners now ask this Court to review this matter pursuant to Rule 12-502 NMRA.

The County has filed a response to the Petition. RGH concurs with and adopts the County's Response, but provides the following as well.

Response to Petitioners' Basis For Granting the Writ

The Court should deny the instant Petition because the District Court properly applied Rule 74 to the case presented. The County did not act arbitrarily, fraudulently, nor capriciously. Further, as the District Court explained, the County's decisions were supported by the evidence. Petitioners would have the courts undo the County's actions, ignoring perhaps the most well recognized and settled principle of administrative law: Courts must defer to the judgment of the administrative body and may only disturb an administrative decision when the stringent standards of Rule 74 are met. *See, e.g., Paule v. Santa Fe County Bd. of County Comm'rs,* 138 N.M. 82, 92, 2005-NMSC-021, ¶ 32, 117 P.3d 240, 250 (noting the "Court views the evidence in the light most favorable to the decision); *Siesta Hills Neighborhood*

Ass'n v. City of Albuquerque, 124 N.M. 670, 673, 1998-NMCA-028, ¶6, 954 P.2d 102, 105 (holding "[a]ppellate review of actions taken by a governing body, such as the City Council, is undertaken with deference and those decisions are disturbed only if the court is not satisfied that the action was authorized by law or if it is not supported by substantial evidence").

I. The County Properly Interpreted "Planned Development Area."

The Petitioners' primary argument has to do with the interpretation of the term "Planned Development Area" ("PDA") as it is used in the Comprehensive Zoning Ordinance of Bernalillo County ("Zoning Ordinance"). Petitioners cite *Burroughs v. Bd. of County Comm'rs,* 88 N.M. 303, 1975-NMSC-051, 540 P.2d 233, a case with no applicability here.

Petitioners claim the District Court "disregarded" *Burroughs*. To the contrary, the District Court cited *Burroughs* and explained its reasoning in light of that case. See Ex. A, p. 11. Indeed, *Burroughs* is no help to the Petitioners here.

In *Burroughs*, this Court held "Planned Development Area" should not be interpreted to include an "overnight campground" under the version of the ordinance

that was in effect in 1975. The version of the Zoning Ordinance at issue in this case does define PDA to includes cluster housing and preservation of open space.[2]

RGH's concept is cluster housing and very much for the preservation of agriculture and open space. Project manager and future co-housing resident Marlies Metodi testified the development will include twenty-seven dwelling units in five structures "clustered around shared space", which will be used for "agriculture, gardening, growing food, and sharing the harvest." She further testified the property was selected specifically for its agricultural opportunities. In affirming the County's approval of the SUP, the District Court noted RGH's plan "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." See Ex. A, p. 13.

The remainder of cases cited in the Petition are for general legal principles and cannot be said to be in conflict with the District Court's Opinion as required by Rule 12-502(C)(2)(d).

[2] See Comprehensive Zoning Ordinance of Bernalillo County §18(B)(23), providing "Planned Development Area, including residential uses…and the applicant demonstrates the need to vary … site features in order to create cluster housing development, preserve visual or physical access to open space…"

The County's determination that RGH would be permitted as a PDA is within the plain meaning of the Ordinance and surely within the confines of Rule 74 upon judicial review. The Petition should be denied.

II. The Process Was Not "Rigged", And The Court Did Nothing Improper With Respect To Supplemental Evidence.

Issues 2, 3 and 4 of the Petition would have the Court believe that some conspiracy occurred below, which is nonsense.

Issues 2 and 3 seem to be contrary to each other, as Petitioners first suggest the District Court improperly considered new evidence, then argue the District Court did not consider enough new evidence. Whatever argument is being made here is belied by the fact that it was the Petitioners who moved the District Court to supplement the record with materials they allege support their claim of some violation of the Open Meetings Act ("OMA"), and the District Court granted that Motion as described in its March 2, 2020 Order. See Order, attached as Exhibit B, p. 2-3. The Court further explained why those materials were not relevant to the administrative hearing because that was not the proper forum for these alleged OMA violations anyway. *Id.*

In any event, Petitioners' attempt to show the process was "rigged" and in violation of the OMA is nonsensical. In its Response to the Petition filed in the Court of Appeals, RGH deferred to the County with respect to the OMA, and will

respectfully do so here. However, as the County and the District Court have explained, there was no communication between County staff and RGH that was illegal, unusual, or not also afforded to the Petitioners. Further, the District Court correctly explained that even if some OMA violation existed, Petitioners were not seeking the correct legal remedy. Ex. B, p. 4-5. The Petition should be denied.

Conclusion and Prayer for Relief

The issues presented to the Court have been settled in RGH's favor at the administrative and District Court levels and the Court of Appeals declined review after being presented with Petitioner's arguments. Petitioners' wild accusations of some "rigging" of the process and violations of the OMA are baseless and should not be entertained by this Court. Further, and more importantly to the matter at hand, the Petition does not demonstrate any error in the District Court's finding that the County took no action that was arbitrary, capricious, fraudulent or unsupported by substantial evidence. Rule 74 requires this heightened standard to disturb the decision of an administrative agency, and there is simply no evidence to support such a finding here. The Petition should be denied.

Statement of Compliance

This Response complies with Rule 12-502(D) & (E). It was drafted in 14-point Times New Roman font. This Response is a total of eight pages and has a word count of 1,494, as calculated by Microsoft Word.

Respectfully submitted by:

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I certify the foregoing was served on all counsel of record on November 25, 2020.

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STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

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.][1]

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

[1] Appellants actually submitted three seemingly identical appeals to the Board.

Exhibit A

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.[2]

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

[2] 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 Panned 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."[3] 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

[3] 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 or "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.

D-202-CV-2019-03654

Exhibit A

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

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

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.

Exhibit B

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

Exhibit B

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

Exhibit B

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

Exhibit B

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.

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Exhibit B