

**Minutes**  
**County Council – Special Session**

**Randall Ryti, Council Chair, Denise Derkacs, Council Vice-Chair,  
Melanee Hand, David Izraelevitz, Keith Lepsch, David Reagor, and Sara Scott,  
Councilors**

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**August 1, 5, & 19, 2022**

**1:00 PM**

**Council Chambers – 1000 Central Avenue**

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**1. OPENING/ROLL CALL**

The Council Chair, Randall Ryti, called the meeting to order at 1:02 p.m.

Councilor Lepsch arrived at the meeting during the discussion of Item 3 at 1:05 p.m.

**The following Councilors were in attendance:**

**Present: 5 - Councilor Ryti, Councilor Derkacs, Councilor Hand, Councilor Lepsch and  
Councilor Scott**

**Remote: 2 - Councilor Izraelevitz and Councilor Reagor**

**2. APPROVAL OF AGENDA**

**A motion was made by Councilor Scott, seconded by Councilor Hand, that the agenda be  
approved as presented.**

**The motion passed with the following vote:**

**Yes: 6 - Councilor Ryti, Councilor Derkacs, Councilor Hand, Councilor Izraelevitz,  
Councilor Reagor, and Councilor Scott**

**Absent: 1 - Councilor Lepsch**

**3. PUBLIC HEARING(S)**

- A.** CASE NO. APL-2020-0020. An appeal to the Los Alamos County Council of the Planning and Zoning Commission's revised Final Order approving applications, Findings of Fact and Conclusion of Law in the matter of CASE No. SUP-2022-0020 Denise Matthews, dba Worms and Wildflowers Daycare, seeking Special Use Permit approval for a daycare facility to provide care, services, and supervision for a maximum of 12 children at her residence addressed as 113 B La Senda Rd., & CASE No. SUP-2022-0021 Denise Matthews, dba Worms and Wildflowers Daycare, seeking Special Use Permit approval for a Home Business, to employ more than one non-family member for a daycare facility to be located at 113 B LA SENDA RD. The property, LSA03024A, is within the La Senda Subdivision and zoned Residential-Agriculture (R-A)

Councilor Ryti outlined the procedure for the hearing.

Councilor Ryti identified the parties involved in the hearing: Denise Matthews as the Appellee, and Patricia Thames, David North, Akkana Peck, Leslie Di Leva, Lynne M. Johnson, Mikkell B. Johnson, Marilyn K. Smith, Barham W. Smith, David L. Paulson, Anne M. Paulson, Fredrick J. Berl, Theresa K. Berl, Phillip D. Noll, Monica D. Noll, William M. Hodgson, Susan Mary Hodgson, Vicki B. Cobble, and Mark Potacki as the Appellants, and the Community Development Department (CDD) represented by CDD staff.

Councilor Ryti called for Council Disclosure:

1. Does any councilor have a potential conflict of interest in this case?  
None.
2. Has any Councilor received any *ex parte* communication regarding this case?  
Councilors Scott, Ryti, Derkacs, and Izraelevitz disclosed.
3. Has any Councilor reached a decision on the merits of this case as a result of the *ex parte* communication?  
None.

Councilor Ryti provided an overview of how the hearing will proceed.

Councilor Ryti called for Appellants to present a three-minute statement.

Mr. David M. North, 111 La Senda Road, spoke.

Ms. Akkana Peck, 111 La Senda Road, spoke.

Ms. Marilyn K. Smith, 116 La Senda Road, spoke and read Mr. Phillip D. Noll, Ms. Monica Noll, Mr. David Paulson, and Ms. Anna Paulson statements into the record.

Ms. Patricia Thames, 115 La Senda Road, spoke.

Councilor Ryti called for Appellee to present a three-minute statement.

Ms. Denise Matthews, 113 La Senda Road, spoke.

Mr. Alvin Leaphart, County Attorney, spoke.

Councilor Ryti called for Council questions.

