

SECOND JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF BERNALILLO

Javier Benavidez, *et al.*,

Appellants/Petitioners,

v. No. D-202-CV-2015-04466
Consolidated with No. D-202-CV-2015-05363

the Bernalillo County Board of County
Commissioners, *et al.*,

and

Consensus Planning and Western
Albuquerque Land Holdings, LLC,

Appellees/Respondents.

THE APPELLANTS/PETITIONERS' MEMORANDUM
IN SUPPORT OF THEIR MOTION FOR CLARIFICATION OF THE
COURT'S MEMORANDUM OPINION AND ORDER

Introduction

The Appellants/Petitioners¹ have moved the Court for an order clarifying three effects of its May 31, 2017 Memorandum Opinion and Order (“Memorandum Opinion and Order”). First, the Appellants/Petitioners request that the Court clarify that its ruling reversing the zone map amendment for the proposed Santolina development (“the Zone Map Amendment”) means that the Bernalillo County Board of County Commissioners’ approval of the Zone Map Amendment is void. Second, the Appellants/ Petitioners request that the Court clarify that its ruling reversing the Zone Map Amendment also voids the Santolina Level A Community Master Plan (“the

¹ Javier Benavidez, James Santiago Maestas, Roberto Roibal, the SouthWest Organizing Project, including its individual and group members, and the Pajarito Village Association, including its individual and group members.

Santolina Level A Master Plan”) because the Zone Map Amendment is a necessary condition for approval of the Level A Master Plan. Third, the Appellants/Petitioners request that the Court clarify that its ruling reversing the Zone Map Amendment voids the Level A Development Agreement between Western Albuquerque Land Holdings, LLC (“the Santolina Developer”) and the Bernalillo County Board of County Commissioners (“the Board of County Commissioners” or “the Board”) (“the Development Agreement”) because the Zone Map Amendment and the Level A Master Plan are necessary conditions for the Development Agreement.

Argument

I. This Court reversed the approval of the Zone Map Amendment.

This Court reversed the Bernalillo County Board of County Commissioners’ (“the Board of County Commissioners” or “the Board”) decision approving the Zone Map Amendment. Memorandum Opinion and Order, pp. 2, 8-9, 9-14, 16-18, 20. The Zone Map Amendment was sought by the Santolina Developers, and it changed the zoning of the Santolina property from A-1 Rural Agricultural to Planned Communities. *Id.*, pp. 2, 5-6. This Court reversed the Board’s approval of the Zone Map Amendment on the grounds that the Board’s Zone Map Amendment proceedings were quasi-judicial and that the Board denied the Appellants/Petitioners procedural due process.² *Id.*, pp. 9-14, 16-18.

II. The Court’s ruling reversing the Zone Map Amendment means that the Board’s Zone Map Amendment decision is void.

The basis on which the Court reversed the Zone Map Amendment was that the Board of County Commissioners denied the Appellants/Petitioners procedural due process by not voting

² The Court addressed the Zone Map Amendment proceedings and the Appellants/Petitioners’ appeal from the County Planning Commission decision on the Zone Map Amendment.

on the Appellants/Petitioners' motion to disqualify Bernalillo County Commissioner Art De La Cruz from participating in the proceedings concerning the Zone Map Amendment.

Memorandum Opinion and Order, pp. 16-17. Moreover, the Appellants/Petitioners sought to disqualify Commissioner De La Cruz from the entire proceeding, not just from voting on the Zone Map Amendment. *See* Appellants/Petitioners' Request for Recusal and Alternative Motion for Disqualification of Bernalillo County Commissioner de la Cruz. ("Request and Alternative Motion") Record ("R"), 80971-80979. As the Court noted, the Board heard argument on the Request and Alternative Motion, but never voted on the Request and Alternative Motion.