**A motion was made by Councilor Scott, seconded by Councilor Derkacs, that the County Council enter into closed session pursuant to NMSA 1978 10-15-1(H)(3) for deliberations in connection with this administrative adjudicatory proceeding.**

**The motion passed with the following vote:**

**Yes: 7 - Councilor Ryti, Councilor Derkacs, Councilor Hand, Councilor Izraelevitz, Councilor Lepsch, Councilor Reagor, and Councilor Scott**

## **RECESS**

**Council recessed into closed session at 2:10 p.m. Council returned from closed session at 4:28 p.m.**

A motion was made by Councilor Derkacs, seconded by Councilor Scott, that the County Council exit its closed session, and further moved that the following statement be entered into the record: the matters discussed in the closed session were limited to those specified in the motion for closure. She also noted that Councilor Izraelevitz, Councilor Lepsch, and Councilor Reagor were present for the entire closed session on zoom.

The motion passed with the following vote:

**Yes: 5 - Councilor Ryti, Councilor Derkacs, Councilor Hand, Councilor Lepsch, and Councilor Scott**

**Absent: 2 - Councilor Reagor and Councilor Izraelevitz**

Councilor Ryti noted that Councilor Izraelevitz and Councilor Reagor were currently not in attendance remotely.

A motion was made by Councilor Scott, seconded by Councilor Derkacs, that this County Council Special Session regarding public hearing of CASE NO. APL-2020-0020 is recessed until Friday August 5<sup>th</sup> at 10:30 a.m.

The motion passed with the following vote:

**Yes: 5 - Councilor Ryti, Councilor Derkacs, Councilor Hand, Councilor Lepsch, and Councilor Scott**

**Absent: 2 - Councilor Reagor and Councilor Izraelevitz**

#### **RECESS**

Councilor Scott called for a recess at 4:30 p.m. to be reconvened at 10:30 a.m., Friday, August 5, 2022.

**Friday, August 5, 2022**

#### **1. OPENING/ROLL CALL**

The Council Chair, Randall Ryti, called the meeting to order at 10:33 a.m.

The following Councilors were in attendance:

**Present: 5 - Councilor Ryti, Councilor Derkacs, Councilor Hand, Councilor Lepsch, and Councilor Scott**

**Absent: 2 - Councilor Izraelevitz and Councilor Reagor**

A motion was made by Councilor Scott, seconded by Councilor Derkacs, that the August 1<sup>st</sup> County Council Special Session regarding public hearing of CASE NO. APL-2020-0020 is recessed until Friday August 19<sup>th</sup> at 9:00 a.m.

The motion passed by acclamation with the following vote:

Yes: 5 - Councilor Ryti, Councilor Derkacs, Councilor Hand, Councilor Lepsch, and Councilor Scott

Absent: 2 - Councilor Reagor and Councilor Izraelevitz

## RECESS

Councilor Scott called for a recess at 10:34 p.m. to be reconvened at 9:00 a.m., Friday, August 19, 2022.

## Friday, August 19, 2022

### 1. OPENING/ROLL CALL

The Council Chair, Randall Ryti, called the meeting to order at 9:02 p.m.

Councilor Reagor arrived at the meeting during the discussion of Item 3.B at 9:04 p.m.

The following Councilors were in attendance:

Present: 6 - Councilor Ryti, Councilor Derkacs, Councilor Hand, Councilor Izraelevitz, Councilor Lepsch, and Councilor Scott

Remote: 1 - Councilor Reagor

### 3. PUBLIC HEARING(S)

- B. Closed Session for Deliberations of a Public Body in Connection with an Administrative Adjudicatory Proceeding Pursuant to NMSA § 10-51-1 (H) (3)

A motion was made by Councilor Scott, seconded by Councilor Derkacs, that the County Council enter into closed session pursuant to NMSA 1978 10-15-1(H)(3) for deliberations in connection with this administrative adjudicatory proceeding.

The motion passed with the following vote:

Yes: 7 - Councilor Ryti, Councilor Derkacs, Councilor Hand, Councilor Izraelevitz, Councilor Lepsch, Councilor Reagor, and Councilor Scott

## RECESS

Council recessed into closed session at 9:07 a.m. Council returned from closed session at 2:06 p.m.

A motion was made by Councilor Scott, seconded by Councilor Izraelevitz, that the County Council exit its closed session; she further moved that the following statement be entered into the record: the matters discussed in the closed session were limited to those specified in the motion for closure.

The motion passed with the following vote:

**Yes: 7 - Councilor Ryti, Councilor Derkacs, Councilor Hand, Councilor Izraelevitz, Councilor Lepsch, Councilor Reagor, and Councilor Scott**

**C. Possible Final Action on this Proceeding**

A motion was made by Councilor Scott, seconded by Councilor Izraelevitz, that Council find that the decision of the planning and zoning commission was in accordance with adopted county plans, policies, and ordinances and that the fact upon which the decision was based or supported by the record and that the decision was not arbitrary capricious or a manifest abuse of discretion; she further moved that council affirm the decision of the planning and zoning commission in case number SUP-2022-0020 and case SUP-2022-0021 by approving the order of the county Council on applications SUP-2022-0020 and SUP-2022-0021 and she further moved to authorize the Chair to sign this order and enter the order into the record.

The motion passed with the following vote:

**Yes: 6 - Councilor Ryti, Councilor Hand, Councilor Izraelevitz, Councilor Lepsch, Councilor Reagor, and Councilor Scott**

**No: 1 - Councilor Derkacs**

**4. ADJOURNMENT**

The meeting adjourned at 2:12 p.m.

INCORPORATED COUNTY OF LOS ALAMOS

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Randall T. Ryti, Council Chair

Attest:

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Naomi D. Maestas, County Clerk

Meeting Transcribed By: Victoria N. Montoya, Senior Deputy Clerk

**BEFORE THE COUNTY COUNCIL  
OF THE INCORPORATED COUNTY OF LOS ALAMOS, NEW MEXICO**

CASE NO. SUP-2022-0020. An application by Denise Matthews, dba Worms and Wildflowers Daycare, for Special Use Permit to operate a daycare facility to provide care, service and supervision for a maximum of 12 children at 113 B La Senda Rd.; *and*

CASE NO. SUP-2022-0021. An application by Denise Matthews, dba Worms and Wildflowers Daycare, for Special Use Permit to operate a Home Business employing more than one non-family member at 113 B La Senda Rd.



LACF2022-0170 08/19/2022 02:25 PM  
Page(s): 17 Naomi D Maestas - County Clerk  
Los Alamos County, NM Allison Collins - Deputy



**ORDER OF THE COUNTY COUNCIL**  
**ON APPLICATIONS SUP-2022-0020 AND SUP-2022-021**

COMES NOW, the County Council ("Council") of the Incorporated County of Los Alamos, New Mexico ("County"), that finds and orders as follows:

**BACKGROUND**

On January 6, 2022,<sup>1</sup> Ms. Denise Matthews filed two special use permit applications ("Application" or "Applications"). The first application, SUP-2022-0020, seeks to operate a home daycare facility for up to twelve (12) children in a Residential Agricultural ("RA") zoning district (see Section 16-533 of the County Code) where the operation of daycare facilities is allowed upon the grant of a special use permit (see

<sup>1</sup> Although Ms. Matthews dated her SUP-2022-0020 as January 5, 2021, the actual date of submittal was January 6, 2022. Ms. Matthews SUP-2022-0021 application was dated January 6, 2022 and filed along with SUP-2022-0020.

11 Section 16-289).<sup>2</sup> The second special use permit application, SUP 2022-0022, seeks to  
12 operate a home business in an RA zone. (id.) This special use permit would allow the  
13 applicant to employ more than one non-family member for the proposed home business.

14 The Planning and Zoning Commission ("Commission") held hearings on both  
15 applications at its February 9, 2022, meeting. The review criteria for each application are  
16 the same so in the interest of time and to reduce necessity for presentation of redundant  
17 evidence and testimony, the Commission consolidated the two applications into one  
18 public hearing.

19 After the hearing on February 9, 2022, the Commission reconvened on February  
20 23, 2022, and adopted an order granting the two special use permit applications. On  
21 February 28, 2022, the Chair of the Commission signed the final order and entered the  
22 Order into the record of the underlying proceeding. On March 6, 2022, Patricia Thames  
23 filed a *Notice of Appeal from a Decision of the Planning and Zoning Commission or Board*  
24 *of Adjustment* listing many other individuals as appellants too.

25 The appeal has followed the Development Code Appeals, Council Procedures  
26 adopted by the County Council on April 15, 2008. On August 1, 2022, the Council  
27 conducted a hearing on this appeal; recessed and reconvened on August 5, 2022, and  
28 recessed the hearing until August 19, 2022, to continue deliberations and prepare a final  
29 order for adoption.