The Appellants/Petitioners filed their Request and Alternative Motion the day before the Board began its hearings on Santolina (R., 80971-80979), and the Request and Alternative Motion was taken up as a preliminary matter at the beginning of the Board's first hearing on March 25, 2015. R., 87277-87296. After the Board failed to vote on the Request and Alternative Motion, Commissioner De La Cruz participated in all of the Board's proceedings concerning the Zone Map Amendment as well as all of the Board's proceedings addressing the Santolina Level A Master Plan, and the Development Agreement. *See* R. 87296-87422 (March 25, 2015 Board hearing transcript); R. 87296-87422 (March 26, 2015 Board hearing transcript); R. 87719-87888 (May 11, 2015 Board hearing transcript); R. 87889-88123 (May 28, 2015 Board hearing transcript); R. 88124-88360 (June 16, 2015 Board hearing transcript); and R. 88361-88526 (June 24, 2015 Board hearing transcript).

The Board denied the Appellants/Petitioners procedural due process at the start of the Board's proceedings, and continued those proceedings on the basis of that denial of procedural due process. For that reason, this case is analogous to the situation in Nesbit v. City of

Albuquerque, 1977-NMSC-107, 91 N.M. 455. In Nesbit, the developer of apartments failed to give the statutorily required notice to neighbors of the property in question. 1977-NMSC-107, ¶1. After the City Commission denied the proposal, the developer obtained review in the District Court, which reversed the Commission in 1973. The Commission then approved the developer’s proposal. *Id.* When construction began in 1976, the neighbors filed a motion to intervene in the litigation and a motion to set aside the 1973 judgment. The District Court granted both motions, and the developer appealed (*Id.*), arguing that even if the zoning agencies’ decisions were invalid, the 1973 District Court decision was correct because all of the parties entitled to notice of that proceeding were served. *Id.*, ¶10. The Supreme Court disagreed, stating:

The 1976 district court found as a matter of law that the failure to give the notice required by statute *rendered all subsequent acts void*. The 1973 judgment and the subsequent approval by the City Commission were also void. *By failing to follow statutory procedures, due process of law was violated and no subsequent act could correct the defect.*

Id., ¶11, emphasis added.

The Supreme Court’s reasoning in Nesbit applies in this matter. There, the neighbors were denied procedural due process at the start of the City’s proceedings, and the Supreme Court ruled that “no subsequent act could correct the defect.” 1977-NMSC-107, ¶11. Here, the Board denied the Appellants/Petitioners procedural due process at the start of the Board’s proceedings concerning the Zone Map Amendment and “no subsequent act by the Board [can] correct that defect.” For that reason, all of the Board’s proceedings concerning the Zone Map Amendment that occurred after the Board’s denial of procedural due process – *i.e.*, all of the Board’s proceedings on that issue – are void. Moreover, the Board cannot correct its error merely by taking a new vote on the Zone Map Amendment. If the Santolina Developers propose to seek a

new amendment of the zone map, they must file a new application requesting that relief, and that application must be considered first by the County Planning Commission.

III. The ruling reversing the Zone Map Amendment also voids the Board’s decision approving the Santolina Level A Master Plan.

A. Amendment of the zone map is a required condition for approval of the Santolina Level A Community Master Plan.

The Bernalillo County Zoning Ordinance (“the Zoning Ordinance”) indicates that an area should be mapped for a planned community before or at the same time that a Level A Master Plan is approved, and this was confirmed by the Court’s Memorandum Opinion and Order. The appropriate sequence of approvals for establishment of a planned community is set forth in the Zoning Ordinance. Section 19.5(B)(1) of the Zoning Ordinance indicates that:

Adoption and amendment of rank two Level A plans is by the Board of County Commissioners. It is initially done when the PC [Planned Communities] zone is mapped for a community; application for the PC zone shall be accompanied by a proposed Level A plan for the planned community.

Zoning Ordinance (PC Planned Communities Zone), §19.5(B)(1).

The significance of this language was explained in the Court’s Memorandum Opinion and Order. The Court stated:

According to the Zoning Code, it appears the PC Zone is “mapped” first before the adoption of a Level A plan, given that the application for the PC Zone needs the Level A with it. This interpretation is supported by Finding of Fact ¶2 in the Decision regarding the Master Plan. [Id. 88647 (“The request for approval of the Santolina Level A Master Plan has been submitted in conjunction with a request for a zone change for Planned Communities (PC) Zoning in accordance with Section 19.5 of the Bernalillo County Zoning Code (Planned Communities Zone)).]

Memorandum Opinion and Order, pp. 13-14.