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<sup>2</sup> Pursuant to Section 16-289 allowed uses upon the grant of a special use permit in an RA Zone other than daycare facilities include commercial kennels, commercial swimming pools or clubs, private schools, social and fraternal clubs, churches, and boarding houses.

## STANDARD OF REVIEW

Pursuant to Section 16-493(c)(1) of the County Code, upon hearing of this matter the Council shall affirm the decision of the Commission unless the Council finds that:

1. The decision was not in accordance with adopted county plans, policies, and ordinances,
2. The facts on which the decision was based are not supported by the record, or
3. The decision was arbitrary, capricious, or a manifest abuse of discretion.

Further, pursuant to Section 16-493(c)(2) Council shall not consider evidence outside of the record sent to it for review.

## FINDINGS AND CONCLUSIONS

Having considered the briefs, the record, and oral argument, the Council finds that the decision of the Commission to grant the two special use permits was in accordance with adopted plans, policies, and ordinances; the facts on which the decision was based are supported by the record; and the decision was not arbitrary, capricious, or a manifest abuse of discretion. The following findings support our conclusion:

### I. Review Criteria for Special Use Permits

The Commission employed the five review criteria for the special use permits found in Section 16-156 of the County Code.

**A.** The first criterion requires the applicant to demonstrate that the issuance of the special use permits substantially conform to the comprehensive plan and that the

establishment, maintenance, or operation of the use applied for, under the circumstances of the particular case, will not be detrimental to the health, safety, peace, comfort and general welfare of persons residing or working in the vicinity of such proposed use; and will not be detrimental or injurious to property or to the value of property in the vicinity; and will not be detrimental to the general welfare of the community.

**1. Substantial Conformity with the Comprehensive Plan**

The Commission found that the special use permits would substantially conform with the Comprehensive Plan as the proposed use supports the economic development goals of the Comprehensive Plan (see page 34, *Comprehensive Plan Los Alamos County 2016*). In reaching this conclusion, the Commission considered the informal survey conducted by the applicant on the need for daycare as well as the testimony of numerous parties and community members on the difficulty of finding appropriate daycare in Los Alamos County.

The Commission was further convinced that this daycare facility would support the economic development goals of the Comprehensive Plan by the testimony of the executive director of the Los Alamos National Laboratory ("LANL") Community Partnership Program, Kathryn Keith. Ms. Keith testified to the dire need for pre-school-aged daycare by LANL employees. Ms. Keith also testified that LANL expects to hire over 2,000 new employees in the next year which will only exacerbate the existing need for pre-school-aged daycare in Los Alamos County. (Testimony of Ms. Keith, pages 163 thru 164, and 166 thru 169, Transcript of February 9, 2022 hearing)

74 To attempt to rebut this substantial evidence, Appellants make the formalistic  
75 argument that since daycare is not mentioned by name in the Comprehensive Plan, a  
76 daycare facility cannot be cast as supporting the economic goals of the Comprehensive  
77 Plan. The Council rejects this argument based on the commonsense proposition that  
78 adequate daycare in the County is necessary to achieve the economic development goals  
79 of the Comprehensive Plan which was supported by the testimony of Ms. Keith. For  
80 economic development to occur, people need to go to work. To go to work, people need  
81 adequate daycare for their young children. Absent adequate daycare, people cannot go  
82 to work and economic development is impeded. Thus, the goal of providing adequate  
83 daycare in the County supports the economic development goals of the Comprehensive  
84 Plan.

85 The Appellants also argue that the proposed use cannot comply with the  
86 Comprehensive Plan because allowing a daycare in this neighborhood fails to protect the  
87 character of the neighborhood, which is an articulated goal of the Comprehensive Plan.  
88 However, the Commission heard testimony that daycare facilities in residential  
89 neighborhoods are common in Los Alamos County. (Testimony of Denise Matthews,  
90 pages 98 thru 99, Transcript of February 9, 2022, hearing) Further, an RA zone expressly  
91 allows for the operation of daycare facilities, private schools, commercial kennels,  
92 commercial swimming pools, fraternal clubs, churches, and boardinghouses with a  
93 special use permit. In short, the RA zone itself contemplates the existence of daycare  
94 facilities existing in the neighborhood. Inherent to the character of an RA-zoned  
95 neighborhood is the potential presence of daycare facilities as well as all the other

96 potential uses listed above. As such, the Appellants' position that the presence of a  
97 daycare facility harms the character of this existing neighborhood was considered.

98 Therefore, it was reasonable for the Commission to conclude that this proposed  
99 daycare facility supports the Comprehensive Plan's economic development goals based  
100 on the evidence presented, given the facts and circumstances regarding daycare in Los  
101 Alamos County. Further, based upon the evidence presented and the language included  
102 in the Code regarding acceptable uses in an RA zone, it was also reasonable for the  
103 Commission to conclude that the presence of a daycare facility in this neighborhood is  
104 consistent with the character of an RA-zoned residential neighborhood. The conclusion  
105 by the Commission that the proposed use substantially conforms to the Comprehensive  
106 Plan was reasonable and supported by the facts in the record.

107 **2. Health, Safety, Peace, Comfort, or General Welfare of Persons**  
108 **Residing or Working in the Vicinity**

109 In addressing the peace and comfort of persons residing in the neighborhood,  
110 noise from the children was a primary objection alleged by the Appellants. There was  
111 much emphasis placed on sound studies and testimony regarding the sounds children  
112 produce while outside. The Applicant performed her own sound study at other daycare  
113 facilities showing that the decibel levels are well below 65 decibels, which is the maximum  
114 amount of sound allowed by the County Code to travel across residential property lines  
115 during business hours as defined in the County Nuisance Code., ~~not an element of the~~  
116 ~~County Development Code.~~ (See Section 18-73 of the County Code) Ms. Matthews  
117 presented these findings to the Commission (Transcript, February 9, 2022 hearing, pages

118 34 thru 40), The Applicant's testimony on the noise issue was subject to cross-  
119 examination by David North who raised concerns about the means and methods of Ms.  
120 Matthews sound study. (Transcript, February 9, 2022, hearing, pages 53 thru 61)

121         The Commission gave due consideration to this evidence and concluded that the  
122 noise from the children would be mitigated to reasonable levels. The Commission took a  
123 more macro view of the issue, rather than merely focusing on sound studies. This is  
124 illustrated in Paragraph(23)(b) of *Order of the Planning and Zoning Commission on*  
125 *Applications SUP-2022-0020 and SUP-2022-0021* ("Commission's Order"). The  
126 evidence in the record indicates that the proposed nature-based daycare facility will  
127 operate from 8:30 am to 5 pm using guided, structured, and supervised outdoor  
128 educational activities for about ~~four~~ four hours a day to complement indoor educational  
129 activities. There is ample evidence provided in the record that the outdoor activities would  
130 be structured and supervised by Ms. Matthews or her staff, and that the children would  
131 not be allowed to run around yelling and screaming.

132         Further, Ms. Matthews is a qualified educator holding a master's degree in science  
133 education with 15 years of experience teaching environmental education. Ms. Matthews  
134 also served for five years as the education specialist for the Pajarito Environmental  
135 Education Center in Los Alamos County. Based on Ms. Matthews's experience as an  
136 educator and the structured educational programming that is being proposed, it was  
137 reasonable for the Commission to conclude that the potential noise created by children  
138 learning outdoors will be properly mitigated to reasonable levels for those persons  
139 residing or working in the vicinity.

Also, it should be noted that the Appellants' opinion that the noise levels created by the children will constitute an annoyance and a nuisance is not shared by others in the neighborhood. The record contains testimony and evidence from some adjoining landowners, some residing within 300 feet of the property, and others in the neighborhood who welcome the opening of this daycare facility and the children it will bring (see Public Input, Testimony of Tyler Jones, pages 98 thru 99; Testimony of Agnes Finn, pages 100-102; Testimony of Ms. Morely, pages 102 thru 104; Testimony of Vanessa Richardson, pages 105-106; Testimony of Laurel Horton, pages 121-123; Testimony of Becca Jones, pages 138 thru 142; Transcript of February 9, 2022 hearing.)

Based on the above, the Commission reasonably concluded that the establishment, maintenance, or operation of this daycare facility will not, under the circumstances of this particular case, be detrimental to the health, safety, peace, comfort, or general welfare of persons residing or working in the vicinity of the proposed daycare facility.