As interpreted by this Court, the Zoning Ordinance therefore indicates that an area should be zoned for a Planned Community before the adoption or at the time of approval of a Level A Master Plan, and this was the procedure followed by the Board in this matter. The Santolina property was zoned A-1 Rural Agricultural until the Board amended the zone map to change that zoning to Planned Communities. R. pp. 86821-86828; 88654-88656. In accordance with the timing dictated by the Zoning Ordinance, the Board made that zoning change first and then approved the Santolina Level A Master Plan. R, 86811-86818; 88635-88637. Moreover, the Zoning Ordinance indicates that this sequence was appropriate. The Ordinance states that:

All property is governed according to the zone in which it is located. Any use not designated a permissive or conditional use in a zone is specifically prohibited from that zone, except as otherwise provided herein.

Zoning Ordinance, §6.E.

The Santolina property was zoned A-1 Rural Agricultural before the Board changed the zoning to Planned Communities. The uses that the Zoning Ordinance authorizes in A-1 Rural Agricultural areas do not include Planned Communities, which means that the Santolina property could not be used for that purpose without the Zone Map Amendment.

B. The Board's decisions confirm that approval of the Santolina Level A Master Plan depends on the approval of the zoning change.

The Board of County Commissioners' written decisions changing the zoning for the Santolina property and the approval of the Santolina Level A Master Plan confirm that the zoning decision is a condition that is to be satisfied at or before the time of the approval of the Master Plan. The Board's written decision changing the zoning for the proposed Santolina development from A-1 Rural Agricultural to Planned Communities states:

The decision is based on the following Findings:

1. The request is for a zone map amendment from A-1 Rural Agricultural to Planned Community Zone in connection with the proposed Santolina Planned Communities Level A Master Plan.
....
3. The request for approval of the PC Planned Communities Zone has been submitted in conjunction with the request for approval of the Santolina Level A Master Plan (SPR-20130004).

Zone Map Amendment Decision, p.2, R. 86822.

Similarly, the Board of County Commissioners' written decision approving the Santolina Level A Master Plan ("the Level A Master Plan Decision") stated:

The request for approval of the Santolina Level A Master Plan has been submitted in conjunction with a request for a zone change for Planned Communities (PC) Zoning in accordance with Section 19.5 of the Bernalillo County Zoning Code (Planned Communities Zone) (CZ-20130009).

Level A Master Plan Decision, p. 2, Findings ¶2, R. 88646.

- C. The Santolina Level A Master Plan also indicates its dependence on the Zone Map Amendment.

The language of the Santolina Level A Master Plan itself confirms that the Zone Map Amendment is a condition for the approval of the Master Plan. For example, the Plan states:

Concurrently with the Bernalillo County approval of this Master Plan, the Planned Communities Zone (PC Zone) has been applied to the property. The Santolina PC Zone (see Chapter 4), places zoning on the property in alignment with the vision for Santolina expressed in this Level A Master Plan.

Santolina Level A Master Plan, p. 10, R. 86584.

As another example, the Master Plan indicates:

In addition to the Master Plan, WAHL [Western Albuquerque Land Holdings, LLC] also requested adoption of Planned Community Zone (PC Zone) for the entire Master Plan Area. The PC Zone is in conformance with the Level A Master Plan for the planned community.

Id., p. 23, R 86597.

- D. This Court's ruling reversing the Zone Map Amendment voids the approval of the Santolina Level A Master Plan.

The Zoning Ordinance indicates that a zone map amendment changing zoning to Planned Communities Zone should be done before or at the same time as approval of a Level A Master Plan. In this matter, this Court reversed the Board of County Commissioners' decision amending the zone map to change the zoning for the proposed Santolina development property from A-1 Rural Agricultural to Planned Communities. The result of that decision is that the land where the proposed Santolina development would be located remains zoned A-1 Rural Agricultural, and the Board's decision changing the zoning of that land to Planned Communities is no longer valid. For that reason, the Board's approval of the Santolina Level A Master Plan also is not valid because the land addressed by that Master Plan is no longer zoned Planned Communities.

- E. The Court's ruling on the approval of the Santolina Level A Master Plan did not address the effect of a ruling voiding the Zone Map Amendment.