### **3. Property Values**

As to property values, the Commission found that the noise of the children would be mitigated to reasonable levels given the structured and supervised nature of the outdoor educational programming. Further, the Commission also heard evidence that no structural changes to any of the buildings would be required, meaning that the residential character of Ms. Matthews's buildings and structures will not change.

Further, the Council finds that the following testimony from Kathryn Keith supportive of the Commission's conclusion that property values will not be negatively impacted. As to property values Ms. Keith testified as follows:

I just want to make the point that in my experience property values are usually driven by supply and demand. As of last week, we had 18 properties for sale in Los Alamos County. And the laboratory projects hiring 2,000 employees this year which I think puts Los Alamos County property owners in one of the most prime positions in terms of property values in this country based on the laws of supply and demand.

Testimony of Kathryn Keith, pages 166-167, Transcript of February 9, 2022 hearing

Based on the fact that the RA zone expressly allows for the operation of daycare facilities and other commercial uses, that the Applicant plans to mitigate noise to reasonable levels, that no structural changes on the property will occur to alter its residential character, and that property values in the neighborhood are likely to keep increasing given the demand for housing, it was reasonable for the Commission to conclude that this proposed use will not negatively impact property values in the vicinity.

The Appellants argue that there is expert testimony in the record that shows that the presence of a daycare center reduces property values in the vicinity. That is not the case. The record contains testimony from David North as to the conclusion of one appraiser from another case in a different jurisdiction who offered an opinion that if a daycare facility is across the street from a property, then the value of that property would drop by 10 to 15 percent. However, many unknown facts make this evidence uncredible. What is unknown about this evidence is the type of zoning district this property was located in, what types of uses were permitted in that zoning district, what type of use was being considered, whether other conflicting expert testimony was offered at that hearing,

whether the fact finder in that proceeding found the expert testimony persuasive in light of the other evidence presented, or whether the facts of the case cited by Mr. North are very similar to or vastly different from the facts of this case.

Further, and most importantly, the appraiser in the case cited by Mr. North was not present and not available to have his opinion cross-examined in light of the facts of this case. Although hearsay evidence is generally allowed in quasi-judicial proceedings, it is well within the purview of the Commission to determine what weight, if any, should be given to such evidence. (“[H]earsay rules do not apply to administrative hearings.” *Arrellano v. N.M. Dep’t of Health*, 2015 N.M. App. Unpub. LEXIS 73, at \*6 (Ct. App. Feb. 9, 2015) citing *Ferguson-Steere Motor Co. v. State Corp. Comm’n*, 1957-NMSC-050, ¶ 14, 63 N.M. 137, 314 P.2d 894). As such, it was a reasonable exercise of discretion for the Commission to give little to no weight to the un-cross-examined hearsay opinion of one expert offered in another case who has no familiarity with this case, and who has offered no opinion on the facts of this case.

Based on the above, the Commission’s conclusion that property values would not be harmed was reasonable and supported by the evidence in the record.

#### **4. General Welfare of County**

As to the general welfare of the County, although there was conflicting evidence, ample evidence was presented as to the need for pre-school daycare in the County. (For example, see page 8, lines 141-159, Order of the Planning and Zoning Commission, February 28, 2022.) Based on the evidence presented, the Commission reasonably concluded that the proposed use was not detrimental to the general welfare of the County.

208 Taking all of the above into account, the finding of the Commission that these  
209 special use permit applications substantially conform to the Comprehensive Plan and that  
210 the establishment, maintenance, or operation of this daycare facility, under the  
211 circumstances of the particular case; will not be detrimental to the health, safety, peace,  
212 comfort or general welfare of persons residing or working in the vicinity of the proposed  
213 use; and will not be detrimental or injurious to property or to the value of property in the  
214 general vicinity; and will not be detrimental to the general welfare of the County was  
215 reasonable and supported by the evidence in the record.

216 Further, the Commission's finding on these criteria is in accordance with adopted  
217 county plans, policies, and ordinances. In particular, the Applications substantially  
218 comply with the Comprehensive Plan and have met the criteria contained in Section 16-  
219 156(1) of the County Code.

220 **B.** The Commission then considered the criteria contained in 16-156(2) which  
221 requires the applicant to show that there will be sufficient parking facilities that are  
222 adequately designed, shielded, landscaped, and lighted to serve the use applied for  
223 based on the requirements found in Article IX of Chapter 16. Here the Commission relied,  
224 in part, on the review of Community Development Department ("CDD") staff and  
225 specifically CDD staff report to the Commission. Also, Ms. Matthews provided in her  
226 application that:

227 The nature of the property, a flag lot of three acres, has an extended  
228 driveway allowing all parking to be well off the roadway and out of sight of  
229 the neighbors. We have six designated spots for parent parking (which can  
230 easily be extended) and we plan to extend our driveway to include a loop  
231 for easy turn-around. A licensed architect is designing all modifications

needed for parking, including ADA accessibility. Solar lights will provide lighting to all parking areas.

(See the second page of the Application for SUP-2022-0020.)

Further, there was no opposing testimony offered claiming that this criterion had not been met. Moreover, this specific finding was not specifically challenged in this appeal. Here, the Commission's finding is reasonable, supported by the evidence, and consistent with adopted county plans, policies, and ordinances.

**C.** The Commission then considered the criterion found in Section 16-156(3) of the County Code. This criterion requires the Applicant to demonstrate that on-site and off-site ingress/egress and traffic circulation will be in conformance with the County's construction standards, that the streets serving the daycare are adequate to meet the traffic needs of the proposed use, and that the proposed use will not adversely affect neighboring properties by virtue of the type of traffic generated by the use.

The application was submitted to the County's Interdepartmental Review Committee, which includes the County Engineer. Upon review of the application, the County Engineer had no comments or concerns. Based on the lack of expressed concern by the County Engineer, it was reasonable for the Commission to conclude that this criterion has been met.

Further, the Applicant conducted her own traffic study showing that traffic is light on La Senda Road. Also, the Commission considered the number of children attending the facility and that there were only two daily 30-minute drop-off and pick-up times. Given the above, the Commission's conclusion that this criterion was met is reasonable,

supported by the evidence, and consistent with adopted county plans, policies, and ordinances.

**D.** The Commission next considered the criterion found in Section 16-156(4) which requires the Applicant to demonstrate that setbacks of building and parking facilities from the property lines, rights of way, and adjacent land uses are in conformance with Chapter 16 and provide protection to and a transition from residential development, existing and contemplated in the vicinity; and that the height and bulk of the proposed buildings and structures are compatible with the general character of development in the vicinity for the use applied for. Here, the Commission found that since no new development or changes to the Property would occur to support the proposed use, based upon the testimony provided by CDDstaff, this criterion had been met. In particular, the CDD Staff Report submitted to the Commission and admitted into evidence states as follows for this criterion:

No new construction is being proposed and the daycare facility is located in an already existing current studio guest house, and that the existing buildings on the parcel are compliant with the development codes standards for an R-A zoning district, and that the setbacks of buildings and parking facilities from the property lines, rights of way and adjacent land uses are in conformance with the Development Code. Further, it should be noted that this application was reviewed and approved by the County Engineer and the County Fire Marshal who voiced no concerns on this topic.

(See Page 10, February 9, 2022, Planning and Zoning Commission Staff Report)

The testimony of Ms. Matthews beginning at line 16 on page 46 of the February 9, 2022, hearing also provided substantial evidence on this criterion. Based on the above, the Commission's conclusion that this criterion was met was reasonable, supported by

the evidence, and consistent with the adopted county plan, policies, and ordinances.

Further, the Appellants did not contest this specific finding in their appeal.

**E.** The Commission then reviewed the criterion in Section 156(5) and found the criterion not applicable for the reasons stated in Paragraph 30 of the Commission's order in this case. The Council concurs with the Commission analysis that since no site plan for any proposed development associated with the proposed use is required in this case, this criterion is inapplicable. Further, the Appellants did not challenge this specific finding in their appeal.

## **II. APPELLANTS' ALLEGED PROCEDURAL ERRORS**

### **A. Allegations of Improper Testimony**

Here, the Appellants overly formalize the procedure required for an administrative hearing before a Planning and Zoning Commission. (...administrative hearings, are meant to be less formal than trials. Indeed, ...[administrative] hearings are not bound by common law or statutory rules as to the admissibility of evidence or by technical rules of procedure.) *Miss. Potash, Inc. v. Lemon*, 2003-NMCA-014, ¶ 1, 133 N.M. 128, 61 P.3d 837). A review of the record shows that many people showed up for the hearing either as a party or to testify in support of or against Ms. Matthew's application. There is nothing in the record that indicates that those who testified at the hearing were not either parties or witnesses. As such, the Council finds no merit to this argument.