Finally, although this Court affirmed the Board's approval of the Santolina Level A Master Plan, that does not mean that the Master Plan is not rendered void by this Court's ruling reversing the Zone Map Amendment. This Court affirmed the Board's approval of the Master Plan based on the determination that the approval of the Master Plan was a legislative action.³ This Court's ruling never addressed the effect on the approval of the Master Plan of a ruling reversing and thereby voiding the Zone Map Amendment. For that reason, this Court's ruling affirming the approval of the Master Plan does not preclude a ruling that the reversal of the Zone Map Amendment also voids the Board's approval of the Master Plan.

³ The Appellants respectfully disagree with this determination.

IV. This Court's ruling reversing the Zone Map Amendment voids the Board's approval of the Development Agreement.

A. Amendment of the zone map is a required condition for approval of the Santolina Level A Development Agreement.

The Board of County Commissioners entered into the Development Agreement on August 10, 2015, nearly two months after the Board's approvals of the Zone Map Amendment and the Santolina Level A Master Plan. R 88725. Section 3.3 of the Development Agreement expressly states the Agreement's dependence on the Zone Map Amendment; it provides:

This Agreement is contingent upon action by the Governing Body approving the Master Plan, the Land Use Plan, the PC Zoning, and this Agreement.”

R 88662.

Moreover, this reflects the Development Agreement's relationship to the Zone Map Amendment. The Zone Map Amendment provides the framework for a Planned Community and is the means for implementing the Planned Communities Criteria and ensuring compliance with the Comprehensive Plan. The Development Agreement is the contract between the Board and the Santolina Developers designed to ensure compliance with the Planned Communities Criteria.

B. The Development Agreement is also dependent upon the now void Santolina Level A Master Plan.

As noted above, the Court's ruling voiding the Zone Map Amendment also voids the Board of County Commissioners' approval of the Santolina Level A Master Plan. However, there can be no valid Development Agreement without a valid Level A Master Plan for three reasons. First, the language of section 3.3 of the Development Agreement quoted above confirms that a valid Level A Master Plan is a condition for the approval of the Development Agreement. *Id.* Second, the Planned Communities Criteria confirm that approval of a

Development Agreement is dependent on approval of a valid Level A Master Plan. The Planned Communities Criteria require the following, in pertinent part:

Level A development agreement will be developed *in accordance with* the Community Master Plan to:

- a. *Codify the Master Plan* and Land Use Plan.
- b. Outline a preliminary infrastructure/service agreement to cover phasing of master plan and public services/facilities, and designation of financial, operations, and management responsibility over time.
- c. Commit to mitigation of negative consequences of development when known.
- d. Provide an assignable agreement expressing items mutually accepted by the City and/or County and the planned community developer and committing to their permanency unless re-negotiated.
- e. Provide a document suitable as a legally recorded instrument with the County Clerk.
- f. Identify incentives to be provided by the City to the developer, if any are agreed to.

Planned Communities Criteria, pp. 36-37, emphasis added.

Third, Section 19.5 of the Zoning Ordinance confirms that approval of a Development Agreement is dependent on approval of a valid Level A Master Plan. Section 19.5(A)(2) states:

Until a Level B plan has been adopted by the County to govern a site, uses and regulations specified in the Level A Development Agreement, which must accompany initial county zoning, shall govern the interim permissive and conditional uses. The uses *shall be consistent with the Level A Plan: community plan.*

Zoning Ordinance (Planned Communities Zone), §19.5(A)(2), emphasis added.

For those reasons, the Court's ruling rendering the Zone Map Amendment and the Santolina Level A Master Plan void also voids the Development Agreement.

Conclusion

The Appellants/Petitioners therefore move this Court to clarify that its May 31, 2017 Memorandum Opinion and Order: 1) voids the Board of County Commissioners' approval of the Zone Map Amendment and the Board's proceedings concerning the Zone Map Amendment; 2) voids the Santolina Level A Master Plan; and 3) voids the Development Agreement.

Dated: June 6, 2017.

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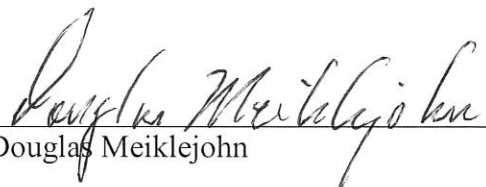
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