### **B. Letters from members of the public who were not present at the hearing were considered by the Commission**

One criterion the Commission must consider is whether the proposed use is detrimental to the general welfare of the County. Letters from the broader public are

probative of this issue. As previously stated, hearsay is admissible, and the Commission can judge what weight, if any, should be given to these letters received from the public, especially in light of the fact that letters both in support and opposition were submitted and considered equally by the Commission. As such the Council finds no merit to this argument.

**C. Objection to Commissioner April Wade's Presence was Unreasonably Limited**

A potential conflict of interest was disclosed by Commissioner Wade. Commissioner Wade stated in the record "I do not feel that will affect my judgment," and no objections were raised. The Appellants argue since the attorney for the Commission properly advised the Commission on the procedure for dealing with potential conflicts of interest, their ability to object was hindered. (Section 30-7(c)) The Appellants could have objected at any time and could have objected to moving on from the topic after no motion was made by the Commission to recuse Ms. Wade. That a party does not raise an objection during an administrative proceeding is a decision of the party. Nothing in the record indicates the Appellants were prohibited in any way from raising any objection the Appellants saw fit to make during the hearing before the Commission.

**D. CDD Staff and Commissioners as Advocates for the Applicant**

Here, the Appellants have conflated the defending of a position with advocacy for the Applicant. It is quite clear that Appellants hold a very different opinion on this matter than the CDD and the Commission. The CDD employs planners and other experts in zoning and land use. The volunteer lay-people on the Commission rely on the subject matter expertise of CDD in evaluating these kinds of Applications. The CDD did form an

opinion and expressed this opinion to the Commission through testimony and documentary evidence presented in the record. That opinion is different from the Appellants' position and supportive of the Applicant. However, that does not mean that the CDD is acting as an advocate for the Applicant as, say, an attorney does.

Here, the role of the CDD is similar to the role of a Special Master in the judicial system. CDD evaluates applications based on their subject matter expertise and then provides a detailed recommendation to the Commission to consider along with all the other evidence presented at the administrative hearing. That is exactly what CDD did here. CDD did not improperly advocate for the Applicant.

Similarly, Commissioners disclosed that ex parte communications had occurred but that the decisions made by the Commission would be based on the evidence and testimony presented as a part of this hearing. As such, they did not start to form a basis for their findings until the hearing began. During the hearing, and after receipt of evidence, the Commissioners expressed their opinions on this matter. The majority of the Commissioners formed and expressed their position that was different from that of the Appellants. That the Commissioners articulated and defended their positions does not constitute advocacy on the part of the Commissioner any more than another Commissioner's opposition to the Applications constitutes advocacy on behalf of the Appellants.

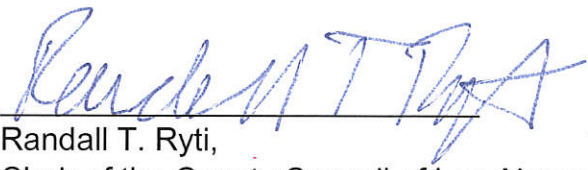
### **III. RULING**

Based on the record in this matter and the findings articulated above, the Council finds (1) that the decision of the Planning and Zoning Commission to grant the special use permits in Case No. SUP-2022-0020 and Case No. SUP-2022-0021 was in

349 accordance with adopted county, plans, policies, and procedures; (2) that the facts on  
350 which the decision was based on are supported by the record; and (3) that the decision  
351 was not arbitrary, capricious, or a manifest abuse of discretion. Therefore, the County  
352 Council AFFIRMS the decisions of the Planning and Zoning Commission in this matter.

353 SO ORDERED THIS 19<sup>th</sup> DAY OF AUGUST 2022.

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Randall T. Ryti,  
Chair of the County Council of Los Alamos

ATTEST: (SEAL)



Naomi D. Maestas,  
Los Alamos County Clerk

by AC

